

Please cite the Published Version

Fletcher, Craig (2019) "Double Punishment" - The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of the Post-Conviction Confiscation Punishment in England and Wales. Doctoral thesis (PhD), Manchester Metropolitan University.

Downloaded from: <https://e-space.mmu.ac.uk/625283/>

Usage rights:



[Creative Commons: Attribution-Noncommercial-No Derivative Works 4.0](#)

Enquiries:

If you have questions about this document, contact openresearch@mmu.ac.uk. Please include the URL of the record in e-space. If you believe that your, or a third party's rights have been compromised through this document please see our Take Down policy (available from <https://www.mmu.ac.uk/library/using-the-library/policies-and-guidelines>)

“Double Punishment” - The Proceeds of Crime Act 2002 (POCA): A Qualitative Examination of the Post-Conviction Confiscation Punishment in England and Wales.

Craig Philip Fletcher

**A thesis submitted in partial fulfilment of the requirement
of Manchester Metropolitan University for the degree of
Doctor of Philosophy**

Department of Sociology

2019

BETTER TO LIGHT A CANDLE THAN CURSE THE DARKNESS

(Amnesty International)

Abstract.

Over the past few decades there has been an increasing use of asset recovery powers which claim to confiscate 'ill-gotten' gains from offenders who derive profit from their crimes. The embodiment of this came in the form of the Proceeds of Crime Act 2002, a piece of legislation that consolidated previous asset recovery legislation and which set out to make sure that 'crime does not pay' (Rees et al., 2012). Whilst the Proceeds of Crime Act 2002 provides a number of asset recovery routes, the most frequently used within England and Wales is post-conviction confiscation (ibid). Despite the increasing use of confiscation powers there is an absence of research which accounts for the voices of those who are subject to this punishment. Such insights may be key to developing an understanding of the 'true' impact of the post-conviction confiscation punishment upon the defendant and their families and illuminate whether this system of punishment meets its wider crime control objectives. Therefore, through the analysis of narrative 'interviews' with twenty-one individuals who have been subject to the post-conviction confiscation punishment, this qualitative study investigates the lived reality of being subject to this contemporary form of punishment. Based upon its findings, this thesis will argue that this form of punishment represents a further level of punishment despite no further offence being committed; that it is a punishment that once inflicted becomes a 'life sentence' that is said to be inescapable; that it disproportionately impacts upon the [innocent] families of the confiscation defendant; that it fails to meet its stated objectives and has no social defence (Mathieson, 2009); and, in revealing both its iatrogenic and criminogenic nature, this thesis argues not for the reform of post-conviction confiscation, but for its abolition.

Contents.

| Chapter | Description | Page No |
|--------------------|---|---------|
| | Abstract | 3 |
| | Contents | 4 |
| | Acknowledgments | 8 |
| | List of Figures | 12 |
| | List of Tables | 13 |
| | Abbreviations | 14 |
| Chapter One | Introduction | |
| 1.1 | Lived Experience and Positionality | 15 |
| 1.2 | The State and the Rule of Law | 19 |
| 1.3 | Official Accounts of POCA | 24 |
| 1.4 | Theorising the Significance of the Political Context in Which Asset Recovery Powers Have Been Introduced and Extended | 26 |
| 1.5 | The Current POCA Situation | 30 |
| 1.6 | Methodological Context and Research Aims | 32 |
| 1.7 | Theoretical Contextualisation | 35 |
| 1.8 | Contribution to Knowledge | 37 |
| 1.9 | Structure of the Thesis | 38 |
| Chapter two | The Asset Recovery literature | |
| 2.1 | Introduction | 42 |
| 2.2 | Genealogy of POCA | 43 |
| 2.2.1 | Key Reports and Policy Documents | 46 |
| 2.2.2 | The Hodgson Committee Report (1984) | 47 |
| 2.2.3 | The Performance and Innovation Unit Report (2000) | 50 |
| 2.2.4 | The Most Recent Official Reports | 51 |
| 2.3 | The Rationale and Objectives that Underpin Confiscation | 54 |
| 2.3.1 | Who is the Target of Confiscation Policy? | 64 |
| 2.4 | The Post-Conviction Confiscation Process | 78 |

| | | |
|----------------------|--|-----|
| 2.4.1 | Evidential Threshold and the Burden of Proof | 80 |
| 2.4.2 | Criminal Lifestyle, Hidden Asset Assumptions and Tainted Gifts.... | 81 |
| 2.4.3 | Gross Benefit Calculations | 83 |
| 2.4.4 | The 'Available' Amount and the 'Benefit' Figures | 85 |
| 2.5 | Summary | 88 |
| Chapter Three | Philosophies of Punishment | |
| 3.1 | Introduction | 89 |
| 3.2 | State Punishment, the Rule of Law and Legitimacy | 89 |
| 3.3 | Human Rights | 95 |
| 3.4 | The Philosophies of Punishment: Retributivism and Reductivism | 98 |
| 3.5 | Retributivism | 98 |
| 3.6 | Reductivism | 102 |
| 3.6.1 | Deterrence Based Punishment | 103 |
| 3.6.2 | Incapacitative Aims | 106 |
| 3.6.3 | Rehabilitative Aims | 106 |
| 3.6.4 | Desistance Theories | 109 |
| 3.7 | Abolitionism..... | 111 |
| 3.8 | Summary | 112 |
| Chapter Four | Methodology | |
| 4.1 | Introduction | 113 |
| 4.2 | Research Aims | 113 |
| 4.3 | Social Constructionism | 114 |
| 4.3.1 | The 'view from Below' | 116 |
| 4.4 | Positionality | 116 |
| 4.5 | Qualitative Methods | 120 |
| 4.5.1 | Narrative Methods | 120 |
| 4.5.2 | Biographical-Narrative Interpretative Methodology | 123 |
| 4.5.3 | Participant Criteria | 125 |
| 4.5.4 | Identifying Research Participants | 126 |

| | | |
|---------------------|---|-----|
| 4.5.5 | Participant's Profiles | 130 |
| 4.5.6 | Interview Setting | 135 |
| 4.5.7 | Data Collection and Recording | 136 |
| 4.5.8 | Data Processing and Analysis | 140 |
| 4.6 | Positioning the Participants Accounts | 145 |
| 4.7 | Ethical Considerations | 146 |
| 4.7.1 | Consent Form | 151 |
| 4.7.2 | Confidentiality and Anonymity | 152 |
| 4.8 | Limitations of the Research | 153 |
| 4.9 | Summary | 155 |
| Chapter Five | The Procedural Experience and Short-Term Impact of the Confiscation Punishment | |
| 5.1 | Introduction | 157 |
| 5.2 | Who Confiscation Orders are Imposed Upon | 158 |
| 5.3 | How Confiscation Figures are Constructed | 163 |
| 5.3.1 | Criminal-Lifestyle Assumptions | 163 |
| 5.3.2 | Hidden Asset Assumptions and Tainted Gifts | 169 |
| 5.3.3 | Gross Profit Calculations | 172 |
| 5.4 | Why the Confiscation Defendant 'Agrees' to a Confiscation Order That They Do Not Agree With? | 176 |
| 5.4.1 | Preparing a Confiscation Defence from Within Prison | 176 |
| 5.4.2 | Legal Representation in a POCA Trial | 178 |
| 5.4.3 | The Impact Upon Prison Sentence Progression and Prison Release | 186 |
| 5.4.4 | The Impact Upon the Family | 190 |
| 5.4.5 | Restraint | 192 |
| 5.5 | Summary | 195 |
| Chapter Six | The Long-term Effects of the Confiscation Punishment | |
| 6.1 | Introduction | 197 |
| 6.2 | The Consequences of Not Satisfying a Confiscation Order | 197 |
| 6.2.1 | The Loss of the Family Home | 205 |

| | | |
|----------------------|--|------------|
| 6.2.2 | The Impact of Receiving Confiscation Letters | 209 |
| 6.3 | Accruing Interest and Section 22 Powers | 214 |
| 6.3.1 | The Impact Upon Pro-Social Aspirations | 224 |
| 6.4 | The Impact Upon the Defendant's Opportunity to Reintegrate and 'Go-Straight' | 233 |
| 6.4.1 | The Impact of Banking De-Risking Policy | 240 |
| 6.5 | Reflections of the Confiscation Punishment | 246 |
| 6.6 | The Emotional and Psychological Effects of POCA..... | 251 |
| 6.7 | Summary | 257 |
| Chapter Seven | Analysis of the Research Findings | |
| 7.1 | Introduction | 259 |
| 7.2 | An Imaginary Penalty | 260 |
| 7.3 | Procedural Injustice | 268 |
| 7.4 | [Un]serious and [dis]organised criminals: The reality of Who the Post-Conviction Confiscation Punishment is Used Against? | 276 |
| 7.5 | Unlawful State Violence | 280 |
| 7.6 | Legitimacy of POCA and the State | 298 |
| 7.7 | Reform or abolition? | 303 |
| 7.7 | Summary | 305 |
| Chapter Eight | Conclusion | 307 |
| | Bibliography | 312 |
| Appendix A | Research Participant Information Sheet and Consent Form | 338 |
| Appendix B | MOJ FOI Request | 342 |
| Appendix C | Short Biographies of the Research Participants from the Initial Research Cohort | 345 |
| Appendix D | E-Mail Correspondence from the POCA'd in Response to the Russell Webster Publication | 351 |

Acknowledgments.

This is the part of the thesis that I have been looking forward to writing since this project commenced back in 2004 in a prison cell on the lifer's wing in HMP Liverpool, an unusual place to draw inspiration from, but that is what it did. Being around people whose lives had changed forever, most of which were serving life for murder, who despite having to carry the burden of guilt and the reality that it would be many, many years till they would experience 'freedom' again, they still somehow found the courage to continue. I did not probably realise it at that time but living in an intimate space with these guys, learning who they were as human beings beyond their offences, and how they had found themselves in this regrettable position, was to change my perception of the world completely. Therefore, it is because of these reasons that I thank these individuals who unbeknown to me or to them at that time, changed my life forever.

Whilst change may very well be an agentic-driven process the extent, speed and direction of change is largely determined by structural factors and key individuals that are able to help overcome these structural barriers. I have been very fortunate to have met several key individuals along this journey of change, who without these key individuals, this thesis may not have been possible. The first is a very special lady, Dr Sally Pilkington, who gave me my first taste of higher education whilst I was serving time in HMP Kirkham. She put incredible trust in me and helped me to believe that I was capable of becoming something more than I was. You were the 'enabler' who helped me to go beyond the 'key skills' glass-ceiling of education within prison. In opening the door to higher education whilst I was in prison, rather than waiting till I was released, she injected me with hope during this liminal phase of my life and without that hope I may very well have chosen a different path.

The next special person that I would like to show my immense gratitude to is my Director of Studies, Dr Kathryn Chadwick. I never knew when I first spoke to Kathryn at a post-graduate criminology prospectus event in 2011 that my life would change forever. We discussed the potential for me to undertake my master's degree and whether my criminal past would present a barrier to participation

and without hesitation Kathryn offered me a place, such is her belief in equal opportunity and promoting social justice. On completion of my master's degree Kathryn invited me to work alongside her teaching criminology at the university. This was an incredible privilege to be able to observe and learn the craft of teaching from somebody who is so well respected, particularly within the field of critical criminology. However, it is not the art of teaching that I am most indebted to Kathryn for because she has provided me with so much more than that. Her altruistic approach to life has been so infectious and as a result of being around her I have learnt how to be a better human being. Kathryn, I thank you for believing in me and continually placing trust in me, again, without you none of this is possible.

I would also like to thank my most incredible supervision team who have invested themselves on this project in ways that go beyond what could ever be expected from a supervision team. They have shown me unconditional love throughout this project and been there to witness both the highs and the lows. They have been there to pat me on the back when milestones were achieved and have been there on hand with a box of tissues when it became all too much. Their innate ability to know when best to push and when best to nurture was incredible. A special group of individuals who each bring a different set of supervisory, academic and personal skills which when brought together presents a formidable package. The team was led by Dr Kathryn Chadwick who brought a wealth of experience, knowledge and wisdom to the relationship and knew when best to bring calm and when things needed to be ramped up. The second member of the team was Becky Clarke, a special human being whose dynamic character kept me on my toes, continually challenging me, forcing me to think deeper so that my thesis was philosophically aligned, but then know when it was time to support me and offer me perspective and personal words of encouragement. The third member of my supervision team, Dr Patrick Williams, sat between these two other special individuals offering a combination of both sets of skills but did so in Patrick's unique style that reflects his approach to life. The Patrick and Becky combination, having previously worked alongside each other within Greater Manchester's probation research department for many years, brought to the table a tried and tested formula of

delivering research projects which was to prove invaluable to this research process. However, the common denominator for these three individuals was their drive to challenge structural inequality and bring about social justice. Without this team and the time and passion that each of them has invested within me and this project, this research does not make it past the research phase. I thank you all and congratulate you on making this possible – It has been one hell of a journey!

I would also like to thank Manchester Metropolitan University for funding the first three years of this PhD.

I would like to thank my research participants who despite the painful nature of drawing upon your life experiences were prepared to do so for the greater good. I hope that this thesis, in allowing your voices to be heard, goes some distance to showing my gratitude to you. Make no mistake as to what this thesis represents. This thesis provides a platform for us to speak truth to power, to hold them to account for the unacceptable and unnecessary harm that they have brought to each of your lives and countless others, in the hope that it will bring about change. I also hope this thesis provides some salvation to your on-going pain and misery that arises as a direct result of the confiscation punishment. I would like to extend my gratitude to Marie Claire who played a pivotal role in helping me to identify individuals that would be willing to take part in my research.

I would like to thank Dr Colin King who for the past few years has supported this project from a distance and allowed me to disseminate and critically discuss my findings within an academic and professional space. It is because of this that this research has already begun to influence those that have the capacity to bring about the necessary changes to this incredibly harmful form of punishment.

I would also like to show my gratitude to my parents who have watched the roller coaster that is my life with both trepidation and joy. I now know as a parent myself how painful it must have been for you to watch the child you brought into this world, loved and nurtured through early life, throw it all away in such devastating fashion and be powerless to do anything about it. I hope this achievement goes some distance to heal those wounds.

I would like to show my gratitude to my partner, Steph, who whilst I have been immersing myself in this project for the past four years, she has been keeping everything else ticking over in the background. Without her none of this is possible. You have provided me with two beautiful children that have enriched my life incredibly. I can only apologise to you that this project come between us and was able to change the trajectory of our lives.

I would like to thank my two wonderful children who bring endless joy to my life and bring purpose to my life. Without even knowing it you inspire me each day to be a better human being. I apologise for the times when this project has come between us, but I hope that when you are older you will understand the importance of this piece of work in the way that I do. I love you both sincerely and unconditionally.

It is hard to put into words how much I am indebted to each and every one of these individuals and many more who have played a pivotal role in this project and my life more generally – thank you.

List of Figures.

| Figure No | Explanation | Page No |
|-----------|--|---------|
| Figure 1 | The total amount of money collected from cash forfeiture and confiscation orders and the total amount paid to victims in compensation from years 2012-2018 | 60 |
| Figure 2 | Breakdown of the costs of administering confiscation orders | 61 |
| Figure 3 | HMCTS Year-end confiscation statistics for 2017-18 | 62 |
| Figure 4 | A pie chart to illustrate how many confiscation orders are imposed according to the financial value of the orders between 1987 and 2013 | 70 |
| Figure 5 | The amount of confiscation orders imposed between 1987 and 2013 and the collection rates | 72 |
| Figure 6 | Outline of how the research participants were identified | 129 |
| Figure 7 | Participant Data | 134 |
| Figure 8 | Offence types which led to confiscation proceedings being initiated | 134 |
| Figure 9 | Letter sent to Brendan from HMCTS asking for permission to deduct £2 a week from his prison wages | 159 |
| Figure 10 | An anonymised confiscation letter sent by HMCTS | 211 |
| Figure 11 | Letter from HMCTS to Brendan detailing the amount of interest that has accrued upon his confiscation debt | 217 |
| Figure 12 | A letter from HMCTS to Daniel detailing the amount of interest that has accrued upon his confiscation debt..... | 221 |
| Figure 13 | A copy of Daniel's letter from his bank informing him that they are closing his account | 242 |
| Figure 14 | The reverse side of a HMCTS confiscation letter which details how to make payment | 244 |

List of Tables.

| Figure No | Explanation | Page No |
|------------------|--|----------------|
| Table 1 | Key developments in confiscation legislation | 46 |
| Table 2 | A breakdown of how many orders are imposed for each offence type since March 2003 | 77 |
| Table 3 | Default prison sentences according to the confiscation debt outstanding for POCA 2002 and SCA 2015 | 86 |
| Table 4 | Confiscation related data for each of the research participants | 131 |
| Table 5 | The amount of interest accruing on Brendan's £200,000 confiscation order | 218 |
| Table 6 | The percentage rate of monthly deductions specified under an attachment of earnings order | 225 |

Abbreviations.

| Abbreviation | Full term |
|--------------|---|
| AML | Anti-Money Laundering |
| ARA | Asset Recovery Agency |
| ARIS | Asset Recovery Incentivisation Scheme |
| BNIM | Biographical-Narrative Interpretative Methodology |
| CFA 2017 | Criminal Finances Act 2017 |
| CJS | Criminal Justice System |
| CPS | Crown Prosecution Service |
| DTA 1994 | Drug Trafficking Act 1994 |
| DTOA 1986 | Drug Trafficking Offences Act 1986 |
| ECHR | European Convention on Human Rights |
| EHRC | Equality and Human Rights Commission |
| ESRC | Economic and Social Research Council |
| EU | European Union |
| FATF | Financial Action Task Force |
| HGV | Heavy Goods Vehicle |
| HLPR | Howard League for Penal Reform |
| HMCIP | Her Majesty's Chief Inspector of Prisons |
| HMIP | Her Majesty's Inspectorate of Prisons |
| HMCTS | Her Majesty's Court and Tribunal Service |
| HMPPS | Her Majesty's Prison and Probation Service |
| HMSO | Her Majesty's Stationery Office |
| IMB | Independent Monitoring Board |
| IPP | Indeterminate sentence for Public Protection |
| MDA 1971 | Misuse of Drugs Act 1971 |
| MOJ | Ministry of Justice |
| NCA | National Crime Agency |
| NAO | National Audit Office |
| NOMS | National Offender Management Service |
| ONS | Office for National Statistics |
| PIU | Performance and Innovation Unit |
| POCA 2002 | Proceeds of Crime Act 2002 |
| PRT | Prison Reform Trust |
| Q.C. | Queen's Counsel |
| ROTL | Release On Temporary Licence |
| SCA 2015 | Serious Crime Act 2015 |
| SOC | Serious and Organised Crime |
| SQUIN | Single Question Inducing Narrative |
| UK | United Kingdom |
| UN | United Nations |
| UWO | Unexplained Wealth Order |

Chapter One – Introduction.

1.1 - Lived Experience and Positionality.

In May 2004 I was arrested for drug related offences and subsequently imprisoned for 54 months. It was at this point that post-conviction confiscation proceedings were initiated against me. I was released from prison in August 2006 but after almost a year on release I was re-incarcerated having failed to satisfy my confiscation order in full. This led to a six-month default sentence being imposed. Despite the default sentence being only six-months, it had a devastating impact upon both myself and my family. The consternation of being re-incarcerated despite my best efforts to meet the demands of the confiscation order and despite not committing any further offences was difficult to overcome. Part of the reason as to why the default sentence was difficult to come to terms with was because I felt it was undeserved and unjust. Whilst feelings of powerlessness and unfairness characterised the confiscation process for me, especially as I was led down from the dock of the courtroom to the holding cell below, I was sobered by the harsh reality that I was being sent back to prison and there was nothing that I could do about it. Those feelings of powerlessness and unfairness were quickly accompanied by feelings of anger and resentment, emotions that are difficult to dissipate. Of course, those pains were not felt by me alone, as for my family observing on the side-lines, the emotional turmoil of watching their loved one be taken away unfairly was said to be crushing.

Furthermore, trying to explain to my parents that I was being sent back to prison because I was unable to pay the confiscation order because it was inaccurately calculated was difficult for them to process; after all, for my parents, the police and the courts are there to uphold the law, not break it. Despite my best efforts to reassure my parents that I had not committed any further offences, that I had conformed with the rules during my prison sentence and whilst on probation, and that I genuinely did not have the money that they demanded, my parents still suspected that there must have been more

to it. This fractured the trust within our relationship; as idealists my parents believed the system would not act in this way without good reason.

From a rehabilitative and reintegrative perspective, being re-incarcerated also meant that my attendance on a university degree course was derailed and my place on the course unnecessarily jeopardized. The stigmatizing effect within higher education of having previous convictions is marginalising in itself but being imprisoned during a course is difficult to recover from.

Since serving the default prison sentence I have continued to receive letters from the courts detailing how much debt is outstanding and how much interest is accruing on it. The repressive effect of receiving these letters is unquantifiable. When the letter, instantly recognisable because it is branded with the royal coat of arms, lands on the doormat it has a paralyzing effect for the whole family as we are reminded that my mistakes of the distant past continue to impede our present and our future.

Despite making monthly payments towards my confiscation order the outstanding amount continues to increase due to the accruing interest. The demoralizing and de-habilitating effect of having your term of punishment continually increased despite compliance is again immeasurable. Ironically, the confiscation payments that I have maintained for the past 3 years have derived from my PhD bursary, dismantling the often-recited claim that confiscation measures recover 'ill-gotten' gain.

As a result of constructing a new pro-social life, which involved making numerous necessary, but nonetheless difficult, changes I found myself wondering why after 14 years of confiscation oppression does a confiscation order continue to impede mine and my family's future, both psychologically and physically. Despite not being in a relationship with my current partner at the time the offences were committed and, therefore, despite my children not being born, the on-going punishment that the Proceeds of Crime Act 2002 (POCA thereafter) wields impacts upon their lives daily. As a result, it has changed how I and my family live our lives in ways that we would not otherwise have chosen. I accept that some people may consider my on-going punishment as deserved but as POCA is not recovering ill-gotten gain, but confiscating legitimately acquired earnings, then this greatly impacts upon my

partner and children whose innocence is beyond doubt. Their only crime was to fall in love with or be fathered by me and, therefore, in recognising that their human rights are being violated, this prompted me to think about the legality of this punishment and its true purpose.

The guilt and self-loathing that is experienced when you realise that the actions of your past impede the lives of the people you love the most is at times unbearable. This, in addition to the emotional and psychological damage already induced at the hands of State punishment, forces you to question your existence.

The long-term impact of being sent back to prison despite not committing a further offence and the emotional upheaval of being pursued indefinitely by the POCA regime is that I remain in a constant state of anxiety, uncertainty and distrust, unsure of what lies around the corner. Being suspended in 'no-man's land', a place in which I have publicly renounced my former criminal lifestyle and set about living a pro-social life but have done so with a growing awareness that my POCA punishment is never likely to end, has left me feeling despondent and highly sceptical about whether 'rehabilitation' is a genuine penal objective. It has also focused my mind to the fact that no matter what I manage to achieve pro-socially in life, it will never 'wipe the slate clean', despite the political rhetoric that suggests otherwise. Therefore, understanding the reality of POCA for others, particularly within the context of 'rehabilitation', became a key motivating force behind this research project.

Since coming out of prison in 2007 I have held several positions working within the criminal justice field, including working as a probation service officer and successfully delivering a youth crime intervention programme for several years. Since 2013 I have worked in higher education teaching criminology to undergraduate students. These positions have undoubtedly shaped my views on crime, punishment and social injustice, as much as my 'criminal' past.

In 2011 I enrolled on a post-graduate criminology course at Manchester Metropolitan University (MMU) under the tutelage of Dr Kathryn Chadwick. On learning about the various philosophies and theories that are said to explain how and why we punish, I began to query whether they accounted

for my on-going experience of the confiscation punishment, and the basis for this thesis was born. This, coupled with the fact that there was a clear absence of research and literature within penology which explored the potentially long-term de-habilitating effects of this increasingly used form of contemporary punishment, made me realise the necessity of this piece of research.

In terms of the construction of this thesis and my positionality within it, I do not profess to be value-free or even value-neutral and, consequently, nor does this thesis. I know what my values are, and they are centred upon social justice and eradicating socio-economic inequality, exploitation and oppression, and these will be reflected throughout this thesis, whether it is in the literature that has been drawn upon to be reviewed, the research methods chosen, the way in which the participant's data will be interpreted and presented, and the way in which this thesis is brought together within its final discussion and conclusions. The purpose of addressing this here at the beginning of this thesis is for the purpose of transparency (Scruton, 2007).

However, it is also important to point out that, despite my oppressive experience of POCA, I fundamentally agree with its moral principle, that 'crime should not pay', and its guiding objective - the removal of ill-gotten gain. However, having experienced both sides of the criminal justice system (CJS hereafter) I have seen first-hand how it fails to be applied equally or fairly and so it is difficult to see how POCA could be applied any differently. Instead it would appear rational to assume that adding a further layer of punishment to a system that is fraught with unequal application and discriminative practice is only ever likely to deepen those injustices. And so, this thesis is projected from a social justice perspective which draws on the ethical Blackstonian position that it is, "[B]etter that ten guilty persons escape, than that one innocent suffer" (Blackstone, 1765 in Volokh, 1997: 174). I also believe that the 'crime should not pay' principle is further mitigated by an understanding that for the casualties of capitalism, who are often socially marginalised and economically destitute, 'crime must pay' in order to survive.

1.2 - The State and the Rule of Law.

Throughout this thesis, significant attention will be given to the role of the 'State' in its capacity to govern and administer punishment and it, therefore, requires a level of definition which not only explains what the State is, what it consists of and what it does, but also acknowledges its insidious and often surreptitious nature. For Coleman et al. (2009: 9), the State is not a 'thing' but a process that:

in its shifting boundaries and ensembles, provides the arena for the organization of social forces, continually recodifying as well as drawing upon 'public' and 'private' interests.

Amatrudo (2009) identifies four features which define the State. Firstly, it must have a working political organisational structure, consisting of a number of institutions which allow it to function, such as a police force, a civil service and a court system. Secondly, it must control a set territory and be able to survive changes in its basic organisation, such as when there is a change in government. Thirdly, it must be sovereign, autonomous and be able to claim a monopoly of political authority, law-making and power. Fourthly, it must command the allegiance of its citizens who are subject to its laws so as to maintain public order. Therefore, such a definition rests upon the idea that the State is a neutral entity that organises for the common good, which from a Marxist perspective is contested on the grounds that the State frames laws and coordinates the interests of the dominant class (ibid). For Gramsci, rather than physical institutions, he argues that the hegemony of the Capitalist State maintains control without the use of force by shaping the ideas and values of its citizens, undermining class conflict and manipulating which issues are allowed to be tackled by political action (Amatrudo, 2009: 6). For Hillyard and Percy-Smith (1989: 533-546), the idea that the British State is a product or symbol of democracy is deeply problematic, highlighting that:

decision making and administration are exclusive, providing few opportunities for popular participation, and where opportunities do exist, then participation for the majority takes place on highly unequal terms [...] the legislature is no longer able to control the executive, while the judiciary is all too often prepared to make decisions in support of the powerful. Britain is now best described as a coercive state.

One of the primary roles of the State is to maintain control and order within society and this is done through its laws. Although the purposes of criminal law have never been officially written down by Parliament they have continued to be constructed over the centuries and there is general consensus to what those purposes are: to protect individuals and their property from harm; preserve order in society; punish those who deserve punishment; educate people about appropriate conduct and behaviour; enforce moral values (Martin and Storey, 2015: 3-4). These purposes are used to legitimize State-sanctioned punishment and play an important role in ensuring that 'consensual' order can prevail. They are also used to guide a plethora of criminal justice agencies and processes that seek to control crime by deterring, investigating, arresting, convicting and punishing those who are found guilty of perpetrating the law. As Ashworth (2015: 77) points out, in an ever-evolving society in which new behaviours and actions are observed which may not contribute to the common-good of society, then parliament is expected to construct new laws which set out to tackle the identified issue, and in doing so restore the conditions of 'order' and 'security'.

Central to the integrity of a CJS within a democratic society is the rule of law with its overarching principle that stipulates that no one is above the law (Bingham, 2011). Importantly, from a Lockean perspective, as the sovereignty of the law applies to all, the rule of law is there to prevent the arbitrary exercise of State power because 'where-ever law ends, tyranny begins' (Locke, 1690 in Bingham, 2011: 8). Therefore, when the State deviates from the rule of law, by introducing new laws which contravene its guiding principles or when it abuses its social control and order powers, then its legitimacy to punish [and govern] is undermined. The importance of the rule of law within the British CJS is captured in the following statement by Lawrence (2008: 22):

At its heart has been the doctrine of the rule of law. This has been anchored to the concepts of fairness and justice, with its judges, juries and barristers standing firmly against oppression by the State and its sometimes harsh laws, whenever it threatens the liberty of the citizen.

To assist in the application of the rule of law the CJS calls upon several key due-process safeguards which aim to balance the power and protect against the risk of injustice in criminal proceedings. These safeguards include the right to have a trial held before an impartial judge and before a jury, the presumption of innocence, the defendant's right to remain silent and a burden of proof which lies with the prosecution to be evidenced to a 'beyond reasonable doubt' threshold. As Ashworth and Redmayne (2010) point out the purpose of due process safeguards are that they seek to provide:

fundamental guarantees against arbitrary State conduct and [the] potential misuse of its authority, an authority that is considerable when the public censure of conviction and State punishment are at stake (in Hendry and King, 2017: 18).

The relationship between the type and amount of punishment that is administered for an offence is influenced by a multitude of factors other than the gravity of the offence such as culture, politics, economics and the justifications for punishment which are favoured at that time. These justifications are either grounded in retribution, a just deserts system of punishment that is said to reflect the culpability of the offender and the severity of the offence or, alternatively, punishment is justified on reductivist grounds which aim to reduce further crime by way of incapacitation, deterrence and/or rehabilitation. Understanding the relationship between the confiscation punishment and these justifications is of primary importance to this thesis

Despite evidence which challenges the benevolent or the equitable perception of the State (Scruton, 2007; Clarke et al., 2017; Sim, 2009; Scott, 2016a; Williams and Clarke, 2018), its legislative reach and its social control apparatus continue to be extended (Cohen, 1985; Garland, 2001a). Such accounts, by highlighting the inequitable access to justice, the harmful effects of the CJS and the ineffectiveness of procedural safeguards to protect specific groups of individuals, begin to challenge the perceived legitimacy of the CJS and pose questions about the true functions of punishment. For example, Chadwick (1996: 12) argues that the function of the CJS and its processes of punishment in an

advanced capitalist, patriarchal and neo-colonial society is to 'maintain social order and political and economic stability', rather than to control crime per se.

One such example of the expansionist agenda referred to above is the introduction of confiscation legislation. Confiscation powers were introduced in the UK on the grounds that traditional law enforcement techniques and powers were largely inept when dealing with the twenty-first century organised criminal who operates internationally (Performance and Innovation Unit, 2000 [PIU, 2000 hereafter]). This narrative was largely conceived in the United Kingdom due to the failings of existing confiscation legislation in the 1970s (Bullock and Lister, 2014; Nicol, 1988; Ryder, 2013). A large-scale covert police investigation into Lysergic Acid Diethylamide (LSD) production and trafficking named 'Operation Julie', which successfully led to the conviction of fifteen defendants, was overshadowed by its failure to forfeit their assets which they were alleged to have acquired through their crimes. In the criminal trial (*R v Cuthbertson*), the House of Lords upheld an appeal brought on the grounds that the powers under the Misuse of Drugs Act 1971 (MDA 1971 hereafter) were limited to physical items used to commit the offence, did not allow for the confiscation of assets when the offence that violated the act was a conspiracy,¹ or if the monies were being held abroad (Bin-Salama, 1998).

In direct response to this trial it was recognised that confiscation law would need to be developed so as to ensure that the profits of crime could also be confiscated. A number of pieces of confiscation legislation have been introduced over the years in a 'piecemeal fashion' (PIU, 2000: 5)² before the enactment of the Proceeds of Crime Act 2002 on the 24th March 2003. As Bullock and Lister (2014: 53) point out, POCA set out to consolidate existing confiscation legislation and 'institutionalise' confiscation practice by 'bring[ing] confiscation in from the margins'. Under POCA there are four main routes for the recovery of assets: post-conviction confiscation, civil recovery (no conviction required

¹ Conspiracy involves an agreement by two or more people to carry out a criminal act. Even if nothing is done in furtherance of the agreement, the offence of conspiracy is complete.

² Drug Trafficking Offences Act 1986, Criminal Justice Act 1988, Drug Trafficking Act 1994

prior to forfeiture),³ cash seizure and forfeiture; and taxation. As post-conviction confiscation powers are the most frequently used here in England and Wales (Rees et al., 2012), this is the area of asset recovery in which this thesis is going to focus upon.

From an ideological perspective confiscation is a punishment imposed upon those who make financial gain from their crimes. It constitutes a legal process that is imposed upon the offender against their will. The removal of personal property in any other setting would be considered unlawful, but within the context of confiscation law it is considered not only legitimate, but an objective that should be pursued with vigour because of its purported deterrence and crime control capacities (PIU, 2000).

Prior to the commencement of post-conviction confiscation procedures, the court will have determined 'guilt' in a criminal trial before imposing a 'proportionate' punishment for the predicate offence that reflects the culpability of the offender, and the severity of the offence (and also considers other public safety and crime reduction factors). Therefore, the confiscation of assets represents a significant extension of punishment, raising important questions about the overall proportionality of the post-conviction confiscation punishment. It is tensions such as these which this thesis aims to explore.

In its determination to construct a piece of legislation that could be effective at recovering ill-gotten gains, the legislature elected to make confiscation proceedings criminal in nature, but draw upon civil law mechanisms that would enable it to operate in a legislative space in which the strict rules of criminal evidence do not apply (Alldridge, 2011). In doing so the standard of proof in a confiscation court case is reduced to the civil threshold; the balance of probabilities. Other key due process safeguards that are circumnavigated within confiscation proceedings include the presumption of innocence, the defendant's right to remain silent, and their right to have their case heard before an impartial judge and in the presence of a jury, indicating a significant shift away from the rule of law

³ Dr Colin King has written extensively on civil forfeiture, particularly in the context of Ireland: Gallant and King, 2013; King, 2014; Hendry and King, 2017.

(Rees et al., 2012). Therefore, the confiscation of property and the potential loss of liberty that can follow under confiscation legislation without the above due-process safeguards represents a significant challenge to the rule of law, especially if evidence was revealed to indicate that these punishments, and the hardships that derive from them, begin to infringe upon the rights of the wider family.⁴ It is in the absence of research which sets out to understand how the confiscation punishment is experienced in reality, that confiscation legislation has continued to receive cross-party political support and its powers have continued to be extended. This thesis, by revealing the experiences of those subjected to confiscation and then considering those narratives within the context of the official confiscation objectives and the long-standing philosophies of punishment, will begin to raise important questions about the judicial process, human rights, proportionality, the legitimacy of the post-conviction confiscation punishment and reveal/confirm the hidden functions of contemporary punishment (Mathieson, 2006).

1.3 - Official Accounts of POCA.

Public awareness of POCA is largely oriented by official discourse and media representations. When this thesis uses the term 'official discourse' it is making reference to the official reports written by State-sponsored agencies, policy documents, political rhetoric and academic research which tends to reflect and reinforce the 'view from above', whilst simultaneously denying the 'view from below' to be heard (Scraton, 2007). Such discourse has enabled a 'regime of truth' (Foucault, 1980: 131) about asset recovery to be constructed which has become our 'institutionalized and professionalized manifestations of knowledge' (Scraton and Chadwick, 2012: 108). As the official discourse is constructed by those in positions of power it is largely inaccessible to those whom POCA is imposed upon, typically because of the isolating effect and the deprivation of goods and services (Sykes, 1958) which result from being incarcerated. Therefore, a combination of the obscuring effect of the POCA 'regime of truth' and the silencing effect of incarceration ensures that little is known in the public

⁴ Article 8 - right to respect for private and family life, and Article 1 Protocol 1 - Protection of property

domain about how the confiscation punishment is experienced in reality and, subsequently, the status-quo is maintained. However, there is a growing set of literature which has begun to challenge the positive depiction of confiscation powers and explore the contradictions between POCA ideology and its application in reality (King, 2014; Bullock, 2014; Bullock and Lister, 2014). This thesis sets out to further explore these contradictions by providing a platform for the voices of those subject to this punishment to be heard.

At the forefront of the official discourse is the underpinning rationale that 'crime should not pay' and through the recovery of assets it is proposed that the following objectives will be achieved: send out the message that crime does not pay; prevent criminals from funding further criminality; remove negative role models in communities; and decrease the risk of instability within the financial markets (PIU, 2000: 5). These objectives are discussed within the official discourse within the context of a growing threat posed by 'serious and organised' criminals and, since the 9/11 attacks, terrorism, of which it is then argued that traditional law enforcement techniques are inadequate to deal with such threats. However, to what extent these measures are being used against these threats and how successful the confiscation system is at meeting its objectives is largely contested within the existing academic literature, as chapter two will reveal.

Within the official discourse the target of these special powers is said to be the 'Mr Bigs' who live a 'champagne lifestyle' aboard their lavish 'yachts, mansions and luxury cars' (NAO, 2007: 4-7). The use of such evocative language facilitates a particular construct of who commits 'serious and organised' crime within our society. Another term adopted within confiscation policy to describe the 'profits' from crime is 'ill-gotten' gains'. However, in failing to challenge the accuracy of this term and through its repeated use, it continues to 'blind-us' to the possibility that these measures may go further than confiscating criminal profits and extend to legitimately acquired assets also. This thesis seeks to better understand who these measures are used against and expose the experiential reality of the

confiscation punishment, and in doing so disrupt the use of such language, language which through repetition, has had the effect of legitimising confiscation policy.

In the absence of 'independent' confiscation data that can reveal the 'true' character of this contemporary form of punishment, this thesis is forced to draw upon official statistics posited by various State agencies. However, it does so with caution, mindful of their limitations, as they may not provide an accurate representation of the confiscation landscape.

1.4 – Theorising the Significance of the Political Context in Which Asset Recovery Powers Have Been Introduced and Extended.

In order to understand how or why these special powers have been introduced and extended it is necessary to acknowledge the wider political context. As Garland (2001) points out crime control measures in the late modern period have not be driven by criminological considerations alone but instead reflect the popular, political and cultural shifts in attitude which form an alternative social terrain amenable to a punitive law and order ideology. The period in which early confiscation legislation has been developed was characterised by the decline of the rehabilitative ideal, influenced by a Thatcher era of individualism and the permeation of neo-liberal politics which have resulted in a 'more regressive public mood and temper' (ibid: 73). Hudson (2003a: 169) also explains that during this period the 'political manipulation of risk consciousness' has made the public hyper-sensitive to the fear of crime and amenable to punitive crime control responses.

Arguably the most significant influence in the conception and development of confiscation legislation was the 'war on drugs' strategy which was gaining political momentum on both sides of the Atlantic during the 1980s onwards. Here in the UK, the introduction of confiscation powers under the Drug Trafficking Offences Act 1986 (DTOA 1986 hereafter), which allowed for the confiscation of profits in drug related offences only, attests to this. The political attitude towards drug offences is captured by

the Prime Minister at the time, Margaret Thatcher, speaking at a press conference⁵ in which she publicly declared war against drug traffickers:

We are after you! The pursuit will be relentless. Relentless! The effort will get greater and greater until we have beaten you! The penalty will be long prison sentences; the penalty will be confiscation of everything you have ever got from drug smuggling! So stop it! We shall make your life not worth living! (Margaret Thatcher Foundation, 1985).

In the same conference a current case which involved a British drug smuggler, who was in the process of appealing to the British government, as a result of facing the death sentence in Malaysia for drug trafficking was discussed. This example provides a further insight into the political attitude towards drug offences at that time:

There is no point in appealing to us. All over Malaysia, you will find posters saying "The penalty for dealing in drugs is death!" You will find it on almost every hoarding. They know full well. They do not hesitate to peddle drugs which can lead to the deaths of others. Malaysia has taken the view that the penalty for dealing in drugs is death and she has carried out several death sentences. That is her law and people are abundantly warned (ibid).

Another example of the political tone at the time in which early confiscation legislation was introduced was provided by the Home Affairs Committee (1985), who had been tasked with helping to shape the DTOA 1986. In their report, they described the imminent threat posed by South American cocaine exporters that were set to target the British market as, 'The most serious peacetime threat to our national well-being' (in Bin-Salama 1998: 22). Such 'doomsday pronouncements' (Scruton, 2007: 228) and moral panics (Cohen, 2011) are often engineered by politicians and the media so as to incite fear and garner support for penal populist policies (Pratt, 2002) that are punitive, have net-widening features, are often intrusive, may otherwise be considered unacceptable and have the potential to contravene human rights. As Scruton (2007: 223) argues, it is via the identification of a common

⁵ The press conference visiting Customs and Excise at Heathrow airport to discuss public spending & borrowing, foreign policy (Asia), law & order, transport

enemy and via the mobilisation of fear that 'special' law enforcement responses follow which reside on the:

margins of law, often on a murky border between criminal law and national security regulations where they lack transparency and accountability and barely respect the liberal ideals of due process protections.

Although early confiscation legislation was conceived under Conservative rule it was under New Labour in which these measures really began to gain traction. As Rees et al. (2012:2) point out, the Labour party wanted to be seen to be the party which ensured that the crime does not pay message is no longer perceived as 'empty and ironic'. Asset recovery also chimed with the political climate at that time with its 'tough on crime, tough on the causes of crime' agenda (Labour Party, 1997) and its 'war on organised crime' in particular (Lea, 2004: 84). Therefore, as Von Hirsch (1993: 93-94) points out, penal policy needs to be understood within the context of such law and order politics:

Where the law-and-order pressures in a particular jurisdiction are sufficiently strong, punishments will increase, and no penal theory can prevent that. Increases in sanction levels are best understood with reference to the underlying political dynamics.... Increased public resentment over high crime rates, identification of crime in the public mind with minority and lower-class groups, and an environment of political opportunism that has fostered official posturing about 'law 'n' order'.

The law and order politics of Tony Blair's administration led to a total of 26,849 new laws being introduced over his time in office, which Nick Clegg⁶ described as a 'frenzied approach to law-making' (Morris, 2006; see also Walters, 2009). These include controversial laws such as the Regulation of Investigatory Powers Act 2000,⁷ dubbed the "snoopers' charter" which presented a serious risk to civil liberties; the widening of 'stop and search' powers under section 44 of the [Terrorism Act 2000](#); the introduction of the Imprisonment for Public Protection sentence (IPP hereafter) under [section 225 of](#)

⁶ Then Home Affairs spokesman for the Liberal democrats

⁷ The Regulation of Investigatory Powers Act 2000 governs the use of covert surveillance by public bodies. This includes bugs, video surveillance and interceptions of private communications (e.g. phone calls and emails),

[the Criminal Justice Act 2003](#); and anti-social behaviour laws which were introduced under [section 1 of the Crime and Disorder Act 1998](#),⁸ which have been accused of ‘fast-tracking individuals into custody’, particularly young people (Liberty, 2011: 3).

Moreover, it would appear that confiscation policy has remained impermeable to any shift in wider criminal justice policies. For example, David Cameron (2016), then Conservative Prime Minister, in his prison reform speech stated that the CJS should rely upon incarceration less, acknowledging the ‘diminishing returns from ever higher levels of incarceration’ and that ‘simply warehousing ever more prisoners is not financially sustainable’. Despite this political shift, under confiscation law, non-payment of a confiscation order can carry a further default prison sentence of up to fourteen years without remission and current political attitudes towards confiscation law are that it needs to become more punitive:

We found too many criminals who are subject to an order to confiscate the proceeds of crime choosing to spend extra time in prison rather than paying up. £490 million is owed by criminals who have served or are serving more time in prison for non-payment. This suggests these sentences provide little deterrence and that the sanctions are not working and need toughening up (Margaret Hodge, MP⁹ - Parliament UK, 2014).

More recently, significant evidence has been provided by confiscation ‘experts’ to both the Home Affairs (2016b, 2016c, 2016d) and Public Accounts Committees (2016b, 2016c), which highlighted a number of contradictions between POCA ideology and the application of POCA in reality. Despite this the recommendations contained within the reports that followed suggested widening confiscation powers as opposed to addressing its fundamental issues. Whilst the tendency for governments to remedy criminal justice failings by ratcheting-up punishment severity is nothing new (Scruton, 2007; Sim, 2009; Scott, 2016a), the unprecedented powers that continue to be expanded under the guise of

⁸ Anti-social behaviour powers were amended under the Police Reform Act 2002, the Anti-social Behaviour Act 2003, the Serious Organised Crime and Police Act 2005 and the Anti-Social Behaviour Crime and Policing Act 2014

⁹ The Chair of the Public Accounts Committee which published its 2014 report titled ‘Confiscation Orders’

‘asset recovery’ represent a landmark in British legislative history and civil liberty rights (Boucht, 2017).

In summary, asset recovery powers have been introduced and developed under Conservative rule as part of the ‘war on drugs’ strategy in the 1980s and extended under the New Labour’s time in power as part of their ‘war on organised crime’. They are part of a wider tsunami of legislation that has been introduced over this time period, a consequence of law and order politics.

1.5 - The Current POCA Situation.

In 2016 the Home Affairs Committee commenced an inquiry into the UK’s confiscation system, publishing its findings later in the year based upon both the written and oral evidence derived from the testimonies of a number of experts from within the field of asset recovery.¹⁰ The report highlighted, *inter alia*, that despite at least £100 billion being laundered through the UK every year, and over 640,000 offenders being convicted of a crime in the UK in 2014–15, many of which will have had a financial element, less than 1% of convictions led to a confiscation order. This suggests that despite the POCA 2002 making it compulsory to impose a confiscation order upon every offender who is convicted of an offence involving financial gain, this is clearly not happening (ibid: 3). Understanding what forces are at play within the judicial discretionary space is, therefore, of interest to this research.

A more recent report by Her Majesty’s Court and Tribunal Service (2018: 13) (HMCTS hereafter) states that as of 2018, £1.96 billion of confiscation debt remains outstanding, of which it is estimated that just £152 million is actually recoverable. The data also suggests that £658 million of that overall debt derives from accrued interest. How and why such large amounts of confiscation debt remain outstanding and what the consequences of this are, is of interest to this research. Furthermore, the gap between the amounts of confiscation ordered and the amount successfully recovered suggests that a significant number of defendants may be subject to an extended period of incarceration in

¹⁰ Oral evidence was heard by a number of experts on 8th March 2016, 3rd May 2016 and 24th May 2016

default, and some confiscation defendants may be reincarcerated and, therefore, this thesis is also interested in exploring the default ratio of the post-conviction confiscation order. Despite the significance of sending people back to prison or keeping them in prison longer under confiscation law, the existing confiscation literature has failed to acknowledge the potential ramifications of imposing default sentences on an already overcrowded prison system, the impact upon the defendant and the impact upon their families. Although default sentence figures were made available in response to a Freedom of Information request (FOI) submitted to the Ministry of Justice in 2018 ([FOI request – see appendix B](#)), the default ratio appears to be inconsistent with the substantial amount of confiscation debt that remains outstanding (£1.96 billion). For example, it is claimed within the FOI data that of the 69,151 orders imposed since its inception, just 2,821 have led to a default prison sentence being activated (4%). Therefore, this thesis will seek to explore the validity of those figures and understand how they are constructed.

Moreover, as discussed above, the rhetoric used to introduce these special powers was based on the idea that it would be used to financially incapacitate ‘serious and organised’ criminals. However, the figures examined suggest that this may not be the case. According to National Audit Office (2013: 10) (NAO hereafter) statistics, of the 52,029 confiscation orders that had been ordered between 1987 and 2013, 24,011 (46%) of those orders were for amounts of £1,000 or less. It could be argued that such trivial amounts do not conjure up images of organised criminality in the sense that is depicted by the prevailing political rhetoric (PIU, 2000; NAO, 2007), but may be more indicative of petty criminals engaging in low level criminality as a result of social and labour market marginalisation and insufficient welfare provision (Wacquant, 2009; Sim, 2009), drug or alcohol dependency, or be consistent with the measly profits that are generated by those whom are exploited or subservient to those further up the criminal hierarchy. Such low amounts of money recovered could also be an indicator that POCA is ineffective at tracing, seizing and confiscating assets from those that have generated significant profit from crime because they were able to conceal its existence (Bullock and Lister, 2014), highlighting an

important contradiction within POCA ideology. Understanding who these special powers are being used against is, therefore, a key aim of this research.

1.6 - Methodological Context and Research Aims.

The overall aim of this thesis is to examine whether the long-standing justifications for punishment contained within the retributivist and reductivist doctrines can account for the post-conviction confiscation punishment. In order to meet this research aim, the following objectives were developed:

1. To capture the impact of post-conviction confiscation legislation on the defendant and their families.
2. Explore what offences this legislation targets and who is it being used against.
3. To critically examine the relationship between the aims of the legislation and its lived reality.
4. To reignite a wider debate around the philosophies of punishment.

In addition to the personal reasons outlined at the beginning of this chapter there are several further reasons as to why it was decided that the philosophies of punishment would be interrogated via the lens of post-conviction confiscation, as opposed to the other routes of confiscation/forfeiture outlined earlier in the chapter. Firstly, as my personal experience of this punishment was under post-conviction confiscation, from an epistemic privilege standpoint, it would appear most logical to research this particular area initially. Secondly, this is the most commonly used asset recovery approach in England and Wales (Rees et al., 2012), making the research more viable and, from a critical research perspective, the contribution to knowledge that derives from it has the potential to have the greatest impact. Furthermore, there are certain characteristics and processes unique to post-conviction confiscation legislation that may represent a significant challenge to the legitimacy of the State in its role to administer punishment, and it is felt that this demands investigation via the lens of those that are able to expose the impact of those processes.

As a critical researcher pursuing social justice; holding those in positions of power and responsibility to account; unveiling systems of punishment (or social structures) which deviate from established practice or purported policy objectives and which appear unjust, compromise civil, privacy, legal or human rights, or represent a significant risk to the 'democracy' of British society, are what orients my research interests. It was thought that the confiscation punishment may fit these criteria.

As this is an initial exploratory piece of research into the impact of post-conviction confiscation, a relatively wide and general approach has been adopted when setting the research objectives. Whilst such generality may make this research susceptible to criticism it is important to remember that, in true pioneering spirit, by opening up new understandings about the impact of confiscation, it aims to provide a base for which further and more specific research can be carried out. The specificity that is being alluded to here, for example, is research that drills down further to expose 'who' these special powers bear down upon in reality; is there a class, race or gender distinction in how POCA is experienced. From a critical research perspective these are important issues to be researched and whilst this research will begin to pose such questions and reveal intricate detail when it is unveiled, providing a comprehensive understanding of how the confiscation punishment is experienced differently by such groups is beyond the scope of this exploratory research. The methodological decisions taken, and the tensions that stem from them, will be discussed in greater detail in chapter four.

During this research twenty-three in-depth interviews with twenty-one participants were conducted and this data was enhanced by observations taken from four confiscation court proceedings. Additionally, contact was maintained with several of the research participants throughout the fieldwork phase of the project allowing for any confiscation related developments and documents (such as court letters) to be shared. Further insight into the impact of POCA was elicited via on-going email communications with a further twenty-two POCA defendants, who of their own volition decided to get in touch after the publication of an article I had written which discussed some of the emerging

findings from this research.¹¹ This data was analysed alongside the existing literature and the ‘expert’ evidence that was provided at both the Home Affairs Select Committee (2016b, 2016c, 2016d) and the Public Accounts Committee (2016b, 2016c) hearings, allowing for both ends of the confiscation spectrum (those responsible for the imposition of the legislation and those whom the punishment is imposed upon) to be considered. This is enveloped and complimented by over fifteen years of personal insight which, in addition to responding to my own confiscation case, I have observed numerous other confiscation cases during my time in prison and in the community.

The choice of research methods was greatly influenced by both the aims of the research and positionality considerations. Therefore, a qualitative approach which could provide a ‘rich’ contextualised understanding of the data (Denzin and Lincoln, 2008) was considered best suited to the research aims. As one of the objectives of this research was to explore the experiential realities of individuals and their families subject to confiscation procedures, not to make other peoples’ accounts fit with my experiences, it was important that research methods were carefully selected. Therefore, it was decided that narrative methods would be adopted but guided by some of the principles and techniques as advocated within Tom Wengraf’s (2004) Biographic-Narrative Interpretive Methodology (BNIM hereafter). These techniques and principles aim to prioritise the narrative of the research participant whilst minimising the interjection by the researcher by posing an open, single, narrative question such as, ‘Tell me about your POCA experience?’ In aiming to maximise interviewee-autonomy, whilst reducing the level of interjection by the interviewer, it was envisaged that this would help minimise the opportunity for confirmation bias within the data gathering phase. Despite these efforts to control researcher influence, this thesis does not claim to be ‘value-free’ or even ‘value-rational’. Instead it reflects the positionality that has been talked to throughout this chapter, but it is guided by the principles of research integrity.

¹¹ ‘How asset confiscation prevents rehabilitation’ – published 04/10/2017 - www.russellwebster.com/how-asset-confiscation-prevents-rehabilitation/ Russell Webster’s criminal justice website

This research sets out from a social constructionist and critical research perspective of 'crime' which challenges the idea that punishment is a direct response to crime and that the CJS is organised in a way that allows it to administer punishment fairly and equally (Scruton, 2007; Sim, 2009; Scott, 2016a, 2018). Social constructionism understands that social processes (both historical and cultural), language and interactions shape our knowledge and that the manner in which the world is constructed is bound by power relations which determine 'what is permissible for different people to do, and how they may legitimately treat others' (Burr, 2015: 5). Therefore, from a social constructionist perspective, this research seeks to understand why confiscation law has been constructed in the way it has, who it is inflicted upon and, by default, who it is not being inflicted upon, and why it is being used against these individuals.

To conclude, this is an inductive piece of research which will generate new theory that emerges from the data. It is original in the sense that it foregrounds the voice of the POCA defendant in order to understand how POCA plays out 'on the ground'. Although other researchers have researched POCA from a top-down perspective, producing an understanding of how POCA works according to those responsible for implementing the punishment or through analysing POCA case law, they have failed to account for the 'view from below'. This has resulted in inferences being made that are based on incomplete evidence and are, therefore, epistemologically vulnerable, a characteristic feature of 'behind-their-backs' social research (Scruton, 2007). Consequently, this research aims to address these shortfalls allowing for new perspectives to influence our understanding about how POCA works in 'reality'.

1.7 - Theoretical Contextualisation.

Integral to the theoretical framework of this thesis are the reductivist and retributivist philosophies of punishment. As will become apparent in chapter two, the official confiscation discourse is projected from both a retributive (the financial criminal deserves to have their 'ill-gotten' gains confiscated) and reductivist position in that it alleges that, by confiscating assets acquired via crime, this will prevent

them from being reinvested into further crime, and by removing the incentive, the financially motivated criminal will be disincentivised from carrying out the financial offence. This thesis, in exposing the reality of how the confiscation punishment is experienced, seeks to understand if these philosophical presuppositions are valid, and in the absence of any evidence to suggest that the confiscation punishment can be accounted for by these long-standing philosophies of punishment, then this thesis will aim to unveil what its hidden functions are (Mathieson, 2006).

As this thesis aims to understand the lived reality of the confiscation punishment and whether the punishment and the State in its capacity to punish is legitimate, key to the theoretical framework is the literature that discusses legitimacy. This thesis will draw upon three accounts that discuss legitimacy. The first account is Tyler's (2003) procedural justice framework, in which he asserts that issues of process and fairness determine whether a law or an authority is perceived as legitimate. The second account considered important in determining the legitimacy of the confiscation punishment is Bingham's (2011) work centred upon the rule of law. In his work, Bingham outlines a number of principles that the State is expected to adhere to so as to remain legitimate in its governance and social order role, and when processes are exposed as not adhering to these principles, then he argues that the State is in violation of the rule of law and the legitimacy of the State to punish would be considered weak. This thesis will also draw upon Scott and Flynn's (2014) work which asserts that the legitimacy of the State in its capacity to punish is eroded when punishment induces social harms beyond those which are officially intended, or a system of punishment is found to be unduly punitive, infringes upon human rights or it is misapplied. Each of these accounts of legitimacy will be explained further in chapter three and then revisited when the findings are analysed in chapter seven. The purpose of drawing upon three different accounts of legitimacy is because it is felt that determining the legitimacy/illegitimacy of the State to punish and determining the legitimacy/illegitimacy of the confiscation punishment was central to this thesis.

Initially, several theories of punishment were considered when developing the theoretical framework for this thesis.¹² However, it was felt that the philosophies of punishment were better aligned to the direction of this thesis in terms of legitimacy.

1.8 - Contribution to Knowledge

Despite confiscation legislation being used for several decades it has only ever gained peripheral attention within penal discourse. Generally, the attention it has gained has come from institutions of power, which for varying reasons have chosen to ignore the perspective of those who it is used against, enabling the State to maintain a hegemonic control over society's understanding of the impact of POCA. This is the opinion of Cram (2013: 121-122) who points out that, 'what research has been done has reflected narrow governmental concerns about reducing monetary attrition and maximising use of the powers' and 'what is lacking is any sustained critical reflection, or research, into the broader implications of this legislation'. This piece of work seeks to challenge this hegemony by venturing into the uncharted territory of confiscation research which seeks to understand the impact of the legislation on the defendant and their families, providing a platform for the 'voices from below' to be heard. The reason for extending the research to account for the experiences of the families is because, despite their innocence (especially children), the impact of State punishment is rarely contained to the defendant (Codd, 1998; Scott and Codd, 2010). Further, as Scraton (2007, 2016) vehemently points out, it is in the absence of the voices of the families in which the 'truth' can be manipulated and miscarriages of justice can occur. It is expected that by providing a platform for such accounts to be heard, the ideology and objectives that underpin and legitimize confiscation policy can be placed under scrutiny.

¹² Namely Emile Durkheim's (1933/2012) expressive theory of punishment; George Rusche and Otto Kirchheimer's (1968) Marxist inspired theory of punishment; and Michel Foucault's (1977) theory of punishment that focuses on power, control and knowledge.

By foregrounding the voices of those subject to the confiscation punishment and unveiling the reality of how POCA is applied and experienced in reality, issues centred upon procedural [in]justice, [dis]proportionality, power[lessness] and [il]legitimacy will be explored. Determining the legitimacy of these special powers is felt to be central to this thesis because in the absence of a sense of legitimacy, the identity of the post-conviction confiscation punishment begins to shift from 'legitimate' punishment to State Violence (Scott, 2016a). The findings of this research will also be considered within the context of the philosophies of punishment as a way of ascertaining whether they can account for the post-conviction confiscation punishment. In the event that these philosophies cannot account for the confiscation punishment, then this thesis aims to unveil what its actual function is. It is from there that this thesis will then consider whether the post-conviction confiscation punishment needs to undergo reform to address any issues identified within the research or whether the extent of its problems demand that it should be abolished.

In summary, in meeting its research aims using the research strategy discussed previously in this chapter (and in more in detail in chapter four) and then critically analysing the findings within the theoretical framework that has been developed, this thesis aims to make a significant contribution to knowledge that is threefold: empirical, methodological and theoretical.

1.9 - Structure of the Thesis

In order to assist the reader whilst navigating through this thesis and support its readability there are a couple of points that need to be addressed. The first point to make is that the term 'confiscation defendant' has been intentionally used throughout this thesis to refer to those subject to the confiscation punishment for two reasons. Firstly, as punishment under post-conviction confiscation procedures represents a further punishment to the punishment inflicted for the predicate offence and, therefore, is not in response to a further offence, it was decided that to use the term 'offender' or any other criminalising label would imply culpability and, therefore, desert. Secondly, as this

research will reveal, POCA as a legal process can go on for many years with the 'defendant' required to attend numerous court hearings. These court hearings do not cease when a confiscation order is imposed but continue into the recovery phase. Therefore, as a result of having to 'defend' on an on-going basis it was felt that the term 'defendant' appeared to be the most appropriate term to apply.

Throughout the thesis a number of abbreviations have been used of which their full terms can be found in the alphabetized list at the beginning of the thesis. To conserve the word count, one acronym that will appear consistently throughout the thesis is 'POCA'. When it is used in this way it will either be used to abbreviate the name of the legislation, The Proceeds of Crime Act 2002, be used as a synonym for 'confiscation order' or it is being used in the verb sense to describe the process of confiscation (POCA or POCA'd). It is also worth noting that, as this research sets out to elicit the voice of those whom POCA has been used against, then it is fitting to use the language that those individuals would apply, and consistently 'POCA' in its acronym form is the term that they have tended to use. Finally, to avoid confusion between civil forfeiture and confiscation, two completely different processes that are provided for under POCA 2002, confiscation in this thesis will always be referring to post-conviction confiscation unless otherwise stated.

This part of the chapter will now outline the structure of this thesis. In chapter two, the historical context of asset recovery powers will be established so as to understand how and why confiscation legislation has taken the shape that it has. This will be followed by a critical discussion centred upon the rationale and objectives of POCA and who the powers are said to be used against. To conclude this chapter, a brief overview of the confiscation process will be provided, highlighting some of the key provisions that are said to be pivotal, yet contentious, to the confiscation process. In order to achieve this, the existing confiscation literature will be critically reviewed. This will include reviewing both official reports and academic literature so as to identify themes and conflicts within the existing knowledge that this thesis may be able to support, challenge or variate and, where gaps are identified, make a valuable contribution to knowledge.

Chapter three will further contextualise this study by discussing key concepts such as State punishment, the rule of law and legitimacy. This will then be followed by a discussion based upon Human Rights legislation before reviewing the literature which discusses the key tenets of the philosophies of punishment, retributivism and reductivism, providing the reader with an understanding of the various role's punishment is said to play within society.

Chapter four will provide a detailed insight into the research strategy adopted for this thesis. It will outline the research aims and explain the underpinning theory of knowledge that orients this research; social constructionism. My positionality will be further discussed in this chapter, outlining some of the advantages and disadvantages of having a 'biographical congruence' (Wakeman, 2014) with the individuals that were being researched. This will be followed by a detailed explanation centred upon the research methods and why they were chosen before discussing how the research participants were identified and where the interviews took place. A brief insight into the participant's POCA circumstances will be provided in various chart formats before outlining the ethical considerations that were designed into this research project.

Chapters five and six will present the findings of this research through the voices of those who participated in the research. In chapter five those voices will provide an insight into the short-term experiential reality of the confiscation process and its impact, focusing upon the time period from when confiscation proceedings are initiated until the confiscation order is finalised in court. This will be followed in chapter six with insights into how the confiscation punishment is experienced in the long-term, revealing the consequences of not satisfying the confiscation order in full. In both chapters extracts from the narratives will dominate the discussion allowing the reader to learn about the confiscation processes, legislative provisions and their impact upon the defendant and their families, in the research participant's words. It is thought that this approach will allow the confiscation defendant and their families the opportunity to 'speak to the reader directly' before those findings are analysed and discussed in chapter seven within the context of the confiscation and the punishment

literature reviewed in chapters two and three. Chapter seven will be structured in a way which allows the research aims to be addressed, discussing the key findings identified in the research within the context of the literature reviewed in chapters two and three, so as to build a case for the abolition of this contemporary form of punishment. This thesis will conclude by reaffirming the contribution to knowledge that this study has made and highlight potential areas for future research.

Chapter Two – The Asset Recovery Literature

2.1 - Introduction

Confiscation measures have for the past few decades become an increasingly prominent feature of the ever-expanding CJS in the UK, considered an 'important tool in global efforts to disrupt organised crime' (Fisher and Bong Kwan, 2018: 193). The development of these powers has been preceded by a number of key reports and policy documents which detail the rationale and aims of asset recovery (Hodgson Committee, 1984; PIU, 2000) and a number of official reports which audit or investigate the performance of the confiscation system (NAO, 2013, 2016; Home Affairs Committee report, 2016a; Public Accounts Committee report, 2016a). This has been paralleled by an expansion in research and literature which discusses the many facets of asset recovery and anti-money laundering (AML hereafter) legislation, policy and practice. This chapter will critically review that literature, synthesising themes and issues and identifying gaps within the existing knowledge base that this thesis can contribute towards. This chapter will begin by detailing the historical development of confiscation law in the UK and will include a review of key confiscation reports that have played an instrumental role in the development and direction of confiscation law, in order to better understand how it came to take the shape it has under the POCA 2002. This will then be followed by a critical analysis of the underpinning rationale and aims of asset recovery, with a particular focus upon its alleged crime control capacities and its use of the 'serious and organised' crime label to justify the introduction of these measures. Finally, an insight into the confiscation process will take place highlighting particular features of the confiscation system that are widely considered contentious and are related to the findings which will be presented in chapters five and six.

Although the focus of this thesis is to understand the impact of post-conviction confiscation, where important issues have been identified in papers centred upon other areas of asset recovery, such as civil forfeiture, and these issues have application for post-conviction confiscation, then these papers will also be included within this review.

2.2 - Genealogy of POCA

The removal of illegal gain is not a new concept which, according to Bowles et al. (2005), dates as far back as Roman law in 451 BC. Early confiscation laws in England can be found in the 1300s in which a person who had committed a capital offence under the law of Attainder could lose their civil rights, including their right to own property and any property was subsequently confiscated by the crown (Bin-Salama, 1998). More recently, confiscation powers were reintroduced under [section 27 \(1\) of the Misuse of Drugs Act 1971](#) (MDA 1971 hereafter) which allowed for the forfeiture of anything related to the commission of an offence (Fisher and Bong Kwan, 2018). However, the limitations of this legislation were exposed a decade later in *Cuthbertson*.¹³ In this case, despite £750,000 worth of assets being identified, the House of Lords upheld an appeal brought on the grounds that the powers under the MDA 1971 were limited to physical items used to commit the offence (such as drugs, vehicles or cash used in the commission of the offence), not the profits that derived from the crime (ibid). It was also highlighted during this trial that the powers contained within the MDA 1971 did not allow for the confiscation of assets when the offence that violated the act was a conspiracy¹⁴ or extend to assets held abroad (Bullock and Lister, 2014; Nicol, 1988; Ryder, 2013). This trial, due to its failure to successfully recover criminal assets, presented a watershed for confiscation legislation in the UK.

¹³ *R v Cuthbertson* [1981] AC 470 - The criminal trial that was to follow on from a large-scale covert police investigation into Lysergic Acid Diethylamide (LSD) production and trafficking named 'Operation Julie'

¹⁴ Conspiracy involves an agreement by two or more people to carry out a criminal act. Even if nothing is done in furtherance of the agreement, the offence of conspiracy is complete.

In direct response the Hodgson committee was formed and tasked with making recommendations that could address the confiscation shortfalls exposed in the *Cuthbertson* case. The committee's findings were later published in *The Hodgson Committee report – The Profits of Crime and their Recovery (1984)*.¹⁵ This report and some of its recommendations were instrumental in shaping the [DTOA 1986](#), as this chapter will go onto discuss.

Whilst under the DTOA 1986 it became mandatory to impose a confiscation order in every drug trafficking case, these powers did not extend to other types of offences in which financial gain had been made (Dorn and South, 1990). As Rees et al. (2012) point out, the importance of this piece of legislation is that many of its provisions were to be retained, but applied more aggressively, under the [Drug Trafficking Act 1994](#) and eventually under [POCA 2002](#). Under the [Criminal Justice Act 1988](#), confiscation powers were extended to all indictable and specified summary offences which involved financial gain.

Boucht (2017) points out that the development of early confiscation legislation here in the UK was greatly influenced by international AML and confiscation legislation policies. Boucht (2017: 3) also points out that the United Nations¹⁶ (UN) and the European Union (EU) have also greatly influenced the direction of UK confiscation policy, actively promoting the 'harmonizing of confiscation regimes' and 'horizontal cooperation' between EU countries so as to facilitate the recovery of assets held abroad.¹⁷ Boucht (2017: 2) also argues that it is the UN and the EU that have often advocated signatory countries to develop confiscation powers that are as 'broad as possible within the domestic legal system and according to domestic legal principles'. This led to the enactment of the POCA 2002 which

¹⁵ For a comprehensive analysis of this report see Bin-Salama (1998)

¹⁶ UN Convention against Illicit Traffic in Narcotic and Psychotropic Substances 1988 (the Vienna Convention), the UN Convention against Corruption 2003, as well as the UN Convention against Transnational Crime 2000 (the Palermo Convention)

¹⁷ See Ryder (2013) for an extensive account of international confiscation legislation and policy

came into force on the 24th March 2003, synthesizing various provisions that were previously situated across various laws.

Confiscation powers have continued to be amended and extended under the [Serious Crime Act 2015](#) (SCA 2015 hereafter) and the [Criminal Finances Act 2017](#) (CFA 2017 hereafter). Most notably under [section 10 of the SCA 2015](#), the terms of imprisonment to be served in default have been made more punitive, the extent of which will be discussed later in this chapter. Furthermore, under [section 7 of the SCA 2015](#) the court has been granted the powers to impose upon the defendant, or a third party, any compliance order it believes is appropriate for the purpose of ensuring that the confiscation order is effective, which can include a travel ban (NAO, 2016). Additionally, [section 14 of the SCA 2015](#) allows cash held in bank accounts to be seized quickly to satisfy a confiscation order. These powers also allow the court to order the payment of funds held in a bank account of a third party where the account is not in the name of the defendant, even if they have not been convicted of an offence and not been subject to confiscation procedures. Despite these extraordinary powers presenting a significant threat to both civil and human rights, the existing literature has failed to discuss the significance of these developments or capture the impact of them upon those that are subject to them, providing a line of enquiry for this thesis. The most notable development under the CFA 2017 was the introduction of unexplained wealth orders (UWO) which require an individual to account for the origin of their assets (Boucht, 2017).

Table 1 – Key developments in confiscation legislation

| Year | Statute | Provisions |
|------|-------------------------------|--|
| 1986 | Drug Trafficking Offences Act | Confiscation provisions for drug trafficking offences |
| 1988 | Criminal Justice Act | Confiscation provisions for all non-drug indictable offences and specified summary offences |
| 1990 | Criminal Justice Act | Further drug and money laundering offences and drug cash seizure on import or export |
| 1993 | Criminal Justice Act | (Other forms of) money laundering offences and enhancements to all crime confiscation provisions |
| 1994 | Drug Trafficking Act | Consolidated the drug provisions and removed mandatory confiscation |
| 1995 | Proceeds of Crime Act | Further alignment of all crime confiscation provision with DTA 1994 |
| 2002 | Proceeds of Crime Act | Consolidated previous confiscation legislation |
| 2015 | Serious Crime Act | POCA 2002 powers extended: Strengthening of sanctions for failing to pay a confiscation order, reduction in time allowed to pay a confiscation order, strengthening of restraint powers; the need to declare third party interests at the outset; compliance order provisions such as a travel ban |
| 2017 | Criminal Finances Act | POCA 2002 powers extended: Introduction of unexplained wealth orders |

2.2.1 – Key Reports and Policy Documents

Whilst the recovery of assets is discussed in various reports, reviews and policy documents, this section of the chapter is going to critically review the two most significant reports within the historic development of confiscation powers. The selection of the Hodgson Committee report - *The profits of crime and their recovery (1984)*, and the Performance and Innovation Unit report – *Recovering the proceeds of crime (2000)* (PIU hereafter), is based on an understanding that they have been the most

influential and represent significant markers in the development of recent confiscation legislation, evidenced by the amount of times they have been cited and critiqued within the wider literature. This will then be followed by a brief analysis of two of the most recent official reports: the NAO report (2016) titled 'Confiscation orders: progress review' and the House of Commons Home Affairs Committee report (2016) titled 'Proceeds of Crime'.

2.2.2 - The Hodgson Committee Report (1984)

The Hodgson committee was formed and tasked with reviewing the UK confiscation regime in order to help the government address the legislative shortfalls identified in the *Cuthbertson* case. The committee's findings were later published in *The Hodgson Committee report – The Profits of Crime and their Recovery (1984)*.¹⁸ It provided a comprehensive analysis of international confiscation systems and a discussion of confiscation principles before going on to make several recommendations. The committee that conducted the research originated mainly from a judicial or law enforcement background and it was formed and financed by the Howard League for Penal Reform (HLPR). Despite claiming its independence, the committee was Chaired by Derek Hodgson (High Court Judge), and consisted of two further High Court Judges, a member of the Queen's Counsel, a solicitor, a barrister, an accountant, a senior police officer, a member of Parliament, a former probation officer and one criminologist. Whilst it is expected that judicial and law enforcement 'expertise' may have been a selection criterion when forming the committee, this thesis queries its capacity to be considered 'independent'. This thesis also acknowledges an important tension for the HLPR in playing such a pivotal role in the development and introduction of confiscation powers. The HLPR believes that 'prison must be a true last resort' and its objectives are stated as being to 'minimise the human suffering and social harms that are both causes of crime and consequences of punishment', and so it campaigns to 'stem the flow' of people entering the CJS, and 'work on better justice which emphasises

¹⁸ For a more comprehensive analysis of this report see Bin-Salama (1998)

rights and remedies' (HLPR, 2019). Therefore, if this research is to reveal that the infliction of the confiscation punishment creates pain and disadvantage beyond what is considered legitimate (see chapter three), then this would be considered antithetical to the Howard League's values and objectives, and its financing and undertaking of this report, which had the effect of legitimizing early confiscation legislation, might be considered to undermine its professed independent and progressive status.

As Bin-Salama (1998) points out, confiscation was conceptualised as a restorative act by the Hodgson committee and, therefore, its report recommended that the courts have the power to confiscate benefit accrued as a direct result of committing an offence in order to eliminate any pecuniary advantage the offender has accrued over the victim.¹⁹ The report also recommended a number of provisions that should be included in a British Confiscation system which included pre-trial restraint of assets, powers for searching property, powers to force defendants to disclose the whereabouts of their assets, a framework for the assessment of means, and a consideration of third-party interests and the appointment of a receiver.

In response to the Hodgson Committee's recommendations the legislature adopted some, but not all, of their proposals in the [DTOA 1986](#).²⁰ The recommendations that were dismissed will be highlighted here as they were instrumental in shaping the confiscation regime under the DTOA 1986 but also relate to provisions that have been retained, and in certain situations made more punitive under POCA 2002. These provisions will be discussed in greater depth within the context of POCA 2002 later in the chapter. The report recommended that confiscation should be limited to confiscating net profit only, a recommendation that was disregarded by the legislature who choose to extend its reach to gross profits (Hodgson, 1984). The basis for this recommendation was that the recovery of assets was to be applied restoratively and as the confiscation of gross proceeds would fail to take into consideration all

¹⁹ In light of there being no direct victim from drug trafficking the victim is understood to be society in general.

²⁰ For a full detailed analysis of the DTOA 1986 refer to Nicol (1988); Feldman (1988); Fortson (1992); and Mitchell et al. (1992)

involved 'operational' expenses and payments incurred during the offence/s, then this would go further than would be necessary to put the offender in the same position as if they had not carried out the offence (Hodgson 1984). As Nicol (1988), a member of the Hodgson Committee, points out to go further than net profit when confiscating assets risks not achieving the status-quo goal but will leave the offender out of pocket, and this equates to an added punishment, as opposed to a recovery of loss or the forfeiture of profit.

Another recommendation contained within the Hodgson report that the legislature chose not to implement was, allowing remission in sentencing when the confiscation defendant acknowledges their culpability by entering an early guilty plea, and in doing so saving the court time and money in the process, as is practice within criminal proceedings (Mitchell et al., 1992). The committee also recommended that a minimum £10,000 confiscation threshold should be imposed which would help to ensure that confiscation powers would not be used in petty cases where other methods of recovery might be more appropriate; this recommendation was also disregarded (Nicol, 1988). A quantitative understanding of the impact of dismissing this recommendation can be drawn by analysing NAO (2013: 15) statistics which show that, out of the 52,029 confiscation orders made since 1987, 46% (24,011) were for amounts of £1,000 or less, and 84% (42,602) were for orders £25,000 or under. Therefore, a significant proportion of these individuals would have not been subject to confiscation proceedings had the legislature accepted the £10,000 threshold recommendation. To build upon this, this thesis aims to unveil the qualitative reality of the legislature's choice to ignore the committee's £10,000 minimum threshold.

One of the most controversial provisions that some of the committee²¹ objected to was the proposed retrospective element of a confiscation order, which would allow the court to make criminal lifestyle assumptions on assets acquired for a period that dates back six years from the date of arrest (Bin-Salami, 1998). Whilst the implications of this provision have been discussed within the context of

²¹ Namely Andrew Nicol and Clive Soley

judicial integrity by Lawrence (2008), the existing literature has failed to conduct research to find out what the impact of it is upon the defendant and their families, providing another line of enquiry for this study.

Whilst this report was clearly influential in the development of early confiscation legislation, it would appear that their efforts to curtail the legislative powers were relatively unsuccessful. In dismissing some of the recommendations made by the Hodgson Committee, the legislature has set out to create a more aggressive system of confiscation, oriented by its crime control objectives rather than restorative objectives (Rees et al., 2012), the consequences of which this thesis sets out to reveal.

2.2.3 – The Performance and Innovation Unit Report (2000) (PIU, 2000)

The second report to be considered is the Performance and Innovation Unit report: 'Recovering the Proceeds of Crime' (PIU, 2000), which preceded the enactment of POCA 2002 and culminated from a nine-month study published by the Cabinet Office. The report was highly critical of the way in which previous confiscation legislation had been developed stating that there had been 'anomalies' in the application of the legislation which had been developed in a 'piecemeal fashion' (PIU, 2000: 5). The tone of the report was that of the need to extend asset recovery powers and resource, whilst creating a simpler and more consistent system of asset recovery designed to 'institutionalize' confiscation procedures within criminal justice practice (Bullock and Lister, 2014: 53). Despite its overall punitive tone, the report claimed that the 'regime is intended to be reparative, not retributive, i.e. it only seeks to recover from offenders the benefit of their unlawful activities' (PIU, 2000: 28). Therefore, investigating whether the confiscation system does in fact limit its recovery powers to the benefit accrued from an offender's unlawful activities is an important line of enquiry for this research, as it will facilitate a discussion regarding the retributive/reparative nature of the confiscation system.

Despite both the Hodgson report and the PIU report having played a significant role in the development of confiscation legislation the overall tone of them were noticeably different. For

example, the Hodgson report, whilst recognising the value of asset recovery measures, conceptualised confiscation within a restorative framework whereas the tone of the PIU report was clearly punitive in fitting with New Labour's 'tough on crime, tough on the causes of crime' approach (McLaughlin et al., 2001). When these differences are considered from a philosophical perspective, these distinctions become significant. For example, whilst confiscation under a restorative framework, which seeks to restore the balance by confiscating the profits wrongfully accumulated, might be considered a legitimate justification for punishment, a system that goes further by confiscating assets beyond those acquired illegitimately might be considered disproportionate, especially in light that confiscation represents an additional punishment to the punishment already passed down for the predicate offence. This is a discussion that will be developed further in chapter three within the context of the punishment literature.

2.2.4 - The Most Recent Official Reports

The NAO (2013) report provided a damning 'value-for-money' assessment of the British confiscation system highlighting that, for every £100 of criminal proceeds the amount confiscated was just 26 pence (ibid: 4). A progress review published by the NAO in 2016 highlighted that most of the issues raised in the 2013 report remained outstanding. For example, the 2013 report highlighted the ineffectiveness of the 8% interest provision, but despite this the Home office decided to retain the provision and as a result, the 2016 NAO report noted that of the £1.61 billion²² in outstanding confiscation debt, £471 million²³ of it constituted accrued penalty interest (NAO, 2016: 22). Again, despite almost half a billion pounds of interest being accrued, the significance of this figure has not drawn the kind of attention that might be hoped for within the existing literature. It is hoped that this thesis may be able to provide some insight as to why the 8% interest provision has been retained,

²² This total amount of outstanding confiscation debt is now estimated to be £1.961 (HMCTS, 2018: 13)

²³ The amount of interest was is now estimated to be £658 million (HMCTS (2018: 13)

despite its apparent ineffectiveness to ‘incentivise’ payment (Rees et al., 2012) , and the impact it has upon the defendant and their families.

In response to the 2013 NAO report, and the lack of progress since, the House of Commons Home Affairs Committee commenced an inquiry into the UK’s confiscation system in early 2016, publishing its findings later in the year based upon both the written and oral evidence derived from the testimonies of a number of experts from within the field of asset recovery.²⁴ The report highlighted, *inter alia*, that despite at least £100 billion being laundered through the UK every year, and over 640,000 offenders being convicted of a crime in the UK in 2014–15, many of which will have had a financial element, less than 1% of convictions led to a confiscation order (ibid: 3). Many of the experts who provided evidence highlighted a number of fundamental problems with the confiscation system in the following areas: the use of gross benefit calculations, hidden asset and criminal lifestyle assumptions; lack of consistency in POCA cases; the problematic nature of the 8% interest provision; and, the lack of understanding about whether these measures are effectively meeting the wider objectives of confiscation beyond its capacity to recover assets. The report was of the opinion that defendants were choosing to serve their default sentences rather than pay their confiscation order and that harsher punishments should be introduced so as to ‘incentivise’ payment (ibid: 37 – recommendation 17). It also recommended that the non-payment of a confiscation order should be made a separate criminal offence; that no criminal should be allowed to leave prison without either paying their confiscation order in full or engaging with the courts to convince a judge that their ‘debt to society is squared’ (ibid: 37 – recommendation 18); and, that the Government should confiscate the passport of any criminal subject to a confiscation order (ibid: 37 – recommendation 19). Despite the problematic nature of some of these recommendations, and the assumptions that underpin them, they are yet to be critiqued within the existing academic literature. In response, this thesis will consider those of relevance when analysing the findings later in this thesis. Of particular interest, is

²⁴ Oral evidence was heard by a number of experts on 8th March 2016, 3rd May 2016 and 24th May 2016

the assumption that POCA defendants are choosing not to pay their order and the potential consequence of not allowing those with outstanding confiscation orders to leave prison. Whilst these recommendations may improve the 'efficiency' of the confiscation system and reflect the neo-liberal, managerialist and 'populist punitiveness' (Bottoms, 1995) climate that has continued to shape the UK's criminal justice landscape for several decades now (Sim, 2009), they fail to address the much more fundamental problems that were highlighted by the experts. Interestingly, when the report was published, many of the discussions that were critical of the confiscation regime provided by the experts failed to make it into the report. For example, having described the confiscation system as an 'abomination', Tim Owen Q.C. went on to make the following damning statement which was excluded from the report:

When you come to explain what "the proceeds of crime" means and what the benefit sum is and then the hidden assets possibility, there is general, universal astonishment. Personally—it is anecdotal; it is not empirical—my impression is that people are astonished to discover the full reach of it and cannot quite believe that that is the law [...] I am afraid you need to—I am sure the prospects of this happening are small—start again, in my view, and introduce a much simpler system' (Home Affairs Select Committee 2016a: 18-31- Q68, Q42).

Furthermore, having suggested that the hidden asset provision should be scrapped, another statement made by Tim Owen Q.C. which also failed to make it into the report, was his response to a question prompted by the committee when asked how they would recover hidden assets if the hidden asset provision was abolished:

The answer is you will not seize that money, but you are not seizing it now anyway, and you are gearing up an entire court system; you are making courts make orders that nobody believes, in the vast majority of cases, are fair or real orders (ibid: 24, Q56).

The importance of these omissions is that, despite claiming that its goal was to gain a better understanding as to why the confiscation system is failing, so as to advise the government accordingly, in choosing to filter out the expert evidence that was critical of the confiscation regime when the

report was written, the committee exposed what might be considered the true purpose for its inquiry; to garner evidence that would legitimise the widening of asset recovery powers. Again, the filtering out of such evidence has not been widely discussed within the existing literature, reinforcing the importance of this research.

What is consistent between the Home Affairs Committee report, the Hodgson Committee report and the PIU report is that the voices of those who are subject to this punishment were completely absent, despite their potential invaluable insight and, therefore, this thesis presents an opportunity for this epistemic deficit to be addressed.

2.3 - The Rationale and Objectives that Underpin Confiscation

The rationale that underpins asset recovery is that crime should not pay (PIU, 2000), a rationale described as 'intuitively appealing' by King and Walker (2014: 11). Accompanying this rationale are a number of objectives:

- Send out the message that crime does not pay;
- Prevent criminals from funding further criminality;
- Remove negative role models in communities; and
- Decrease the risk of instability in financial markets

(PIU, 2000: 5)

For Bullock and Lister (2014: 48) these objectives are 'sustained and reinforced' by several assumptions as to the underlying motivations of crime and how it might be controlled. The first assumption is that crime is motivated by profit and, therefore, by 'hitting them where it hurts' (Lea, 2004) this will disincentivise financially-motivated crime. Drawing on rational choice theory the PIU (2000: 20-21) report argues that offenders make 'relatively rational' cost/benefit calculations prior to carrying out an offence and, therefore, by confiscating 'ill-gotten gains', increasing the 'costs' and removing the 'benefit', offenders will be deterred from carrying out the crime. However, much of the

literature is sceptical of the alleged deterrence properties of POCA, with many of them foreseeing how it might have the opposite effect. For example, Ulph (2010: 251) points out that the confiscation punishment would have to be 'foreseeable' and widely understood by a prospective criminal. Dorn and South (1990: 186) also point out that the confiscation of assets may escalate the stakes or force offenders to become more ruthless in the way they carry out their business. Similarly, Bowles et al. (2005: 293) argue that rather than be deterred, offenders will simply adapt as 'organised criminals are likely to be able to find strategies that raise the costs to enforcement agencies' and will make 'serious efforts to avoid detection', leading to what Ekblom (1997: 249) describes as an 'arms race' between criminals and law enforcement. For Levi and Osofsky (1995: 12), as some offenders perceive the profits of their crime/s as their entitlement, their subsequent confiscation is likely to cause resentment and lead to a greater determination to get their 'just deserts'. The deterrence properties of confiscation are further challenged by Sproat (2009: 147) who, based on his analysis of confiscation datasets, argues that because of the insignificant amount of assets realized when compared to the amount of profit that is alleged to be made by 'organized criminals', prospective criminals are unlikely to be deterred (see also Bullock, 2010). Bullock and Lister (2014: 57) further pierce the alleged deterrence value of POCA highlighting that, 'the distal threat of confiscation is unlikely to hang heavy over their deliberations as they contemplate their next foray into the criminal marketplace'. Despite there being consensus within the literature about the alleged deterrence capacities of confiscation law, no research has been conducted with those who are subject to the punishment so as to gain an evidence-based 'reality' of how the defendant responds to the confiscation punishment, deterred or otherwise, something that this thesis seeks to address.

Whilst financial gain may be a motivating factor for many acquisitive offenders, others may be seduced or compelled by other motivations such as social inclusion, radicalised ideology, hedonistic pursuits, and drug or alcohol addiction. Furthermore, in a capitalist society where success is determined by material possessions, humans are socialized to prosper, yet for those who are denied the opportunity to do so they might experience what Merton (1938) describes as 'strain'. Strain is said to occur when

an individual is prevented from acquiring cultural or social goals legitimately. Merton suggested that when faced with strain, people are faced with five modes of adaptation: conformists accept the goals of society and work within the structure of society to achieve those goals; innovators accept the goals of society but are denied legitimate means to attain those goals and so they adopt socially unapproved or unconventional means to obtain those goals; ritualists abandon the pursuit of the [unattainable] social goals and remain legitimate by aspiring for more modest goals; retreatists reject both the cultural goals and the means to obtain them; and, the rebel who rejects cultural goals and the means to achieve them, instead creates their own goals and means as a mode of revolt.

Furthermore, in returning to the first confiscation objective - Send out the message that crime does not pay – this objective also assumes that the confiscation punishment has a communicative function and that the message that the State wants to convey, that crime does not pay, is the same message that will be received by the intended audience. It is expected that this research, in accounting for the voices of the punished, will be able to investigate the validity of this assumption also.

The second confiscation objective, that the confiscation of assets will prevent criminals from funding further criminality, assumes that assets will be traceable and recoverable, that these measures will have an incapacitative function and that they will be used against those that organize and finance crime from the higher echelons of the criminal network. However, much of the literature is sceptical of whether the confiscation powers are being used against such individuals, as will be discussed within the next section of this chapter. Furthermore, much of the literature is also sceptical of the confiscation systems capacity to recover these profits (Bullock et al., 2009; Naylor, 1999; Levi and Osofsky, 1995; Wood, 2016a, 2016b). Bullock and Lister (2014) argue that the assumption that most offenders prudently save or invest their 'profits' in ways that would facilitate confiscation at a later stage is flawed. Instead the 'inherent hedonism and status trappings of the criminal lifestyle, coupled with concerns about detection by law enforcement' results in most criminals adopting a 'spend-as-you-go' lifestyle (ibid: 55). They also point out that the increased risk of confiscation may 'perversely'

spur offenders to accelerate the process of asset dissipation (ibid: 58). In order to contribute to the discussion, 'who' these measures are used against and whether they have the desired incapacitative effect are important lines of enquiry for this study.

It would appear that the third confiscation objective - remove negative role models in communities – may provide an insight into who these measures are targeted at. For example, if these measures are targeted at those individuals who make significant wealth from corporate crime, for example, then these individuals tend to live in privileged gated-communities and suburban communities, worlds apart from the disadvantaged ghetto communities in which 'impressionable' young people are forced to inhabit. Therefore, this objective implicitly outlines who these measures are targeted at, a discussion that will be returned to in the following section of this chapter. In meeting the second research objective - explore what offences this legislation targets and who is it being used against - it is hoped that this thesis will be able to contribute to this discussion, illuminate who these special powers are used against and whether them being punished under confiscation law has made any significant 'aspirational' impact within their communities.

As a justification for the introduction of these special powers, the fourth confiscation objective - decrease the risk of instability in financial markets – has the effect of justifying any law enforcement measures, regardless of their punitiveness or implications for human and civil rights, because the integrity of the financial system is considered so central to everything else within society. However, if this is a genuine objective of asset recovery which aims to have the optimal impact, then these powers would need to be used against serious and organised criminals who have accumulated significant wealth and, therefore, have the means to invest their profits in legitimate markets. Whether these measures are used against such individuals is again something that will be addressed by meeting the second research objective of this thesis.

For Bullock and Lister (2014: 55), these confiscation objectives and the assumptions that underpin them are 'at best, unprovable and, at worst, fundamentally flawed', whilst Lawrence (2008: 24)

suggests that they obscure the true function of POCA; 'revenue-raising'. Moreover, as Colin King pointed out whilst providing evidence to the Home Affairs Select Committee (2016a), discussions about the effectiveness of the confiscation regime have been limited to its ability to deny criminals of their ill-gotten assets to the detriment of its other objectives. Whilst it is acknowledged that social value is difficult to quantify, however, as these measures have been introduced and legitimized on the basis of these objectives, measures that might not otherwise have made it through parliament, then it becomes imperative that the capacity of the regime to meet these measures is audited. The need for such evidence has also been acknowledged within a number of official reports (PIU, 2000; NAO, 2013, 2016; Home Affairs Select Committee, 2016a; Public Accounts Committee, 2016a), yet despite the failure of such evidence to materialize, asset recovery powers have continued to be extended.

In the foreword of the PIU report (2000: 4), Tony Blair outlined the purpose of confiscation law in the UK:

We will deter people from crime by ensuring that criminals do not hang on to their unlawful gains. We will enhance confidence in the law by demonstrating that nobody is beyond its reach. We will make it easier for courts to recover the proceeds of crime from convicted criminals. And we will return to society the assets that have been unlawfully taken. All this will need to be achieved in a way that respects civil liberties.

The deterrence properties of POCA have been discussed above and a discussion on who is subject to the confiscation punishment and whether it is a punishment that is distributed equally so as to ensure that 'nobody is beyond its reach' will be discussed in the following section of this chapter (ibid). This thesis, in revealing the processes and impact of the confiscation punishment, will be able to provide a greater understanding as to whether the objectives of POCA are pursued in a way that 'respects civil liberties' (ibid). However, what will be discussed here is Mr Blair's assertion that confiscation is a 'restorative' punishment.

When Home Office (2018) statistics are considered, which illustrate that of the £185²⁵ million recovered from confiscation orders in 2017-2018, this is divided in an equal 50% split between the operational agencies who were involved in the recovery of the orders and the Home office. Out of the £185 million recovered in that year, £38 million compensation was awarded to victims (ibid). It is not known whose share of the money this compensation comes out of or whether this is taken out before the money is divided up. However, what can be inferred is that the percentage of money being returned to the victims is approximately 20%, significantly less than the total amount recovered and significantly less than is apportioned to the Home Office and dispensed to the confiscation operational agencies via the Asset Recovery Incentivisation Scheme. It is in light of this that we can consider who may benefit from confiscation policy, lending further credence to Lawrence's (2008) revenue raising function of POCA. This apportionment of monies to victims becomes more problematic when it is analysed over a five-year period. Drawing on Home Office (2018) figures, between the years 2013 to 2018 a total of £1.18 billion has been recovered by way of cash forfeiture and confiscation orders. However, in the same period just £181 million has been returned to victims, which equates to approximately 15% (see Figure 1). These statistics further expose the misleading nature of the reparative claims within confiscation policy (PIU, 2000), especially when it is considered that a percentage of that money would have been recovered and gifted back to victims by way of existing powers if confiscation powers did not exist (by way of compensation order etc). When considering the total amount returned to the victims of crime, it is necessary to compare this to the costs of administering the confiscation system over the same period, which amounts to approximately £500 million (see figure 3) (costs which do not appear to include the costs of prison default sentences).²⁶ So, in drawing upon the official data, which has begun to expose the restorative pretence of POCA, in order for these special measures to be considered 'justifiable', the

²⁵ This thesis notes that there is a £10 million discrepancy between the estimated confiscation amount in 2017-18 between the Home Office and HMCTS – as figure 2 illustrates

²⁶ The NAO (2016) estimates that it costs approximately £100 million a year to administer confiscation services

confiscation system would need to evidence itself to be effective in regards to its wider objectives, reinforcing the importance of this research to expose the lived reality of the confiscation punishment.

Furthermore, in relation to the current system of recovered money allocation, there are wider implications to consider. For example, in not returning all of the money directly to victims and retaining the majority of it for the Home Office and for the ‘investment in future asset recovery work’ (Home Office, 2018: 3), those victims who are not compensated are in essence paying twice for these government ‘services’; via taxation and paying for it via what should have been their compensation monies.

Figure 1 - The total amount of money collected from cash forfeiture and confiscation orders and the total amount paid to victims in compensation from years 2012-2018

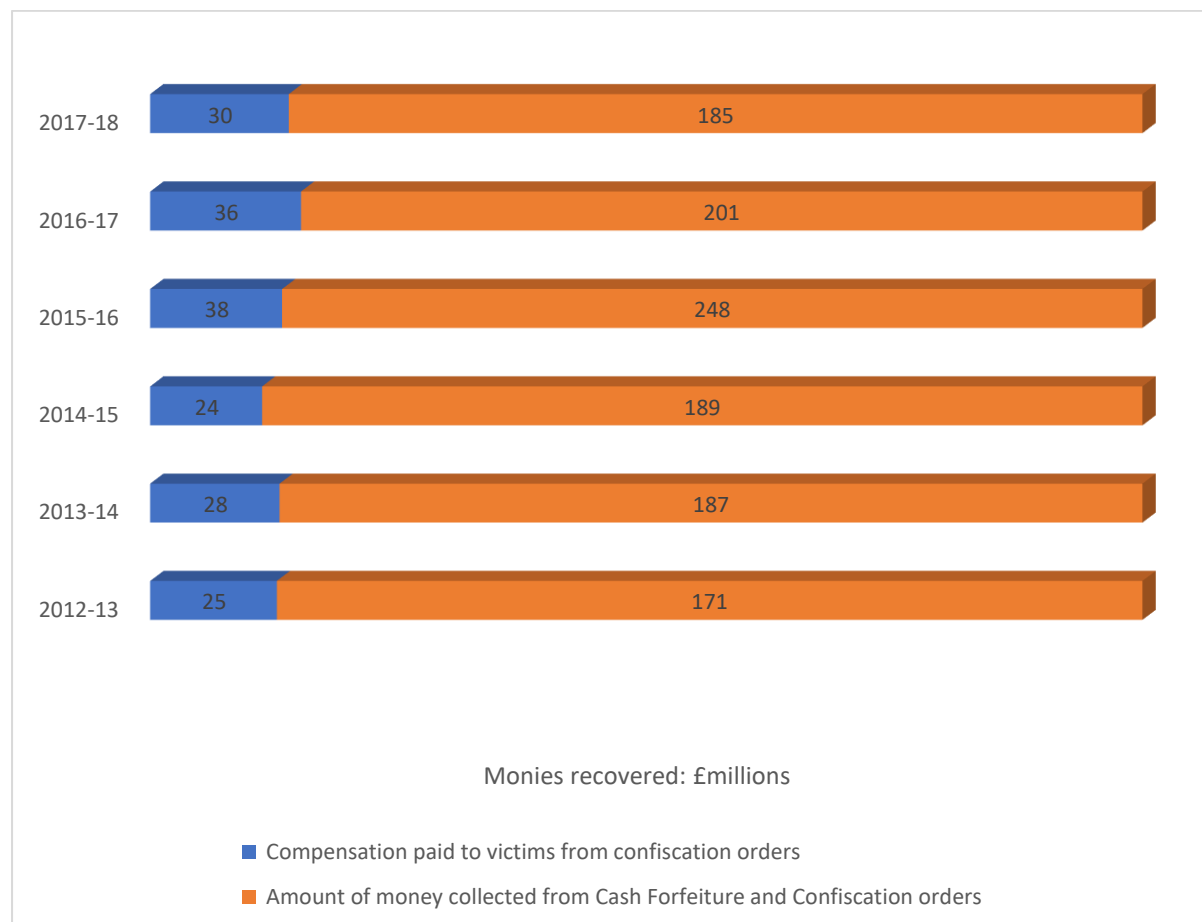
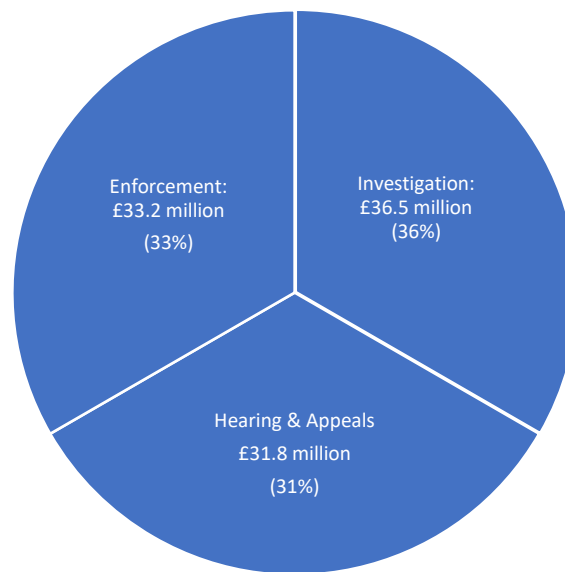
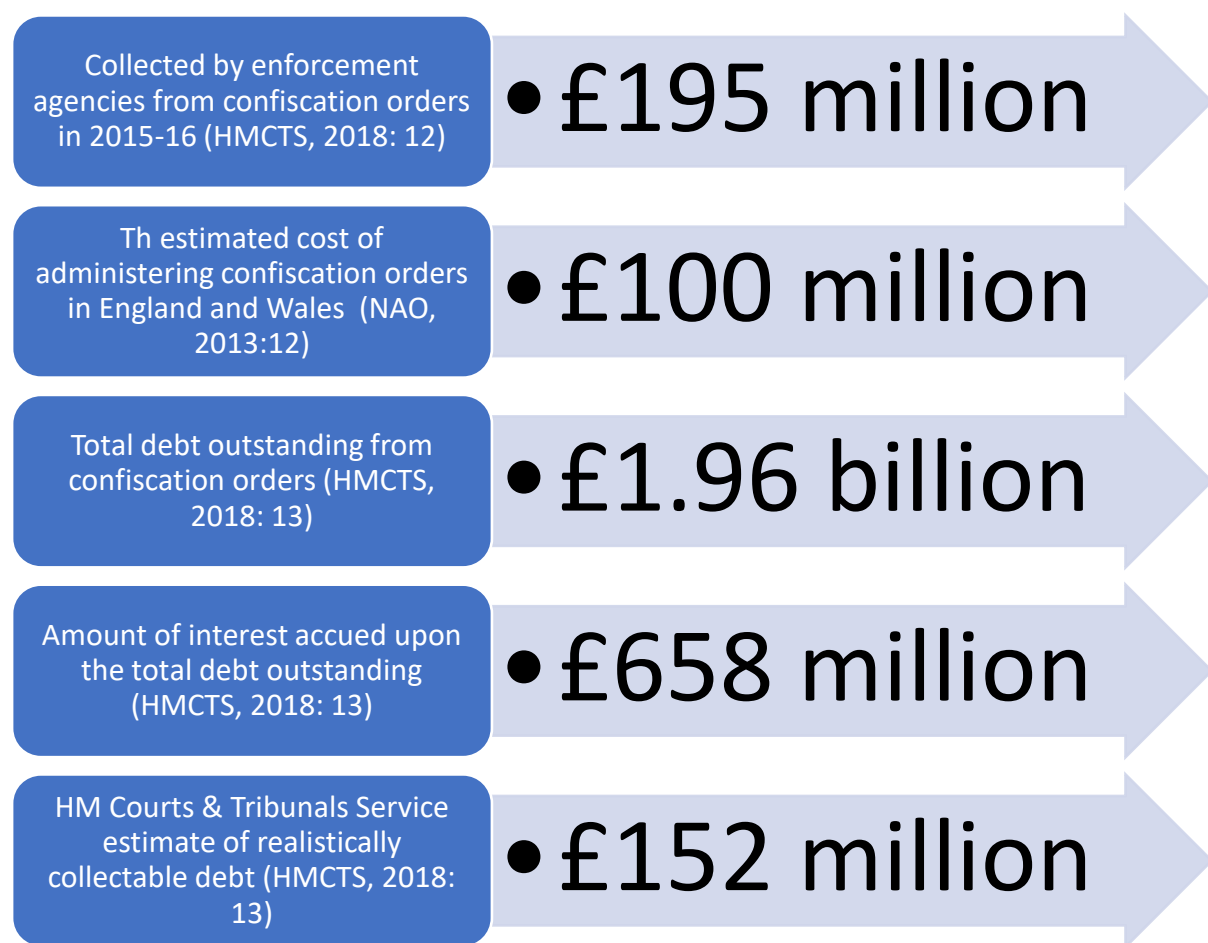


Figure 2 provides a breakdown of the costs of administering confiscation orders (NAO, 2013: 12)



A number of performance figures were discussed in the previous section of this chapter when reviewing the Home Affairs committee report (2016a), however, more recent figures further indicate that the confiscation system is perhaps not functioning as it alleges. In figure 3 below, HMCTS (2018: 13) data illustrates that as of 2018, £1.96 billion of confiscation debt remains outstanding, of which it is estimated that just £152 million is actually recoverable. The data also suggests that £658 million of that overall debt derives from accrued interest, providing an insight into the significance of the interest provision within confiscation law. As the overall outstanding debt figure remains on the books, then it must do so for a reason, especially as it does not show asset recovery performance in a favourable light. Therefore, the regime, must at some point expect to recover it, despite a large proportion of it originating from interest rather than the profits of crime, further supporting Lawrence's (2008) assertion that the real objective of POCA is to generate revenue.

Figure 3 Illustrates HMCTS Year-end confiscation statistics for 2017-18



Nevertheless, from a managerialist or tax-payers perspective, the potential for asset recovery measures to ‘generate significant revenue flows that reduce the net costs to the criminal justice system’ (PIU, 2000: 6) may have popular appeal, especially within the context of austerity cuts. However, it has been argued that the self-financing capacity of confiscation could have a distorting and corruptive effect on policing priorities, shifting police attention away from ‘violent to wealthy offenders’ (Naylor, 2007: 27 – see also Cram, 2013; Zander, 1989; Ryder, 2013; Garland; 2018).

Overall, there appears to be general consensus that the confiscation system is failing to meet its objectives. Therefore, in order to understand the true purpose of POCA it may be necessary to consider whether the confiscation system has any hidden, additional, unintentional or alternative functions. Whilst the revenue raising function of POCA was highlighted by Lawrence (2008), an alternative function that is not officially discussed within policy, but was disclosed by Mick Creedon,

then National Lead Officer for Serious and Organised Crime, whilst providing evidence to the Public Accounts Committee (2016: 6), is the 'lifetime offender management' function of POCA. As he failed to expand on what he meant by lifetime offender management, it is unsure exactly what it is and how it is facilitated but suggests that POCA has some kind of surveillance function, perhaps similar to the all-seeing disciplinary gaze function of Jeremy Bentham's panopticon prison design (Foucault, 1977: 201). It was theorised that because of the panoptic all-seeing disciplinary gaze, prisoners would be induced into a state of 'conscious and permanent visibility' and consequently they would begin to discipline themselves (ibid). In exposing how POCA is applied in 'reality' and revealing the 'true' reach of its powers, it is hoped that this research will illuminate what the 'lifetime offender management' function is, enabling these findings to be considered within the context of the panopticon concept.

In summary, in reviewing the various policy documents and the accompanying literature, the general consensus is that, whilst appealing, the stated rationale and objectives of POCA are not being met and much of the literature is sceptical of the regime's ability to ever meet them, with some commentators suggesting alternative functions that better explain the purpose of the confiscation system. As the knowledge base on these alternative functions of the confiscation punishment are cursory, this thesis sets out to make a valuable contribution to this discussion, whether that be in confirming such functions or otherwise, allowing the 'empirical flesh' to be applied to the 'theoretical bones' (Coleman and Sim, 2005: 102)

2.3.1 – Who is the Target of Confiscation Policy?

In order to justify the introduction of such 'extraordinary' (Sproat, 2009) powers, 'apocalyptic depictions of organized crime' have been 'routinely promulgated by government officials, law-enforcement agencies and media outlets' (Bullock and Lister, 2014: 56-57). This was accompanied by a narrative that suggested that traditional law enforcement methods were 'proving to be of limited

effectiveness' when competing with the increasingly sophisticated modern-day criminal, who operates across international borders, is engaged in 'poly-criminality' (NCA, 2018: 11), is tech-savvy and, therefore, often anonymous, and if this was allowed to continue, confidence in the rule of law would be undermined (Kennedy, 2004: 13).

Since 9/11, on both sides of the Atlantic, AML and asset recovery powers have been further legitimized as an effective tool in the war against terrorism (Boucht, 2017). Such was the fear, vulnerability and pain amongst the public after 9/11, that any new laws introduced that were said to help in the fight against 'terrorism' were never likely to be met with public resistance, and so both governments capitalized on this opportunity by incorporating the terrorist rationale within confiscation policy (ibid). However, Ryder (2013: 6) argues that the motives for terrorism are greatly different from acquisitive crime and, therefore, confiscation and AML measures may be largely ineffective against 'money soiling', whereby 'clean' and 'legitimate' money is used to fund terrorism. He supports this critique by highlighting the ineffectiveness of the confiscation system to confiscate terrorist financing with just £1.45 million being forfeited between 2001 and 2006, a time when there was a coordinated will to eradicate terrorism (HM Government, 2006 in Ryder, 2013: 28). Importantly, Boucht (2017: 9) argues that by uncritically accepting 'follow-the-money' approaches as the panacea to such threats, people become "blind to the potential risk to individuals' rights" as institutions such as banks, estate agents, solicitors, jewellers and car dealers have been 'thrust into the front line of money laundering detection and intelligence gathering' (Rees et al., 2012: 2). Therefore, as 'criminals' represent a minority within society, these powers and AML processes are likely to impact more greatly upon the privacy and civil rights of the law-abiding population as they are upon those that seek to launder illegitimate money, something that this thesis aims to further illuminate in its findings.

Much of the literature has challenged the organised crime narrative both in terms of how big the organised crime threat is here in the UK (King, 2014) and to what extent these measures are likely to be/have been effective against it (Levi and Osofsky, 1995; Sproat, 2009). For King (2014: 391), despite

the official discourse making 'sweeping statements' as to the extent of the organised crime problem, there is 'little hard (or accurate) data' that can be called upon to support their assertions. Nonetheless, the organised crime rationale continues to feature heavily within official discourse.

The NAO report (2007: 4-7) presents a gold and diamond encrusted Rolex watch across the entire front page and then discusses confiscation within the context of the 'Mr Bigs' benefiting from a 'champagne lifestyle' aboard their lavish 'yachts, mansions and luxury cars'. In depicting the criminal in such a way and highlighting their unjust enrichment, this gives the impression that crime is exceptionally profitable for all criminals and that this is who these special powers will be used against. However, the PIU (2000) report diversified its approach by not only vilifying the offender in such a way, but it sought to evoke a sense of injustice, envy, and victimhood within the general population that would appeal to the 'authoritarian within' (Scruton, 2007: 230) and in doing so 'manufacture consent' (Sproat, 2009: 146) for the introduction of these special powers:

It simply is not right in modern Britain that millions of law-abiding people work hard to earn a living, whilst a few live handsomely off the profits of crime. The undeserved trappings of success enjoyed by criminals are an affront to the hard-working majority (Tony Blair – PIU, 2000: 3).

Furthermore, an insight into who these measures are designed for is gained by analysing the type of language used by the media, policy makers and politicians alike. For example, in a recent newspaper article the confiscation punishment was described as a 'Gangster tax' (Bona, 2019) whilst the term that has become synonymous with the 'serious and organised' crime phrase is 'Mr and Mrs Bigs'. In the Home affairs committee oral evidence session on the 8th March 2016, the term 'Mr and Mrs Bigs' was used no less than seventeen times by both the 'experts' and committee members and has since been adopted within the wider literature. Who or what constitutes being labelled as 'Mr or Mrs Bigs' is not explicitly defined within policy; however, it would appear to be predominantly used within the context of 'drug trafficking', helping to permeate a specific construct of who these measures are targeted at. When this is considered within the context of Cohen's work (2011), it becomes apparent

that the drug dealer has become the modern day 'folk devil', with the State and the media going to great effort to publicise their unjust enrichment and portray them as being responsible for the moral decline of society. The construction of the drug-dealer as the modern day folk-devil and the subsequent moral panic that ensues, also has the effect of deflecting attention away from the problematic nature of drug [and other crime and social] policy, and discourages a conversation about the market reality of drug dealing, one that acknowledges that much drug enterprise is based upon consensual supply and demand, and these markets will always thrive, regardless of crime control strategies whilst demand remains (Paoli, 2002). However, as Cohen (2011) argues, the value of constructing a folk-devil is that it generates significant political profit.

For Dorn et al. (1992), they argue that there has been a noticeable shift in the type of language used within the official discourse, where those once described as 'dealers' have become 'traffickers' implying notions of serious offending and, therefore, in terms of confiscation, significant benefit. For Dorn and South (1990) this has led to economists, drug researchers and the media describing drug markets in terms of monopolies and cartels as this type of rhetoric helps to conjure up the image of 'large, durable and hierarchically structured transnationals of crime' (Naylor 2007: 29). For Levi (2009) the language, tone and strategies used to combat the alleged drug trafficking problem is different to that used when discussing how the State will respond to white collar crimes. Such language is instrumental for the fuelling of the public's fear, and it is through the manipulation of fear that our care for liberty and justice is overwhelmed (Hudson, 2003b).

For Hobbs and Antonopoulos (2013), 'alien conspiracy theory' – the idea that organised crime is 'imported' and carried out by migrants – is one of the most influential perspectives on organised crime discourse which has greatly influenced how organised crime has been viewed and also shaped the design of public policy against organised crime. They also point out that this construct of organised crime was manufactured in the United States and exported internationally on extremely heterogeneous criminal landscapes, and in their attempt to establish a global hegemony on organised

crime policy, the United States has since expanded the 'organised crime' term to include 'transnational' (ibid). As Levi (2014: 1) points out such language carries 'threat imagery' - evocative connotations of interpersonal and social threat – which in turn has triggered greater investigative powers and tougher sentences in many countries.

However, Wright (2006: 14) cites a number of empirical studies that investigated criminal structures and found that they were characterised by a 'lack of centralised control, an absence of formal lines of communication, and [were] fragmented', leading him to describe them as 'disorganised' rather than organised. For Levi (1998: 336) the 'demonology' of 'organised crime' within political rhetoric creates an 'emotional kick' which makes it easier to get resources and power. He also goes on to point out that the 'organised crime' term tends to focus our attention downwards towards the threat posed by groups of 'low-lives' rather than focus our attention upon 'State-organised crime', such as those crimes carried out by intelligence services or covert military operations overseas (ibid: 337).

In the absence of a clear definition within confiscation policy as to what constitutes organised criminality this thesis turns to Article 2 of the [United Nations Convention Against Transnational Organized Crime \(2000: 5\)](#) which defines it as a:

structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The risk of such a broad definition is that it could be easily applied to most criminality in a way that differs to its hierarchical use within policy documents. Such a net widening approach would 'legitimize' the use of confiscation and other laws upon relatively small-time offenders in the State's drive to criminalize and control certain sections of society (Cohen, 1985; Garland, 2001).

An alternative definition of organised crime which more accurately captures the hierarchical power status of such criminals is provided by the German federal police, the Bundeskriminalamt:

Organised crime is the planned violation of the law for profit or to acquire power, which offences are each, or together, of a major significance, and are carried out by more than two participants who co-operate within a division of labour for a long or undetermined time span using: a) commercial or commercial-like structures; or b) violence or other means of intimidation; or c) influence on politics, media, public administration, justice and the legitimate economy (in Levi, 1998: 335).

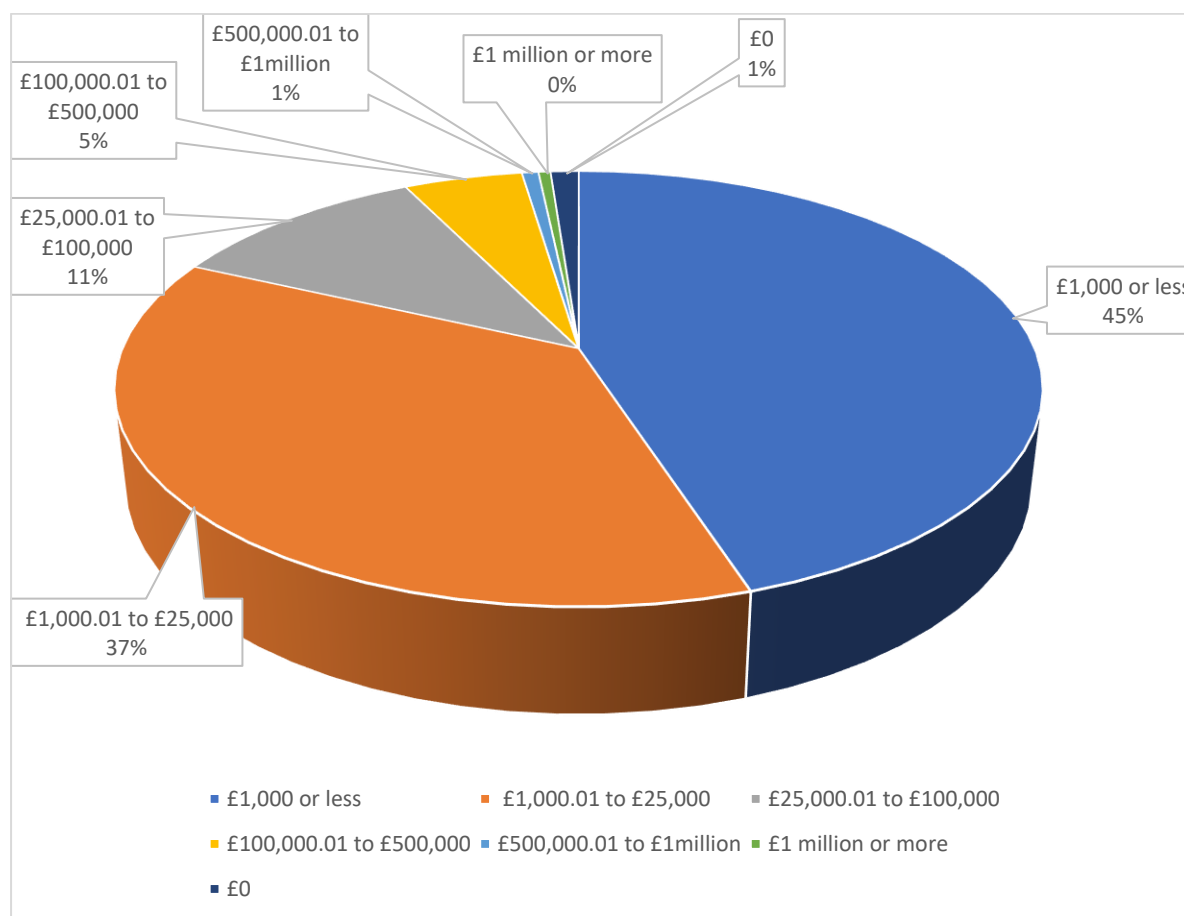
This definition appears to capture the Mafiosi-like characteristics of organised crime (such as the use of violence and intimidation and their ability to influence, corrupt and contaminate the 'social fabric') and in doing so it distinguishes it from other definitions that appear to conflate serious and organised crime together. Whilst it could be argued that organised crime tends to be serious, serious crime might not always be organised. This might explain why policy makers in the UK have adopted the broader 'serious and organised crime' term allowing law enforcement agencies to cast its net wide when applying these special measures but also when justifying other measures such as joint enterprise law and IPP sentences.

Whilst both of the above organized crime definitions acknowledge financial gain as a key component, they fail to emphasise that significant revenue would need to be generated to sustain the infrastructure of an organised crime group. It follows then that, if confiscation powers are being used against such individuals, then the orders that follow will be high-value orders. However, in analysing official statistics it would appear that this is perhaps not the case. As already established earlier in this thesis, of the 52,029 confiscation orders made since 1987, almost half (24,011) were for amounts of £1,000 or less (NAO, 2013: 10-15). Such a trivial amount fails to conjure up images of 'organised criminality' in the sense that is depicted by the prevailing political rhetoric discussed throughout this chapter. The 'low-hanging fruit' theory is further supported when Bullock's (2010: 6) research with financial investigators is considered:

...highly visible but relatively low-level drug dealers and/or users are routinely swept into the radar of confiscation proceedings. Financial investigators highlighted that these offenders are often living hand to mouth and have very little that could realistically be recovered.

Moreover, the remaining statistics, which can be seen in figure 4, further illuminate who these special powers are being used against: 82% (42,602) were for orders £25,000 or under, compared to just 261 orders for orders £1 million or more, which equates to just 0.5 per cent (NAO, 2013)

Figure 4 – A pie chart to illustrate how many confiscation orders are imposed according to the financial value of the orders between 1987 and 2013

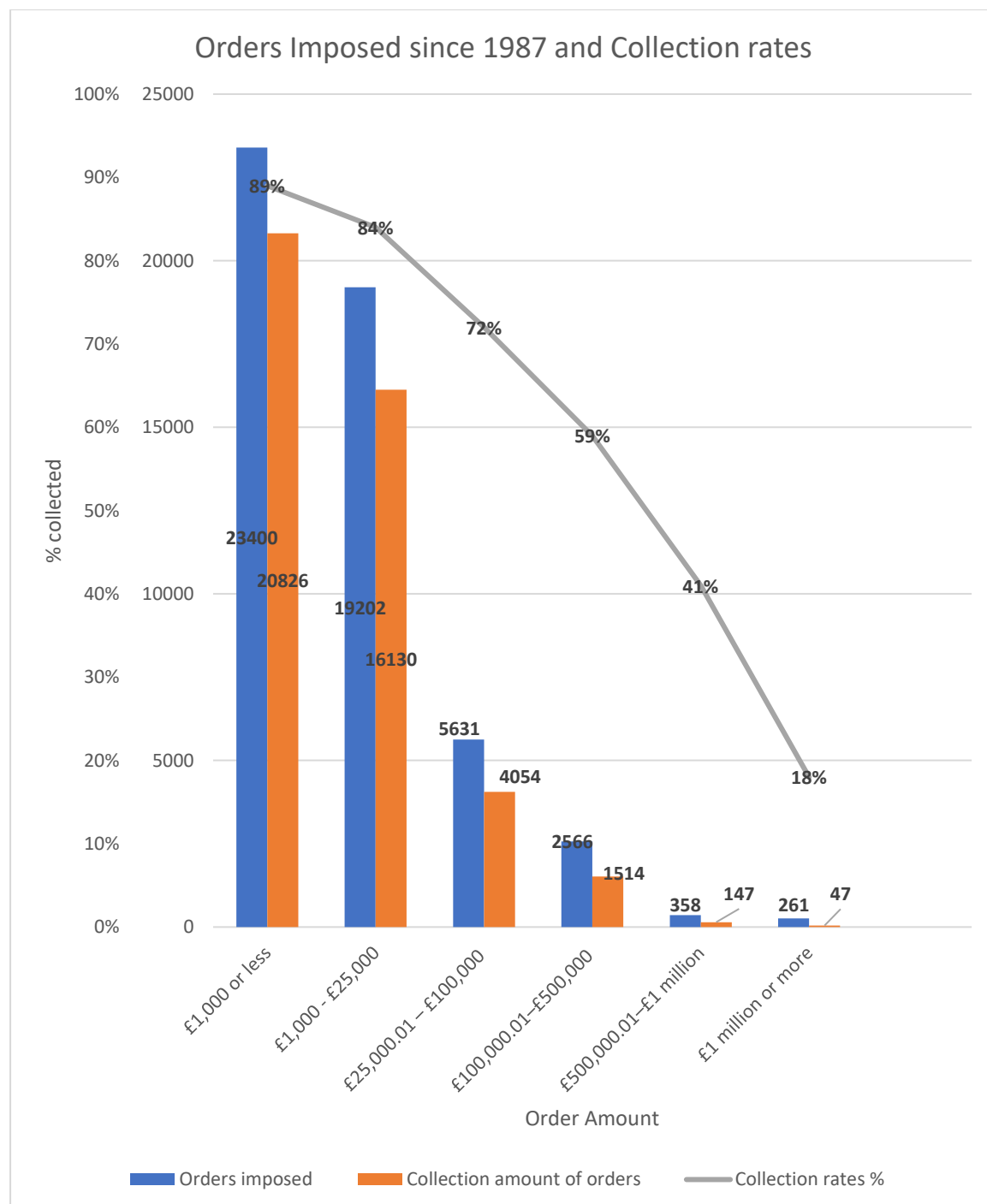


It is also important to consider that, despite the judge's discretion being removed as to whether a confiscation order should be imposed, out of the 640,000 convictions secured in the year 2014-15, many of which would have involved financial gain, just 5,924 confiscation orders were imposed, equating to less than 1% (NAO, 2016: 14). When analysing these figures alongside the figures illustrated in figure 4, we begin to get an idea that other political forces maybe at play as discretion

perhaps plays a bigger role in determining 'who' is and, more importantly, 'who is not' subjected to these powers.

From a crime control perspective, low-level offenders may prove to be easier pickings, however, to fully appreciate the utility of imposing these small orders, then it may be necessary to view these figures from a managerialist perspective. For example, when collection rates are considered, 89% of orders for £1,000 or less are successfully collected (20,826 orders), for orders between £1,000 and £25,000 84% of orders are collected (which equates to 16,130 orders), and for orders of £1,000,000 or more just 18% of them are collected, which equates to approximately 47 orders (NAO, 2013; 15 – see figure 5). Therefore, it would appear that the imposition and collection of orders of £1,000 or less, whilst not advantageous from a revenue raising perspective, are advantageous in terms of bolstering collection rates which can be used to surreptitiously create the perception that the regime is more effective at asset recovery than it is in reality.

Figure 5 – The amount of confiscation orders imposed between 1987 and 2013 and the collection rates (NAO, 2013: 15)



Despite overwhelming evidence of a ‘low- hanging fruit’ effect in the use of confiscation powers, the State’s actions have been defended on the basis that, the crimes of low-level offenders generate significant harm and their capture and punishment will have a significant deterrence effect and but for the efforts of those ‘foot-soldiers’, the illicit businesses of those ‘at the top’ would not succeed

(Home Affairs Committee, 2016a). Whilst this may be true, it fails to address the issue that these special measures were not introduced or legitimized for the use on such individuals.

The credibility of the State to use these special powers against the 'Mr or Mrs Bigs', is further strained when evidence to the contrary is considered. For example, in 2016 HSBC was found guilty of allowing serious organized criminals, including both 'terrorists' and drug dealers such as Mexico's 'Sinaloa drug cartel', to launder almost a billion dollars through its banks (Neate, 2016). Instead of those bankers or its shareholders being punished in the same way that anybody else would be who was found guilty of money laundering, the HSBC was able to hide behind its 'corporate veil' and the company was given a \$1.92 billion fine which, whilst significant, is proportionate to their overall turnover, making law-breaking a financially viable option for the banking system. According to HSBC's annual report and accounts, its adjusted profit before tax was estimated to be \$21.7 billion for 2018 and has \$2,558 billion worth of assets, putting the \$1.92 billion fine into perspective; approximately one month's profit (HSBC, 2018: 2). Importantly, the decision not to prosecute HSBC on money laundering charges was greatly influenced by British MP George Osborne, who intervened and persuaded the Department of Justice in America not to proceed with the charges because HSBC is a 'systemically important financial institution' and any prosecution brought against them could result in a 'global financial disaster' (ibid). This would suggest that perhaps the real 'Mr and Mrs Bigs' are too big to prosecute, undermining public confidence in the State to apply these special powers equally and fairly and in a manner which is consistent with the confiscation rhetoric.

It is further undermined when we consider the failure of the system to impose any confiscation orders against any of the members of parliament who were found guilty of fraudulently claiming expenses. Once such case being Labour MP, Margaret Moran, who despite fraudulently claiming £53,000 worth of expenses, somehow managed to avoid a criminal conviction and, therefore, a confiscation order (Williams, 2012).

One reason that is suggested as to why these measures may be imposed upon low-level offenders rather than serious and organised criminals is because the hierarchical positioning of those 'at the top' enables them to work remotely beyond the reach of law enforcement, insulated by layers of subordinates that work on the front line (Hendry and King, 2017), and so the criminal conviction required prior to confiscation is difficult to secure (Kennedy, 2004). It is then highlighted that such individuals are unlikely to have the necessary means to successfully defend themselves against a complex piece of legislation designed for capturing sophisticated and organised criminals (Sproat, 2009; Levi and Osofsky, 1995; Bullock, 2014; Winch, 2016). This view is shared by Laurence Sacker, a corporate finance and money laundering reporting officer, who whilst providing evidence to the Home Affairs Select Committee (2016b: 27) explained that:

the more money you have the easier it probably is to find ways to get around the system, so it is the smaller people who would be more likely to get caught by [POCA].

In the same evidence session, the Chair of the committee, Keith Vaz MP, acknowledged that the 'Mr and Mrs Bigs' will be in a position to procure the 'best accountants and lawyers in the country' so as to frustrate confiscation attempts (ibid, Q205: 27). This was recently demonstrated in the case against Zamira Hajiyeva, the wife of a jailed banker who was the first person to be subject to an unexplained wealth order in the UK, who as a result of her privileged position is able to defend her case with a £500 an hour barrister (McCahill, 2018).

Despite this admission by the establishment that there is a clear contradiction within the ideology of POCA, confiscation powers continue to be extended. For Sproat (2009: 147), this contradiction suggests that the confiscation agency is either incompetent in tackling organised crime or the threat of organised crime has been grossly exaggerated to justify the introduction of powers that might not otherwise have been granted and this:

raises huge questions about the trustworthiness and morality of those politicians and ‘professionals’ who use their extra-ordinary threat of ‘organised crime’ to manufacture consent for their (often extra-ordinary) measures.

In drawing upon official data which illustrates which types of offences are most frequently being subject to confiscation proceedings, we are able to gain an insight into who the State views as being ‘Mr or Mrs Big’. As can be seen in table 2 below, out of the 69,151 post-conviction confiscation orders imposed since the POCA 2002 was enacted in 2003, 39,948 were imposed for drug trafficking offences, which equate to 58%. To give an idea of scale in regard to the disproportionate use of confiscation law against drug related offences, the second most frequent offence to be subject to confiscation proceedings is the broad category titled, ‘Other Fraud / Embezzlement / Deception / Crimes of dishonesty’ which has triggered just 8691 (13%) confiscation orders within the same time frame, despite the obvious harm and profits made by such offences. According to the NCA (2018) fraud costs the UK economy £190 billion per year and a report published by Crowe UK,²⁷ which draws upon twenty years of extensive global research from forty sectors, estimated the global cost of fraud related offences to be in the region of £3.24 trillion a year (Crowe, 2018: 15), yet it is drug related offences that are massively over represented within confiscation statistics. Furthermore, environmental waste crime which can result in irreversible damage to the planet, is estimated to cost the UK up to £1bn per year through tax evasion, lost profits to legitimate industry, and clean-up costs (Taylor et al., 2015). In 2015 the environmental agency was reported to have closed over 1,000 illegal waste sites with estimated losses to the economy and taxpayer of £150-200 million, whilst Fly-tipping is said to cost an estimated £60 million in clean-up costs to local authorities each year. Despite the substantial criminal benefit to be made from such crimes, the costs that are subsequently incurred by the tax-payer and the substantial harm caused, environmental offences do not even feature within confiscation data, providing a damning insight into the UK’s law-enforcement priorities. In ascertaining that these

²⁷ A leading audit, tax, advisory and risk firm

special powers are being disproportionately used against drug related offences, it can be assumed that confiscation policy is, in essence, an extension of the government's war on drugs' policy.

Table 2 – A breakdown of how many orders are imposed for each offence type since March 2003 (FOI request – see appendix B)

| Offence Type | Commitment Warrant Issued | | Total | % of overall orders |
|---|---------------------------|-------|--------|---------------------|
| | No | Yes | | |
| Arms Trafficking | 66 | 2 | 68 | 0.09 |
| Bribery and Corruption | 48 | 1 | 49 | 0.07 |
| Burglary / Theft | 5496 | 172 | 5668 | 8.1 |
| Counterfeiting / Intellectual Property / Forgery | 1118 | 60 | 1178 | 1.7 |
| Drug Trafficking | 38572 | 1376 | 39948 | 57.7 |
| Excise Duty Fraud | 807 | 57 | 864 | 1.2 |
| Handling Stolen Goods | 834 | 29 | 863 | 1.2 |
| Human Trafficking | 224 | 43 | 267 | 0.3 |
| Intellectual Property Crime | 151 | 1 | 152 | 0.2 |
| Money Laundering - Drugs | 2183 | 109 | 2292 | 3.3 |
| Money Laundering - Other | 3256 | 187 | 3443 | 4.9 |
| Other Crime | 1135 | 56 | 1191 | 1.7 |
| Other Fraud / Embezzlement / Deception / Crimes of dishonesty | 8297 | 394 | 8691 | 13 |
| Pimps and Brothels / Prostitution / Pornography | 444 | 25 | 469 | 0.6 |
| Robbery | 859 | 91 | 950 | 1.3 |
| Slavery / Servitude / Forced or Compulsory Labour | 5 | 0 | 5 | 0.007 |
| Tax and Benefit Fraud | 2077 | 154 | 2231 | 3.2 |
| Terrorism | 13 | 1 | 14 | 0.02 |
| Trading Standards Offences | 193 | 8 | 201 | 0.2 |
| Unknown | 135 | 15 | 150 | 0.2 |
| VAT Fraud | 352 | 35 | 387 | 0.5 |
| Vehicle Offences | 65 | 5 | 70 | 0.1 |
| Total | 66,330 | 2,821 | 69,151 | |

In summary, in reviewing both the existing literature and official data it becomes apparent that these special powers are being disproportionately used against relatively low-level offenders, as opposed to 'serious and organised' criminals as the State alleges. The statistics also inform us that this is a punishment that is disproportionately imposed upon those who commit drug related offences. However, what is clearly absent within the literature is an understanding of what the impact is of using these special powers, powers which were designed for use against serious and organised criminals, upon relatively low-mid-level offenders and, therefore, this provides a key line of the enquiry for this thesis.

2.4 - The Post-Conviction Confiscation Process

POCA is a complex piece of legislation that has 462 sections, 12 schedules and runs to over 700 pages and so the word constraints of this thesis prevent a full and detailed analysis of its entire provisions. Therefore, there are several stages, features and issues that will be briefly discussed here so as to provide the reader with a baseline understanding of POCA and then in both the findings and the discussion chapter, a more detailed analysis of the systems and processes of confiscation will be carried out within the context of the findings.²⁸

Under POCA 2002, the court is 'obligated' to initiate post-conviction confiscation proceedings when a defendant has been found guilty of a criminal offence in which financial gain is suspected to have been made.²⁹ An assessment of 'benefit' that a defendant is assumed to have made is accompanied by an assessment of the 'available' amount by a financial investigator, and this will be provided on a section 16 statement. The defendant is then offered an opportunity to contest these figures by providing evidence to the contrary (section 17 statement) before an order is finally made by the court. Failing to turn up to court or failure to provide evidence which indicates why these figures are inaccurate will

²⁸ A more comprehensive account of the legislative capacity of POCA and its provisions can be found in Rees et al. (2012).

²⁹ However, just 1% of the convictions secured in 2014-15 led to a confiscation order being imposed (Home Affairs committee, 2016).

result in the court accepting the prosecution's assertions (Rees et al., 2012). The court must impose an order based on the full benefit amount unless it has been determined that the offender does not have sufficient assets available. The defendant is then allowed three months to satisfy the order.³⁰ Failure to satisfy the order in full will activate a default custodial sentence in which the length of sentence is determined by how much money is outstanding on the confiscation order (see table 3). This is an additional prison sentence to the sentence an offender may be serving for the predicate offence.

Importantly, [section 38\(5\) of POCA](#) depicts that serving the default sentence does not expunge the debt which persists indefinitely. Instead under [section 12 POCA 2002](#) the outstanding amount increases with interest at a rate of 8%. As Rees et al. (2012) point out, the imposition of an additional default sentence and interest being added onto the unpaid order was justified on the grounds that it would 'incentivise' offenders to pay. Whether these provisions have the desired outcome is a particular line of enquiry for this thesis.

One of the most contentious features of POCA is its hybrid civil-criminal construction which enables the confiscation legal process to circumvent due process safeguards (Hendry and King, 2017; Bullock and Lister, 2014; Lawrence, 2008), making the confiscation system 'susceptible to manipulation' (Cram, 2013: 121). Hendry and King (2017: 22) argue that 'POCA itself constitutes [an] overt legislative overstepping in its evasion of enhanced procedural rights protections' which is further compounded by 'the failure of the courts both in identifying this excess and in taking steps to prevent or mitigate its effects'. This has implications for the rule of law but also human rights. However, as Rees et al. (2012) point out, confiscation law does not engage human rights protections because the defendant is not charged with a criminal offence – it is argued that the imposition of the confiscation order is preventative not punitive (see Kennedy, 2004); it aims to prevent criminal funds from being reinvested back into further crime. In light of this there are several lines of enquiry for this research. Firstly, by

³⁰ Previously 6 months under POCA 2002 but halved to 3 months under SCA 2015

eliciting the voices of those subject to the confiscation punishment, this thesis aims to better understand whether the confiscation punishment is actually preventative in nature. Secondly, this thesis sets out to understand what the consequences are of being subject to a 'preventative' criminal justice process without the protection of human rights. And finally, this thesis sets out to better understand to what extent this punishment and its wider effects impact upon the family and, therefore, whether their human rights are violated as a result of the confiscation punishment.

The due process safeguards that are abandoned under POCA include the loss of the right to remain silent, the presumption of innocence and the right to a fair hearing before an impartial judge and before a jury. These will be discussed in further detail throughout the remainder of this chapter. Although they may not always be explicitly written into confiscation legislation, the erosion of these safeguards come about as a consequence of other POCA legal provisions, provisions to which we now turn.

2.4.1 - Evidential Threshold and the Burden of Proof

Whilst the burden of proof initially lies with the prosecution during POCA proceedings, the standard of proof is reduced to a civil 'balance of probabilities' threshold which, according to Gallant and King (2013), is easily satisfied by the prosecution. This in turn reverses the burden of proof upon the defendant in order to rebut the assumptions imposed upon them and in doing so erodes their right to remain silent. Lawrence (2008) points out that the jurisprudential significance of the lowered threshold means that, in essence, POCA allows for opinion and hearsay evidence, allows for evidence such as a co-defendants interview and it allows contested witness statements from the predicate offence court proceedings to be heard and be made admissible during confiscation proceedings. Whilst a punitive confiscation regime is justified on the grounds of the serious nature of the offences in which this legislation is to be used against (PIU, 2000), Gallant and King (2013: 97) point out that 'given what is potentially at stake', the loss of property and incarceration, 'it might well be argued that a heightened standard of proof ought to apply'. It is expected that if the lowered threshold of proof

within a confiscation trial is of significance to how the confiscation order is constructed and imposed, then this thesis, through the voices of those subject to them, will reveal the impact of it.

2.4.2 - Criminal Lifestyle, Hidden Asset Assumptions and Tainted Gifts.

One of the most controversial features of the confiscation regime is the application of assumptions when calculating a confiscation order. Although a criminal-lifestyle criteria must be met before the court is entitled to apply the assumptions, Nicol (1988) points out that this threshold is easily met. Under [section 75 of the POCA 2002](#) the criminal lifestyle guidance is provided. A person has a criminal lifestyle if the offence satisfies one or more of these tests:

1. It is specified in Schedule 2 (see below for a list of schedule 2 offences);
2. It constitutes conduct forming part of a course of criminal activity; and/or
3. It is an offence committed by the defendant over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.

The following offences are specified in Schedule 2: drug trafficking, money laundering offence, directing terrorism, human trafficking, arms trafficking, counterfeiting, intellectual property, pimps and brothels, blackmail; or, an offence of attempting, conspiring, inciting, aiding, abetting, counselling or procuring an offence specified in Schedule 2.

The criminal lifestyle test is not satisfied unless the defendant has obtained benefit of at least £5,000 in the cases of (2) and (3). An offence which constitutes conduct forming, part of a 'course of criminal activity' (2), defined as where the defendant has been convicted of at least four offences in the same proceedings from each of which s/he has benefited or where the defendant has been convicted of two offences within six years of the start of the proceedings from each of which s/he has benefited.

In the event that a defendant does not meet the criminal lifestyle criteria then the court must determine whether the defendant has benefited from her/his 'particular criminal conduct'. However,

if a defendant does meet the criminal lifestyle criteria the court must then ascertain whether the defendant has benefitted from her/his 'general criminal conduct'. If this is asserted, then the court must apply the relevant assumptions when assessing the amount of benefit a defendant has accrued from her/his criminality. In essence, this means that the court must assume that all income and expenditure and assets that a defendant has acquired and dissipated, dating back six years from the date of the offence, has derived from her/his criminality unless the defendant is able to prove otherwise, or to do so would result in a serious risk of injustice³¹. However, as Rees et al. (2012: 14) points out, it is confiscation policy and not procedural fairness that orients POCA:

The injustice must arise from the operation of the assumptions and not generally from the severe consequences of a confiscation order. Hardship arising from the making of a confiscation order is not considered injustice in this sense.

The consequence of the criminal lifestyle provision is that the POCA defendant is being 'tried and sentenced to years in jail based on guesswork, not on evidence properly tested before a jury' (Bedingfield and Sallon, 1993: 170). Ulph (2010) also points out that this provision can be used against 'first-time offenders' if they meet the criminal-lifestyle criteria and, therefore, have assumptions imposed upon them, despite no previous offences ever being determined. Whilst the defendant is given the opportunity to rebut the assumptions by evidencing that the assets were legitimately acquired, this results in the loss of their right to remain silent (Rees et al., 2012). If a defendant opts to remain silent in these circumstances, then this would constitute acceptance of the prosecutor's allegations and the assumptions will remain part of the benefit figure (ibid). Whilst the ability to rebut the assumptions acts as a safeguard that renders this provision compatible with human rights legislation (Giles, 2013), Ulph (2010: 271) points out that in reality it may be 'very difficult to bring forward convincing proof – or even remember the facts – in relation to a transaction made some years before' (see also Lawrence, 2008).

³¹ Section 10(6) POCA 2002 provides the conditions when assumptions would not be appropriate

Helena Wood (2016a) considers another difficulty in rebutting the six-year assumptions explaining that it may be impossible for a defendant to demarcate between what assets derived from legitimate and illegitimate means. She asserts that as a result the court may end up determining legitimate assets as criminal benefit, not because they are so, but because the defendant was unable to prove otherwise, undermining its main objective of recovering ill-gotten gain. In light of the practical difficulties in rebutting the assumptions, Tim Owen Q.C. argues that criminal lifestyle assumptions are a 'route to massively inflating the benefit figure' (Home Affairs Select Committee 2016b: 25).

When the court is determining the 'available' amount and identifies assets of interest that were visible within the six-year retrospective period but are no longer traceable at the point of arrest, then such assets are to be listed on the confiscation order as 'hidden assets'. As Ulph (2010) points out, it may be difficult to convince a court that an asset is not hidden, but no longer exists. Paradoxically, the hidden asset assumption risks completely undermining the definition of the 'available amount' if such assets are in fact not available. Consequently, Nicol (1988: 81) asserts that, 'it is a totally unrealistic method of assessing the defendant's ability to pay'.

Under section 77(1) to (5) of POCA 2002, in criminal lifestyle cases, assets that are dissipated are considered tainted if they were gifted away at any time during the six-year period preceding the date in which the defendant was charged, and in non-criminal lifestyle cases, a tainted gift is a transfer made by the defendant at any time after the date when the offence was committed. Further, under section 78(1) of POCA 2002, if property is transferred undervalue the difference between the official value of the asset/s and the value realised within the transfer will be added to the 'available amount' (Rees et al., 2012).

2.4.3 - Gross Benefit Calculations

Another feature of POCA which has received significant attention within the existing literature is the pursuit of gross benefit, rather than net profit, during POCA proceedings. As aforementioned, this

provision was introduced under the DTOA 1986 and later retained under POCA 2002, despite the advice of the Hodgson Committee which recommended a confiscation system restricted to net profit.

Alldrige (2011: 833) identifies three 'obvious' objections to confiscation being limited to net profits. Firstly, in essence, calculations of net profit would require consideration of any expenditure incurred such as petrol costs from drug trafficking, protection, and even clothing which he points out might be considered 'inappropriate' for the court to get caught up in such considerations (ibid). The second objection which follows on from this is that an offender should not have been engaging in the criminal enterprise to which such expenses were incurred and, therefore, such deductions would be considered illegitimate. The third objection is that any claims for expenses incurred would be too easy to make and too difficult to disprove for the system to function (ibid). Despite this, Alldrige argues that such expenditure should be accounted for as it is in tax law (ibid). Although Alldrige drew an important distinction here between tax law and confiscation proceedings he failed to explore any potential rationales that may underpin this distinction in the two legislative approaches. Whilst understanding why these important distinctions exist between tax and asset recovery law lies beyond the scope of this thesis, from a critical research perspective, it is necessary to acknowledge that they exist, and that the laws are generally perpetrated by two different echelons of society and, therefore, the State has made a conscious decision to construct the two regimes differently in response.

As Ulph (2010: 251) points out, the consequence of having a gross-benefit confiscation system is that a 'much larger confiscation order can normally be made under this scheme as compared to one limited to profits alone'. Despite this undermining its objective of recovering ill-gotten gain and, therefore, its delegitimizing effect upon the confiscation regime, any confusion as to the intention of the judicial system was abated in *R v Waya* (2012):

To embark upon an accounting exercise in which the defendant is entitled to set off the cost of committing his crime would be to treat his criminal enterprise as if it were a legitimate business and confiscation a form of business taxation [...] To attempt to enquire into the financial dealings of criminals as between themselves would usually be equally impracticable and would lay the process of confiscation wide open to simple avoidance. Although these propositions involve the possibility of removing from the defendant by

way of confiscation order a sum larger than may in fact represent his net proceeds of crime, they are consistent with the statute's objective and represent proportionate means of achieving it (in Alldridge 2014: 8).

Whilst the existing literature has acknowledged the problematic nature of the gross benefit approach to confiscation, this thesis aims to create a better understanding of just how inflated a confiscation order can become under a gross benefit calculation and, more importantly, what are the consequences for the defendant and their families of being subject to it.

2.4.4 - The 'Available' Amount and the 'Benefit' Figures

As previously discussed, at the bedrock of the confiscation regime lies two figures of interest for the court; the benefit figure, which is best described as the total amount of proceeds in which the financial investigator has 'calculated' the defendant to have made through their criminality, and the available amount, which is calculated according to the amount of realisable assets a defendant is believed to possess, including assets considered as 'hidden'. The significance of the available amount is that this is the amount a defendant must pay in order to avoid the imposition of the default prison sentence, whilst the benefit amount is a figure which remains a State debt that can be recovered at any point in the future.

As can be seen in table 3, the lengths of sentence imposed in default under the SCA 2015 has increased significantly. Despite the rhetoric suggesting that these measures were introduced to tackle serious and organised crime, the greatest increases in punishment under the SCA 2015 are inflicted upon those orders under £200 with a 2471% increase, whilst orders in excess of £500,000 have increased by just 40%, raising important questions as to why the legislature felt it necessary to increase the scale of punishment so disproportionately for individuals whom the legislation was not designed or intended for.

Table 3 –Default prison sentences according to the confiscation debt outstanding for POCA 2002 and SCA 2015

| | Default under POCA 2002 | Default under SCA 2015 | Change |
|---|------------------------------------|-----------------------------------|-----------------------|
| An amount not exceeding £200 | 7 days | 6 months | 2471% Increase |
| An amount exceeding £200 but not exceeding £500 | 14 days | 6 months | 1186% Increase |
| An amount exceeding £500 but not exceeding £1,000 | 28 days | 6 months | 543% Increase |
| An amount exceeding £1,000 but not exceeding £2,500 | 45 days | 6 months | 300% Increase |
| An amount exceeding £2,500 but not exceeding £5,000 | 3 months | 6 months | 100% Increase |
| An amount exceeding £5,000 but not exceeding £10,000 | 6 months | 6 months | No change |
| An amount exceeding £10,000 but not exceeding £20,000 | 12 months | 5 years | 400% Increase |
| An amount exceeding £20,000 but not exceeding £50,000 | 18 months | 5 years | 234% Increase |
| An amount exceeding £50,000 but not exceeding £100,000 | 2 years | 5 years | 150% Increase |
| An amount exceeding £100,000 but not exceeding £250,000 | 3 years | 5 years | 67% Increase |
| An amount exceeding £250,000 but not exceeding £500,000 | 5 years | 5 years | No change |
| An amount exceeding £500,000 but not exceeding £1 million | 5 years | 7 years | 40% Increase |
| An amount exceeding £1 million | 10 years | 14 years | 40% increase |

Bullock (2014: 52-53), as a result of her empirical research conducted with one hundred financial investigators, was able to provide insight into how these figures are constructed. She highlighted that a combination of the assumption provisions contained within POCA and the significant discretion afforded to financial investigators, enables some of them to 'go wide' in their calculations, whilst others may choose to 'go narrow' (ibid: 57). One financial investigator in her research highlighted the perils of being empowered with wide discretionary responsibilities so that two different investigators could be presented with exactly the same financial information yet estimate benefit vastly differently. Bullock also argues that benefit figures in drug cases in particular are often 'artificially inflated by extravagant and widely speculative calculations' because of 'double counting of income derived from and expenditure of drugs' (ibid). In her research, financial investigators discussed how they would include assets such as pets, children's clothes and furniture on their calculations, which is notably different from the types of assets that are discussed within the official discourse - yachts, flash cars, designer clothes and expensive jewellery (NAO, 2007; PIU, 2000). Bullock (2014) also highlighted that under [section 79](#) and [section 80](#) of POCA, property must be valued at what it was worth at the time it was obtained, even though such items are never likely to achieve such value if resold, and this has the effect of inflating confiscation calculations. Therefore, as Bullock (2014) points out, the available amount is simply a computation of the total value of a defendant's assets, regardless of whether they were acquired legitimately or otherwise, and it is not considered the role of the financial investigator to explore whether third parties may have been aware of the illegitimacy of such assets. Their role is to simply calculate the benefit and available amounts using the extraordinarily broad formulas provided for within confiscation law (ibid). Furthermore, Bullock (2014) also found that, often, cases involve large benefit figures yet low available amounts, which may reinforce Levi and Osofsky's (1995: vi) assertion that the confiscation system is never likely to be successful at reclaiming the past 'entertainment expenditures' from people who have enjoyed a profligate 'spend-as-you-go' lifestyle. However, as Rees et al. (2012) point out, under [section 22 of POCA](#), the State is able to revisit confiscation orders in the future and amend the available amount within the constraints of the benefit

figure (uplifted for inflation). Whilst this may appear rational in the event that further illegitimate assets are identified, but as Bullock (2014) explains this provision enables the court to recover after-acquired and legitimate assets, and so from a revenue raising perspective, it is in the interest of the State to generate inflated benefit figures. Despite the significance of the section 22 powers, they have received little attention elsewhere within the literature or within the official discourse and no research has been conducted with those individuals who may have been subjected to such provisions. As a result, many questions remain unanswered as to the impact of such a provision upon the defendant and their families, something that this thesis sets out to address.

2.5 - Summary

As this chapter has revealed, much of the confiscation literature is critical of the UK's confiscation system, including its capacity to achieve its objectives, the hybrid manner in which confiscation law has been constructed so as to circumnavigate due process safeguards and critical of many of its provisions. In reviewing the literature on confiscation, issues of proportionality, [in]justice, and legitimacy begin to emerge, and so these will become important lines of enquiry for this thesis.

Where there is an obvious gap in the knowledge base is in regard to how these issues are experienced by those that are subject to the confiscation punishment. A consequence of failing to account for such voices is that the existing literature presents as disconnected and dehumanized, discussing it exclusively within the context of systems and processes, ignorant to the potential impact upon the defendant's families in particular and, therefore, as a result the academic community, to some extent, is complicit in concealing the real-life pain and hardship of these processes.

Chapter 3 – Philosophies of Punishment.

3.1 - Introduction

As discussed in chapter two, much of the focus of confiscation policy has been centred upon justifying the introduction and extension of confiscation powers. What has received little attention within the academic literature is a discussion about the philosophical underpinnings of these powers. Therefore, this chapter will draw upon the wider literature on State punishment in order to understand whether it can account for the rise of post-conviction confiscation punishment, whilst also helping to construct a theoretical framework in which the findings of this thesis can be understood.

This chapter will begin by briefly exploring three key terms that will feature throughout the thesis: State punishment, the rule of law and the concept of legitimacy, before turning its attention to the competing philosophies of punishment; retributivism with its focus on just deserts and proportionality, and reductivism which focusses upon reducing future crime by way of deterrence, incapacitation, and rehabilitation. This is an integral part of the theoretical framework, key to meeting the one of the main aims of this thesis - a re-examination of these long-standing justifications of punishment within the context of the research findings.

3.2 - State Punishment, the Rule of Law and Legitimacy.

In establishing the principles of social control, John Locke argues that citizens accept a measure of curtailment of their freedom in order for their natural rights and freedoms to be protected, and the State is endowed with the role of punishing infringements of the laws which they enact so as to uphold those individual rights and freedoms (Hudson, 2003b). Freedoms in a pre-social state of nature are understood by Locke as being the freedom to act as one wishes; freedom to dispose of one's property unhindered; and freedom to repel or exact revenge upon those who impinge on one's actions or

property (ibid). Property from this perspective is understood to mean life and liberty as well as material possessions (ibid). Therefore, a just society is one which secures those natural rights and the State, in its use of coercive power and capacity to infringe upon an individual's liberty, is justified only to the extent that these powers are used to secure those natural rights. The use of such powers for other ends would constitute a breach of the social contract, and the State in its law and order capacity would be considered illegitimate.

In discussing contemporary State punishment, Garland (1990: 5) argues that it is a taken for granted institution of both ancient and modern society which has taken on a 'quasi-independent' life of its own. He also points out that, by failing to engage fully with the philosophical questions that are fundamental to punishment, an 'institutional framework' has been constructed that obscures the complexity and tensions that characterise punishment, and through its continued use and respect for State authority, a 'regime of truth' is developed that can 'shore up the institutional structure' and stifle any efforts that may seek to destabilise the status-quo (ibid: 4). He also goes on to point out that it is because of the 'inevitability' of punishment that we have been denied the right to think deeply about why we respond to wrongdoing in the way we do (ibid: 3). Fitzgerald and Sim (1982) argue that this is aided because modern punishment is characterized by secrecy with researchers and the outside world being consistently denied access. In the context of POCA, the absence of research which foregrounds the voices of those whom confiscation is imposed upon, combined with the silencing effect of incarceration, has enabled official accounts to dominate society's understanding of POCA, helping to cultivate and preserve the perceived legitimacy of the legislation. Awareness of how POCA is experienced is further obscured because it is a punishment that sits within the 'shadow of the prison' (Canton, 2017: 5), where punishment is often perceived to be deserved and the punished are often forgotten.

Such is the complexity of State punishment that defining it is a difficult task. For Garland (1990: 17), punishment 'is not reducible to a single meaning or a single purpose' and is not 'susceptible to a logical

or formulaic definition....because it is a social institution embodying and “condensing” a range of purposes and a stored-up depth of historical meaning’. Despite this, Garland explains punishment to be a:

legal process whereby violators of the criminal law are condemned and sanctioned in accordance with specified legal categories and procedures [involving] interlinked processes of law making, conviction, sentencing and the administration of penalties. It involves discursive frameworks of authority and condemnation, ritual procedures of imposing punishment, a repertoire of penal sanctions, institutions and agencies for the enforcement of sanctions and a rhetoric of symbols, figures, and images by means of which the penal process is represented to its various audiences (ibid).

This definition sits within the legal or judicial paradigm of punishment and like most definitions of punishment it fails to account for the non-legal, routine and residual effects of punishment (humiliation, intrusiveness, family breakdown, loss of human and social capital, labelling and stigma etc) (Canton, 2017). Such effects of punishment are implicit penalties experienced during the prosecution process and the ‘afterlife’ of punishment; understanding the impact of such in the context of POCA is key to this thesis.

Flew (1954), in an attempt to define what constitutes State punishment, identifies five important criteria: firstly, it must involve an ‘evil’ or ‘unpleasantness’ to the victim; secondly, it must be for an offence; thirdly, it must be of the offender; fourthly, it must be the work of personal agencies and not be a natural consequence of an action; and fifthly, it must be imposed by virtue of some special authority. He proposes that if punishment fails to meet these criteria, then it is likely that it will be considered a penalty, a natural disaster, an act of revenge or a hostile act rather than State punishment. However, as Scott (2016b) asserts, it is the State itself who monopolizes and shapes what constitutes ‘legitimate’ punishment, mystifying State violence so that it appears as justified and legitimate.

As Flew points out, punishment must involve an 'evil' or 'unpleasantness' upon another human being (ibid) and the power to punish, therefore, requires certain constraints so as to prevent the arbitrary use of these powers. Such constraints are said to be provided within the rule of law, which as Lord Bingham (2011) points out, applies to all as no one should be above the law. In defining the rule of law Bingham calls upon eight guiding principles: the law should be clear, accessible and intelligible and without undue difficulty we should be able to find out what the law is; we should be governed by law and not discretion; there should be equality before the law; the exercise of power should be used for the purposes of which they have been conferred upon; the law should offer a place for disputes to be resolved; the law must afford adequate protection of fundamental human rights; the State should provide a fair trial; and, finally, the State has an obligation to comply with its national and international laws (ibid). The purpose of drawing upon the concept of the rule of law and these eight principles is to highlight that, as a method to avoid the arbitrary and excessive use of power, which could lead to cruelty, torture or persecution, the State is expected to adhere to such principles so as to remain legitimate in its governance and social order role. Moreover, when processes are exposed as contravening the rule of law, then the legitimacy of the State to punish would be considered weak. The democratic importance of the 'rule of law' and how it differs from the 'rule by law' was recently emphasised by Frans Timmermans, the European Commission's second-in-command, at the European parliament:

Every despicable sentence by Nazi courts was based on law. It was in fundamental contradiction with rule of law. It was in fundamental contradiction with fundamental rights. But it was based on laws. We have a choice in our history: either we have the rule of law or we have the rule by law. Then we are a dictatorship and we can no longer say that we are a democratic society (Zsiros, 2019).

Fundamental to the rule of law are due process safeguards which in a criminal trial involve the observation of the presumption of innocence until guilt has been proven beyond reasonable doubt in a trial held before a jury. From a Blackstonian position, which accepts that it is better that ten guilty

persons go free than one innocence person be convicted (Volokh, 1997), due process safeguards are an important mechanism in the pursuit of justice.

Like Flew, Scott (2018: 83) recognises the unpleasant nature of punishment, asserting that it involves the deliberate infliction of pain and it is, therefore, 'diametrically opposed to the belief that harming other people is wrong' and 'out of kilter with many other human values', capturing the immoral nature of such action. Scott (2016a: 123-124) uses the term 'State violence' to describe excessive punishment, which he describes as:

physical/psychological pain, harm or death resulting from an individual action or a given set of structural arrangements. Violence is the systematic denial of need and pertains when the social production of suffering and harm are legalised, institutionalised and endemic within state policy and operational practices. State violence, then, is understood as a form of coercive power which produces violent outcomes.

When discussing imprisonment, Scott (2018: 164) asserts that it is characterised by the 'spirit of death', a combination of civil death (death in law; the loss of citizenship and most legal rights whilst in prison), social death (death in terms of social relationships) and corporeal death (the literal death of the body). For him, it is because of the civil and social death of the prisoner that the corporeal death of the prisoner is much less socially, legally or politically significant because the prisoner ceases to exist long before they commit suicide and, therefore, corporeal death should be understood within the context of civil and social death (ibid). He also goes on to point out that, whilst not being able to protect prisoners from most of the worst harms generated by the prison experience, (Article 2 of) the ECHR has acted as a 'life-support machine' for the prisoner's legal right to life.

It is because of the dehumanising effects of punishment that it requires legitimisation. For Scott and Flynn (2014: 213), the legitimacy of the State's power to punish is predicated upon the fair:

distribution and application of punishment, and upon successfully attaining political validity and a sense of moral rightfulness in a given society, and lead to acquiescence, obedience and consent from both those imprisoned and from the general public.

They go on to point out that the State's perceived legitimacy is also eroded when punishment induces social harms beyond those which are officially intended; infringes upon human rights; when dehumanising penal regimes become endemic within operational practice; when tolerable pain thresholds are exceeded; or when punishment is entirely misapplied and inappropriately punishes certain categories of harm or wrongdoers (ibid).

For Tyler (2006: 376), legitimacy is the belief that 'authorities, institutions, and social arrangements are appropriate, proper, and just'. Tyler goes on to point out that legitimacy is key for effective governance because governance based solely upon power would require enormous expenditures of resources. In his procedural justice framework (2003), he asserts that issues of process dominate our evaluations of authority and people who receive outcomes that they regard as unfavourable, such as being sent to prison or being served with a confiscation order, are more willing to accept those outcomes, if they are arrived at by procedures which they regard as being fair, when they are treated with dignity and they have their rights acknowledged. For him, these are the influencing factors as to whether a law or an authority is perceived as legitimate and legitimacy plays a pivotal role in shaping compliance (ibid). Therefore, the influence of legitimacy develops from within the person rather than through coercion.

In chapter seven this conceptual framework of legitimacy³² will be called upon to examine whether the post-conviction punishment, and the State in its capacity to administer punishment fairly, can be considered legitimate. In the absence of a sense of legitimacy then this will further undermine the State in its punishment role and this thesis will call for the abolition of the confiscation punishment.

Having constructed an understanding of what constitutes State punishment and developed a theoretical framework for determining the legitimacy of the confiscation punishment, this chapter will now review some of the Human Rights that may be considered relevant to this thesis.

³² Bingham's (2011) rule of law, Scott and Flynn's (2014) legitimacy of the State, and Tyler's (2003) procedural justice framework.

3.3 - Human Rights

Whilst a number of appeals against POCA have been brought on the grounds of Human Rights, it becomes apparent that many have been unsuccessful (See Rees et al., 2012; Ulph, 2010). Human rights are supposed to act as a safeguard against the arbitrary use of power and compel State agencies such as the, police, courts and the prison service to treat everyone equally, with fairness, dignity and respect. They are also considered key to the justification of specific punishments, in assessing the justice of punishments and in improving standards in penal institutions, and a system of punishment which respects human rights will have more legitimacy than one that violates them (Easton and Piper, 2016). According to the Equality and Human Rights Commission (2019) (EHRC hereafter) human rights are:

the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life [...] They can never be taken away, although they can sometimes be restricted – for example if a person breaks the law, or in the interests of national security.

In Britain our human rights are protected on a domestic level by the [Human Rights Act 1998](#) and on an international level by the [European Convention of Human Rights](#) (ECHR hereafter). As a country that considers itself to be ‘civilised’ and ‘democratic’, the State often [but selectively] condemns human rights abuses in [certain] other countries, despite itself failing to comply with human rights (e.g. prisoners’ voting rights, the right to family life in deportation cases and the legitimacy of whole-life sentences – Easton and Piper, 2016). Therefore, if this research was to reveal evidence which suggests that the UK is again failing to comply with human rights, its moral and legal character would be further discredited upon the world stage.

Whilst there are a number of human rights, there are some which are clearly more relevant to this study than others. These will now be considered in turn. Article 3, the prohibition of torture, stipulates that no one shall be subjected to torture (mental or physical) or to inhuman or degrading treatment

or punishment. This is an absolute right and it applies equally to the State and its agents. According to EHRC (2019) torture occurs when someone deliberately causes very serious and cruel suffering (physical or mental) to another person. Inhuman treatment or punishment is treatment which causes intense physical or mental suffering and degrading treatment involves treatment that is extremely humiliating and undignified (ibid). Factors such as the duration of the treatment, its physical or mental effects and the sex, age, vulnerability and health of the victim determine whether a treatment is considered as degrading (ibid).

Under article 4, the prohibition of slavery and forced labour stipulates that no one should be held in slavery or servitude or be required to perform forced or compulsory labour except in certain circumstances such as any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 or during conditional release from such detention.

Under article 5, the right to liberty and security, stipulates that no one shall be deprived of their liberty unless it is in accordance with a procedure prescribed by law such as the lawful detention of a person after conviction by a competent court, or the lawful arrest or detention of a person for noncompliance with the lawful order of a court.

Article 6, the right to a fair trial, stipulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It goes on to state that everyone charged with a criminal offence has the following minimum rights: to be presumed innocent until proven guilty according to law; to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them; to have adequate time and facilities for the preparation of their defence; to defend themselves in person or through legal assistance of their own choosing, or if they do not have sufficient means to pay for legal assistance, to be given it free; to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.

Article 8, the right to respect for private and family life, stipulates that everyone has the right to respect for their private and family life, their home and their correspondence. There are a number of restrictions to this right which include circumstances such as to prevent crime.

Article 14, the prohibition of discrimination, requires that all of the rights and freedoms set out in the Act must be protected and applied without discrimination. Discrimination occurs when a person is treated less favourably than another person in a similar situation and this treatment cannot be objectively and reasonably justified. The Human Rights Act makes it illegal to discriminate on a wide range of grounds including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or 'other status'. The case law relating to this right has shown that the term 'other status' includes sexual orientation, illegitimacy, marital status, trade union membership, transsexual status and imprisonment (EHRC, 2019).

Article 1, Protocol 1, the Protection of property, outlines that every natural or legal person is entitled to the peaceful enjoyment of their possessions and that no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law. However, this right should not impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

As aforementioned, a number of appeals against POCA have been brought on the grounds of Human Rights, it becomes apparent that many have been unsuccessful (See Rees et al., 2012; Ulph, 2010). However, this thesis aims to contextualise these rights within a collective and long-term understanding of the lived reality of the post-conviction confiscation punishment so as to understand whether human rights protections remain fit-for-purpose or whether they require urgent attention, so that they can remain viable in the ever-evolving nature of punishment.

3.4 - The Philosophies of Punishment: Retributivism and Reductivism

Key to the theoretical framework of this thesis is the literature which critically discusses the philosophies of punishment. Duff and Garland (1994) argue that philosophical accounts of punishment are ideal theories which outline what aims and values a system of punishment must embody for it to be a legitimated response to crime. As punishment involves the deliberate infliction of pain (Duff and Garland, 1994; Scott and Flynn, 2014; Scott, 2016a; 2018), such behaviours would be considered socially unacceptable if they were not conditioned and guided by a set of guiding principles that justify such a response. Historically, retributivism and reductivism as philosophies of punishment have continued to compete for dominance with each rationale enjoying ascendancy at different times. In terms of confiscation, in order to justify the introduction of these special powers, early policy was characterised by restorative overtones, as revealed in the previous chapter (Hodgson, 1984). However, both the retributive and reductivist philosophies feature much more prominently in more recent policy (PIU, 2000). Placed in its simplest form asset recovery is justified on retributive grounds on the basis that criminals should not benefit from crime and, therefore, the confiscation of assets is deserved, and on reductivist grounds in the sense that the purported crime control properties of confiscation law were said to be able to deter and incapacitate financially motivated crime. It will only be through engaging in an examination of the experience of these punishments that the impact upon those subject to them, and therefore the potential to deliver their justifications, can be understood. This is where this thesis sets out to make a valuable contribution to knowledge.

3.5 – Retributivism

The fundamental principle underlying retributivism is that wrongdoers should be punished because they are deserving of such in response to their wrongdoing (Hudson, 2003a). Such approaches are unreservedly backward-looking, focussing exclusively on the offence in question and culpability, choosing to ignore any mitigating or aggravating features (ibid). In this model punishment is

defensible as the offender deserves it; an offender should get their just deserts; if no crime is committed then no punishment is required (ibid). It is predicated on the classical notions of free-will and rational choice. It calls upon social contract theory that depicts that citizens, in return for certain rights, have an obligation to fulfil certain responsibilities which include the rule of law (Bingham, 2011). An act of criminality breaches this contract and in doing so disturbs the 'equilibrium' by gaining an unfair advantage over those who have abided by the rules. Therefore, from a retributivist perspective punishment restores the balance by cancelling out this advantage with a proportionate disadvantage (Boonin, 2008). Hudson (2003a) highlights the problematic nature of social contract theory on the basis that society is largely unequal to begin with, weakening theories that legitimise punishment on the basis of restoring an equilibrium.

Central to the just-deserts approach is that punishment should always be proportionate – the punishment should fit the crime - with a tariff system that allows for the offence, depending on its gravity, to be matched with a punishment that is commensurate (Von Hirsch, 1993). Underpinned by a fundamental principle of 'justice' in which both the offender and the victim have rights, it proposes that criminals should not be punished any more than the crimes are felt to deserve and, therefore, they have the right to go free once they have repaid their debt to society (ibid). Other rights which the offender is typically entitled to include the right to be treated with respect as an autonomous being; the right to remain silent; the right to be presumed innocent until proven otherwise; the right not to be treated unfairly or discriminatory treatment; and in the event of an abuse of process, the right to redress (Ashworth and Horder, 2013).

For Von Hirsch (1993: 2), the proportionality principle functions as a fairness-constraint which limits the pursuit of wider social goals, providing consistency and, therefore, 'comports with our intuitive sense of fairness'. Von Hirsch also argues that desert theory, with its notion of proportionality of sentence, will have appeal and feel more ethical and aligned with justice, in comparison to preventative penal strategies that allow punishment of crimes yet to be committed often under the

guise of treatment and prevention (ibid). Importantly, Von Hirsch argues that desert theory's guiding principle of proportionality is grounded in ideas of equity and does not claim to be able to impact on crime rates as crime rates are not typically sensitive to sentencing policy (ibid). He argues that being transparent about this helps to safeguard from the pressure to escalate punishments for preventative ends (ibid). However, Von Hirsch himself acknowledges the difficulty in constructing a system of punishment that aims to be proportionate in its meting out of punishment pointing out that, often, the duration of sentence (how long a custodial sentence, how much a fine is, how long an electronic curfew should be etc) is used to measure how punitive a punishment is with little understanding of the reality of what that punishment involves or deprives (ibid). He goes on to point out that the consequence of administering punishments blindly, without an understanding of what the actual effects of a punishment are, means that the punishment itself can create an injustice or disadvantage impacting on physical and mental health, family breakdown and even suicide, which he argues would be an infringement of the main guiding principle of just deserts - proportionality.

Hudson (2003a) is critical of the denunciation component of retributive sentencing arguing that public censure and its attached stigma provides punishment in itself and the sentence that follows then becomes an additional punishment, which is arguably a contradiction of just desert principles. She also highlights that the grounds in which desert-based sentencing are justified, parity in sentencing, may be problematic on the basis that it standardises punishment and in doing so it does not give the courts discretionary powers to punish persistent and dangerous offenders, to respond to waves of particular crime and to reduce sentences in special circumstances (ibid). Hudson also criticises desert-based sentencing because it fails to address the causes of crime. She goes on to point out that desert-based approaches in sentencing could prove illogical, inefficient and be a contributing factor in the commission of future offending by denying an individual the support they need to address the 'risks' linked to their offending. However, Von Hirsch (1993) acknowledges that socio-economic disadvantage is a major contributing factor to crime but defends desert theory on the basis that addressing such criminogenic factors is the role of intelligible social welfare measures and not criminal

justice legislation. Furthermore, he points out that in accepting that sentencing policy is ill-placed to address socio-economic disadvantage, a desert-based sentencing framework provides a fair, consistent and coherent approach that does not leave disadvantaged offenders worse off (ibid). He explains that by denying social factors which can blur culpability and risk, and sentencing based solely on the seriousness of the offence, this helps to ensure that those that would be perceived as presenting a greater risk by a reductivist approach, are not disproportionately punished under desert-based methods. However, the suggested 'neutrality of desert' is accused of being a false narrative by Hudson (1987) as she argues that indigent offenders are faced with disadvantages at all stages of the criminal process and their disadvantages should be off-set earlier on grounds of extenuation, urging a reliance on methods that avoid criminalisation rather than desert, a view shared by Scott (2018). She points out, therefore, that a just deserts approach is more likely to 'freeze in', rather than eliminate, socio-economic injustices and discriminative practices (Hudson, 1987: 114).

In a similar vein, Tonry (1994) points out that determining desert is an impossible task in an unjust society and a just deserts response fails to mitigate the socio-economic disadvantages that underpin much offending and the structural bias that exists within the CJS. He argues that sentencing predicated on proportionality will in fact exacerbate social injustice and 'further disadvantage the already disadvantaged', which often tends to be minority groups (ibid: 65). Importantly, Tonry also argues that desert-based approaches attach no significance to the collateral effects of a prison sentence on the offender especially when the offender has dependants such as children (ibid). He argues that:

surely it is morally relevant whether a particular punishment will be more intensively experienced by one person than another (ibid: 74).

Whilst the impact of parental imprisonment has received increasing attention over the last few decades (Mills and Codd, 2008; Dobson, 2015; Minson, 2017), there has been no literature written that discusses the effects of the confiscation punishment upon a defendant's children. Therefore, this is an important line of enquiry for this thesis.

As a result of the cumulative criticisms of desert theory, proponents of utilitarian approaches argue that proportionality-constraints should be relaxed for the sake of other objectives such as rehabilitation, incapacitation and deterrence (Hudson, 2003a).

3.6 - Reductivism

According to Garland (1985), the failures of the classicist approach to penalty by the late nineteenth century fuelled a growing dissension, providing an opportunity for the inauguration of penalty based on positivist criminology. He notes that positivism sought no compromise, revision or reform with classicism, instead it actively opposed it in its entirety (ibid). The conversion to positivist understandings of crime left concepts such as free-will, responsibility, guilt and uniformed punishment redundant alongside the impossible task of calibrating punishment proportionately. The foundations of positivism proposed that crime no longer lay in sin or in faulty reasoning but is an aberration or abnormality of the individual which demanded intervention and human transformation (Hudson, 2003a). Foucault (1977) points out that positivism, with its knowledge-power approach, was characterized by its desire to observe the individual, allowing for the collection of information concerning the individual and her/his criminality. This information would be collated to feed scientific knowledge which could then be applied by the penological apparatus in order to eliminate criminality.

Reductivist arguments propose that punishment is justified because it is a means to an end; the reduction of future crime via deterrence, incapacitation and rehabilitation. From a utilitarian perspective, punishment is justified if the harm that it prevents is greater than the harm in which it inflicts on the individual. Jeremy Bentham, the main proponent of utilitarianism, in recognition of punishment being an evil itself, argued that punishment should be used as sparingly as possible and he therefore propounded the principle of parsimony – penalties should be no more severe than they need to be in order to meet legitimate social purposes.

However, Hudson (2003b) is critical of both the foundations of utilitarianism and its ensuing practical realities as they do not:

offer adequate protection of each [and every] individual citizen against encroachments in the name of the good of society as a whole, or of the majority (ibid: xi).

Further, Murphy (1973) argues that utilitarianism under a Kantian lens is morally problematic because it justifies the punishment of an offender on the grounds of its desired social goals of incapacitation, deterrence or reform, which means that an offender is being used as a means to an end, seriously compromising the rights of the individual.

3.6.1 - Deterrence Based Punishment

An attractive justification for utilitarians is that punishing an offender will have a deterrent effect by inhibiting future criminality. Deterrence theory is underpinned by classical thought; an individual is a rational free actor and makes a choice on a particular course of action based on their calculus of pain and pleasure. Therefore, if the pain administered in response to wrongdoing is greater than the pleasure that they might realise from its commission, it is believed that one would be deterred from carrying out such a course of action: 'Pain and pleasure are the great springs of human action' (Bean 1981: 30). Von Hirsch et al. (2009) explain that there are three components that optimise deterrence: certainty, severity and celerity. If a potential offender believes that punishment is more than likely to follow a course of action 'sufficiently severe so as to prove aversive' and 'imposed sufficiently soon after the offence occurs' then he/she is more likely to be deterred from that course of action (ibid: 40).

Deterrence theorists distinguish between the two audiences that will be deterred, the individual who is deterred from reoffending (specific deterrence) and a general deterrence in terms of the wider public who observe the offender being punished. Hudson (2003a) points out that an integral component for the success of general deterrence is that a potential offender would need to have an

awareness of a punishment prior to the commission of an offence. How and where the deterrence message is conveyed in modern society is unclear. Historically, as Foucault (1977) points out, deterrence messages were conveyed via public spectacles of capital and corporal punishment. However, contemporary penalty relies on the mass media to convey its messages to the public and, as Duff and Garland (1994: 219) point out, the filtering and 'focusing efforts' of the media determine what messages are percolated and the result is often not one that reflects the punitive reality and depth of punishment, but a false depiction of punishment as being too lenient.

Under the doctrine of specific deterrence, criminal sanctions should make punished individuals less likely to reoffend, as Andenaes (1974) explains:

Prima facie, it seems natural to expect that the experience of punishment would tend to strengthen fear. The abstract threat of the law has come to life, and the offender visualizes the consequences more clearly than he did before.... Actual experience is much stronger than theoretical knowledge. (in Pogarsky and Piquero 2003: 97).

However, Pogarsky and Piquero (2003) conducted research into deterrence and identified a potential positive punishment effect that they refer to as 'resetting'. Their research indicated that sanction-certainty estimates were virtually identical among individuals at high risk of offending, regardless of whether they had previously been punished or not, which undermines specific deterrence claims. Furthermore, they did find evidence for resetting for low-risk subjects, which further undermines specific deterrence theory. They asserted that their 'resetting' theory is predicated on the idea that punishment invokes a decision-making bias known as the 'gambler's fallacy' in which punished offenders reset their future sanction certainty estimate, believing they would have to be 'exceedingly unlucky' to get caught again:

punished individuals may also believe that the occurrence of an exceedingly rare event makes its reoccurrence suddenly less likely. Under this view, individuals may believe a punishment experience helps insulate them from apprehension for subsequent offenses. The logic is simply "lightening never (or rarely) strikes twice." They therefore reduce their

sanction-certainty estimates following punishment, prompting them to offend more earnestly in the future (ibid: 96-100).³³

Hudson (2003a) highlights two moral objections often made by retributivists in terms of sentencing on deterrence grounds: it allows for disproportionate punishments not in parity to the harm caused by the offence and it punishes individuals for speculative crimes that 'may' take place in the future, which she argues is especially problematic because they may not go on to commit the suggested offences. She also morally objects to punishments based on general deterrence aspirations as it could be argued that a person is being excessively punished not for the crime that he/she has committed, or what they might go on to commit themselves in the future, but for the crime that someone else may commit in the future, a serious infringement of punishing principles and human rights (ibid).

Cavadino et al. (2013) also explain that the 'anti-deterrent' effects of criminalisation and punishment include the 'labelling effects' which stigmatize individuals and, in the process, make it more difficult for them to conform to a law-abiding life in the future. If the non-criminal lifestyle is closed to them because of a debilitating label, they argue that the criminal world is only too prepared to welcome them back. Whilst much of the confiscation literature is sceptical of the alleged deterrence properties of POCA (Bowles et al., 2005; Dorn and South 1990; Bullock and Lister, 2014; Levi and Osofsky, 1995), this theses aims to make a valuable contribution to this area of knowledge via the voices of those that the State claim will be deterred.

³³ Their research was limited to drink driving offenders and, therefore, their certainty perceptions and their findings may not necessary translate to other types of offences. Also, severity and celerity perceptions which may also affect an individual's sanction-certainty perceptions were not considered in their research.

3.6.2 - Incapacitative Aims

The second reductivist justification to be discussed is incapacitation. Policy rhetoric discusses how POCA can financially incapacitate offenders by confiscating their 'ill-gotten' gains and in doing so, prevent them from being reinvested into further illicit enterprise (PIU, 2000).

Incapacitation theory infers that offenders are prevented from committing further crimes by removing them from society and punishment is justified on the grounds of public protection. Historically, incapacitation has taken different formats including transportation, capital punishment, imprisonment and an increasing reliance on more technological methods such as electronic tagging. However, in discussing the effectiveness of incapacitation, Cavadino et al. (2013) argue that unless punishment takes the form of capital punishment, the 'incapacitative gain' is only temporary, especially as the current penal system is not geared-up to address the socio-economic disadvantages that underpins much offending. Cavadino et al. (2013) also highlight that even incarceration cannot pause some criminal trajectories, as some prisoners will continue to carry out criminal acts, such as thefts or assaults on other inmates and staff, or some prisoners will continue to run their criminal enterprise from inside prison. Critics of incapacitation also point out that locking up offenders does not necessarily solve the problem but will often create a vacuum of criminal opportunity, easily filled by a new generation of criminals waiting in the wings (ibid; Banks 2013).

The most common form of punishment imposed in the United Kingdom is the fine. In 2017, 75% of all offenders received a fine, equating to 896,611 offenders (MOJ, 2018b: 6). The fine has great appeal because it is an efficient form of punishment that places little burden on the taxpayer whilst simultaneously generating revenue. Whilst the UK experimented with the day-fine system in 1992, a system which set out to inflict a financial penalty that is proportionate to the gravity of the offence but also considered the socio-economic status of the offender, it was later abandoned for a 'fixed amount' system in which the court are able to raise or lower the amount imposed according to the

offender's means (Easton and Piper, 2016). This commitment to proportionality and equity in punishment was emphasised by the Sentencing Guidelines Council (2008: 148) who pointed out that:

The aim is for the fine to have an equal impact on offenders with different financial circumstances; it should be a hardship but should not force the offender below a reasonable 'subsistence' level. Normally a fine should be of an amount that is capable of being paid within 12 months though there may be exceptions to this.

Therefore, under this system it becomes apparent that the purpose of the fine is to impose a proportionate financial penalty rather than [financially] incapacitate, an important distinction from the stated aims of POCA which explicitly set out to financially incapacitate an offender so that no funds can be reinvested into further criminality (PIU, 2000). It is because of this noticeable deviation in sentencing practice within confiscation law that this thesis aims to understand the nature and extent of the alleged incapacitative effects of the post-conviction confiscation punishment.

3.6.3 - Rehabilitative Aims

As Robinson and Crow (2009) point out, rehabilitation sits within the positivistic doctrine of criminology which argues that biological, psychological or sociological forces are responsible for an individual's offending rather than free-will. Historically, the format which rehabilitation has taken has varied including regimes of solitude and reflection; religious reform; hard labour and discipline; education and training; and rehabilitation via treatment (both psychological and physical) (Garland, 1990). Rehabilitation is found to be attractive not only because, in true utilitarian spirit does it offer the 'greatest happiness to the greatest number of people', but because it is presented beneath a veneer of humanity by way of helping the individual to live a more honest, respectable and fulfilled life. Consequently, reform has been a constituent objective of penal ideology for over a century, at least in the rhetoric of reformers and officials, providing a 'sense of purpose and justification' that made punishment appear 'meaningful' (Garland, 1990: 6). As a result of the perceived legitimacy of rehabilitative pursuits it has allowed for offenders to be pathologized by 'experts' using a normalising

apparatus of inquiry which allowed for individualisation, classification and treatment that could ‘cure’ the individual (ibid). However, as Garland (2001) points out, indeterminate sentences that are longer than would have been justified under a retributive approach have been utilised under the guise of rehabilitation, with a need for the offender to ‘respond’ to their treatment in order for their sentence to conclude. Mathieson (2006), argues that the treatment model has led to disproportionate, extremely intrusive and onerous sentences that contravene human rights being passed in the name of rehabilitation. Therefore, despite the popular appeal of rehabilitation as a rationale for punishment, Garland (1990: 6) points out that since the 1970s, notions of rehabilitation have begun to be viewed as ‘problematic at best’ and ‘dangerous and unworkable at worst’.

More recently, rehabilitation has re-emerged as a political priority, with the coalition government announcing a ‘Rehabilitation Revolution’ when they were elected in 2010 and the subsequent publication of the Transforming Rehabilitation (MOJ, 2013) agenda in 2013. In a speech on prison reform in February 2016, David Cameron, then prime minister, stated that his government aimed to make prisons places of ‘positivity and reform – so that we can maximise the chances of people going straight when they come out’, and that they wanted to make prisons ‘places of care, not just punishment; where the environment is one of rehabilitation and mending lives’ (Cameron 2016). This benevolent rhetoric has been followed by a number of official documents that allege to place rehabilitation at the centre of penal policy (MOJ, 2016a, 2016b, 2018). However, this rhetoric fails to appreciate the incompatibility of rehabilitation with other penal objectives; take account of the calamity that has become the probation service (NAO, 2019); or, acknowledge the dilapidated state of the prison system which is compounded by squalid living conditions (HMCIP, 2019), a regime characterised by lack of meaningful activity, lack of staff resource, and unrepresented levels of violence, bullying, neglect, self-harm and suicide (Scott and Sim, 2018). The prison conditions have become so notoriously poor that in 2019 a Dutch court refused to extradite a British man back to the UK to face imprisonment on the basis that the prison conditions in the UK were considered so ‘inhumane’ and

‘degrading’, that they violated Article 3 of the ECHR³⁴ (Boffey, 2019). It is in light of these penal realities that Scott (2016a: 9) argues that:

despite the continuous rhetoric of “reform” and “rehabilitation”, pain infliction and suffering are the real products of the prison place.

As Scott (2008, 2016a, 2018) points out, the residual effects of punishment and the structural barriers faced upon release, greatly impede an ex-prisoner’s efforts to reintegrate back into society as they are denied the full reinstatement of their civil rights or access to equal opportunities that are enjoyed by other members of society, further eroding claims that ‘rehabilitation’ is a genuine penal objective. Therefore, rather than rehabilitate, being subject to State punishment is more likely to reproduce, and further entrench, the structural inequalities that are widely considered contributing factors as to why so many offenders transgress the law in the first place (ibid).

Further, ‘rehabilitative interventions’ are selective in who they are prescribed to with offences such as street crime, violence, burglary and drug offences being the target as opposed to the tailoring of interventions towards, war crimes, corporate crimes, fraud or tax evasion. The integrity of the State’s aspiration to support people making necessary life changes is further undermined in the knowledge that more than 118,000 offenders have taken part in rehabilitation programmes which do not have impact evaluations, with the potential for some of these programmes to increase the risk of reoffending (Transform Justice, 2019).

In a recent piece of research carried out by the PRT prisoner policy network, which consulted with over 1,250 people, many of which were serving prisoners, it was pointed out that rehabilitation as a penal objective is met with scepticism with one prisoner calling rehabilitation within prison as ‘superficial’, and another stating that ‘rehabilitation is the runt of the judiciary litter’ (Harriot, 2019).

³⁴ The prohibition of torture

Whilst the confiscation punishment has not been justified on grounds of rehabilitation, it is a punishment that is inflicted concurrent to the punishment for the predicate offence, of which it is likely that that punishment will purport to have 'rehabilitation' as one of its objectives. Therefore, understanding the impact of the confiscation punishment upon the experience of the original sentence is an important line of enquiry for this research.

3.6.4 - Desistance Theories

For the past few decades researchers, academics, policy makers and criminal justice practitioners have shifted their attention to understanding why and how some offenders desist from crime. As McNeill (2012) points out, the difference between rehabilitative and desistance approaches is that rehabilitative approaches target their interventions on factors that are linked to an individual's offending behaviour [or within the context of Feeley and Simon's (1992) work, interventions are targeted at managing their aggregate risk], whereas desistance approaches concentrate on factors linked to those which are evidenced to support a move away from offending (discussed below). Maruna (2006: 4) argues that, in order to support desistance society must begin to move beyond its perception that criminals are incorrigible and 'essentially flawed'.

Longitudinal studies based on the life course of offenders (see Glueck and Glueck, 1940; Farrington et al, 2006) have provided a valuable insight into the dynamics of desisting individuals. Subsequently, numerous desistance theories have been propagated over the years. For example, Glueck and Glueck (1937) argued that offenders tend to 'age-out' of crime (see also Goring, 1919). However, Maruna (1997: 3) critiques maturational theory on the basis that the age of criminal onset may be consistent (see Moffitt, 1993), but the age of desistance shows far greater diversity and, therefore, it 'fails to account for the considerable heterogeneity of development pathways'.

An area of desistance theory that is of interest to this thesis is Sampson and Laub's (1993) social bond theory. Their theory suggests that desistance is more likely to occur when an individual has a strong

emotional attachment to attaining and maintaining societal goals such as employment, marriage and parenthood. They argue that for a bond to be developed between an individual and society that is likely to support desistance, then the individual needs to believe that they can attain such social attachments via legitimate means. Their theory also suggests that when this bond is weakened or broken, offending is more likely to occur. However, as Maruna (1997) points out, despite there being much value in this account of desistance, its underpinning theory of change is limited by its incomplete explanation of a causal relationship between social attachments and desistance and its failure to recognise the importance of agency, which he argues is necessary for desistance to be achieved.

The importance of agency is evident in Maruna's (2006) work which suggests that, *inter alia*, developing a pro-social identity and self-efficacy is key for desistance. Fergus McNeill (2009) later developed a practice-based model of desistance which appears to recognise the importance of both Sampson and Laub's social bonds theory and Maruna's agentic theory. In McNeill's model he highlighted the importance for interventions and practitioners to support an offender in developing and deploying motivation, human capital and social capital (*ibid*).

As space will only allow for a cursory account of the desistance theories referred to above the idea here is to highlight the notion that by removing societal barriers to desistance, whilst simultaneously supporting an individual to develop pro-social attitudes and skills, increases the chances of a successful desistance transition (McNeill, 2009). Conversely, by creating barriers to desistance and reintegration that overwhelm an individual's emotional and practical capacity to desist from crime can derail the desistance process or lead to what Halsey et al. (2016) describe as 'F*ck it!' moments. This thesis, which sets out to understand the impact of POCA on a defendant and their family, recognises that the process of confiscation is experienced at a time when the individual may be negotiating personal change. Therefore, the importance of understanding the impact of POCA at this important and impressionable time is key to this research.

3.7 – Abolitionism

In identifying that the prison cannot be defended on either retributivists or reductivist grounds, Mathieson (2006: 141) describes it as a ‘fiasco’ that must be abolished in the same way that capital and corporal punishment (Foucault, 1977) have been abolished in the UK. From an abolitionist perspective ‘crime problems should be treated in the specific context in which they emerge, and reactions should be oriented towards reintegration rather than exclusion’ (Swaaningen, 2012: 1). For Sim (2012), State responses to crime [and social problems more generally], such as the wholesale use of the prison, reinforce dominant ideological constructions of crime, reproduce social divisions and distract attention away from crimes committed by the powerful, rather than address the issues linked to the offending directly. Therefore, an abolitionist perspective asserts that transgressions of the law should not be responded to by a system built on hurt, violence, suffering, deprivation, exclusion and death, but responded to by a system guided by the principles of inclusion, social justice, solidarity, equality, humanity, compassion and dignity (Scott, 2016a, 2018). Abolitionists are also weary of penal reform, as this tends to have a bolstering and legitimizing effect which, ironically, results in the perpetuation of human pain and suffering, rather than eradicating it (ibid).

This thesis, in revealing the ‘true’ character of the post-conviction confiscation punishment, will consider those findings within the context of the abolitionist perspective as a way to determine whether this new form of punishment is simply dysfunctional and whether its problems could be overcome by way of reform, or whether those problems are in reality more pervasive and entrenched, to the extent that this thesis is forced to call for the abolishment of the post-conviction confiscation punishment.

3.8 – Summary

As this chapter has shown, State punishment has become a powerful institution that on the surface is widely considered a necessary response to transgressions of the law. However, the format that

punishment takes, and the amount of punishment inflicted, is far more contentious. In presenting the literature that discusses the two main competing philosophies of punishment this chapter has highlighted their main tenets, their strengths and their weaknesses and this thesis, through the voices of the POCA'd, aims to understand which of these philosophies best account for the post-conviction confiscation punishment, and whether the call for its abolition needs to be considered.

Chapter Four: Methodology

4.1 - Introduction

This chapter will outline and explain my research design and the strategy that was adopted so as to meet the aims of this thesis, drawing upon methodological literature where relevant. It will include a discussion centred upon my positionality and what impact this had upon the research process. Additionally, a discussion will take place that details the research participant criteria and the methods adopted to identify suitable research participants. The methods used to capture, transcribe and analyse the data will then be discussed. The chapter will conclude with a discussion about the ethical considerations that were undertaken during this thesis and the underpinning principles that influenced them.

At times the term 'interview' will be used during the thesis, however, this is for the want of a better term. Interview fails to accurately describe the exchange that took place between the researcher and researched. The word 'interview' itself, for those individuals who have lived experience of criminal justice processes, tends to conjure up images of authority, particularly of the police. Although, the term 'conversation' feels less authoritarian, generally because power tends to be more equitable in a conversation than in an interview, this was also considered an inadequate description of the exchanges that took place during this study, because of my intentional abstention from verbally participating in the interview (as explained later in the chapter).

4.2 – Research Aims

As outlined in chapter one, the overall aim of this piece of exploratory research was to better understand the lived reality and the impact of the post-conviction punishment, upon both the defendant and their families, seeking subjective explanation and meaning rather than causality. As a by-product of achieving this overall aim, it is expected that a number of other more specific aims will

also be achieved that can aid this thesis in its attempts to enhance our existing knowledge of the confiscation punishment:

1. To critically examine the relationship between the aims of the legislation and the experience of implementation in reality
2. Explore what offences this legislation targets and who is it being used against.
3. To reignite a wider debate around the philosophies of punishment.

As an exploratory piece of research, a relatively wide and general approach, consistent with an inductive research strategy (Glaser and Strauss, 1967), has been adopted when setting these aims, allowing the data generated to guide the research, rather than the research guide the data. Therefore, with no set hypothesis to trajectory the research, this thesis is amenable to unveiling both suffering and flourishing, resilience and subjugation, in an attempt to understand how POCA influences the lives of those subjected to it.

4.3 – Social Constructionism

This thesis is underpinned by a social constructionist perspective. For Slater (2017: 1624) social constructionism asserts that ‘knowledge is social in origin’ and is not ‘predetermined by some natural order’. Our ontological and epistemological understandings of the world are shaped through our social, historical and cultural experiences which are constantly shifting through subject-object and subject-subject relations within the world (Crotty, 1998). For Crotty, culture is best seen as the source rather than the result of human thought and behaviour and it not only shapes the way in which we see things, but also the way in which we feel things, giving us a quite definite view of the world (ibid).

Whilst culture can provide freedoms and agency, it can also provide constraint:

We are born into a world of meaning. When we first see the world in a meaningful fashion, we are inevitably viewing it through the lenses bestowed upon us by our culture. Our culture brings things into view for us and endows them with meaning and, by the same token, leads us to ignore other things (Crotty, 1998: 54).

Importantly, social constructionism insists that we take a critical stance towards our taken-for-granted ways of understanding the world and ourselves:

It invites us to be critical of the idea that our observations of the world unproblematically yield its nature to us, to challenge the view that conventional knowledge is based upon objective, unbiased observation of the world (Burr, 2015: 2).

Burr also points out that a social constructionist perspective is critical of the classifications imposed upon objects, behaviours and people, as these are used to divide us socially, economically and politically (ibid). Knowledge, from a constructionist perspective, is always changing according to perception and experiences. The way in which human subjects make sense of objects is contingent upon variables such as their own interpretations, biographies, their own sense of the world, emotions, their reflexive capacity, and their own value system. Therefore, it refutes the idea that there is an objective truth waiting for the researcher to identify. However, as Crotty (1998) points out, whilst all meaningful reality from this perspective is socially constructed, there are shared conventionalities within those realities. It recognises that subjects and objects have limits, and these limits shape how we see things, interact with them and derive meaning from them and they are not, therefore, open to radical reinterpretation. In the context of the research, this study seeks to better understand whether there is a shared understanding of the confiscation punishment based upon the experiences of those who are subject to it.

This perspective also understands that, despite objects and social actions being socially constructed and influenced, they can have causal properties. However, because of the complexity of human-object relations, this makes it extremely difficult, if not impossible, for a specific causal link to be isolated. Therefore, this research proceeds on the basis that certain conditions set forth the realms of possibility, and it is these conditions which are of interest to this thesis, rather than claiming a direct causal link between, say, being subject to the confiscation punishment and reoffending.

4.3.1 - The 'View from Below'.

As already discussed, the public's understanding of confiscation is largely shaped, and constrained, by official discourse, whilst an understanding of its impact is virtually non-existent. Scraton and Chadwick (2012: 107), provide an explanation as to why such an epistemic void may exist:

Knowledge is derived and reproduced, historically and contemporaneously, in the structural relations of inequality and oppression that characterise established social orders (ibid).

In order to understand the 'true', as opposed to the ideological, impact of the confiscation punishment, it requires the voices of those that are subject to it to be heard. However, such voices tend to be suppressed through the State's institutions of power and domination, namely the prison and probation services (Scott, 2013a). For Anderson (2016), inflicting punishment and then denying those individuals a voice constitutes an inhumane act. Therefore, this research, in providing a platform for the 'view from below' (Scraton, 2007) to be heard, sets out to dig deep beneath the surface of appearances, probe and challenge, and in revealing how the confiscation system really works, it aims to deconstruct the prevailing narrative that curtails our understanding of the confiscation punishment.

4.4 – Positionality

Having defied the structural forces which tend to deny those with lived experience of the CJS a route to prosperity, and in securing a position as an associate university lecturer, I was aware that such an achievement came with a moral responsibility to use such a privileged platform to shape society's knowledge as to the reality of crime and punishment, and the injustices that characterize them. I quickly became aware that an epistemic deficit existed in relation to the confiscation punishment, particularly in regard to how it is experienced in reality, and that the best way to address this deficit would be to create a platform for the hidden voices of POCA to be heard.

My positionality within this research is fairly unique, not just because of my lived experience of POCA and position of privilege as a researcher, but also because I have held various criminal justice positions,

including working as a probation service officer, since choosing a life away from crime. Whilst all clearly different walks of life, in which most people will only experience one, they shape who I am today and how I see the world.

I was aware that having lived experience of the issues I was about to submerge myself in by way of research, presented both opportunities and risks; opportunities that I would endeavour to take advantage of, and risks which I would need to safeguard against. These will be discussed as this section of the chapter unfolds. Wakeman (2014) uses the term 'biographical congruence' to describe a shared background or experience between the research participants and the researcher. He points out that one of the advantages of having a biographical congruence is that it can offer the researcher a privileged position in the field in which the researcher has 'insider' knowledge yet 'outsider' status (ibid: 711).

One clear advantage of disclosing my lived experience with the research participants was that it authenticated my motives for undertaking the research whilst simultaneously helping to subjugate any potential suspicions that other researchers with an 'outsider' status can be faced with. It was thought that such suspicions would be more acute for those research participants who had been arrested as a result of covert police operations, as the residual effect can be a heightened sense of paranoia and an overall concern about self-incrimination. As Copes and Hochstetler (2010) explain, most ex/offenders perceive outsiders as possible snitches or undercover police and, therefore, alleviating such suspicions was considered crucial to accessing such individuals and key to breaking down self-preservation barriers that can influence the narratives conveyed. It was also thought that, if the majority of the research cohort accessed within this study were convicted of drug related offences, some of which under covert police operations, there was a heightened need to alleviate such suspicions. Therefore, in such circumstances, 'who' asks the questions can be as important as 'what' is asked (Greener, 2011).

Having a biographical congruence and breaking down any suspicions allowed for the trust and rapport building phase of the interview process to be expedited, which in turn maximised the opportunity for their narratives to be shared. Wakeman (2014) highlights that, a biographical congruence between researcher and researched can also provide a vantage point that is useful when making sense of the personal data shared, but the researcher should be of the understanding that lived experience does not directly equate to expertise; 'suffering a heart attack does not make one a cardiologist' (ibid: 715). This was considered important because it was foreseen that the research participants might form the conclusion that, the dual social identity of lived experience and being an academic researcher equates to being an 'expert' within this particular field and, therefore, the research participants only convey partial experiences thinking that the researcher knows the 'in-between' detail. Equally, as a researcher with a biographical congruence, I had to ensure that I did not accept taken-for-granted assumptions that a researcher without a biographical congruence might interrogate. Therefore, as a conscientious researcher, so as to encourage the research participants to provide full and detailed responses, it was necessary for me to act, at times, as if I did not know how things worked so that I was able to capture the whole picture and gain an insight into the logic behind their situated actions (Mills, 1940). Wakeman (2014: 711) describes such tactics as 'outsider naivety', a strategy that could appear disingenuous if it is not applied effectively, but is considered both necessary and important so as to minimise the interpretative space in which I would later have to work within when analysing the data. To do this required real-time reflexivity skills, being responsive to the research participants accounts and prompting further detail where necessary.

However, as Anderson (2016) points out, bearing witness to the injustice of others is not cost-free. I knew that engaging in research that could reveal human pain and hardship would, at times, test my resilience, especially because conducting this research was likely to resurface personal and traumatic experiences from my own confiscation experiences, experiences that continue to plague mine and my family's everyday lives. The strategy that I had developed over the years for coping with my on-going

confiscation ordeal was denial; try and forget that it is happening, and so undertaking this research project meant having to abandon that coping strategy, and in doing so increase my vulnerability.

An example of when the research tested my resilience was when the participants described their pains at receiving court letters threatening to send them back to prison if they failed to satisfy their order. The dredging of such memories, and the reminder that I could receive such a letter at any point, filled me with trepidation and affected my overall well-being for days and sometimes weeks. It was during the analysis stage of my research, that these fears became a reality and I received a confiscation letter from HMCTS. However, whilst deeply unsettling, receiving such a letter enabled me to draw on those emotions and thoughts as I analysed the narratives of my research participants. Wakeman (2014) argues that this biography-emotion intersection is advantageous when conducting social research allowing the researcher to get beyond the words conveyed.

A disadvantage of having lived experience of the area I was submerging myself into within my research was that I was not able to 'switch-off', escape and create a separation between 'work' and my personal life. Conducting research that elicited narratives of trauma and human pain from a punishment that I have, and will continue to experience, ensured that confiscation was at the forefront of my mind at all times. As Wakeman (2014: 715) highlights, there is potential in projects such as this for an increased focus upon the self, which can result in an increasingly isolated self.

However, as many aspects of the research participant's experiences resonated with my own experiences and traumas of the confiscation process, whilst emotionally unsettling to listen to accounts that detail human pain, perversely, it also had a cathartic benefit. Despondent and bewildered at the State's willingness to punish so punitively in defiance of my pro-social achievements, one of the residual effects for me was that I thought I was going insane, thinking that I was the only one experiencing this level of injustice. However, on listening to others share their similar experiences, selfishly, this had the effect of reassuring me that I was not insane, I was not the only one this was happening to.

4.5 - Qualitative Methods

As this is an exploratory piece of research it was felt that qualitative methods would be the most appropriate method to generate in-depth, rich (Bryman 2012) and contextualised data, that could open the 'black-box' of the confiscation punishment and reveal its true impact in a way in which quantitative methods could not. For example, quantitative methods might be able to provide a statistical record of how many people have lost their *houses* (bricks and mortar) through confiscation, but they would not be able to capture the qualitative impact of losing a *home*, a place where life-memories have been created. Furthermore, in order to move towards a full understanding of the impact of POCA this thesis also sets out to understand how people respond to the confiscation punishment, as criminal justice processes tend to greatly influence life trajectories in one way or another (Maruna, 2006), insights best served by way of qualitative methods.

4.5.1 - Narrative Methods

There were two main reasons as to why narrative approaches represented the most suitable choice of methods for this research. Firstly, because of my personal experience of POCA it was important to develop a method that would minimise, as much as possible, the capacity for me to steer the interview and introject. I understood that if I had chosen, say, semi-structured interviews I would have had a greater capacity to guide and influence the research in a way that was ordered according to my experience of the confiscation punishment. This was something that I consciously wanted to avoid as it was the research participants experiences that were central to this research, and it was thought that narrative methods would allow the research participant to become an active subject in their own story, rather than an object to be controlled by the researcher (Anderson, 2016). The second reason for choosing a narrative approach was that, in order to meet the aims of the research, such methods allow for a descriptive and contextualised understanding of the research participant's experiences to be revealed which, from a social constructionist perspective, was considered epistemologically essential:

Rather than stripping individuals of community and macro-historical context, narrative analysis can inform our understandings of cultural influence and the underlying sociostructural dynamics of a society (Maruna and Matravers, 2007: 431).

It was also felt that the open nature of such methods would allow for underlying issues of power, powerlessness and legitimacy to be exposed in ways that other methods may not, and these were considered key to developing a full understanding of the processes that underlie and drive the confiscation punishment. Other advantages of using narrative methods include the idea that they allow for a natural flow of conversation, and as a result they tend to produce a descriptive sequence of events that provide valuable insight and are also rich in emotive detail, allowing the reader to understand the thoughts and feelings that shape the way in which individuals respond to certain circumstances (Maruna, 2006).

However, we are not obliged to accept the person's account as an objective empirical fact about the events that occurred, rather that the narrative offers a valuable opportunity to 'find shape in the telling' (Anderson, 2016: 416). Instead of being 'perfect factual representations of history', narratives represent 'personal outlooks and theories of reality, not reality itself', an 'imaginative rendering' and a 'sort of mythmaking through which the past is reconstructed, edited and embellished in order to create a coherent plot and themes' (Maruna and Matravers, 2007: 431). In the context of this research, because many of the participants were still subject to the confiscation punishment, it was hoped that their narrative accounts, whilst providing a detailed insight into the lived reality of the confiscation punishment and how it is shaping their lives, could also reveal intention, as the individual tends to act in ways that are in fitting with their perception of reality (ibid). Understanding how the confiscation defendant responds to this punishment was considered of great importance to this study.

It was also understood that their narratives would be affected by variables beyond the control of any research approach, such as memory degradation:

We do not seem to store complete records of events that can be accessed intact. Instead our memories seem to be largely reconstructed; and our thoughts, feelings, and opinions at the time of recall can have a large impact on the nature of that reconstruction (Holmberg and Holmes, 1994 in Copes and Hochstetler, 2010: 58).

As this research was exploring the impact of State punishment, not just upon the defendant, but also upon their families, it was expected that this would involve a great deal of painful reflection and the research participants would, therefore, describe their experiences through emotive descriptions that illustrated the depth of their pain. Sayer (2011) argues that, despite the perceived threat to objectivity of such emotive reflections, values and emotions are vital in social research because they enable us to understand what matters to people, why they matter and how they shape reality. It was this level of rich detail and insight that this research sought.

Whilst narrative methods tend to take the shape of a conversation rather than an interview, a conversation still presents significant opportunity for researcher interjection as they unwittingly find themselves pulled into a discussion, a heightened risk when there is a biographical congruence between researcher and researched. Therefore, it was decided that additional measures were required to further minimise the risk of researcher influence. It was decided that adopting several of the guiding principles within Tom Wengraf's Biographical-Narrative Interpretative Methodology (BNIM hereafter) could help mitigate this risk, whilst also democratising the research process further by allowing the research participant to have autonomy as to the direction, depth and extent of the experiences they shared. This was considered an important principle of this research because, having been the researched party on many occasions myself, I knew the inherent dangers within the research process, in which the researched goes away from the exchange feeling exploited, disempowered, not listened to and, consequently, angry.

4.5.2 - Biographical-Narrative Interpretative Methodology (BNIM)

In order to guard against the risk of breaking into a conversation during the interview, in which unrestricted participation can lead to influence and structure, it was decided that some of the guiding principles and techniques contained within the BNIM may provide a potential solution (Wengraf, 2006). For example, BNIM uses what is called a Single Question Inducing Narrative (SQUIN) (ibid: 113). In essence, this requires the researcher to ask a single question 'designed to elicit the life-story of the informant as he or she chooses to tell it' (Wengraf, 2004: 4). The key is to then, for as long as possible, allow the research participant to maintain control over the interview maintaining the 'maximum of power asymmetry against yourself' and engage in a process of active listening (Wengraf, 2006: 113). The theory behind the SQUIN is that, by avoiding interruption of the interview with sequenced questions according to the order of the researcher's reality, the SQUIN allows for the gestalt of the narrative to be preserved. Although BNIM does allow for reassurance and prompts to be used they are to be of a non-directing nature.

During the pilot interview the SQUIN posed was, '*Tell me about your experience of punishment?*' The reason why such a wide question was posed was to see how quickly the discussion turned to POCA, providing some insight into how prominent they felt POCA was in the context of their wider experience of the CJS. However, in posing such a broad question, a surge of data related to the 'whole-life-histories' of the research participant was revealed, all of varying degrees of relevance, but difficult to manage when it came to the data processing and analysis stage. Therefore, it was decided that the SQUIN would need to be narrowed to, '*Tell me about your experience of POCA?*' This SQUIN allowed me to direct the narrative towards the POCA chapter of the research participant's lives, whilst still allowing them to draw in their wider biography as they felt necessary, this helped to make the data produced more manageable.

However, being able to apply this method strictly proved to be a challenge. Naturally, as the narratives unfolded, the urge to interject with narrative-related follow-up questions was at times unbearable. It

also became particularly hard to resist interjecting whenever there was an uncomfortable silence that pierced the interview. It is at this point during a BNIM interview where the researcher is expected to encourage the participant to continue without posing a direct question. For most participants it felt unnatural to be part of a unilateral interview, as they were constantly looking for reassurance and direction.

When the participant declares that they have nothing further to add, the first sub-session has then come to a natural end and the researcher is then able to proceed immediately to the second sub-session. In this second sub-session, questions can be asked by the researcher, but they must be narrative-pointed questions based on the topics raised by the research participant in the first sub-session, and asked using the words and the sequential order in which the research participants presented them in. Revisiting the topics identified in the first sub-session prompted the research participants to offer greater depth and explanation to these areas. Although BNIM does allow for a third sub-session to be used, in which narrative and non-narrative questions can be asked, it was decided that I would not do so as this would undermine the reasons as to why I adopted the BNIM in the first place. Of course, in failing to carry out the third sub-session an opportunity to pose questions directly related to the research aims were potentially missed. Although this was considered unfortunate, it was considered necessary to maintain the integrity of the research.

One of the greatest advantages of adopting such an open and non-interrogative approach to 'interviewing' is that the 'power' typically held by the researcher when conducting research is surrendered and handed over to the research participant. I felt this was important, after all, it is the research participant who possesses the commodity that is sought after; knowledge.

However, there were times when it was considered necessary to abandon the 'rigidness' of the BNIM approach during the interview because it proved too uncomfortable for the research participant, and as a result it was having a 'suffocating' effect upon the interview. This required me to be reflexive in real time, be responsive to cues and make decisions that were felt to best facilitate a productive but

also 'enjoyable' interview for the research participant. There were also times when I probed narrative-related questions in the moment rather than waiting for the second sub-session, which is advised against within BNIM, but it was felt necessary [and natural to do so] in that moment. The challenges that arose in using this model of interviewing were not considered to be a criticism of the methodology itself, quite the opposite, they were considered a reflection of my struggle to strictly apply them.

4.5.3 - Participant Criteria

The criteria for participating in the research was relatively simple; they must have been subject to POCA proceedings in the past or are currently subject to them or be a family member of somebody that has been/is currently subject to POCA proceedings. As this was an initial exploratory piece of research with a relatively broad remit to understand the impact of the confiscation punishment, no other restrictive criteria were applied. Although POCA defendants that were at the time in prison were not officially excluded from the research, it was decided that this research would focus its attention upon confiscation defendants that were not in prison. There are two reasons for this. Firstly, gaining access for research purposes within prisons is notoriously bureaucratic and difficult (Sim, 2009), especially for researchers with convictions:

an inherent problem in researching the powerful from the standpoints or experiences of the powerless is the discretionary use of institutional power to inhibit, or prohibit, access (Scruton, 2007: 11).

Secondly, it was felt that for those POCA defendants who were incarcerated, the immediacy of their POCA proceedings would limit their capacity to reflect, resulting in a set of results that were narrow. Instead it was thought that by targeting research participants who had completed their time in prison, with the passing of time, they would be better placed to provide a more complete account of their experiences, revealing both the short-term and the long-term effects of the confiscation punishment.

Again, although no limit was placed on how many research participants would be sought, it was decided that due to the abundance of data that tends to be generated when using narrative methods, a target of approximately twenty participants would be considered suffice. Whilst a quantitative perspective of social research views small research samples as an epistemic vulnerability (Denscombe, 2010), to meet the specific needs of this study it was felt that content was more important than quantity:

...it becomes apparent that the deep exploration into the life narrative(s) of a single individual can generate at least as much insight into offending as getting to know a little bit about 200 or 2000 human beings in a large-scale survey (Maruna and Matravers, 2007: 437).

4.5.4 - Identifying Research Participants

It was expected that identifying potential research participants may be difficult via official routes because those subject to a confiscation order are a hidden cohort within the penal system, reflected by the lack of official data that is recorded ([see FOI request – appendix B](#)). Therefore, a strategy was designed and adopted that involved me contacting a number of solicitor firms that specialised in the proceeds of crime to see if they could signpost any suitable and willing individuals to the research. Overall, this approach failed to generate the interest that was hoped for and it is not known whether the solicitors, acting as professional gatekeepers, decided that it was not in their client's best interests to take part in fear of self-incrimination. Despite planning in the initial research proposal to advertise the research in the prison newspaper, 'The Inside Times', it was decided that as most of its readership would be in prison, this approach was likely to generate (significant) interest from incarcerated POCA defendants, and as explained above, I wanted to avoid such interest.

I was aware that, despite my status as an 'insider', getting people to speak about their experiences could be difficult, especially as many of them were still under threat of further incarceration and subject to on-going financial scrutiny as a result of their confiscation punishment. Therefore, it was

decided that I would contact a few individuals from my criminal past that I knew had been subjected to POCA proceedings. I also reached out to my professional peers that I have worked alongside in various positions since coming out of prison. This proved to be very productive and several gatekeepers were identified that could negotiate my access to eligible research participants and they were also able to advocate on my behalf, so as to minimise suspicion from those research participants.

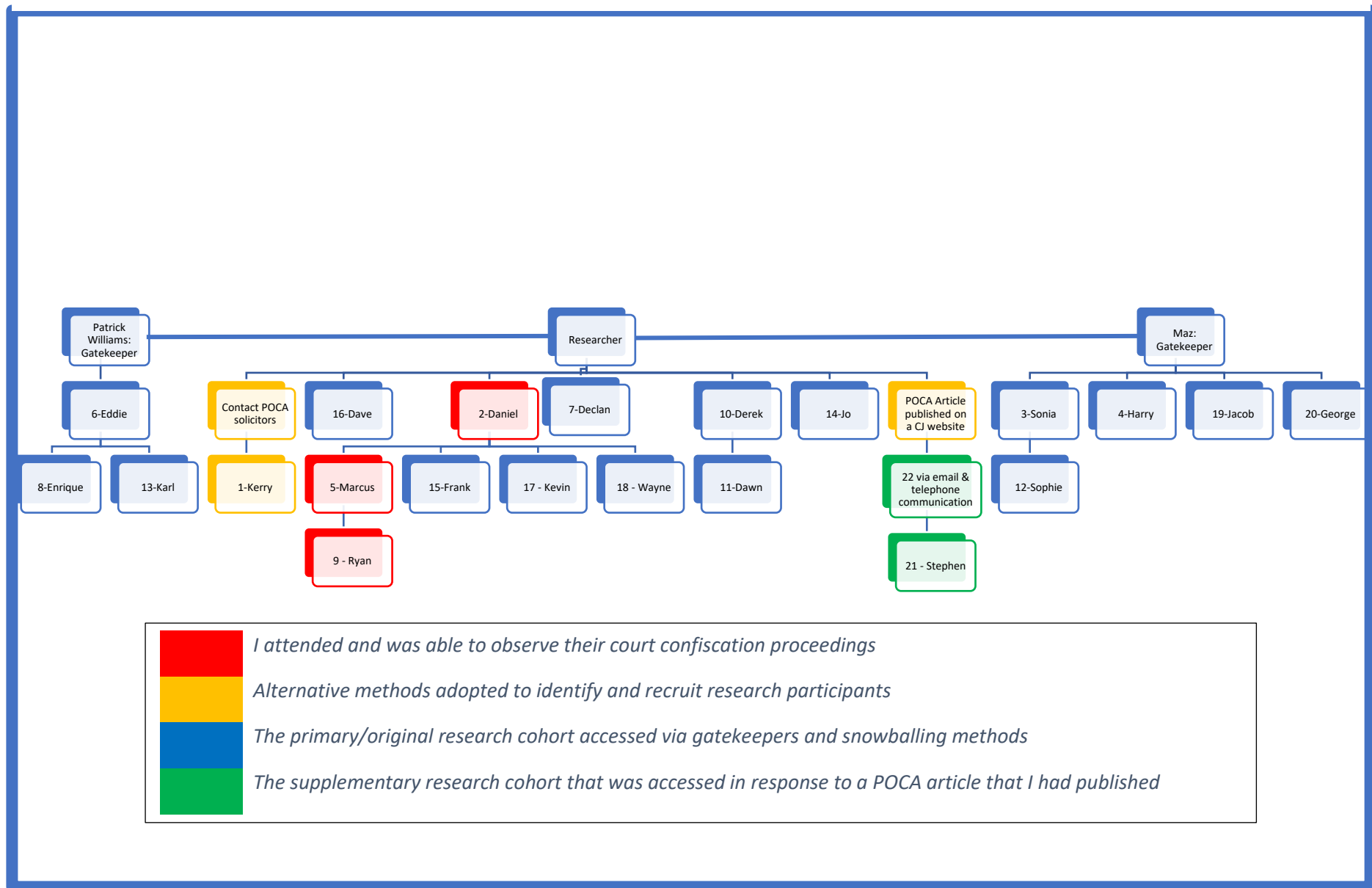
The remaining research participants were then identified via snowballing methods (Lewis-Beck et al., 2004) as most POCA defendants tend to know others who have been subject POCA proceedings. This is because many of the research participants stated that, due to the incompetence of their legal team, they were forced to seek advice from their peers on the prison landings and a POCA community was born out of this.

While snowballing methods enabled me to meet my research complement (Cohort 1 - N=21), further insight was provided in response to a POCA article that I had published on Russell Webster's³⁵ website (Cohort 2 - N=22). Although, there was no explicit request within this article for people to make contact, such was the level of interest aroused within the POCA community, many people felt compelled to share their experiences of POCA. As this took place outside of the official fieldwork phase of the research, and as they were geographically located across the country, it was beyond my capacity to visit these individuals in person and, therefore, apply the same level of in-depthness to these research participants as I was able to do so with the original cohort. Therefore, contact was made with these individuals by way of email and telephone communication. Although every confiscation case is unique in its experience, it was identified that these correspondences, generally, confirmed the existing themes that had been identified from the in-depth narrative interviews conducted within the original research cohort. Consequently, their experiences were not directly included within the finding's chapters or the tables of analysis illustrated below. However, it is

³⁵ Russell Webster's is one of the UK's leading criminal justice commentator's - <http://www.russellwebster.com/how-asset-confiscation-prevents-rehabilitation/>

accepted that, whether consciously or subconsciously, those communications will have been drawn upon when analysing the findings and writing up this thesis. The exception to this was in the case of Stephen (participant no 21) who was part of the supplementary cohort. It was decided that as his case offered a new insight, in terms of his offence (Environmental offence), that had failed to materialize in the original research cohort, then it was considered necessary to apply the same in-depth methods to his case that were applied to the original cohort. It is also hoped that these supplementary accounts will be a source of valuable data that can be called upon when producing future academic papers.

Figure 6 outlines how the research participants were identified



4.5.5 – Participant’s Profiles

As can be seen in Table 4, twenty-one people were interviewed as part of this research. However, as Daniel was interviewed on two further occasions this brings the total number of interviews to twenty-three. From those interviews, two of the research defendants were females who had been subjected to confiscation proceedings directly, with the remaining sixteen being confiscation orders imposed upon male offenders. Three of the research participants were family members (two wives and one sister), although the impact upon the family is widely discussed by the confiscation defendants also. Significantly, eighteen (86%) of the cases reported to have children either at the time their confiscation order was imposed, or since. Ten (48%) research participants revealed that they were either currently serving a default sentence or had already served one – this may have increased since the time of reporting as some participants were still in the early stages of the confiscation process. One of the research participants had absconded before the default sentence was activated – this would have increased the default percentage to 52%. Seven (33%) cases had reported being subject to asset-restraint proceedings. Twelve (57%) cases were reported as having confiscation figures which consisted of tainted gift or hidden asset assumptions as part of their calculations. The type of offence that led to the imposition of a confiscation order was overwhelmingly reported as being drugs related (fifteen – 71%), with four being for fraud (19%), one for armed robbery (5%) and one for failing to obtain an environmental waste permit (5%).

Table 4 – Confiscation related data for each of the research participants

| Name | Gender | Relationship | Children | Served or serving a Default Prison Sentence | Restraint procedures imposed | Hidden Assets or Tainted Gifts Included in the confiscation figures | Type of Offence which led to confiscation proceedings | Confiscation proceedings still on-going |
|-------------|--------|------------------------------------|----------|---|------------------------------|---|---|---|
| 1-Kerry | F | Wife of a Confiscation Defendant | ✓ | | ✓ | ✓ | Fraud | Y |
| 2-Daniel | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 3- Sonia | F | Sister of a Confiscation Defendant | ✓ | ✓ | ✓ | ✓ | Fraud | Y |
| 4- Harry | M | Confiscation Defendant | ✓ | | | | Fraud | Y |
| 5- Marcus | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 6- Eddie | M | Confiscation Defendant | ✓ | | | | Drugs | N |
| 7- Declan | M | Confiscation Defendant | ✓ | ✓ | ✓ | ✓ | Drugs | Y |
| 8- Enrique | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 9 – Ryan | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 10 – Derek | M | Confiscation Defendant | ✓ | Absconded | ✓ | ✓ | Drugs | Y |
| 11 – Dawn | F | Wife of a Confiscation Defendant | ✓ | | ✓ | ✓ | Drugs | Y |
| 12 – Sophie | F | Confiscation Defendant | | | ✓ | | Drugs | Y |

| | | | | | | | | |
|--------------|-----------------|--|-----|-----|-----|-----|---|----------------------------|
| 13 - Karl | M | Confiscation Defendant | ✓ | | | | Drugs | N |
| 14-Jo | F | Confiscation Defendant | ✓ | | | | Drugs | Y |
| 15 - Frank | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 16 – Dave | M | Confiscation Defendant | ✓ | ✓ | | | Drugs | Y |
| 17 – Kevin | M | Confiscation Defendant | ✓ | ✓ | | ✓ | Drugs | Y |
| 18 – Wayne | M | Confiscation Defendant | | | | ✓ | Drugs | Y |
| 19 – Jacob | M | Confiscation Defendant | ✓ | | | | Fraud | Y |
| 20 – George | M | Convicted of armed robbery prior to the widespread use of confiscation law | | | | | Armed Robbery | N |
| 21 - Stephen | M | Confiscation Defendant | ✓ | ✓ | ✓ | | Failing to Obtain an Environmental Waste Permit | Y |
| Total | 5 x F 16 x M | | 86% | 48% | 33% | 57% | Drugs = 71% Fraud= 19% Armed Robbery = 5% Environmental crime = 5% | 90% of cases still ongoing |

Also, of significance was that eighteen of the twenty confiscation cases³⁶ discussed were said to be still on-going (90%). This consists of cases in which the defendant has failed to satisfy the available amount but also includes cases in which the defendant has successfully managed to satisfy the available amount figure, however, their benefit figure remains outstanding. Just two of the cases reported their confiscation case to be completed. However, it was not known if this was accurate because they were unsure as to whether they still had a benefit figure still outstanding - a theme that will be discussed in greater detail within the findings chapter is that there was uncertainty as to the difference of the two confiscation figures (benefit and available amount), with many participants stating that they did not actually know the difference between them and how much both figures exactly were. One of the interviewees reported that, despite committing a financially motivated offence, he had not been subject to confiscation proceedings because his offence took place prior to the widespread application of confiscation law. Even in the case in which the defendant was no longer alive, it was understood that the confiscation proceedings were continuing as the courts were seeking to recover the assets from his estate.

³⁶ George's offence took place prior to confiscation legislation

Figure 7 – Participant Data

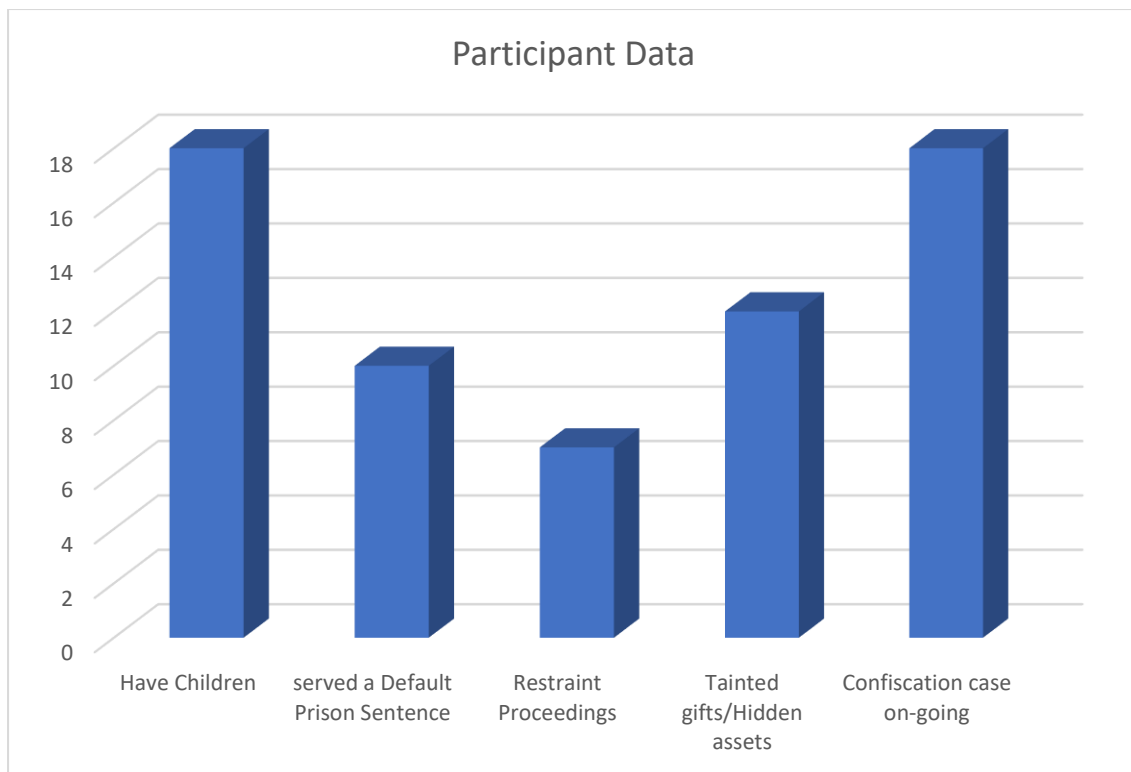
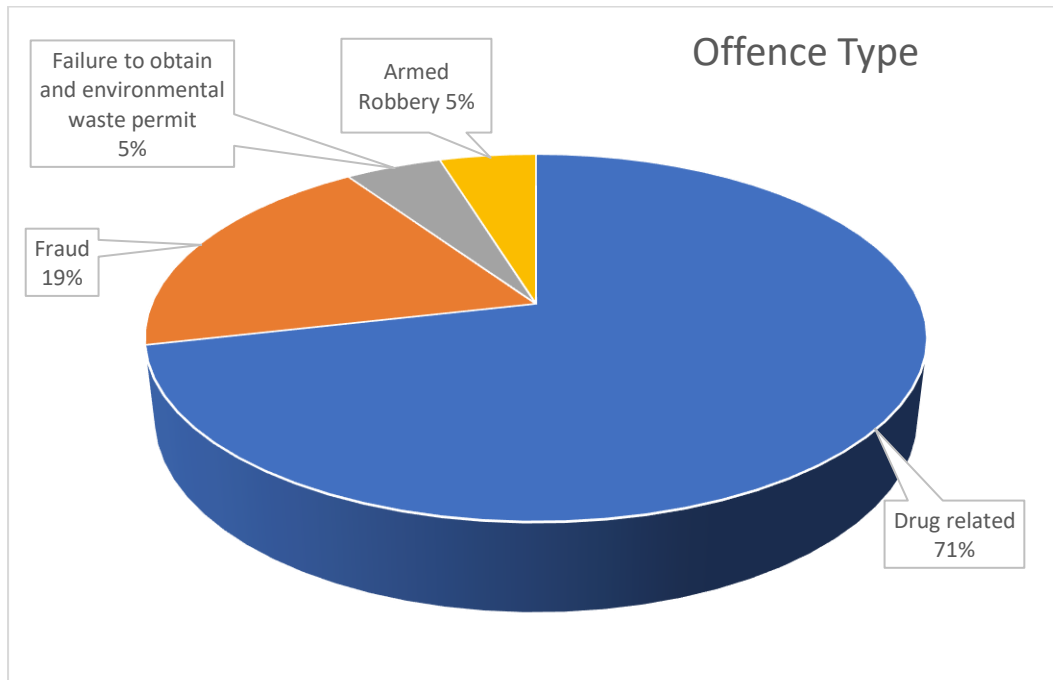


Figure 8 illustrates the offence types which led to confiscation proceedings being initiated



4.5.6 - Interview Setting

The setting in which an interview takes place is said to play a pivotal role in the construction of knowledge which can either facilitate or hinder the extent and quality of the data generated (Herzog, 2012). Seidman (1991) highlights the kind of factors that need to be considered when selecting a suitable interview setting:

The place of the interview should be convenient to the participant, private, yet if at all possible, familiar to him or her. It should be one in which the participant feels comfortable and secure. A public place such as a cafeteria or a coffee shop may seem convenient, but the noise, lack of privacy, and the likelihood of the interview's becoming an event for others to comment upon undermine the effectiveness of such a place for interviews (in Herzog, 2012: 209).

The research participants that agreed to take part in the research were geographically located in various places across the UK. This meant that their local knowledge of the area was greater than mine and so I empowered them to choose a place where the interview could take place. This was considered important so that the interview took place on their terms, in a setting that was likely to make them feel more comfortable and, therefore, facilitate 'deep disclosure' (Gubrium, and Holstein, 2001: 57). Most interviews took place in their homes, although two took place in their workplace, two in a coffee shop, one in a gym [which he owned] and one in a barbershop [which he seemed to own]. Although, every attempt was made to avoid conducting the interviews in a social setting, it was not always possible. Some of the research participants could not use their home because they did not want to do the interview in the presence of their family. It is also expected that some of them may not have felt comfortable allowing a complete stranger into their homes, which is a perfectly good reason, regardless of whether it was explicitly stated to be the case.

4.5.7 - Data Collection and Recording

The data from the first cohort of research participants (N=21) was generated by way of narrative 'interviews' using BNIM. Whenever possible I conducted the interviews face-to-face, however, on three occasions this was not possible due to unforeseen reasons on the research participant's behalf and so the interviews were conducted over the telephone. Despite being apprehensive about conducting some of the interviews over the telephone, as I thought this might cause a disconnect between the researcher and the participant, this turned out not to be the case. Conversely, these interviews turned out to be some of the most productive interviews of the research. This may have been because the formality of face-to-face interviews can be unsettling for some people as it evokes, often unpleasant, memories of formal interviews with systems of authority. I also found it easier during the telephone interviews to resist the compelling temptation to inject when moments of silent awkwardness arose, a by-product of using the [SQUIN approach of BNIM](#). Another advantage of conducting telephone interviews was that it enabled me to conceal my emotions more easily as research participants shared in-depth accounts of their enduring pains and hardships, pains and hardships that resonated with my own experiences of POCA.

As a result of being the researched on a number of occasions myself, a recognition of the power imbalances aroused when conducting research interviews encouraged me to deformatize the process and place the research participants at ease. This was done by sharing my past with them and restating the aims and objectives of the research; this acted as a kind of icebreaker that got the 'juices flowing'. Care was taken not to reveal too much detail about my POCA experiences, but to offer them enough so as to develop a bond. It was felt that too much detail may lead or influence their responses; the purpose of this research was to excavate their POCA stories, not reinforce mine. Although a tricky

objective to achieve as they were naturally inquisitive. Therefore, being transparent with them about the epistemic reasons as to why I was refraining from revealing too much detail enabled them to understand. I also advised that we could hold a more open and in-depth conversation about my experiences after the interview was completed.

The interviews ranged from one to two and a half hours in length, determined largely by the extent of their experiences and their ability or willingness to convey it during the interview. This produced a vast amount of qualitative data to be transcribed and thematically analysed. Interviews were tape-recorded as it was felt that extensive note taking may disrupt the natural flow of the interview and be a distraction for both parties. However, in order to capture contextual data, I decided that it would be necessary to make some notes during the interview, particularly in regard to non-verbal data (e.g.- body language, facial expressions, tone etc), emotions and reactions. One of the biggest advantages of using a voice recorder to capture the respondent's data is that it provided me with an unlimited opportunity to revisit the interview. However, tape recorders can be viewed as a tool of power as they tend to be used by people who hold positions of authority, which can have an unnerving effect. This is heightened when conducting research with those with lived experience of the CJS, as most of them will have been tape recorded during police interview and potentially had those conversations used against them in court. Therefore, the researcher felt it vital to ensure that the participants were comfortable with having the interview recorded so as to not inhibit free expression. To minimise the above threat further, the researcher reassured the participants the reasons for recording the discussion, reassured them of the confidentiality agreement and also advised them that they could at any time terminate the interview or switch the recorder off (Bryman, 2012). They were also advised that once the research project was completed and had been written-up, the tape recordings would be deleted.

A dilemma faced whilst conducting the interviews was whether to keep the tape-recorder on after the formal part of the interview was concluded. As research participants tend to relax when the tape recorder is switched off, they often open-up about things that may be of relevance to the research. Despite the value in capturing such data it was decided that it could be perceived as deceitful as this is a grey area in terms of consent, and the desire to capture such data, should not come at the cost of the integrity of the research. Therefore, the tape recorder was switched off at the end of the interview and the research participant made aware of this. If during the closing pleasantries further detail was offered that was of relevance to the research, then I asked the research participant for permission to put the tape recorder back on again and talk to the issues that they had raised.

After the interview I captured other information that a voice recorder is unable to capture such as: how the interview went; interviewee's appearance, attitude, emotional state, compliance, facial expressions, and agitations; and, where the interview took place and its suitability.

Additionally, contact was maintained with several of the research participants throughout the fieldwork phase of the project allowing for any confiscation related developments and any confiscation related documents (such as court letters) to be shared. For one of the cases, Daniel, I was able to conduct two follow-up interviews over a two-year period and engage in numerous telephone conversation so that I could capture his case developments. I was also able to observe one of Daniel's confiscation court proceedings.

The data from the second cohort (N=22) was generated by way of email and telephone correspondence. Whilst there are potential disadvantages to conducting telephone interviews (impersonal, absence of visual cues which could compromise rapport) there are also advantages (both parties felt more relaxed) (Novick, 2008). As aforementioned, I found no real disadvantage to using

telephone methods and some of the interviews conducted over the telephone turned out to be some of the most productive, an outcome consistent with Farooq and De Villiers's (2017) findings on the suitability of using telephone methods for qualitative research.

As the second cohort contacted me in response to an online article that I had published that discussed the emerging findings from this research, they were getting in touch and sharing their experiences completely of their own volition. Some continued the dialogue by way of providing a telephone number and those that did not suggested to me that they were more comfortable communicating by way of e-mail. Whilst time-consuming and, therefore, inefficient, e-mail communication provided some significant advantages. For example, having the time to reflect on what was being written before clicking the send button sometimes meant that the experiences they conveyed were more considered. Also, e-mail interviewing allowed significant flexibility; the 'conversation' could take place at a time [and place] suitable to the person sending the e-mail, with the same flexibility being afforded to the researcher. This took the formality out of the research process. From a researcher's perspective, one advantage of e-mail communication was that in having the data in written format, the quotes could be extracted in absolute verbatim. Therefore, overall, e-mail communication as a form of interviewing was considered beneficial, a finding consistent with Burns's (2010: 1) assertion:

Current indications are that emergent media technologies such as email interviews, like other new media innovations, do not diminish older forms, but rather enrich the array of investigatory tools available for social research today.

These methods of data collection were also complimented by way of court observations.

3.5.9.a - Ethnography

Whilst the majority of the research data was generated by way of interviews, this data was complemented by data captured when observing four separate confiscation-proceedings in court. It was felt that seeing the punishment being administered in real-time, would allow me to become immersed within the reality of the POCA court setting and capture the significance of the wider contextual environment, and the various actors as they performed their duties, and in doing so enhance this research considerably (Greener, 2011). It enabled me to listen to the language being used, observe the power relations between court officials and the defendant and, importantly, observe the impact of POCA proceedings upon the defendant and their families. Although, these observations offered invaluable insight, it was at times distressing to stand shoulder-to-shoulder with the defendants and their families and witness the pain, confusion, frustrations, hopelessness, uncertainty, disempowerment, exclusion and tyranny of what took place. I felt the emotions as they felt them, as those fears and emotions were 'banked' deep within my memory from when I had once stood in the dock awaiting the decision of my confiscation trial.

4.5.8 – Data Processing and Analysis

It was decided that on completion of each interview I would immediately revisit the tape recordings, enabling me to listen out for important detail that I may have missed in the interview and make further notes accordingly. As some of the interviews took place at places which were geographically distant, this provided an opportunity for me to listen to the tape recordings on the journey home in the car. By listening to the narratives several times and then transcribing them, I felt a connection with the data so much so that I could hear the accent and visualise their individual mannerisms whenever I

read their narratives back. It is widely known that narrative methods tend to produce an abundance of unstructured data which is resource-intensive when it comes to transcription, analysis and thematising, but this is offset by the depth, richness and spontaneity of the data (Chamberlain, 2013).

Each interview was transcribed verbatim in an attempt to capture the research participant's idiosyncrasies, which can allow the researcher to look for patterns in behaviour when the research participant is discussing particular areas of their narrative, when they are trying to make sense of things for themselves or when they are linking events in their lives. Often these can be marked by various body movements, emotional states, the speed in which they speak and the tone. As Kvale (1996) aptly notes, transcripts are decontextualized conversations and so, wherever possible, it was considered important to furnish those transcripts with the data captured by way of notes – body language, emotions, facial expressions, laughter etc. Each interview was transcribed immediately after it was captured, whether this was the same day or the next, whilst the interview was still fresh in my memory. Although transcription of such vast amounts of data is particularly laborious and time-consuming, the value of undertaking this task myself was that it enabled me to begin the process of thematic analysis at the point of transcription, identifying emerging themes and copying and pasting selected quotes according to these themes in a separate word document organised according to the emerging themes. The advantage of beginning the thematic process at this stage was that it meant that the data could be processed gradually, in smaller and more manageable amounts, rather than waiting till the end of the fieldwork phase and then trying to wade through the mass data that was generated through the twenty-one narrative interviews and situated over hundreds of thousands of words. In transcribing the data myself, it also enabled me to become immersed within the data, forming a connection with the data that would be difficult to achieve otherwise. In terms of research integrity, it also felt appropriate that this task should be undertaken by myself, as I was the one who

had carried out the research interviews and, therefore, I knew the relevance and the temporal significance of the notes that had been taken during the interview. It was also considered unethical to ask the research participants to give up their time to share [often painful] experiences, and then for me to not reciprocate with the same level of integrity by not transcribing their interviews myself.

The research data was analysed using thematic analysis methods (Braun and Clarke, 2006). It was considered a huge hermeneutic responsibility to interpret their experiences well and present the findings in a well-formed thesis that could begin to challenge the stranglehold that those in power have over society's understanding of the confiscation process.

When analysing the data, I iteratively revisited both the auditory accounts and the transcriptions for data re-familiarisation purposes helping me to identify patterns, salient issues, the frequency of terms used and understand turns of phrase (ibid). This helped to confirm the themes that were identified at the transcription phase and identify any new ones that I may have overlooked. However, in developing the themes it was important to make sure that the interdependent relationship between themes was not lost, as the relationship between themes was considered key to making sense of the cumulative effects of the confiscation punishment and the reality of how it is experienced by the defendant.

At times, it was necessary to delve beneath the spoken words in search of hidden meaning, interrogating the data beyond the semantic (Braun and Clarke, 2006: 84):

A thematic analysis at the latent level goes beyond the semantic content of the data, and starts to identify or examine the underlying ideas, assumptions, and conceptualisations – and ideologies – that are theorised as shaping or informing the semantic content of the data.

Of course, in doing so this increases the interpretive space in which the researcher can impose their own perspective on the data, a potentially heightened threat to the validity of the data due to my

biographical congruence. Rather than this be concealed, this is explicitly acknowledged here, and in [section 4.8](#) of this chapter it will be defended by way of a counter-argument which demonstrates that, rather than it be perceived as a threat, it should be perceived as an epistemic advantage.

Furthermore, the fieldnotes taken from the court observations and the data generated by the second research cohort (emails and telephone conversations) were also drawn upon to aid me in the analysis stage.

There were several processes that greatly enhanced this research by forcing me to explore deeper within my interpretation of the data. One of those processes was through supervision, as each time I submitted a version of the finding's chapter, my supervision team challenged me and offered me potential alternative interpretations that they had formed from their standpoint. This was an effective strategy that helped to make me aware of alternative perspectives that I may have been 'blinded' to because of my closeness to the subject area. The second process was by attending various asset recovery and money laundering conferences. As the speakers at such events were 'experts' within this field and the conferences were attended by law enforcement, legal practitioners, financial investigators, policy makers, NCA agents and Home Office officials, this allowed me to access alternative insights and explanations to phenomenon that I was unveiling and analysing within my data. The third process was by writing a chapter based upon some of the emergent findings from my research, that was to be published in a book which focussed upon asset recovery and money laundering legislation. As a result of these three processes, I was able to continually refine and question my own understanding of the data, unveil 'granular detail' that I had previously overlooked and, subsequently, by creating a more nuanced understanding of what was going on within the data, my overall understanding of the data was enhanced (Greener, 2011: 94).

One of the biggest dilemmas I faced was deciding how best to present the data. As the word count constraint for the thesis would not allow for all case studies to be presented, this would have meant having to choose between case studies as to which ones to use and which ones would be left out. Such a prospect was felt to be disrespectful, since each of the participants had been kind enough to let me intrude into their lives whilst they shared their painful confiscation experiences with me, and to not reciprocate that generosity by making sure all their voices were heard would be unethical. Therefore, in order to overcome this dilemma, it was decided that the themes identified within the analysis, would be presented in chronological order according to when (what stage within their wider punishment experience) they were said to impact upon the research participants and their family's lives.

In terms of presenting the findings, it was necessary to identify, extract and abridge the core elements of each testimony (Scraton, 2007). Consequently, the findings chapters would be extract-heavy, so as to allow the reader the opportunity to analyse those extracts for themselves and, in turn, this would then enable the reader to contest or reformulate alternative interpretations of the research participant's experiences. Selecting whose and which extracts to use was a difficult process overcome by a combination of intuition and a selection process guided by the aims of the thesis.

One of the most significant problems of using written language to convey real-life impact and hardship is that it becomes difficult to reflect the emotion and pain conveyed during the interview. Words can dehumanize or objectify the pain experienced. As an attempt to overcome this, wherever possible, when writing-up the findings and discussing them in the final chapter, I adopted psychosocial descriptive methods which revealed the interrelation of social factors, individual thoughts and behaviours (Maruna and Matravers, 2007: 430). This enabled me to contextualise their experiences

further by linking the research themes identified to important factors which can influence how the defendant experiences and responds to their confiscation punishment. Understanding an event or experience in isolation fails to recognise the reality of how the confiscation punishment is experienced. This was made more difficult because of the complexity of confiscation legislation with its various interconnected provisions that were said to have causal properties. Therefore, at times this meant repeating previously discussed themes, but this was considered a necessary consequence of reflecting the participant's lived reality and sharing that with the reader.

4.6 – Positioning the Participant's Accounts

In order to ensure that the confiscation defendant's experiences were not taken out of context it was felt that the findings of this thesis need to be analysed and understood within the contextual reality in which their experiences were conditioned. Their responses to the confiscation punishment did not just occur on a physical plain. They were intertwined, influenced and strained with thoughts and emotions. They will have been influenced by intuition and learnt behaviours consistent with an offender's/prisoner's sub-cultural norms. As Box (1987: 29) points out:

Although people choose to act, sometimes criminally, they do not do so under conditions of their own choosing. Their choices make them responsible, but the conditions make their choices comprehensible. These conditions, social and economic, contribute to crime because they constrain, limit or narrow the choices available. Many of us, in similar circumstances, might choose the same course of action.

According to Popper (1945), in order to explain social action what we need is a detailed understanding of the situation in which social action takes place (in Hedström et al., 1998). He goes on to explain that objective understanding, or situational logic, 'consists in realizing that the action was objectively appropriate to the situation' (ibid: 347). Similarly, Mannheim (1940) argues that 'both motives and

actions very often originate not from within but from the situation in which individuals find themselves (in Mills, 1940: 906). Therefore, it is important to try and understand the research participants responses from the position in which these individuals are situated, not from the decontextualized and privileged position to which the reader may benefit. The reader, therefore, is urged to consider each theme or each explanation of the confiscation process and its various provisions within the context of the wider emergent findings that will be presented over the course of the two findings chapters, which were said to have a cumulative effect. Considering the findings in isolation risks distorting the reality in which they are experienced.

4.7 - Ethical Considerations

Scruton (2007) explains that the purpose of ethical codes in social research as being the guidelines that detail the researchers' responsibilities towards those whom they research, designed to safeguard against physical, social and psychological harm of the researched. However, as Scruton also points out, the impact of the research process cannot always be predicted as 'revisiting deeply sensitive issues is always an emotional, and often painful, experience', especially when such issues have been purposefully buried (ibid: 15-16). Therefore, ethics sometimes become situated and have to be responded to in real time as situations arise. Due to the exceptionally open methods adopted for this research this meant that I had less control over the direction of the interview, which in terms of ethics, reduced my ability to steer the direction of the interview according to the emotional cues that were observed (Mason, 2002). Therefore, it was imperative that I had a good ethics strategy, which was reinforced by common sense and instinctual benevolent principles.

The ethical strategy applied within this study was influenced by the six Economic and Social Research Council principles (2005 in Greener, 2011: 145) which are as follows: 1) research should be designed,

reviewed and undertaken to ensure integrity and quality; 2) research subjects must be informed fully about the purpose, methods and intended possible uses of the research, what their participation in the research entails and what risks, if any, are involved; 3) the confidentiality of information supplied by research subjects and the anonymity of respondents must be respected; 4) research participants must participate in a voluntary way, free from any coercion; 5) harm to research participants must be avoided; 6) The independence of research must be clear and any conflicts of interest or partiality must be explicit.

The first ESRC principle was addressed initially by way of the university's rigorous ethics procedures and was actively reviewed by myself throughout the research and during supervision meetings. The sixth ESRC principle has been addressed and explained throughout this thesis, in which I have offered complete transparency about my lived experience of the confiscation punishment. How this research addressed the remaining principles will be explained as we proceed through the remainder of this chapter.

Principle five – minimizing harm, was addressed in a number of ways. Asking research participants to share and relive past experiences of punishment, resurfacing traumatic memories and recirculating negative emotions, can be akin to 'picking at a scabs or a wound'; for some it can be cathartic and for others it can bring deep sadness, regret and depressive thoughts and feelings. Therefore, I hoped for the former and prepared for the latter.

As this study involved investigating the impact of State punishment upon the defendant but also upon their families, it was foreseeable that such reflections are likely to be characterised by anger, despair, and human suffering. Therefore, I felt a personal obligation to manage any distress caused to the participants as adding to their pains by engaging with the research was considered to be both

antithetical to my personal values and to the implicit aims of the research. It was considered important because in having an unpleasant research experience, whether this be by way of dredging up painful memories or as a result of feeling exploited, this could affect their well-being, but it could also have the effect of putting them off participating in future research. Rather, it was hoped that the participants would experience therapeutic value from the opportunity to discuss their experiences. For Jacob (research participant), he found comfort in being able to finally speak to someone about his experiences:

I have found that there are not many people that I could speak to about this because nobody really gets it, err, they don't understand it, so to be able to talk about it has been useful.

As this research set out with true equipoise intent, to receive such feedback was considered an achievement in itself.

It became obvious early in the research that there was a need to manage the participant's expectations in terms of what the research could potentially achieve. For many of the participants, such was their sense of despair and desperation, somebody finally taking an interest in their confiscation order provided them with hope. For example, Daniel at the end of one of his interviews stated, *'Do you think it's going to get scrapped?'* It was at that moment that the enormity of what was expected of me hit me; writing a good thesis in itself would not suffice and, therefore, disseminating the results in ways that could challenge the status-quo would be considered equally as important. However, in order to manage the expectations of the participants, I had to be honest with them, whilst at the same time not 'confiscate' the glimmer of hope that taking part in the research had given them. This involved explaining to them that all change begins with discourse and enlightenment, and, therefore, this thesis provided a platform for their voices to be heard. However, I also advised them that history has shown us that taking on the establishment is a long, arduous and

demoralizing 'David and Goliath' uphill battle, that is designed to deter, intimidate and prevent justice from prevailing. However, it can be achieved, calling upon the Hillsborough justice campaign as an example (Scruton, 2016).

Going into the research I was aware of the fact that some research participants may be still engaged in criminality, or suspected of being so by the police, and they could, therefore, be under covert police surveillance. This is a risk that all researchers conducting research with 'ex-offenders' have to consider. However, as a researcher with a criminal past, the potential misinterpretations by the police and conspiracy implications of such are greatly heightened. A safeguard put in place to help minimise this risk was to try and avoid high-profile cases that the media were reporting on, as it was felt that these individuals were more likely to be under surveillance, whether this be by the police or the media. Furthermore, when contact was made with research participants the purpose of the phone call or visit was always verbalised at the beginning of the conversation in case the participant's conversations were being recorded by the authorities. This may appear excessive or paranoia, however, this is the residual effect of being criminalized and having seen the level of injustice that characterises our criminal 'processing' system, and so I felt the need to be extra cautious.

As most of the interviews were characterised by a clear sense of injustice and hopelessness, as the findings chapters will reveal, it was important that the researcher managed the emotions of the interview by concluding the interview on a less sensitive subject (Noaks and Wincup 2004). This involved reacclimatising the research participant by taking the intensity out of the conversation and shifting the focus from them and their personal experiences, to reciprocal conversations centred on generic and light-hearted issues. All interviews were concluded by reminding them that I could be

contacted at any time by e-mail or telephone call, whether it be for a welfare chat, if they had any questions they wanted to ask or if they had any further information that they wanted to share.

In order to maintain research integrity and to further my duty of care to the research participants I had an aftercare strategy in place. Having been the researched on numerous occasions myself, I was only too aware of the potential emotional crash and empty feeling that can be experienced after the formal part of a research interview has taken place, which can then be followed by feelings of paranoia. As Scraton (2007) points out disclosure and discovery are not necessarily empowering, they can reaffirm to oneself the injustices that we face. Therefore, I made it a personal responsibility to contact the participants the next day to check they were okay, and this normally triggered a further conversation about POCA as they had now remembered something that they had failed to mention during the interview. As I had phone numbers for all research participants, I have also sent them messages periodically to update them on the progress of the research, this provided those participants who wanted to stay engaged with the process the opportunity to do so. It also provided the participants with an opportunity to update me on their confiscation developments.

I was aware that the longevity of my confiscation experience had provided me with [mainly unpleasant] insights that the research participants may not yet have experienced. This presented me with an ethical dilemma as to whether I had a duty to share my experiences with them after their interview was completed for precautionary purposes. Afterall, by this point we had built up a relationship based upon trust and I possessed certain knowledge that, if I shared with them, could help them to prepare themselves for such eventualities. However, if on sharing that information the research participant made changes that changed their life trajectory based purely upon the sharing of that knowledge, only for those eventualities not to occur, then this would be considered equally as

problematic and unethical. It was decided that, based on my values that guide me in life, I had a duty to inform them of the reality of the confiscation landscape, but to do so in a way that worked within the law and did not exacerbate their anxieties and also encouraged them to seek further legal advice. The basis underpinning this decision was that as a critical researcher guided by democratic principles, the monopolization of knowledge is something that I aim to eradicate, not contribute to.

4.7.1 - Consent Form

How the second, fourth and fifth ESRC principles were addressed will be explained in this section of the chapter. Informed consent entails making sure that that research participants have all the necessary information they need to make an informed decision as to whether they should take part in the research (Kvale 1996). Therefore, all research participants were sent a research information sheet and consent form to read and complete in advance of their interview. The purpose of the information sheet was to provide an outline of the research and its aims, explain both their role and the researchers, explain the potential benefits and risks of participating, what will happen with the data that is collected, and what their rights are ([see appendix A](#)). The consent form asked them to confirm that they had read and understood the information sheet and had been allowed the necessary time to consider taking part. It also asked them to confirm that their participation was voluntary, that they agreed to be tape-recorded and that they agree to take part. These forms were revisited on arrival for the interview, checked and collected prior to the commencement of the interview. It was also at this point that they were reminded that they could take a break at any point during the interview, have the tape recorder switched on/off as they felt necessary and had the right to withdraw at any time. The purpose of the research was also reiterated to them as a way of bedding in the research participant before the interview commenced.

4.7.2 - Confidentiality and Anonymity

How the third ESRC principle was met will be explained in this section of the chapter. The data captured on the voice recorder was transferred from the recording device to a password-protected pen drive on return home from the interview (Bryman, 2012). When not in use the pen drive was kept secure in a safe within my home.

However, there are certain situations, particularly those that concern harm, within the social research setting where confidentiality may not be assured. As Scraton (2007) points out, in encouraging people to recall and reflect, researchers have to be prepared for unexpected disclosures, whether this be centred upon harm to oneself, harm to others or committing a criminal offence. As a measure to help reduce the risk of the defendant incriminating themselves they were advised to carefully consider revealing such information. However, in doing so this risked compromising the authenticity of the individual's accounts and, therefore, was counter-productive to the aims of the research – to understand the lived *reality* of the confiscation punishment. Balancing such ethical considerations with the aims of a social research project which sets out to reveal structural forms of violence and how people respond to them, is a conundrum that I felt strained by at times. Thankfully, often this predicament was managed by the participant through their considered self-representation and because most offenders are adept at not revealing incriminating details, as processes of criminalization educate to this effect.

Whilst the promise of anonymity may be a safeguard to protect the researched and encourage participation, it was important to remember that most people with experience of the penal system (and other State institutions) have been lied to before, despite assurances being made (Scraton, 2007; Sim, 2009). Therefore, to protect the research participant's identity all identifiable data was

anonymised and each of them was allocated a pseudonym. Additionally, information such as names of family or associates were changed or anonymized, and other identifiable data such as dates and specific geographical locations were omitted. These measures were applied to both the narratives but also the confiscation correspondence that some of the research participants provided (HMCTS confiscation letters etc).

4.8 – Limitations of the Research

An anticipated criticism of the research is that due to the small sample size, the research findings have weak external validity, a criticism often posed by quantitative researchers (Greener, 2011). This was partly dealt with earlier in the chapter ([see chapter 4.5.3](#); Maruna and Matravers, 2007). The criticism tends to hold onto the idea that the findings that are generated from a small data set are not generalisable as the complexity of social reality, with its infinite variables that could have causal properties, some observable and some not, cannot all be accounted for in such a small sample size. However, in response to this criticism, this research did not set out to generate a set of generalisable findings. Instead, it is an exploratory piece of research; its purpose is to generate insight, building a platform from which further research can be carried out.

At the research design stage, it was felt that the use of quantitative methods alongside the qualitative methods could have enhanced the research in terms of evidencing the extent as to which these measures are being used. However, it was understood that, as the MOJ, the Home Office, prison service or the probation service only hold limited data on the confiscation punishment (limited to data such as how many orders have been imposed), and that they do not track or record specific data on post-conviction confiscation defendants ([see FOI request – appendix B](#)), identifying suitable research participants as part of a large-scale qualitative study would have been difficult if not impossible to

achieve. This quantitative ‘information deficit’ was highlighted by Richard Fisher Q.C. whilst providing evidence to the Home Affairs Select Committee (2016b: 10):

I do not think we have the figures that actually show who is in prison in terms of confiscation and for what. How many defaulters do we have in prison?

Another possible limitation to the research was the epistemic uncertainty that inductive research methods create; that the understanding of the confiscation punishment generated in this study is limited by time and, therefore, presenting a synchronic analysis. An epistemic challenge of inductive research is that, what is evidence as ‘truth’ today may be proven false tomorrow especially as individuals are ‘forever re-scripting [their] pasts’, and ‘making sense of the things that happened in light of subsequent events’ (Andrews, 2013: 215). Furthermore, as what matters to people changes all the time (Sayer, 2011), knowledge produced by research carried out today may produce a completely set of results if it is to be carried out with exactly the same people over time and inductive methods fail to capture that reality. As a way to mitigate this threat to research validity, a case study approach was adopted for Daniel, allowing for a diachronic insight into Daniel’s experiences over the period of two to three years. Whilst this is still considered a relatively short timeframe, it did allow for any shifts in Daniel’s, thoughts, feelings, perspectives and behaviours to be captured as and when they developed. It is also hoped that this data set could be used as part of a longitudinal study, enabling the problem of induction to be further mitigated. In fact, a longitudinal study of the impact of the confiscation punishment is felt to be absolutely necessary because of the indeterminacy of it and, therefore, the capacity for a defendant’s perspectives to change, or harden, over time.

One of the greatest regrets of the project, and something that I would probably do differently, was not asking the research participants to complete a personal data form. The rationale underpinning

this decision was centred upon the idea that in asking them to reveal particular details relevant to their case, details that they may suspect would risk identifying them, this may have aroused unnecessary suspicion or concern with the research participants and discouraged them from taking part. However, the consequence of not asking them to complete a personal data form was that, useful personal information that records characteristics such as age and race and confiscation-specific information such as their 'benefit' and 'available' amounts, were not formally captured. However, much of this data was provided freely within the narratives and, as become apparent throughout the research, many of the participants did not know the exact value of their confiscation figures anyway. This uncertainty was said to arise because, during the confiscation court proceedings, figures are imposed and contested for a number of years, to the extent that the defendant is not sure what the figures are. It was also revealed that, for many of the research participants, those figures have increased since the time they were imposed because of the accruing interest.

4.9 - Summary

This chapter has provided a rationale for the methodological approach adopted within this study. It has explicitly detailed my positionality and the philosophical underpinnings of the research methods adopted in a way that allows the reader to fully understand my standpoint. This chapter has also detailed the research participant criteria, the strategy adopted to identify suitable research participants and the methods adopted for data collection and analysis. In preparation for the findings chapters to follow, a brief insight into 'who' the research participants are was also provided. This chapter has also provided an overview of the ethical considerations that were designed into the research. This also included an insight into some of the unique ethical dilemmas that this research faced as a direct result of my biographical background. This chapter finished by detailing some of the

potential limitations of the research and provided counter-arguments and strategies which could be applied so as to mitigate those potential shortcomings.

Chapter 5 – The Procedural Experience and Short-Term Impact of the Confiscation Punishment.

5.1 - Introduction

The principal aim of this piece of research was to capture the impact of the post-conviction confiscation punishment upon the defendant and their families. Due to the uncharted nature of this area of research and partly due to the complexity and longevity of the POCA process, a chronological approach which outlines the various stages of the confiscation process will be adopted in order to present the findings. In doing this the findings will be split into two chapters. The first chapter will focus upon the period in which post-conviction confiscation is initiated, investigated and prosecuted through the courts. It will begin by discussing the types of individuals that confiscation powers are being used against before highlighting how key legislative provisions are said to shape the confiscation experience; criminal lifestyle assumptions, hidden asset assumptions and the application of gross benefit calculations. This leads into a discussion of the inherent difficulties of preparing a confiscation defence from the confines of a prison cell and provide an insight into the quality of legal representation that the confiscation defendant was said to receive. As most post-conviction confiscation orders are imposed against individuals that are at the time serving a custodial sentence for the predicate offence, this chapter will also reveal how this impacts on the individual's adjustment into the prison regime as well as revealing how this period of the confiscation process affects their family on the outside. This chapter will conclude by discussing the impact of asset restraint provisions. In revealing the 'short-term' impact and processes of the confiscation punishment this sets up the following chapter which will reveal how the confiscation punishment is experienced in the long-term,

highlighting what occurs in the event that the defendant is unable to satisfy the confiscation order in full.

5.2 - Who Confiscation Orders are Imposed Upon.


As highlighted in chapter two, confiscation discourse tends to be discussed and justified within the context of 'serious and organised' crime and, therefore, this thesis seeks to better understand whether this is who these special powers are being used against.

Brendan was given a £200,000, confiscation order which he was unable to pay and, therefore, a thirty-three-month default prison sentence was added to his current prison sentence to run consecutively. However, Brendan's sister, Sonia, argues that these figures failed to reflect what he earned from his crime in reality, and she asserts that the court's assessment of Brendan's 'available' assets is indicative of this:

But, yeh know, he is in prison so how is he supposed to pay it, how on earth can he pay money that he never had in the first place, so where do they think the money is going to come from? Nobody is saying that he hasn't done wrong, he has, and he is serving his punishment for that but to then make up some ludicrous figure and to impose it as if it was true is just wrong. Surely the fact that he has nothing, they've [Brendan and his wife] now lost their home as they were unable to keep up payments whilst he was in prison and, as I said, [Brendan's wife] is unable to work, so they literally have nothing, but somehow they come up with figures that nobody recognises, they are completely fictional...

Whilst in prison Brendan was sent a letter from HMCTS which sought consent from him to detract £2 a week from his prison wages to go towards payment of his confiscation order (see figure 9). The pursuance of such miniscule amounts of money, despite such a significant confiscation order being imposed, begins to reveal potential deficiencies within confiscation policy and contradictions between POCA rhetoric and its lived reality.

Figure 9 – Letter sent to Brendan from HMCTS asking for permission to deduct £2 a week from his prison wages

| | |
|---|--|
|  HM Courts & Tribunals Service | <p style="text-align: center;"><u>Authority to dispose of cash / property</u></p> |
|---|--|

In respect of the confiscation order made by [REDACTED] Crown Court on [REDACTED],

I, [REDACTED] do hereby authorise the:

1. Finance Team at HMP [REDACTED] to deduct £2.00 from my prison account and forward to HMCTS on a weekly basis to pay towards my outstanding Confiscation Order.

Signed _____

Date _____

Any cheque should be made payable to **HMCTS** and sent to:

[REDACTED] Regional Confiscation Unit
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

WHEN MAKING PAYMENT PLEASE QUOTE REF: [REDACTED]

Please forward a copy of this consent form with the payment to HMCTS so that my account can be credited upon receipt and clearance of the cheque.

If you need any assistance or advice regarding this consent form you can contact the [REDACTED] Regional Confiscation Unit on [REDACTED].

| | |
|---------------|--|
| RCU use only: | |
| Legislation | |
| | |

Doc. Ref: 0105

There was general consensus amongst the research participants that these measures were being used against relatively low-level offenders, as Jo begins to explain:

Don't forget there is this thing about highly organised criminals making millions and millions of pounds and they need to pay them back. Yeh ok, if you can catch them, but it very rarely happens. That's not been my experience in prison - I see proceeds of crime being levelled against mostly working-class people who have got caught up in often minimal stuff or drug conspiracies and they don't have the assets that they [the financial investigator/court] assume they have; they are notional assets. How the benefit is defined is quite at odds with the realities of the distribution and where you sit within the hierarchal ladder and what is made from your crime in reality. Cos actually the profit margins aren't as generous as people imagine, or as the press makes out anyway. Do you see what I mean? I think the reality of the proceeds of crime is very different to what you read in the newspaper headlines and the public don't know any different.

Here Jo has begun to highlight that the problem may lie in how 'benefit' is determined by the courts, with the orders imposed failing to reflect the reality of what is actually made from crime. In the following extract Ryan is sceptical of the suggestion that the function of these measures is to recover profit from crime:

Come on. Really? Do you think that's who they are being used against? [...] Not a week goes by where there isn't some kind of scandal in the news which exposes such corruption but who gets served a confiscation order, not them that's for sure because its more convenient to target the drug dealer or the person who has lied on their mortgage application. This ain't no conspiracy theory, the facts speak for themselves, don't they? How many politicians who were found guilty in the expenses scandal were subjected to POCA? None as far as I'm aware, otherwise they would have publicised it. What about the phone hacking scandals? They illegally hacked people's phones and then used that information to sell newspapers for mass profit. Who got served with a confiscation order? Do you see what I mean? POCA has nothing to do with, erm, recovering profit from crime it's about controlling those at the bottom whilst making a shitload of cash off the back of it!

In highlighting several cases which he believes were not subject to confiscation proceedings, despite significant profit being made from those crimes, Ryan begins to challenge the policy construct of who might be considered as 'serious and organised' criminals, whilst also suggesting two alternative

functions for POCA: control of the poor and revenue raising, two functions that will be discussed later in the findings.

For Wayne, he is of the opinion that confiscation measures do not, and are unable to, impact upon those that make significant profit from their criminality:

Me solicitor sent me a booklet when I was in prison that explained about POCA and it said that, err, something along the lines that it is there to make sure that crime doesn't pay, something like that anyway, and it's there to catch the Mr Bigs. Well, as you can see it doesn't play out like that, it ain't capturing the Mr Bigs because they can hide their profits away amidst layers of legitimate income and pay the best accountants to represent them. A guy I know who was in prison at the same time as me, well, he was Mr Big and they couldn't get a penny out of him.... So I don't think it does catch those at the top, err, instead it catches those at the bottom, those that work on the front line getting their hands dirty.

Marcus was also able to identify an important limitation of post-conviction confiscation:

...they are rarely going to be used against these types of people [serious and organised criminals] because they got to catch them first and that doesn't happen because they have fall guys who are there to take all the risks and make sure they don't get caught...

Therefore, in recognition that these measures are unable to impact upon those that make significant profit from crime, several of the research participants suggested that confiscation figures were inflated so as to create the impression that these measures were being used against serious and organised criminals, as Derek begins to explain:

They got to be seen to get the Mr Bigs haven't they cos that's how this thing has been packaged, but rather than admit that it is useless at targeting them, they just make figures up to make people look like they are the Mr Bigs.

Marcus, reflecting upon his own confiscation case, explains how and why confiscation figures are inflated:

Because I couldn't tell them who I was working for they calculated the street value of the drugs and made that my benefit figure [£14 million]. It's impossible to know how they come to these figures, I just wish that it really was that profitable because I wouldn't be

living in a three-bedroom terrace and driving around in a 58 plate van [registered in 2008, insinuating that being 11 years old its value would be relatively insignificant] [...] it's because they can't get those at the top, that they hit us with the big confiscation orders in the hope that we panic and tell them who we are working for and, err, at the same time it makes a great newspaper headline that looks like they are getting the big time gangsters [...] but let's be straight about this, as the courier of the drugs I made a few thousand pounds not fourteen million pounds, that's for sure.

Here Marcus explains that in order to rebut the assumptions which led to the construction of his inflated calculation order he would have had to have “grassed” in the people in which he was working for, a cardinal sin that carries serious consequences within an offending subculture. For Marcus, he explained that for the sake of his safety in prison and the safety of his family on the outside, this was not an option. Therefore, from this example it can be inferred that creating a robust confiscation defence may require the defendant to provide intelligence on their criminal associates without being offered any witness protection or any assurance that in doing so, their information will be accepted in court and, therefore, improve their confiscation predicament. As a result of not being able to tell them who the drug consignment belonged to, as he was in possession of the drugs at the time of the bust, Marcus's benefit figure was estimated to be the street value of the drugs, £14 million, despite him being just a courier who was paid a few thousand pounds. In light of Marcus's case we are forced to question whether confiscation figures can be relied upon as an indication of whether these powers are being used against serious and organised criminals as the rhetoric suggests or whether they are in reality being used against the ‘foot-soldiers’, and the way in which the confiscation process is applied creates this deception. The task then becomes to better understand how the confiscation figures are constructed.

5.3 - How Confiscation Figures are Constructed

The provisions which featured most prominently within the narratives as being key in the miscalculation of their confiscation figures were: criminal lifestyle assumptions; tainted gifts and hidden asset assumptions; and gross profit calculations of benefit. Each of these will now be discussed in turn.

5.3.1 - Criminal Lifestyle Assumptions

The criminal lifestyle provision featured most prevalently within the research. It is likely that this is because drug related offences were the most frequent offence type committed by the research sample and, as highlighted in chapter two, the supply of drugs is considered a criminal lifestyle offence which then allows the court to make assumptions as to the source of a defendant's assets dating back six years from the date of the arrest. Furthermore, these assumptions were applied regardless of whether there was any evidence to suggest that they were involved in crime for the six-year period. The burden of proof then lies with the defendant who, in order to rebut the assumptions, must provide evidence to the contrary. However, it was pointed out that as a convicted criminal this was difficult, as Jo explains:

Yeh know, you're deemed culpable, an evil drug dealer who's got to pay back your ill-gotten gains, so it doesn't matter how much you explain things or what you say in your defence, they just simply dismiss it because at the end of the day you're a criminal, yeh?

Similarly for Declan:

They won't ever accept what I'm gunna say in court cos in their eyes I'm just some black drug dealer ain't I? I could tell them somethin all day long but they ain't ever gunna listen to me, they won't take my word for it.

What these two extracts begin to highlight is that, because post-conviction confiscation requires a criminal conviction prior to the imposition of a confiscation order, the credibility of the defendant is greatly compromised, especially as it tends to be the same judge who presided over the criminal trial who then handles the confiscation trial. Further, what Declan also highlights is that his disadvantage as a convicted drug dealer is heightened because of his race, which correlates with the findings of the Lammy (2017) and Young (2014) Reviews which suggested that individuals of BAME characteristics are significantly disadvantaged at every stage of the CJS.

The imposition of the criminal lifestyle provision is defended on the basis that the safeguards provided under section 10 (6) of POCA 2002 are designed to prevent misapplication. These safeguards assert that the court must not make a required assumption if the assumption is shown to be incorrect, or there would be a serious risk of injustice if the assumption were to be made. However, the narratives contained within this research begin to highlight the illusory nature of these safeguards, as Declan explains:

[T]hey said, err, in my POCA, err, I have lived a criminal lifestyle or something and this allowed them to say that everything I had was the profits from drugs. Well it wasn't. I worked on the doors [nightclub security] for many years and okay, yeh, I accept that I didn't pay tax on it, but it was legit earnings, that's what helped me to pay the bills, it wasn't from drugs. But it didn't matter what I said to them in court, they wouldn't accept it, they wouldn't listen to me.

Declan went on to explain that despite conceding that he failed to declare this legitimate income and is, therefore, liable for the unpaid tax, the court refused to accept his rebuttal and insisted that these monies remained part of his benefit figure. Like Declan, Derek highlights the difficulty in being able to successfully rebut the prosecution's assumptions:

I provided them with evidence, but they wouldn't accept it. It didn't make any difference [...] I showed them evidence from my legit businesses, the accounts, err, which were all done proper by me accountant, but they would just say "well where did yeh get the money to start that business up or where did the money come from for the deposit for that house?". They wouldn't accept a word I said...

Derek's case also highlighted the illusory nature of the six-year retrospective period when the source of an asset in question needs to be proven.

In trying to show them where the money had come from to buy the house I had, I had to go back like twelve years or something, showing them how I had used the equity from each house to put down on the next one.

In the following example from Sophie we get a further sense of what is required in order to rebut the assumptions:

The whole disproving the assumptions thing was impossible. It's difficult cos they've gone back through my accounts for the last six years and I'm sat in prison and they are asking me "what is this payment five years ago that was put into your account?" and I'm thinking I wasn't even with this guy [partner and co-accused] then so should you even be looking back this far? Yeh know, I'm having to get my family to run around, even my grandma, my eighty-year-old grandma, for a payment, err, she had given me some money to help me when I was having new central heating fitted to me house and they were questioning that. So I had to get my eighty-year-old grandma to go back through her bank statements to prove that she had actually give it to me, errm, it was just ridiculous. The work that you have to put in to prove them wrong is ridiculous and when you're in prison, where you've got no paperwork, no access to a computer or phone, and then have your solicitor come and visit you and ask you what this payment is and what's that payment, well trying to remember all that off memory going back six years is impossible.

Sophie provided further insight into the difficulties faced when trying to arrange for third parties to corroborate her confiscation defence:

People don't want to get involved, and I get that. They don't want to have to go to court and be interrogated, have their integrity questioned when they haven't done anything wrong.

She also pointed out that as her case was published in the local media, when she was sent to prison her relationships with people on the outside changed. This meant that some of the people that she would have required to provide evidence in her defence were no longer in touch or willing to come to court because of a fear that their evidence would be misconstrued by the prosecution and they would themselves be incriminated.

I couldn't get them to turn up to court even if I could have got hold of them because the only thing they would have been thinking is that it's going to bring heat [police attention] on them.

For Sophie, who had decided relatively early within her punishment experience that she wanted to change the trajectory of her life, she recognised that she would need to disconnect from certain individuals involved in her case, namely her [then] partner. Yet in order to be able to successfully defend her confiscation case by acquiring corroborative evidence, this required her to communicate with her [now ex] partner and his brother undermining her efforts to move away from an offending lifestyle:

All my finances were intertwined with [her ex-partner] and his family and I was desperately trying to detach myself from them and start afresh, it was their fault I was in this mess. But in order to document my assets and where my money had come from I would've needed to have communicated with him, which I don't think is right.

In instances where the confiscation defendant is attempting to move away from criminal peers for desistance reasons or for those who are trying to escape abusive or exploitative relationships, policy that compels a confiscation defendant to reconnect with people from their criminal or abusive past in order to defend against the court's confiscation assumptions, appears to be not only problematic but irresponsible, immoral and potentially dangerous.

Furthermore, Daniel was able to offer another example as to why he was unable to call upon third parties to corroborate his defence:

It's not always that simple to get people who can provide evidence to support yeh defence [...] I bought that house with me ex-missus like so there's no way she's going to come to court on my behalf, yet I needed her to prove that the deposit for that house was legitimate.

What these examples illustrate is that, not being able to persuade witnesses to corroborate evidence translates within a confiscation trial into the assumptions being upheld, not because they are necessarily accurate, but because a defendant is not in a position to make an evidenced counter-claim, an important distinction previously highlighted by Wood (2016a). It was because of experiences such as these that the research participants felt that there was little chance of successfully defending against the criminal lifestyle provision as Eddie begins to explain:

It's not geared up in the interests of justice, its geared up to make sure that they get everything [...] They just do and say whatever they want cos at the end of the day nobody's arsed if the convicted drug dealer gets a raw deal, are they? So what? That's why there's no jury in there, so that they can say whatever they want with nobody to query it.

Here Eddie states that the consequence of not having a jury present during a confiscation trial is that assumptions made by the prosecution are not subject to robust scrutiny which favours the prosecution and disadvantages the confiscation defendant:

If the evidence on both sides is flimsy, who do you think the judge is gunna side with? Prosecution, every time!

It is in light of these key insights that we can begin to understand how inflated calculations of benefit are constructed: the 'demonology' (Levi, 1998: 336) of the defendant which makes their defence less credible, the lower burden of proof which allows for the prosecution's assumptions to be more easily

accepted, the reversal of the burden of proof upon the offender with a requirement to evidence all financial transactions dating back six years [and sometimes longer], and the absence of a jury to scrutinise the evidence. This is the experiential reality of defending a criminal lifestyle confiscation order, which raises concerns centred upon procedural injustice and the erosion of due process, both of which will be discussed further in the final chapter. These findings are consistent with Bullock's (2014: 49) research in which she argues that 'highly speculative assumptions' are put forward because the financial investigator is not burdened with verifying the origins of the assets. Bullock also pointed out that assumptions can be applied by the financial investigator not because they are accurate but because the defendant is unable to rebut them. Therefore, the court is obliged to accept the assumptions.

For many of the research defendants the idea that there is a neat binary distinction between which assets had been legitimately and illegitimately acquired is problematic, yet their legitimate assets were included within their courts calculation as Kevin begins to explain:

They want the fucking lot, it don't matter whether its legit, they still fucking want it [...] they listed everything, even though some of it was clearly legit, like me wheels (car), that was on finance and the payments were made from [his girlfriend's] wages so how can they say that's not legit and the house for that matter, well we both put money into that, in fact the mortgage payment went out of [his girlfriend's] account....

Through the voices of the research participants this section of the chapter has begun to highlight the reality of being served with a criminal lifestyle order, the difficulties in defending against it, how orders become inflated because of it and how this provision allows for legitimately acquired assets to be included within the calculation of 'benefit'.

5.3.2 - Hidden Asset Assumptions and Tainted Gifts

A provision that also featured significantly within the narratives was the hidden asset assumption, an assumption that was consistently described as impossible to defend against, as Daniel begins to explain:

I actually always believed that proceeds of crime was asset stripping. Asset stripping in my eyes is taking everything that you've got. But this hidden assets law is taking something that you've not got. It's so frustrating. Even being asked to prove it, it's a stupid thing to ask. How can you prove you've not got something? If you've not got it, then you've just not got it, and I didn't have it.

The hidden asset assumption was described as being unfair and as can be seen in Karl's extract below it further erodes the 'legitimacy' of the confiscation punishment within the eyes of the defendant:

As I said, err, I think if you've been caught with yeh pants down then fair enough. If you've been caught with £50 million in cash and £50 million in drugs then obviously the drugs get confiscated and so does the cash because it's there, it's actually there physically. Not hidden like they say, it's there (hits the arm of his chair to emphasize his point). But when they start demanding money that just isn't there and start saying that you've got hidden assets, that's complete nonsense, that's just going too far.

Some of the research participants stated that they were unsure whether assets that had been listed on their available amount were listed as hidden assets or tainted gifts, as was the case with Daniel.

What Daniel also pointed out was that these were not hidden, they were unrecoverable:

Well I couldn't get the wedding and engagement ring back from my ex-missus because we had split up whilst I was in prison. But of course, I couldn't get her to come to court and admit that because we had gone through an acrimonious divorce and we no longer spoke to each other; we hate each other's guts! To be honest, I expect she has probably pawned them in anyway cos I think she has remarried now, so there was nothing that I could do to get them back anyway, err, so I'm not sure what the court expected me to do.

Despite providing a plausible explanation as to why Daniel was unable to recover those assets they remained upon his confiscation order nonetheless, with the consequence being that the default prison sentence is likely to be activated. Other reasons that were suggested within the research as to why assets listed in the 'available' amount as hidden assets were no longer available included: lost, stolen, used as a stake when gambling, cashed-in and dissipated on day-to-day living before arrest, exchanged for drugs or other illegitimate items, 'taxed'³⁷ by other criminals, gifted away or used to pay a [drug] debt. Whilst some of the reasons provided as to why there was an attrition of available assets involve varying degrees of 'benefit' or pleasure to the offender, other explanations, such as being taxed, were beyond their control. The point to be made here is that, in terms of asset recovery efficacy, the assets no longer exist and are, therefore, unrecoverable. This would appear to correlate with Levi and Osofsky's (1995: vi) findings that, despite the best intentions of the confiscation regime, it cannot 'reclaim the past entertainment expenditures of proceeds of crime by people who have no apparent assets'.

However, the most frequent explanation provided within the research as to why assets listed in the available amount were not available was that they never owned the assets in the first place, as was the case for Wayne:

Being seen talking to somebody in a Porsche doesn't mean that I own it. If they are saying that I own it then surely, they should be able to trace it, otherwise they can just say whatever they like.

³⁷ 'Taxing' involves a criminal stealing something of value from another criminal in the knowledge that they cannot go to the police. It usually involves stealing the other person's drugs or money and is a relatively common activity within the criminal underworld

For Derek, who had been arrested in response to a covert police operation, he points out that the hidden asset assumptions applied in his case, which were based on ‘police intelligence’, were arbitrary:

They listed every car they'd [undercover police] seen me in [on his confiscation order]. It didn't matter if I was driving em or if I owned them. If I was seen in it, it was listed [...]. Common sense suggests that I don't own all those cars but that doesn't fit with what they want to do, which was to rinse me for as much as possible.

When Derek's extract is considered alongside an understanding that, under the Asset Recovery Incentive Scheme (ARIS) the investigative agency is allocated 18.75% of all monies recovered (Home Office, 2015: 2),³⁸ then this begins to raise questions as to whether the police have a vested interest in overestimating the extent of Derek's assets. The tensions of self-financing is a theme that will be discussed further in the final chapter.

Despite the contentious nature of a hidden asset order, as Jo points out in the following extract, the consequence of failing to satisfy it is the activation of the default sentence:

...I knew girls that were serving default sentences for hidden asset orders for which there is no defence for. Yeh know, in some ways my case was a sum of money that could be identified, tangible, yeh? But with a hidden asset order, where the court just says we believe you made money and its millions but we can't find it so we will make a hidden asset finding, well generally you can't find it because it isn't there, not because it's hidden (laughs in disbelief as she speaks),

Jo later went on to add that despite it being impossible to rebut a hidden asset assumption, and the significant risk of an injustice as a result, there is no route for appeal:

At what point can you appeal a hidden asset order? You can't so I've been told. Cos I always used to say to her 'why don't you appeal it, why don't you appeal it?' and she told me

³⁸ ARIS funds breakdown: The Home office retains 50% of all monies recovered, 18.75% is allocated to the agency responsible for investigating (for example, the police or National Crime Agency) 18.75% is allocated to the prosecuting agency (usually the Crown Prosecution Service), with the remaining 12.5% allocated to the agency responsible for enforcing the order (HMCTS),

there is no way of appealing against a hidden asset order because it's impossible to prove that the hidden assets are in fact not hidden, they just don't exist, they are fictional.

This section of the chapter has begun to highlight a number of tensions related to the use of orders that contain hidden asset or tainted gift assumptions, especially when the defendant either did not have the assets in the first place or no longer has control over them. Once again, these provisions were said to lead to inaccurate calculations of 'benefit' and the 'available' amount.

5.3.3 - Gross Profit Calculations

In further attempting to explain how confiscation figures become inflated a number of participants highlighted that there is a disconnection between the way in which the profit margins of criminality work in reality and how the profit margins are miscalculated for the purpose of asset recovery by the financial investigator, as Dave begins to explain:

So let's just say you get some gear [drugs?] for five grand (£5,000) on tick (on credit) and then that gets taken off yeh when you get caught and the government work out that you owe them the five thousand it would of cost to get the stuff in the first place but then they add another fifteen thousand because that's what they say you would of made by selling it. So you end up, like, owing something like twenty grand when I haven't even sold it because it's been confiscated, and the stuff was on tick, so I owe out a further five grand on top of that to the suppliers who I got it off. So on something that I would have only probably made a couple of hundred quid on had I managed to sell it, I end up with over twenty-five grand on the confiscation order with interest being added, its madness!

Kevin was able to offer further insight into the attrition of illegal profits:

When they make estimations of how much money you've made they don't account for yeh losses. It's as if selling drugs is a risk-free enterprise where everything is blissful in 'crack-alley'. Of course it's not. It's dog eat dog and people are being robbed or ripped off all the time...

Kevin then went on to provide an example of one such loss that he encountered but was unaccounted for within his benefit figure:

When one of your boys gets nicked then you have to cover that loss and you have to see him right financially, err, sort his missus out or what have yeh, otherwise there's a chance he's gunna rat you out [provide information on you to the police].

In this example Kevin explained that his loss was not limited to supporting his associate's girlfriend out financially because when his associate was caught by the police and they raided his home they confiscated all his drugs:

It hit us hard and it took us a while to get straight again [...] but yeh see none of that is considered when they are working out how much money you've earnt.

Marcus also pointed out a number of significant costs that failed to be acknowledged in his calculation of 'benefit':

Just think about it, that means that nobody else would have been involved in the process and made any profit from it, yeh know, like transportation costs, safe-houses or even the money to buy the drugs in the first place. They must think that the Columbians, being the kind people that they are, give the drugs to us for free (laughs as he is talking).

Here Marcus points out that the financial investigator's calculation of benefit fails to account for the cost of buying the drugs, a significant expenditure that would have a considerable impact upon the amount of profit actually made. Furthermore, the disjuncture between the financial investigator's calculation of benefit and the profit made in reality is best captured in the following exchange with Eddie:

CF: *In terms of your confiscation figure, which was just short of twenty-grand wasn't it?*

Eddie: *Yeh.*

CF: *Was that an accurate reflection of how much money you made from your crime?*

Eddie: *(He gives out a slight laugh in disbelief) We didn't make any money!*

CF: *What do you mean you didn't make any money?*

Eddie: *There was no proceeds from the crime cos it never got to that stage.*

CF: *What do yeh mean?*

Eddie: *It got stopped six weeks before the crop was ready so there was no benefit. The crop hadn't even yielded when they busted us, it was about six weeks out so there was no benefit. It was worthless.*

CF: *Sorry, I'm just trying to make sure I'm getting this right here. So are you saying that you never made any benefit?*

Eddie: *No, because the crop hadn't finished and until it finishes we couldn't sell it could we so there was no profit, it's crazy isn't it? What they said was that they suspected that we had already done a crop and so based on the size of the crop that they busted they billed us for that amount.*

In a criminal trial, the supposition that a defendant has engaged in further criminal activity than what is accounted for in the evidence would be inadmissible in court, however, the lowered civil threshold of proof within a confiscation trial appears to be the judicial mechanism which has led to the assumptions being accepted in Eddie's case. As a result of being 'hit' with a confiscation order that Eddie claims was completely fictional, he felt that the process was deeply unfair.

In the following extract from Harry, a former accountant, we begin to get an insight into the extent of how inaccurate the confiscation figures can be:

At the time when my original benefit figure came out it was much higher in the region of eight hundred thousand, errm, and I went through it and found double calculations and errors for which I made them aware of those and then the figure was reduced to just over five hundred thousand.

In highlighting a £300,000 discrepancy, Harry has thrown a spotlight upon the formulas used by financial investigators to calculate profit and how they can be challenged and reduced when the right

amount of resource and expertise is applied to the confiscation defendant's defence. Harry referred to a technique called 'double calculations' which also appeared in Derek's account:

Derek: *They had double-banked loads of assets on my order.*

CF: *What's 'double-banking'?*

Derek: *It's where they list your assets more than once in yeh order. So for example, they listed the value of me house in [place] which I sold then they listed the value of the next house that I bought, but obviously part of the equity in the second home was the equity from the house in [place] and so it's been accounted for twice...*

This would appear to correlate with Bullock's (2014: 52) research in which she identified that 'double counting of income' led to the inflation of the benefit figure.

The emergent findings within the last three sections of this chapter have begun to expose the legislative mechanisms and financial investigator techniques which give rise to miscalculations of benefit, enabled by the civil threshold of proof and the circumnavigation of due process safeguards, as Dave explains:

I think there needs to be more evidence that is accurate before an order is made against yeh instead of just making assumptions about how much you have. You know if it was a murder case they wouldn't just go "right we think you were there, so you're guilty!" They have to have solid evidence so why don't they have to have solid evidence for the proceeds of crime. The stakes are the same whether you are found guilty of murder or whether it is a POCA case, they are life sentences in effect, but at least you're afforded a level of protection in a murder trial in that the case brought against you has to be based on evidence heard before a jury. POCA uses hypothetical evidence and gives you an indeterminate sentence! It's like an IPP sentence (Indeterminate sentence for Public Protection), they've financially got this hold on yeh forever.

In the following chapter the consequences of the confiscation provisions highlighted above, the civil threshold and the circumnavigation of due process safeguards will be discussed within the context of

the default sentence and the subsequent addition of interest on the unpaid amount. However, in revealing that the confiscation figures are grossly miscalculated, the question that arises from this discovery is why the defendant would then agree to those figures in court, a question to which this thesis will now turn.

5.4. - Why the Confiscation Defendant 'Agrees' to a Confiscation Order That They Do Not Agree With?

"I'd have done anything"

It was suggested that a combination of personal, procedural and environmental factors influenced why the defendant 'agreed' to a confiscation order that not only did they disagree with, but, they knew they could not afford to pay.

5.4.1 - Preparing a Confiscation Defence From Within Prison

As already established, most of the research participants were in prison serving their punishment for the predicate offence at the time when their confiscation order was initiated. Therefore, this meant that they had to create a legal defence from the sparse conditions of their prison cell, as Jo begins to explain:

[T]he benefit figure was like some crazy figure, who knows where they found that from. This is what I'm saying, the way in which they compute that figure, it's a science in itself and you have no real ability from a prison cell to dispute it, yeh? Because I really tried and you're very disadvantaged in that you haven't got access to the internet and you can't look at all your expenditure, you can't look at your bank statements, you can't remember things, do you understand what I'm saying? And how they compute it, well I was really disconnected from that process because it simply didn't make any sense.

Similarly for Kevin, he was able to provide an insight into the reality of what he was up against in terms of preparing his confiscation defence from his prison cell:

I was trying to make sense of the paperwork that they sent over, going through years and years of bank statements, trying to account for every penny. I'm having to do this from my bed, it's not like I've got a desk to work off, so there's paper all over the place and in the background all I can hear is my cell-mate making a right din playing on his play-station and on the landing outside my cell people are arguing and shouting. That's how it is.

Inadvertently, Kevin makes a really important point here. He points out that his cell-mate had access to a computer for playing games but for Kevin, a confiscation defendant who is trying to prepare his defence for his forthcoming trial, with the prospect of further incarceration if he fails to do so, he is denied access to a computer. Therefore, this example begins to reveal the structural barriers in which a confiscation defendant is faced with before they have even set foot within the court room.

This section of the chapter has begun to highlight the environmental barriers which impede the confiscation defendant's chances of successfully preparing a legal defence for their trial. Whilst it is accepted that remand prisoners also have to prepare their defence case from the confines of a prison cell, however, as the burden of proof lies with the defendant within a confiscation case in order to rebut the assumptions imposed, this requires more preparation for the defendant than in a criminal trial. It is thought that these factors played a significant role in limiting the defendant's opportunity to prepare a robust defence and so they 'agree' to the confiscation order through an inability to construct a defence from the confines of a prison cell, a further way in which the defendant is disempowered, and a disadvantage that was previously highlighted by Lawrence (2008).

5.4.2 – Legal Representation in a POCA Trial

“A Spectacle”

From an ideological perspective, it would be hoped that the defendant is safeguarded from making poor decisions in relation to their confiscation case by their legal team. However, it became apparent that this was often not the case. It was suggested by some research participants that their decision to ‘agree’ to the inflated benefit figure was done so on the advice of their solicitor, as Dave begins to explain:

It does not matter if you don't agree with their calculations because they will find a way to make you agree [...] My solicitors come to me and said that if I don't agree to their [prosecutor's] figures then it will piss the judge off and they will then dig deeper and I'll get a bigger order or my family's finances will be investigated, and so of course I agreed. I agreed because I was left with no option but to agree, not because I agreed with the order...

And similarly for Ryan, he explained that his solicitor came to him during his confiscation trial and relayed the threats being made by the prosecution:

When they threaten to put yeh missus on the stand and charge her with money laundering then everything goes out of the window. That ain't happening, she's innocent, yeh know. It becomes a case of damage limitation by this point; I'm in prison anyway so it's better for me to get a longer sentence than me missus get caught up in all of this. And that's how they get you to agree to the confiscation figures, that's how it works...

What these two examples begin to expose is the coercive tactics adopted by the prosecution, and co-opted by their defence teams, in order to get the defendant to agree to their calculations and expedite proceedings. This ‘Achilles heel’ tactic recognises that, for many confiscation defendants, they fear two things. The first thing they fear is that the prosecution will delve deeper into their financial past. The second thing they fear, and this was the one that the research participants said they feared most,

was that their family would become embroiled within the confiscation proceedings. This was the tactic most reported within the research as having been experienced. Many of the research participants discussed how, because of the ambiguity of confiscation legislation, it was not known what could be determined as representing a tainted gift. For example, some discussed how they questioned whether taking their mum for a meal or taking their partner on holiday would qualify as them benefiting from the profits of crime and whether they could be brought into the proceedings. It would appear that it is the uncertainty of not knowing the reach of confiscation law and how the court can interpret it which creates a sense of paranoia, coupled with an absolute will to protect their family from criminalisation, that makes the prosecution's threats so intensely fearful.

Consequently, for Ryan, he felt the court process was staged to give the impression that he had come away with a "good deal":

Looking back I think they knew what they were going to come away with before we went into the court room [...] and so the prosecution and defence got their heads together and worked out what they were prepared to budge on, yeh know, "get him to agree to this and we will drop this", that kind of thing. That way it looks like a fair trial has took place and me solicitor has done what he was supposed to have done, it's all a pretence

Here Ryan highlights the submissive role that his legal team played during these 'negotiations'. It was also pointed out by Ryan that these 'negotiations' took place in the holding cell below the court room and not within the court itself and, therefore, away from the scrutiny that would be expected within the formal environment of a court room. Although this correlates with Bullock's (2014) research, the voices elicited within this research described a less consensual and more coercive process. In the following extract Sonia details the pressure her brother was placed under to agree to his confiscation order:

They said that “you either sign this form agreeing to the two hundred thousand confiscation order now or we will go back in (to court) and you’re looking at another ten years, your call”. So of course he signed it. Who wouldn’t in the same circumstances? When you have seen the power that these people have and the way they go about their business doing whatever they want, unaccountable to anybody and pulling unrealistic figures out of the air, and making unsubstantiated accusations related to money. You worry that if you don’t agree to it, and as the solicitor describes it, we ‘antagonise the judge’, he will give Brendan another ten years on his sentence. So yeh he agreed to sign.

Sonia then went onto explain that it did not seem to matter that Brendan could not afford to pay the confiscation order:

It didn’t seem to matter that he didn’t have this money or the fact that he was never ever likely to be able to get it together seen as he is in his fifties. Instead he (Brendan’s barrister) went and had a chat with the prosecution and they said, “if you sign this form to say that you will give us this money we will agree to it.” And Brendan said, “I can’t sign the form to say I will give you the money because I’ve got no money and my family have got no money. I’m in jail for at least eight years, and I’m literally on the liver transplant list so the chance of me getting a job when I get out is very negligible. How can I possibly say I’m going to give you something that I haven’t got, it’s impossible?” And his solicitor said, “you either sign this form now for two hundred thousand or you’re looking at ten years, so I would advise you to sign the form.” You can protest till you are blue in the face, it doesn’t seem to make one bit of difference, they know what they want and nothing else matters. The court case is just for show, it’s just a spectacle to give the impression that everything is being done above board and justice is being served, but of course anybody who has witnessed how POCA works knows it is far from fair...

Like Ryan, Sonia was of the impression that the confiscation trial is a ‘spectacle’. This is a serious assertion to make in that it suggests that the confiscation process is predetermined and the trial itself does not represent the pursuit of justice but rather the illusion that justice is being served. The second point in relation to Sonia’s extract above is that she highlights that it did not matter whether Brendan could afford to pay the order he was ‘agreeing’ to. This, therefore, represents a shift from traditional sentencing practice in that when a fine is imposed as a punishment in a criminal court case, the judge is required to take into consideration the financial capacity of the defendant to meet the demands of

the punishment (Carlen, 1989), but this practice appears to have been abandoned under confiscation law.

On analysis of the research participant's accounts, despite the questionable nature of such practice, it would appear that the use of coercive measures was largely effective, in the sense that they expedited confiscation proceedings and managed to secure grossly inflated confiscation orders that create the perception that the confiscation regime is successfully targeting serious and organised criminals. However, as discussed in chapter two, HMCTS (2018: 13) statistics reveal that an estimated £1.96 billion of confiscation debt remains outstanding and, therefore, the imposition of large confiscation orders does not necessarily translate into equally impressive recovery rates and so assessing success on these criteria would be considered a false positive.

In addition to the pressure exerted by the prosecution to agree to their confiscation figures some research participants explained that this was accompanied, and intensified, by the need to have their confiscation order resolved for the sake of the family on the outside, whom the hardships and strains of confiscation were said to fall most greatly upon (as discussed further later in this chapter). However, as many of the participants later found out, in agreeing to an order that they could not satisfy this meant that, rather than resolve their difficult situation, their prison sentence would in fact be extended in default, adding to the pressures both within prison and on the outside for the family, as Harry begins to explain:

I mean in the end I think I just threw the towel in and said yeh I will take it [agree to the order] because I had got no help on it, errm, no legal representation on it. When they make claims that you just can't defend because you're stuck in a prison cell, what you supposed to do? And the stress it was causing all the family, so I just thought to meself, fuck it!

For Harry it would appear that the confiscation process had taken such a toll on his life that he 'agreed' to the grossly inflated confiscation figures through submission.

Several of the research participants also explained that they had been advised by their legal representatives during their confiscation trial not to become too concerned with the benefit figure, as it is the available figure that is important as this carries the immediate threat of a default prison sentence, as was the case for Derek:

I just thought it was a joke at the time, so I didn't take it seriously and neither did my solicitor really. He just kept saying, like, "don't worry about it cos if you haven't got anything, then they can't take what you haven't got" [...] So the solicitor said don't worry about the benefit figure and let's just work on this realisable figure.

And similarly for Declan:

I remember the solicitor saying to me not to worry about the benefit figure, yeh not going to get extra jail for that, or something, so don't worry about that, let's just get this other figure sorted.

And whilst Dave's solicitor did explain the relevance of the benefit figure, he failed to stress the long-term importance of it within the context of section 22 powers which allow the court to confiscate after-acquired assets, even if they have been legitimately acquired:

My solicitor did mention it once saying that technically I will still owe this money, but they hardly ever come and try to retrieve it unless you do something like win the lottery or a relative dies and you come into some money.

What was consistent within the research was that confiscation defendants were not told about section 22 powers at any point during their confiscation trials. Instead this was something that became

apparent to them after their confiscation order had been 'agreed' and, therefore, too late, as Ryan explains:

No one mentioned to me that they would be able to take yeh hard-earned assets in the future. Well they wouldn't would they, because you wouldn't think it would be possible. I mean taking assets earnt through crime is one thing, okay, but taking legit assets can't be legal surely?

The overwhelming sense of disbelief for Ryan at the realisation that such measures exist within confiscation law forced him to question the legality of such powers. For Daniel, who despite it being over ten years since his confiscation ordeal commenced, he had only recently become aware of the section 22 powers: *"At no point was I told that they could come along ten years later and take legitimate assets, never!"*

The practice of encouraging the confiscation defendant to agree to benefit figures that they did not agree with and could not afford to pay was reported in both historic confiscation cases in this research sample as well as in more recent cases, suggesting that such malpractice is perhaps ingrained within confiscation legal practice. In not providing their clients with all the information required to make fully informed choices in relation to their case, this contravenes the solicitors professional and ethical codes of practice (Solicitors Regulation Authority, 2018). Furthermore, if the law is not clear, intelligible and accessible without undue difficulty, then this would also be considered a breach of the rule of law (Bingham, 2011). However, when considering the evidence presented earlier in this section of the chapter, which revealed how the confiscation defendant is coerced into agreeing the confiscation figures, it would appear that being made aware of section 22 powers at the investigation or prosecution stage is unlikely to have made much difference, such was the defendant's desire to protect their families by containing the process of criminalization to themselves.

Further, all of the people interviewed during this research had been defended under a legal aid system, a service which has for the past decade been severely hit by austerity cuts. As their assets were placed under restraint, this had the effect of denying them of the opportunity to commission a private legal defence that specialises in confiscation proceedings so as to increase their chance of successfully defending their confiscation order, as Derek begins to explain:

In my mind I wanted to get a solicitor who specialised in POCA to defend my case. It made sense to me to do so. I mean I was going to lose the money one way or another, so it may as well go on a solicitor who could help me fight it, do yeh get me? [...] they make sure that you can't cos your assets are frozen [placed under restraint] [...] So for me it's just another way in which they try to have you over [put you in a helpless position], err, handicap, yeh, and make sure that you can't fight back.

Consistently throughout the research it was pointed out that the confiscation legal representation, in comparison to the legal representation they received for their criminal court case, was deeply inadequate both in resource and in confiscation competence, which was thought to advantage the prosecution further. It was thought that the resources that their legal teams were able to apply to their confiscation cases were largely determined by the finances made available under the legal aid regime and not by the complexity of the case; inevitably this undermined the ability of the legal team to represent the best interests of the defendant, as Sonia begins to explain:

The solicitors to be fair (pause).... were useless (chuckles). I can't think of any other way of describing them. The solicitor just couldn't be arsed, excuse my French, but they couldn't. They got their legal aid money for the original court case, but they haven't done diddly squat for us when it came to the POCA thing. I don't think we did get any legal advice if the truth be told. I mean they never even said to us that there would be two court cases, one for the original trial and then one for the POCA and I think it's because they just didn't have a clue about POCA. They didn't have any expertise in that area, yet they were happy to get paid for the work without actually doing anything and I think that is morally wrong cos these are people's lives we are dealing with here. People are having years in prison put onto their sentences, surely that has got to be fraud or theft if they are claiming for the legal aid money yet not doing any of the work. It's just very wrong in my opinion. It's

wrong not only because they are getting paid for not doing anything, but because they have no expertise in the POCA area, they are not advising Brendan, but then when it comes to the POCA court case he's going up against a prosecution that knows the POCA legislation inside out cos this is what they do, day in, day out. So it just doesn't seem fair cos the odds are completely in the prosecution's favour.

And similarly for Kerry:

If you are on legal aid you are only going to get somebody that can put in so many hours because that's all legal aid will allow them to do [...] I'm not saying that solicitors don't help you but when they are legal aid then obviously they are only as good as what you are and the information you give them and if you don't understand it, they won't work over and above for yeh, yeh know, they are not fighting for you as such, they're just putting the facts forward that you have given them whereas the prosecutor was very quick on his toes, he knew his job inside out. The difference being that if you're paying for a top solicitor then he is going to specialise in confiscation orders and have a better chance at winning the case, errm, you're on a more level playing field then I guess.

Another aspect that was identified within the research as being problematic was that the confiscation process does not allow for a defendant to choose who represents them in court. Whilst this practice may be implemented on the basis that the legal team that represented the defendant in the trial for the predicate offence are familiar with their client and their case, such practice becomes problematic if there is a breakdown in the relationship or when that legal team do not have the confiscation expertise required so as to best serve their client's needs. This is a valid argument to make as a conveyancing solicitor would not be expected to represent a case that requires an expertise in family or employment law, especially when the complexity of confiscation law is taken into consideration. In the following extract Jo begins to explain how this impacted upon her confiscation defence:

So generally the same barrister that represents you in your criminal justice case will also represent you in the confiscation case and advise you around that, where actually that's a specialist area of law that needs to be understood in a way that my defence couldn't, yeh? So there were errors in the way they acted on my behalf. So what I come to realise is there were moments in the construction of my defence case where I could have mitigated the impact of a potential confiscation order that were completely missed because my legal team were completely out of their depth dealing with a confiscation case, and that's wrong, wrong when it is your liberty that is at stake.

Once again, this extract illustrates the extent to which the confiscation defendant is disadvantaged when defending against a confiscation order. However, as this thesis has revealed (and will continue to do so), the extent of the legislative and procedural flaws are so significant and interwoven into the fabric of the confiscation system, especially in regard to how the confiscation figures are constructed, that it is difficult to know whether assigning adequate or competent legal advice would make much difference. These are important considerations that lie beyond the scope of this thesis as they require some kind of quantitative investigation which compares privately funded confiscation defences against legal aid funded cases to identify whether the privately funded cases fair better during confiscation proceedings.

In summary, this section of the chapter has begun to expose the inadequacy and the malpractice of the legal defence experienced within confiscation trials and in doing so further illuminating the procedural injustices that are said to characterise the confiscation process. Whilst it is accepted that receiving inferior legal advice is not unique to confiscation cases, the point here is to highlight that this is another cumulative factor that shapes the confiscation defendant's capacity to defend against their confiscation order. The long-term importance of which will be discussed in the following finding's chapter.

5.4.3 – The Impact Upon Prison Sentence Progression and Prison Release

As aforementioned, most of the research participants who took part in this research had as a result of their offence/s been subjected to a custodial sentence in punishment for their predicate offence. This meant that for them the confiscation process was initiated whilst they were in prison. The significance of this is that the confiscation process is experienced at the same time as an individual is adjusting to

life in prison, a daunting task in itself. Many of the research participants highlighted how having to deal with a confiscation order whilst in prison disadvantaged them in terms of preparing for a life beyond prison, as Ryan begins to explain:

I spent much of my time in prison dealing with me confiscation order instead of focussing on what I needed to be putting me head into, which was me family and preparing for my release. I remember me personal officer doing me sentence plan and saying that I might benefit from doing the ETS programme (Enhanced Thinking Skills: an offending behaviour programme based upon cognitive behavioural therapy principles), but when you are trying to defend yeh POCA and in a constant state of vex and turmoil because of it then how can you begin to contend with the stuff that they bang-on about during these programmes? It's, it's difficult because you become so resistant to the system when you're dealing with a POCA...

It would appear that the injustice experienced during the confiscation process and the ill-feeling that derives from this inhibits the defendant's outlook on life and leaves them feeling wary of authority and angry, states of mind that are not thought to be considered conducive to the mindset required for bringing about personal change (Maruna, 2006) or engaging in programmes that are said to be linked to reducing an offender's risk of reoffending (MOJ, 2013). This disadvantage becomes further problematic when it is considered that such programmes tend to require successful completion as part of an offender's compulsory sentence plan targets (ibid).

Moreover, it was also pointed out that being subject to a confiscation order also greatly hinders sentence progression, as Sophie begins to explain:

...It [confiscation] kind of puts everything on hold; I couldn't get my ROTLs, I couldn't get to open conditions, I couldn't get me tag or anything like that because I had this proceeds of crime hanging over me [...] they know that you will agree to anything because it is holding yeh sentence up and you're desperate to get your ROTLs or your tag, its cruel...

And similarly for Frank:

And it took almost two years after I was sentenced for the POCA case to be dealt with and during that whole time I couldn't get me Cat-D cos they wouldn't let me go to an open prison until my POCA case was sorted.

Conceptualising this within an understanding that, for most prisoners, their number one priority is to get out of the prison gates as fast as possible, whether this be by way of an electronic tag or being de-categorised to open prison conditions so that they can go out on ROTLS (release on temporary licence) or home leave. This research revealed that being subject to a POCA denies, or delayed participants from taking advantage of these privileges, whilst simultaneously incapacitating them for longer in higher security prisons which heightens the level of risk that they are exposed to, as Harry begins to explain:

I can't be doing with this hanging over me and the sooner I get this put to bed the sooner I can get me Cat-D, I'm just too old to be in these local prisons...

As the prevention of de-categorisation for a confiscation defendant is not specifically outlined within confiscation legislation, it would appear that it materializes within the discretionary space that exists between policy and practice, conceptualized and legitimized on the basis that a POCA defendant has access to money and is therefore deemed a 'flight-risk'³⁹ that must be contained within closed prison conditions. Such practice, therefore, would appear to be a mechanism for imposing a risk label upon the confiscation defendant, allowing the State to then inflict further restrictions and controls upon them (Cohen, 1985), a theme that will be revisited in the final chapter.

³⁹ An individual is perceived to be a 'flight-risk' if they are thought to be likely to abscond from prison, and in the context of asset recovery abscond abroad, and frustrate asset recovery efforts.

In the following extract Marcus effectively captures the physical, emotional and psychological reality of having his prison sentence disrupted and being removed from open conditions and having to go back into closed conditions so that he could attend his confiscation trial:

oh I was devastated, I kept going back, I (pause) keep, keep getting took back to cat-B prison from cat-C, err, D (Cat-D). Oh it was horrible, it was horrible, I'd have done anything, anything, (long pause) yeh, to stop me going back (to cat-B prison for POCA court case) [...] And then I'm fucking back in there, sat in (begins to laugh as he is speaking) with all the fucking nutcases [in HMP Liverpool] (long pause)... craig [researcher], its fucking heart-breaking mate, heart-breaking getting on that bus, especially as like I said I knew I was going home [his original release date was just a few weeks away] and they are fucking dragging me back to closed conditions. I was devastated. It's like you get yehself settled in a prison, earn yeh town visits and home leaves and then one day they just come and take it all away, move yeh away from yeh mates who you've settled in with and return yeh back to closed conditions when you've not done anything wrong. It's a real kick in the teeth, and all that just so yeh can get to court for the proceeds of crime, and yeh always get stuck in the local prison for weeks, getting out ov there is impossible.

What becomes apparent within Marcus's account was his desperation to get his confiscation order 'resolved' so that he could progress within his prison sentence - "*I'd have done anything*" – a desperate state of mind which was said to constrain the defendant's 'choices' in relation to defending their confiscation case.

It was evident that the denial of sentence progression was frustrating and represented an emotional barrier for the research participants as much as it did a practical one, evident by the aggressive tone in their voices and the frequency and types of profanity that was used to describe the confiscation system and their experiences. It is also necessary to highlight that several of the research participants, like Marcus in the above extract, laugh or chuckled when discussing certain areas of the confiscation experience. It appeared that this emotional response signified the research participants disbelief in what they had been subjected to. However, it could also have been used as a way to mask the effects

of the traumatic experiences that they are unveiling. As Clough (2007) points out, affect exists beyond consciousness and, therefore, emotions such as laughter occur autonomically.

It was explained that at the beginning of the prison sentence for the predicate offence a number of eligibility dates were given to them such as their Home Detention Curfew eligibility date (electronic tag), their ROTL eligibility date, their parole eligibility date and their end of licence date. As prison represents an abrupt and devastating culture shock to most people (Sykes, 1958; Clemmer, 1940), these dates were said to have a tonic effect that provided hope and allowed for them to plan for their future. Therefore, any uncertainty, disruption or delay to these dates, despite not committing any further offences, deepened their sense of injustice, especially as this impacted upon their families as much as it did upon them, as Sophie explains:

It was cruel on me mum especially, because she had been counting down for fourteen months to me coming out on tag, so when that didn't happen because of the proceeds of crime she was devastated...

In summary, this section of the chapter has revealed the disadvantaging effects of being subject to a confiscation order whilst in prison for the predicate offence. These insights have also provided some further explanation as to why a defendant would agree to a confiscation order that they do not actually agree with; to minimise any further disadvantage in their prison sentence progression.

5.4.4 – The Impact Upon the Family

An underlying influence on the decision to concede defeat and agree to the confiscation order was said to stem from an understanding that the longer the process, the more disruption, uncertainty and pain experienced by both the defendant and their family, as Eddie begins to explain:

From the first time I got arrested which was in December 2012 it's a long time to have this POCA thing hanging over yeh head going on and on with the fear of going back to jail, going backwards and forwards to court not knowing is this the time when they send me back. And the weeks and months leading up to these court appearances are traumatic for the family. It creates a lot of tension and stress and, yeh know, arguments cos everybody is stressed with it. Am I going back to prison? Is dad going to be here next week to take me to me audition or something? It's a lot of turmoil for the family to have this hanging over their heads for all these years with so much uncertainty.

Here Eddie begins to unveil the cruel nature of the confiscation punishment for the family due to the uncertainty that it induces. This was felt to be especially cruel upon the children in particular as Dave begins to explain:

It's the uncertainty that's the killer! It was messing her head up [his daughter], making her ill and she was having to miss school [...] there were times when I would go up to her room and find her crying her eyes out and I would say to her, "what's up?" and she would say, "I don't want you to go back to prison" [...] So when you can see it ripping yeh kids' lives apart you will do anything to make it right. I even thought about doing a bank job (chuckles) [...] in the end you just agree to it [the confiscation order] because your desperate to make it stop...

Here we begin to gain an insight into the effects in which oppression and uncertainty can induce. In his paternal instinct to protect his children Dave becomes "desperate", and desperation for a person with limited options is a dangerous situation to be in, a theme that will be discussed further in the following chapter.

Sonia points out that the stress caused to both the defendant and the family of having to endure two court cases greatly influences decisions in relation to the confiscation case:

Where I think it is so soul destroying and hurtful and detrimental is because it is hard going through all this once (court case for the predicate offence) so when you are at your lowest they come and kick yeh in the teeth and say "mate, we're gunna put yeh through this all again [POCA court case], see how you get on with that".

Again, this section of the chapter has revealed how, in a desperate attempt to minimise any further pain to the family, the confiscation defendant will 'agree' to decisions in relation to their confiscation order that may not be in their long-term interests.

5.4.5 - Restraint

Seven of the research participants disclosed that they had been subjected to restraint procedures as part of their confiscation case. Whilst the rationale for restraint procedures appears rational – freeze all assets so as to prevent their dissipation and maximise recovery – it was pointed out that the restraint procedures were often imposed at the point of arrest for their predicate offence, which means that the individual is at that point still legally innocent, arrested under suspicion until guilt is proven in a court of law. Importantly, it was pointed out that the restraint of assets is a punishment that falls disproportionately upon the family whose day-to-day life is thrown into chaos and financial hardship, as Kerry begins to explain:

Now the restraint order, erm, because we were a married couple and we didn't have separate bank accounts, we didn't have separate assets, we had everything jointly, therefore the restraint order affected me as a wife and our family because all our assets were restrained whilst the enquiry was going on.

The material reality of having her assets placed under restraint being:

...we had no money, our companies had to close because the companies were held under restraint also so, therefore, the bank accounts weren't allowed to be used, therefore, nothing could be paid, therefore, you couldn't trade. So our whole income structure was gone. Any assets that we owned we couldn't sell to live because of the restraint order so we were, therefore, living day-to-day by borrowing money off our friends and family really.

As the wife of a POCA defendant, Kerry then goes on to explain how restraint procedures affected her:

Now we are talking 2010 when my husband was convicted and it was 2015 when the POCA was finalised, it kept on being extended and extended, so five years we have been held under this [restraint procedures] and I wish that we had got divorced because then at least I would have been seen as a separate entity and not been pulled into everything [...] I wished now that even though I would have supported my husband, somebody would have said to me, "yeh know what, divorce him because then you will be an individual rather than being something attached to your husband and therefore everything you own and everything that you have got is his." Yeh know half of the assets were mine and I haven't been convicted of any offences so for the last five years whilst the confiscation case has been going on all my assets have been frozen and that's cruel.

Ironically, despite not having been charged with any offences, Kerry points out that she had less rights than her husband when it came to accessing legal advice:

I couldn't get any legal advice because I wasn't party to the criminal activity, but then I didn't have money to pay for criminal advice either, so it hit me double-whammy even though I wasn't involved in the crime. I wasn't allowed to have legal aid, yet all my money had been held up under a restraint order so therefore I couldn't pay for anything. So it's really hard to be a wife in these circumstances I think.

Kerry pointed out that the system does not entitle the partner to have legal aid so that they can defend their interests. Therefore, the system automatically assumes that the defendant's and the defendant's family's interests are the same which is problematic in that the legal aid solicitor's job first and foremost is to represent their client, which in this case was Kerry's husband, and not Kerry directly and subsequently she would often find herself having to go through her husband so as to get legal advice.

For Kerry, a mother of five, the restraint of her bank account was especially problematic:

How the hell do they expect you to feed your children and put clothes on their back, they still need to eat [...] it was impossible. The businesses had collapsed by this time which meant that we had no income but at the same time I wasn't entitled to any benefits because, on paper, we had assets and money in our bank account [...] I tried to explain to them [benefits advisor] that we may have assets but we can't access them because of the

restraint order but they didn't understand, their systems couldn't process our application because on paper we had too much money.

It is important to consider whether the denial of autonomy for Kerry over her financial affairs, despite not being convicted of any offence, may constitute a breach of her human rights:

Having to apply to the court to have access to my own money, I shouldn't have to. What have I done wrong? I have my own successful business and I haven't been charged with anything, so I shouldn't have to apply to get my money.

Furthermore, Kerry's case highlights an important tension in terms of the rule of law and due process. In light of the fact that Kerry's assets began to dissolve as a direct result of the restraint order, despite not committing, being charged or convicted of any offence, completely erodes the presumption of innocence principle and, therefore, represents a significant miscarriage of justice. Moreover, what Kerry's case begins to illustrate is that, despite not directly committing any criminal offences or there being any evidence to suggest that she was aware that her husband was committing any offences, as his wife, the confiscation punishment is automatically extended to Kerry to the extent that her assets were taken into consideration and the effect of the confiscation process meant that she was financially ruined. Therefore, for Kerry, due to the insidious manner in which confiscation laws have been constructed, her husband's confiscation order has become 'their' confiscation order, and this is reflected in the way she refers to it as such. There are a number of further points to address in light of Kerry's experiences. Firstly, the loss of her 'income structure' because of the closure of their businesses is more likely to reduce their ability to make any future payments to their confiscation order and as was the case for Kerry, no longer being able to afford to pay the mortgage. So, paradoxically, instead of preserving the assets for future confiscation, restraint procedures in this case led to the dissipation of their assets. The second point of interest is that, in losing their income

structure this meant that the family on the outside was left struggling to meet the costs of day-to-day living (clothes, food, mortgage payments, utility bills etc). What Kerry's experience begins to demonstrate is that the impact of the restraint order impacts most greatly upon the family on the outside as the confiscation defendant is in prison, insulated from the direct impact of loss of income, loss of the family home and all the related strains that tend to follow on from those losses. These are important revelations that will be revisited in the following chapter when the long-term impact upon the family is discussed.

In summary, what these last five sub-sections of the chapter have revealed is how the stresses, pains, hardships, and disadvantages caused to both the defendant and the family throughout the judicial process constrains the defendant's 'choices' and, subsequently, in their desperate attempt to "make it stop" they agree to the court's confiscation figures, regardless of the fact that they want to contest them or that they are unable to pay them.

5.5 - Summary

In revealing that these special powers are being disproportionately used against low-to-mid-level offenders, it has begun to challenge the official discourse which professes to be using them against 'serious and organised' criminals. It has then revealed the processes which facilitate the construction of grossly inflated confiscation figures so as to make it appear as though these measures are being used against 'serious and organised' criminals. In doing so, this chapter has exposed which legislative provision were instrumental in the process of grossly inflating the confiscation figures and the consequences of the legislation being able to circumnavigate due process safeguards. This chapter then revealed the coercive tactics adopted by the prosecution; the incompetency and collusion of the 'defence' legal team; the impeding effects upon prison sentence progression and privileges; the

distress and hardship for those whose assets were placed under restraint; and, the pain and hardships being experienced by the family on the outside, all of which were said to compel the defendant into 'agreeing' to the confiscation order in the hope that this would alleviate the pain induced by way of the confiscation process. In addition to the pains and hardships that have already been acknowledged, this chapter has revealed the level of uncertainty that the confiscation process induces and how this is damaging for the defendant but the family especially. Therefore, this chapter has exposed a legislative process that is procedurally unjust, that is predicated upon a presumption of criminality rather than innocence, violates human and civil rights, is disproportionate and impacts significantly upon the family who are innocent and as a result, its legitimacy is brought into question. These are all important issues that will be considered in the following chapter when the long-term impact of the confiscation punishment is revealed and then revisited in chapter seven when analysing the findings within the context of the literature reviewed in chapters two and three.

Chapter 6 – The Long-Term Effects of the Confiscation Punishment

6.1 - Introduction

Whilst the previous chapter began to reveal how post-conviction confiscation is experienced in the short-term, this chapter will turn its attention to revealing how it is experienced in the long-term. It will begin by discussing the impact of receiving confiscation related correspondence and what the consequence is of failing to satisfy a confiscation order are, before moving on to discuss the consequences of adding interest upon the confiscation debt. This chapter will then reveal how the confiscation punishment disadvantages the defendant in the long-term and impedes their efforts to develop a life away from offending. The final section of the chapter will reveal how the confiscation punishment affects the defendant and their families emotionally and psychologically. By synergizing the findings discussed over the two chapters, this will enable a broader discussion to take place in the following chapter within the context of the existing literature so as to achieve the research objectives.

6.2 - The Consequences of Not Satisfying a Confiscation Order

In failing to satisfy a confiscation order in full, and within the specified time,⁴⁰ the court is obliged to activate the default prison sentence in which the length of time served is determined by how much confiscation debt remains outstanding. The principle that underpins the use of default sentences is that the pending threat of prison will incentivise payment (Home Affairs Committee, 2016a), however, Declan's account begins to challenge this idea:

*It just doesn't make any sense, if yeh haven't got it, yeh just haven't got it, simple as that!
Sending me back to prison isn't gunna make some money magically appear!*

⁴⁰ Under s.5 SCA 2015 an order must be paid in full on the day on which the order is made unless the court is satisfied that the defendant is unable to do so in which case the defendant has a up to three month to pay

It was said that, because of the injustice of how the confiscation figures were grossly miscalculated, the punishment inflicted for not satisfying the order was felt to be deeply unjust, as Sonia explains:

The second sentence (POCA default sentence) for me and my family, even though the first sentence (for the predicate offence) was longer, is far more detrimental than the first. The first one we come to terms with that, but as I said, with the POCA one you just feel so helpless and frustrated because you can see its being implemented so unfairly.

In the following extract, Frank states that he agrees with the confiscation of tangible assets but believes that the imposition of an extra prison sentence for assets that he does not have [or no longer has] is unfair:

So yeh I accept my punishment for that [drug offences] and I accept the fact that they confiscated everything, me watches, the cash and the cars, I'm okay with that, but to then send me back to prison for money that I haven't got isn't fair. People must see that surely?

And similarly for Kevin:

To be sent back to prison for assets that they say are hidden is so, so corrupt. If I had a house or some money in me bank account and I was refusing to hand it over then I would get it, I'm choosing then to keep the assets and serve the default sentence. But that's not the case. They are saying that I've got hidden assets, which I haven't, but I've got no way of proving to them that I haven't [...] so for me, the default sentence was unfair and that's why I'm so angry...

As will become apparent throughout this chapter, the perception that the confiscation punishment had been unjustly imposed, sets the tone for how the confiscation punishment was responded to. For those research participants who were still in prison for their predicate offence at the time when their default sentence was imposed, this was said to have a disruptive and devastating impact upon both themselves and their families, as Frank explains:

Yeh me head was seriously done in when the [default] sentence got added on because it was like starting all over again [...] When you get sentenced you are able to start planning yeh sentence, working out yeh ROTL eligibility dates, when you can go home and stuff but that all gets kiboshed (put a stop to) when you get given a POCA default sentence and so you have to then explain to yeh missus and everyone else that the dates and yeh plans that you had been arranging have all gone out of the window. So it messes everybody's head up.

And similarly for Marcus:

I was a broken man at that point because my whole world had been turned upside down, when I was just getting ready for getting out (of prison) [...] you've spent yeh whole sentence making plans with yeh kids for getting out, talking about what we are going to do together when I get out and then they extend yeh sentence. How do you explain to an eight-year-old that I'm not coming home now? To them all they can think is that dad has been naughty again, when I haven't.

In addition to highlighting the devastating and confusing impact upon his child when the default sentence was activated, Marcus makes another important point here. The way in which his eight-year-old son understands the extension of his dad's prison sentence is similar to the way in which most people would understand it; prison sentences are only ever imposed/extended if further convictions are secured or further offences occur during an inmate's sentence, none of which were true for Marcus. His 'offence' which led to the extension of his prison sentence was that he was not able to satisfy his confiscation order, a confiscation order which he asserts was grossly miscalculated in the first place. It is in light of such findings that our normative understanding of the relationship between a criminal offence and punishment is disrupted; under confiscation law, no further offence needs to be committed for punishment to take place.

Whilst Marcus's default sentence was only an additional six months, he explains that it had both a psychological and an emotional impact upon him:

So when they then give you an extra six months, which people don't think sounds a lot, well it is when all yeh wanna do is get out of prison and be with yeh family, six months feels like a lifetime and there were guys in there when I was in there who were doing years and years of extra jail for their default [...] for me I thought my world had ended, he [the judge] might as well of said that I had to serve an extra six-years cos my brain couldn't process the fact that I wasn't getting out. That has to be a low-point for me I think because it made me realise that anything is possible with POCA, anything!

Once again Marcus highlights the uncertainty that characterises the confiscation punishment, a thread that was to run through many of the narratives. In the following extract, Enrique was able to offer a detailed insight into how abruptly his reintegration plans were derailed when his default sentence was imposed and the devastating impact it had upon his family especially:

It messes with yeh head, it really does. Not just my head but me missus and me lads head as well [...] So come the Monday, when I'm supposed to be getting released on the Friday, they give me six months (default sentence). So I rang home at about half past six and she said, "why haven't yeh rang me, what the fuck you been doing?" And I said, "I've just been to court and they have just give me six months for proceeds of crime". She just burst into tears and I just thought, it's worse than getting sentenced [for his predicate offence] knowing that she was so upset. It's punishing her cos since the day you get sent to prison every prison visit, phone call and letter is spent talking about yeh plans together when yeh get out and you're all geared up for getting out and just five days before, and all those plans have gone out of the window. It's wrong. It's bad enough for me in prison but for me missus and me son, who that's all they've been thinking about, it's fucking with their heads and it's wrong.

In addition to the cruelty, this insight begins to raise some important questions around the morality of imposing a default sentence so close to a prisoner's release date when the potential to psychologically and emotionally unsettle Enrique is taken into consideration. Equally important is the potential impact upon the family who, having planned for Enrique's release in just five-days' time, were now left having to re-adjust once again. Again, this example provides an insight into the level of

emotional and practical uncertainty that characterises the POCA sentence, uncertainty for both the offender and the family.

Enrique went on to explain the impact the default sentence had upon his reintegration plans:

My mate who was on these wind-farms, he offered me a job. I was due to get out on the first of May last year and he said, "in July [Enrique], we are taking two more crew on and I've got one of those jobs". Obviously, me POCA sentence was added and I missed the job cos I didn't get released till September. So I lost out on a job cos they couldn't hold the position for me cos they needed to fill it. That's where it doesn't make much sense cos they send you to prison for not paying yeh POCA, but if you're in prison then you're not able to pay anything off it are yeh? If I hadn't been on me default sentence I would have got that job and I would have been able to make some payments towards it. There's no common sense when it comes to POCA, it's fucked up!

What Enrique's experience begins to illustrate is the perverse effects of prioritising punitive confiscation policy over the wider 'rehabilitative' objectives of the CJS. For those that had been released from the prison sentence for the predicate offence when their default sentence was imposed, this was said to be equally as devastating, as Daniel explains:

It crushed me to be sent back to prison because you manage to adjust to life on the outside, yeh know, get your life in order; I met [his partner], got a job and began to rebuild me relationship with me lad and then they send yeh back to prison. It's cruel. Cruel on me but especially cruel on the family.

Here Daniel begins to explain how he had managed to rebuild his life when he came out of prison, traversing what Mischkowitz (1994 in Healy, 2010: 77) describes as the 'conformative spiral', developing social bonds (Sampson and Laub, 1992) that are said to be consistent with a pro-social lifestyle and enduring transformation. Therefore, in creating further strain and disruption, the imposition of the default sentence risks derailing desistance. This is a theme that will be discussed further later in this chapter.

For Daniel, despite knowing that he was facing being sent back to prison if he failed to satisfy his confiscation order, he never thought it would actually happen:

It's weird because on the letters it says that if you don't pay it you will be sent back to prison on a default sentence but yeh think to yourself, surely they're not actually going to do it, especially as I'm working, I'm paying tax and I'm not offending. Where's the logic in that?

In not having the discretion to suspend the default sentence, the system denied itself the opportunity to recoup some of the confiscation debt by way of a payment plan and denied itself the opportunity to receive tax-revenue from Daniel's earnings, whilst simultaneously prolonging the financial burden upon the taxpayer by keeping him in prison. It is in light of such illogical findings that questions about the true purpose of the confiscation punishment begin to arise.

Daniel then went on to explain how the default sentence differed from his first prison sentence for the predicate offence:

Being sent back to prison on me default was different to when I got sent to prison the first time. I didn't know what to expect on the first one but on the default sentence I knew exactly what to expect, yeh know, what lay ahead, and I knew that I didn't want to go back in there. So, err, the psychological effect of thinking I'm going back into the chaos of Walton [HMP Liverpool] is devastating, devastating in a way that is hard to explain to be honest, it's just devastating.

It is understandable why Daniel would fear being sent back into HMP Liverpool considering the conditions reported within its 2017 inspection which concluded that there had been an 'abject failure of HMP Liverpool to offer a safe, decent and purposeful environment' (HMCIP, 2017: 5). Therefore, the extension of a prison sentence or the reincarceration of the confiscation defendant under the default sentence punishment needs to be considered within the context of Article 3 of the European

Convention on Human Rights, which prohibits torture and ‘inhuman or degrading treatment’ (European Council of Europe, date not provided: 5). Moreover, as the NAO Report (2017b) points out, those in prison disproportionately suffer from physical and mental ill-health to begin with and exposure to the prison environment is likely to exacerbate those problems. Therefore, this research, in revealing that the confiscation defendant is exposed to an extended period in prison, also unveils the heightened risk to the mental wellbeing of the defendant.

When the insights of the last two extracts from Daniel are considered, which suggest that Daniel was well advanced within the process of building a life away from crime and displaying signs that he was deterred by the prospect of having to return to prison, questions arise as to why the further punishment objective of confiscation policy took precedence, especially as this could risk undoing those desistance milestones that Daniel had managed to achieve.

Daniel’s experience also begins to challenge the ideology that defendants serve a default sentence because they refuse to ‘cough-up’ the money:

So what can you do, you’re in an impossible situation and to be sent back to prison time and time again and destroy your life and your family’s life, I don’t think that’s fair. That’s the frustrating thing for me, I’m in a no-win situation here cos believe me, after my time in jail and what it put me family through, if I had it, I would have paid it to make sure that I don’t have to go back to jail.

The distinction between refusing to pay a confiscation order and being unable to pay it is crucially important from a legitimacy standpoint. Therefore, being punished for something that he felt was beyond his control fuelled Daniel’s sense of injustice:

Well the default sentence is something that is out of your hands. Your first sentence is in yeh hands, I played that part, so that sentence (for the criminal offence) I received was

something that I had to take on the chin. But taking something on the chin for something that you've not got, what you've not had, and you can't fulfil, it's a bitter pill to swallow.

And similarly for Kerry:

Yeh know, as painful as it is for [her husband] to have been sent to prison, we just have to deal with that; he committed a crime and he deserves to be punished but sending him back to prison for money that we just don't have and has been wrongly calculated is wrong and unfair, it's shameful...

Furthermore, Daniel was able to illustrate the impact the default sentence had upon his partner:

I've been in a new relationship, err, for a number of years now and we've been living together for three-and-a-half years. Obviously, she stood by me, but, err, it did affect her [when Daniel was sent back to prison on his default sentence]. I'd be phoning her up, errm, on a night (from prison) and she had hit the ale [started drinking]. I could tell she'd hit the ale cos she was lonely, yeh know, she had nobody around her and she's struggling to deal with the fact that I was in prison. She couldn't understand how they were able to send me back to prison if I haven't committed a crime, so naturally she thought there must have been something more to it, yeh know, like I was keeping something from her.

This example begins to provide an insight into how the POCA process puts further strain upon relationships and, due to the perplexity of sending the confiscation defendant back to prison despite not committing any further offences, creates doubt and suspicion within the minds of the family.

Daniel then went on to explain how the default sentence also impacted upon his son:

So I know that it was affecting him as well. Errm, he had a scholarship at Wigan (rugby club) and he was due to sign the professional forms for them and due to me going back on that (default sentence), that just went up in the air because he wasn't playing to his full potential like, cos his mind was elsewhere thinking about me going back to prison and that. It's a lot for a fifteen-year old to take on-board cos I'd promised him that I'd finished with drug dealing and that I wouldn't be going back to prison again, that I'd be there for him, and then I get sent back to prison. It proper messed his head up cos he thought that I'd let him down when I hadn't, there was absolutely nothing more I could have done, I just couldn't give them what I didn't have, it's as simple as that...

In addition to exemplifying the effects upon his son, this example reinforces the point made earlier regarding how the imposition of a default prison sentence disrupts our common understanding that the commission of a criminal offence precedes State punishment (Flew, 1954).

This section of the chapter has begun to reveal the devastating impact of the default sentence upon the defendant and their families. Furthermore, in highlighting how the confiscation defendant is unable to satisfy their confiscation order, as opposed to refusing to, it has also begun to challenge the legitimacy of the use of default sentences as a method of ‘incentivising’ payment.

6.2.1 –The Loss of the Family Home

“Legalised Robbery”

A theme that was prominent within the research was that many of the research participants had lost their family home as a consequence of the confiscation process, as was the case for Karl:

I've had to sell me house and put me missus and me daughter out of a home for six and a half grand. They are prepared to make a family homeless for six and a half grand! Even though that six and a half grand was earnt legally. Again, in POCA's eyes they are entitled to take it anyway, even though I can prove where every penny that went into buying that house and paying the mortgage came from, it doesn't matter. They say that they are entitled to take it and that's hard to deal with. It's legalised robbery.

On analysis of Karl's case it would appear that, whilst the loss of the family home for Karl and his family was devastating, his sense of injustice stems from an understanding that his home was bought and paid for with legitimate money. Being an *in personam* confiscation system meant that Karl would not have been directly ordered to sell his house by the courts, but it would have been listed upon the court's assessment of his available assets. Therefore, Karl is obliged to come up with a sum of money equal to the available amount or face the imposition of the default sentence, a prospect that he said

would have “put [him] over the edge”. Karl also pointed out that because he nor his wife were working, they were unable to re-mortgage their home as a way to release some equity, a potential solution available to those in favourable financial circumstances. Therefore, selling his family home became the only lawful option. This insight into Karl’s experience begins to raise the question as to whether confiscation as a form of punishment is experienced differently by those who have little [or no] financial and/or social capital than those who do?

In the following extract Jo highlights the destabilizing effects of losing their family home, especially for her children:

Confiscating a family home, and let’s get this straight this wasn’t an eight-bedroomed mansion or something, it was just an ordinary terraced, family home, yeh? But it’s not about the bricks and mortar, its more about the stability that signified for the kids, do you understand me like? [...] my children were already stressed out by their mother not being there and the massive change and all that distress that they were caused but they were also about to be made homeless and that was hanging over our heads whilst we tried to adjust to mum being in prison.

It is through Jo’s case that the impact of the confiscation punishment is best exposed, highlighting that the hardships induced by the confiscation of material assets falls disproportionately upon the children of the confiscation defendant, whose innocence is absolute, and not directly upon the defendant as the rhetoric suggests:

So my kids, as a consequence of my offending, lose their home and get pushed into some sink estate. So they get the double punishment, yeh, of losing their home, their peer support group, their school places, their potential and get moved to any area in [city]. I don’t know, it was just horrendous. Can you imagine how angry my children were with me? Not only had I got myself put in prison, but they then stood to lose everything else in their lives that offered them a bit of stability through these difficult times. If we lost the house I don’t think that’s fair because its impacting on the innocent and they become victims of the whole confiscation process.

When these findings are considered amongst the recently published Joint Committee on Human Rights Report (2019), which recommended that when a judge is considering sending a primary carer to prison, which is usually a mother, the child's right to respect for family life should be a central concern, the illegitimacy of the confiscation punishment is brought further into view. This research has revealed that despite Jo committing a 'non-violent' offence, not only was she sentenced to eight years imprisonment, but this was accompanied by an additional confiscation punishment and all the pains, disadvantages and hardships that ensue from it, an exceptionally punitive level of punishment that bore down heavily upon her children. Therefore, this begins to highlight that confiscation policy amplifies the disregard that contemporary forms of punishment and sentencing practice have for the rights of an offender's children.

As the loss of the family home tended to occur whilst the confiscation defendant was in prison, for their children, who were already struggling to cope with the loss of a parent, it was said that having to move away from their family and friends had a devastating impact upon their lives, as Karl begins to explain:

Me daughter had to have counselling because, errm, basically, because of seeing me get upset about how I was unable to pay this POCA and losing our home, err, a house that she was born in and brought up in for over seventeen and a half years with all those memories and all her friends that she has grew up with, she has had to move away from.

In light of the knowledge that most confiscation defendants may be in prison at the time their order is imposed, and in knowledge of the fact that under [section 5 SCA 2015](#) the maximum time that a

defendant has to satisfy their confiscation debt has been reduced to three months,⁴¹ it is important to consider who the burden of realising the family home falls upon:

Sophie: *They gave me three months over Christmas to sell the property and pay it and, of course, I was still in custody then so that was left up to my family to do which obviously it wasn't their house, it was my house, so they didn't know where everything was, where the paperwork was, they didn't know how to go about it. Errm, the courts didn't offer my family any help in terms of support and selling it, errm, or anything like that. It was just a case of get it sold in three months or we are giving you extra time (in prison), errm, so lots of pressure on the family.*

As the speed in which an asset sells or the amount of cash that is raised from its sale is largely dependent upon market demands, to a large extent, the defendant has little control over those influences. But as Sophie begins to explain, even if a potential buyer for a property is found, the sale price needs to then be approved by the court:

I got quite a few offers on the property, but the CPS kept on refusing the offers because they wouldn't have made enough off it. Errm, they were never gunna get the full £60,000 that they were after, they had over-valued the property in the first place but yet they kept on refusing any offers that were made on it, errm, and you have to remember that they expect you to do all this in three months [...] when you are having to do it from your prison cell via your family and, err, it was Christmas as well, which nobody buys houses at Christmas do they? I mean you have to remember what is at stake here, my liberty. If I don't sell the house my prison sentence is getting extended.

As Sophie points out the consequence of failing to raise the funds by selling the house is that her default prison sentence would have been activated, which heightened the burden upon her mother especially:

The stress of her youngest daughter being in prison and having to deal with everything on the outside to do with the POCA, like selling the house, errm, I could see that she had lost

⁴¹ If the full amount ordered cannot be paid upon the day on which the order is made, then the specified time to satisfy a confiscation order is within three months from the date the order is imposed

so much weight when she come up on visits, yeh, she was a bag of bones, clearly suffering with depression.

When the loss of the family home (or any other legitimately acquired assets) is considered alongside the findings within the previous chapter, which revealed how confiscation figures are inaccurately constructed and 'agreed' to, then we can begin to appreciate the source of the research participant's sense of injustice that has been revealed within this section of the chapter. More importantly, this section of the chapter has revealed the devastating impact upon the children when the family home has to be sold in order to satisfy their parent's confiscation order.

6.2.2 – The Impact of Receiving Confiscation Letters


As the default sentence does not expunge the debt, in order to remind the defendant of their obligation to pay the order, it was revealed that they would receive letters from HMCTS which demanded payment, but also threatened further imprisonment, which was said to cause great distress, fear and uncertainty, as Kevin begins to reveal:

This has been going on since 2008, nearly ten fucking years of mental torture with no end in sight. That's what it's like when you keep getting letters sent to you saying that you now owe this amount, and it's gone up stupid amounts, and they are gunna send you back to jail if you don't pay it. Every time I get one of these letters it gets me thinking, 'Am I going back to prison?', erm, 'Are they going to turn up one day and arrest me in front of me daughter?' and I get angry, I get crazy thoughts just thinking about it.

This sense of fear that Kevin describes is also fuelled by an understanding that the threat of re-incarceration is real, having witnessed many people being sent back to prison to serve a default sentence whilst he was in prison. In order to appreciate why the research participants placed so much

emphasis upon the oppressive nature of these confiscation court letters, it is necessary to analyse their content. Figure 10 is a confiscation letter received by one of the research participants.

Figure 10: An anonymised confiscation letter sent by HMCTS

 **HM Courts
& Tribunals
Service**

My Ref: [REDACTED]
Your Ref: [REDACTED]
[REDACTED]
[REDACTED]

HMCS NW Regional Confiscation Unit
PO Box 1960
Liverpool
L69 2PJ

T 0151 471 1048/1049/1050/1051
F 0151 471 1053
E ME-NW.Confiscation@hmcts.gsi.gov.uk
www.justice.gov.uk

Dear [REDACTED]

RE: Outstanding Balance on your Confiscation Order

I am writing to you in reference to the Confiscation Order made against you at Liverpool Crown Court on [REDACTED] for the sum of £6,587.00

The total amount outstanding is £6,587.00; the Crown Court ordered the amount to be paid by 31st January 2013. In addition, interest is charged at 8% daily on any amount unpaid from the date when the payment period expires.

The assets identified as available are:

- o Credit balance re Nat West account number [REDACTED]
- o Breitling watch
- o Renault Kangoo venture van

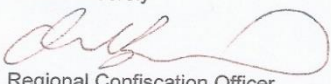
It is **your** responsibility to realise these assets and pay the remaining balance of your Order.

If the order is not paid this will result in further enforcement activity which will include:

- Affecting any privileges you have that are currently authorised by the Prison Service including your parole eligibility.
- The use of bailiffs or receivers to sell your property/assets. Where bailiffs or receivers are used their costs are deducted from the funds raised and you will remain liable for the payment of any amount outstanding.
- The imposition of the sentence of imprisonment ordered by the Crown Court for non-payment, which in your case is 7 months; this does not expunge the debt.

You should be taking steps to pay the order prior to the expiry of the deadline, rather than on the date of expiry. Please inform me as soon as possible regarding your proposals for paying the order. Details of how to pay can be found on the reverse of this page.

Yours sincerely


Regional Confiscation Officer
NW Regional Confiscation Unit

CP0101_110719_228905_Machine(220605027304)

In addition to this letter highlighting the amount of outstanding confiscation debt it also lists the enforcement activity that will follow if the defendant fails to meet the demands of the order. The first enforcement activity (*affecting any privileges you have that are currently authorised by the prison service including your parole eligibility*) would suggest that parole eligibility, or prison recall for those that have already been released by the time the confiscation order is determined, is conditional upon the prisoner meeting the demands of their confiscation order, a further level of disadvantage and punishment exclusive to the confiscation defendant. This becomes more problematic in light of the earlier findings which have revealed that the confiscation orders are grossly miscalculated. Other privileges offered by the prison service that they could be alluding to in the letter could be eligibility for early release on electronic curfew or being de-categorised to open prison conditions so as to take advantage of ROTL opportunities. Therefore, this would appear to further support earlier disclosures within the previous chapter which revealed that the confiscation defendant is subjected to a heightened level of disadvantage during their prison sentence.

The second enforcement activity that is threatened upon the letter is the use of bailiffs or receivers to recover and sell the defendants assets, with the bailiff's costs being added to the amount the defendant is legally obligated to pay. This is likely to exacerbate the financial strain and cumulative disadvantage already experienced by prisoners and their families when they are released from custody (Pleggenkuhle, 2017) and place further strain upon the relationships.

The third enforcement activity that is threatened upon the letter is the imposition of the default prison sentence, with a reminder that serving this further prison sentence does not expunge the debt. The threat and experience of the default sentence was perhaps one of the most discussed areas of the research, as Daniel begins to reveal:

Sick! Sick! That's how it makes me feel. Well put it this way since I've had that letter I've pushed it aside and just tried to gather my thoughts and I've been drinking every night since which is mad because I was just beginning to feel like I was getting on top of things and now my life's been turned upside down again.

And similarly for Karl:

When that letter lands, that's the bomb. For me depending on yeh relationship and how solid it is with yeh missus, that letter landing through yeh door can mean the end of yeh relationship or it is definitely making it very fragile, err, yeh know, it has to be worked on if yeh like.

The psychological effect of being repressed in a state of uncertainty becomes evident within Dave's narrative:

You can't take action against it. Err, you can't hire a solicitor because they've taken all yeh money off yeh, so you're just sitting there like a sitting duck, waiting for them to pick you off. I imagine it must feel similar to when somebody is in a domestic violence relationship and you wake up each morning thinking, 'is it going happen today? Is he gunna give me a beating today?' Well that's what this is like. Every day praying that today is not the day when the letter arrives. Living in constant fear. The fear every time a letter comes through the door thinking this might be the courts again.

Whilst it is accepted that there are significant differences between Dave's confiscation predicament and the experiences of those subject to domestic violence, he does begin to capture the effects of not knowing what lies around the corner and how this might begin to impede upon his confidence, self-esteem, identity and how he views [and responds to] his position in the world. In order to appreciate the extent of the fear and uncertainty that consumed Dave it is important to acknowledge what conditions they are being threatened to be returned to:

Dave: *when I was in prison [for his predicate offence] I got a kettle of boiling water chucked over me.⁴² So when I get letters threatening to send me back to jail, its traumatising for me to think that I might have to go back in there.*

In acknowledging Dave's fear of being sent back to prison if he does not satisfy his confiscation order, arguably, it would suggest that if he did genuinely have the money then his fear would have compelled him to make payment, highlighting the difference between the often-conflated positions of those who 'choose not to pay' and those that are 'not in a position to pay'. The current confiscation system fails to make this important distinction, instead it threatens the activation of a default prison sentence on the basis that the threat of further imprisonment will incentivise payment. It would appear then that confiscation correspondence sent by HMCTS acts as a mechanism for fear and uncertainty for liminal and vulnerable beings, the consequences of which will be discussed later in this chapter.

6.3 - Accruing Interest and Section 22 Powers

A theme that was prominent within the research was the impact of having interest added onto the confiscation debt. This was said to impact upon the defendant and their families in various ways.

Firstly, it was said to have a demoralising effect, as Enrique begins to explain:

Yeh, I got 6 months default and it was £4.22 a day (interest) on that £18,000 I think, which still goes up to this day and I was released in Jan [20]12. It's now four years and three months later, still on-going, and about two-pound-fifty on the £11,000. Remember, I've still got two POCA's live with interest being added. So what's that about, err, let me work it out [gets his phone out of his pocket and starts calculating it] two-fifty times three, six, five equals nine hundred and twelve pounds and fifty pence, and the other is, what did I say it was again, let's say four pounds times by three hundred and sixty-five equals one

⁴² A common form of retribution in prison in which a prisoner typically puts sugar or honey into a jug of boiling hot water so when it is thrown over somebody's face it sticks to the skin and, therefore, scars and is extremely painful. Referred to in prison as being 'swilled'.

thousand, four hundred and sixty pounds. Add them together and we are looking at.... two thousand, three hundred and seventy-two pounds and fifty pence. Not small change is it when you're on benefits? [...] well it's going up faster than I'm able to pay it. I'm paying five pounds a week out me benefits but I think it is going up by about forty-five quid a week (in interest). What other punishment do yeh know that increases as you're doing it? Get yeh head around that one.

And Similarly for Marcus:

Yeh me job every week, err, me wages, I think just fifty pounds every week is left over but I think it was ten pounds a day interest, err, so it's just never gunna go away, keep going up and up, so I just think to myself, 'what's the point'?

It was also pointed out that the interest begins to accrue from the point in which the specified time⁴³ lapses, which for many of the participants meant that it begun to accrue interest whilst they were in prison, as Sophie explains:

The prison wages are pathetic so how on earth do they think you're supposed to pay it from prison? it's unbelievable! Yeh! It's ridiculous. I'm sat in prison and I've got no money to pay it and I'm getting two pounds a day from me job so how the hell can you then add on interest and say pay it now, it's just out of the question. By that point you will do anything to get some money together and that's really dangerous I think.

Here Sophie begins to highlight that the accruing interest creates a sense of urgency to make money fast which, when understood from the situated reality of the confiscation defendant whose choices are greatly constrained, could influence an individual's decision about reoffending, a theme that will be further discussed later in the chapter.

An example which provides an insight into the scale of interest that can accrue is Brendan's case (see figure 11). At the time when Brendan received this letter he was partway through his eight-year sentence for the predicate offence which had also been extended by 33 months through non-payment

⁴³ or an extended period if this has been granted which under s5(5) SCA 2015- which is a maximum of six months

of his confiscation order. As can be seen from his letter, due to accruing interest, his confiscation order was increasing at a rate of £43.84 a day, which at the time had amounted to an extra £14,246.58 being added to his confiscation order. At the time Brendan said he was earning just £9 a week in prison wages yet his order was increasing each week by £306.88. In light of this, the question that then arises is whether the imposition of further punishment [added interest], on the basis that an individual has failed to meet the demands of the original punishment [his confiscation order], is lawful when the individual is denied the opportunity to comply with the original punishment because they are constrained by their prisoner wages?

Figure 11- Letter from HMCTS to Brendan outlining how much interest is accruing upon his confiscation debt


HM Courts &
Tribunals Service

CONFIDENTIAL

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Regional Confiscation Unit

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

www.justice.gov.uk

[REDACTED]

Dear Sir

A Confiscation Order for the sum of £200,000.00 was made against you at [REDACTED] Crown Court on the [REDACTED]. The Crown Court ordered that the amount was paid in full on or before [REDACTED].

The amount you currently owe is £214,246.58

This includes £14,246.58 as interest charged since the time allowed for payment expired. Interest accrues at a daily rate of £43.84.

Interest is charged at 8% per annum on unpaid amounts from the date when the payment period expires and until the order amount and accrued interest is satisfied.

On the [REDACTED] you appeared before [REDACTED] Magistrates' Court for non payment of the Confiscation Order. At the hearing the Default Sentence of 33 Months was imposed and added to the end of any sentence you are currently serving.

Serving the default sentence does not write off the amount you owe and interest will continue to accrue on the amount outstanding.

You must keep this office informed of any change in your personal circumstances. In particular, you should arrange to pay the outstanding amount as soon as you have means to do so. If you wish to arrange to pay by instalments please contact this office to arrange terms.

If you are unable to make arrangements to pay the Confiscation Order made against you, then with your consent we can make arrangements with The Governor at the prison to deduct monies from your inmate account. Should you wish to proceed in this way I have attached a consent form which you will be required to complete and return to this office as soon as possible in the pre paid envelope provided.

Table 5 below estimates the amount of interest that will accrue on Brendan's £200,000 confiscation order by the time he is released from prison. Whilst it is thought that the confiscation system adopts a compound interest formula, none of the research participants knew for sure and nor could it be located in the legislation, [[S12 of the POCA 2002](#); [S17 of the Judgments Act 1838](#)]. Therefore, calculations using both formulas have been carried out.

Table 5 indicates the amount of interest accruing on Brendan's £200,000 confiscation order

| Type of interest | Amount of interest | Total confiscation debt |
|-------------------|---|-------------------------|
| Simple interest | (8 years [original sentence] + 33 months [default sentence] = 10 years and 9 months ÷ 2 [serve half in custody] = 5 years + 4 ½ months = 1960 days x £43.84 = £85,926.40 in interest | £285, 926,40 |
| Compound interest | Year 1 interest = £16,000; Year 2 interest = £17,280; Year 3 interest = £18,662.40; Year 4 interest = £20,155.39; Year 5 interest = £21,767.82; 4 months interest in year 6 = £7,836 = total interest of £125,210.86 | £325,210.86 |

What both these figures illustrate is the extortionate amount of interest that is being applied to confiscation orders that have been grossly miscalculated in the first place, and the interest is being applied when the defendant is financially incapacitated in prison, raising important questions about the legality and legitimacy of this punishment (Tyler, 2003).

In considering Brendan's situation, his sister begins to challenge the idea that adding interest onto her brother's order is likely to expedite payment:

*Let's be honest, unless he wins the lottery, it's never getting paid, any fool can see that. So these figures are pretty meaningless. They just use them to bully people. They say that the interest is added to make them pay-up faster but that's complete nonsense. Think about it, if you add more money onto the debt, that can only ever slow the repayment, yeh? [...]
By the time he gets out of prison he will only have a few years left before he reaches*

retirement age, but if the truth be known, as an ex-convict in his sixties and in poor health, no one would employ him anyway. So yeh have to ask yourself, what's the point in all this then? Why persecute him? Because they believe he has hidden assets? Think about it, when yeh get to a certain age and when yeh years left to live are less than the amount of years that you've been alive, some things become more important than money. He's in his late fifties, he's not well, his mum could pass away at any time; I can assure you if Brendan had that money, he would have used it as his get out of jail card. Like I said earlier, it's just cruel and shameful what they are doing to him...

In summing up Brendan's predicament, Sonia inadvertently details how the accruing interest locks in punishment for life. This was a commonly held view amongst the research cohort:

Daniel: *I'm paying less each month than what's been added in interest, and I don't see that changing anytime soon, so I see it as a life-sentence.*

And similarly for Ryan:

Ryan: *I don't even know how much my confiscation order is because for the past three or four years it has been going up with interest. All I know is that it is beyond my reach, so it's there for life.*

Similarly for Jo, reflecting on her friend's confiscation predicament, she highlights that by applying interest, the punishment becomes inescapable which has consequences for human rights, identity, de-labelling, and loss of hope:

Even though she's served the default sentence she now has an attachment of earnings for the rest of her life. She never even covers the interest by virtue of the payments and she's making the maximum payments she can according to the means-testing but each day the amount outstanding increases with interest. So she will never escape it; surely that can't be right. How can she ever move on in her life? How can she ever escape the label, it's impossible! At what point is she entitled to go "enough is enough, I've paid my debt, let me move on with my life" [...] If there's no end in sight to your punishment, no way out, then that quickly diminishes hope...

In the following extract Eddie highlights the demoralising effects of the inescapable confiscation punishment:

They come along make a completely false benefit figure up, get a judge to make an order against you and then they persecute yeh till yeh die basically. I've been mugged when I was younger, and it wasn't half as bad as this POCA. At least when I got mugged they took me money and me watch and that was the end of it. With this POCA they mug you time and time again. Yeh get back on yeh feet and have something to show for it and then they come and mug you again and it continues like that on a cycle; legalised mugging! They don't distinguish between what was acquired through crime and what wasn't, they want the lot, no matter what it does to the family.

However, it is perhaps Daniel's case which best captures the demoralising effect of accruing interest and reifies the otherwise abstract concept of 8% interest. As can be seen in figure 12, Daniel received a confiscation order for £42,427.09, he successfully managed to pay £25,627.09 which left an outstanding amount of £16,800 to pay. However, as Daniel was in prison and, therefore, not earning enough to make any further payments, by the time he had completed his prison sentence his order had accrued £12,959.01 in interest taking his order back up to £29,759.01:

What the fuck! It feels like I'm pissing in the wind and I'm getting covered in me own piss. That's nearly thirteen grand of interest that has been added on. Half of what I've already paid has been added back on. That's seriously fucked up! Thirteen grand interest (spoken with emphasis and disbelief). [...] It's like going up an escalator that's going down.

Figure 12 - A letter from HMCTS to Daniel detailing the amount of interest that has accrued upon his confiscation debt



It was pointed out that in perpetuating the confiscation punishment by way of accruing interest this has significant implications for the family as well as for the defendant, as Daniel went onto explain:

And when your affecting somebody that wasn't even with yeh when you committed the crime, it makes you question where does this end? When is my punishment going to be over? When have I been punished enough?

The point that Daniel raises is an important one when it is considered amongst section 22 powers which allow for after-acquired and legitimate assets to be confiscated:

So let's say we get a house together and spend the next ten-years chipping away at the mortgage, could they then come and force us to sell the house for the equity? See what I'm saying? [...] Yeh know, [partner] hasn't been charged with anything, she wasn't even with me when I committed my offences, yet they could come along in ten-years' time and start demanding assets and stuff that we've bought together, with her legit wages as well as mine, that's fucking wrong cos they're taking legit assets that have been jointly bought with someone that's completely innocent.

What Daniel's case begins to expose is that the confiscation of after-acquired, jointly bought, legitimate assets represents a further move away from the official objective of POCA: the confiscation of 'ill-gotten' gains. Demoralized by the fact that his confiscation order had increased with interest despite him making payments, Daniel views the confiscation process as an 'all-or-nothing' system in that, unless a defendant is able to satisfy the order in full, there is little incentive to make part-payment:

My advice to anyone with a POCA is, unless yeh can pay all of it, I wouldn't bother paying it because I tried my best to pay it off, I paid twenty-six thousand grand off it and they still give me a default sentence and by the time I had come out of prison it had gone up in interest by thirteen grand. Do yeh get me? It had swallowed up half of what I'd managed to pay. That's proper devastating. I would have only got a few more months if I hadn't

had paid the twenty-six grand. So that's the advice I give to everybody I speak to when they've got a POCA - unless you can pay it all, don't bother paying it....

In Daniel's confiscation letter (figure 12) it also states that he is required to complete a means-testing form so that a payment plan based upon his affordability can be arranged. Here Daniel begins to highlight the problematic nature inherent within such methods of assessing affordability:

I filled it in like but that in itself is a complete ball-ache, having to list your income and all yeh outgoings and having to account for every penny. I mean, life don't work like that does it? What happens if your washing machine breaks down next week or me lad needs a new pair of pants for school. It feels like nothing is off limits, they can just intrude into every part of yeh life, even ten years later.

What this example begins to expose is the intrusive surveillance and control functions contained within the wider confiscation processes, functions that extend way beyond its official remit of 'confiscating ill-gotten gains'. This example also provides a tangible insight of what was referred to by Mick Creedon (national lead for serious and organised crime) as 'lifetime offender management' (Public Accounts Committee, 2016a: 6). This will be discussed further in the following chapter.

In completing this means-testing form, by default, Daniel's partner's financial position was also accounted for, despite her only developing a relationship with Daniel after Daniel was released from prison:

I mean I live wiv me partner so she gets dragged into it when yeh fill this form in, which can't be right. I met her after I came out of prison so how are they able to intrude into her financial affairs? It's wrong!

What Daniel's example also begins to illustrate is how the surveillance and control mechanisms of the confiscation system are not contained to the confiscation defendant but extend in to the lives of [innocent] members of society (Cohen, 1985), raising important questions centred upon civil, privacy and human rights, issues that will also be revisited in the discussion chapter.

In this section of the chapter, it has been revealed that the accruing interest is felt to 'lock in' punishment, or as Levi and Osofsky (1995: 54) describe it, places the confiscation defendant within a financial 'stranglehold'. Importantly it has revealed how the on-going financial penalty and its surveillance capacities impose upon the family of the defendant. This section of the chapter has also revealed how adding interest on top of a confiscation order further fuels the confiscation defendant's sense of injustice, particularly because it is thought to make the confiscation punishment inescapable and, therefore, suppresses hope. This was said to induce a number of anti-social consequences that will be discussed in the following section of this chapter.

6.3.1 –The Impact Upon Pro-Social Aspirations

“Snakes and Ladders”

One of the most prominent themes to emerge from within the research was the impact of the confiscation punishment upon the motivation to find legitimate employment. It was pointed out by a number of research participants that a method used by the court to recover the outstanding confiscation debt was an attachment of earnings order. This means that a person's salary is deducted with those monies going towards the payment of the confiscation debt. It is thought that the amount the defendant is obliged to pay is determined by [The Council Tax \(Administration and Enforcement\) Regulations Act 1992 \(Schedule 4, Table 2\)](#) as shown in table 6 below. When those rates are analysed

it would appear that the defendant who secures a job with an annual salary over £12,456, they will have to pay 17% on the first £12,456 of their wages, which equates to approximately £170 a month, and then 50% on anything over this amount. Therefore a defendant earning the national average salary, approximately £29,588 (ONS, 2018), which equates to a net wage of approximately £1,971 a month, they will be expected to pay approximately £655.50 from those wages every month (approx. 33%), a crippling amount of money that was said to have devastating consequences.

Table 6 - The percentage rate of monthly deductions specified under an attachment of earnings order

| Net Monthly Earnings | Deduction rate |
|---|--|
| Not exceeding £152 | 0 % |
| Exceeding £152 but not exceeding £260 | 3 % |
| Exceeding £260 but not exceeding £360 | 5 % |
| Exceeding £360 but not exceeding £440 | 7 % |
| Exceeding £440 but not exceeding £700 | 12 % |
| Exceeding £700 but not exceeding £1,000 | 17 % |
| Exceeding £1,000 | 17 % in respect of the first £1,000 and 50 % in respect of the remainder |

For example, it was stated that financially disadvantaging them in such a way disincentivised them from seeking legitimate employment, as Frank begins to explain, *“There’s no point in me getting a job because they are only gunna want to take my wages off me”*.

And similarly for Ryan:

When I went to court for me POCA means-testing, they said that the order is still outstanding and gaining interest and the judge kept saying that it is not going to go away, and he can put an attachment of earnings on my wages when I get a job. Err, well that’s that then isn’t it. Why the fuck would I go and get a job so that they can steal a percentage of my hard earnings on top of everything else you’ve gotta pay like tax. Come on, why would I? There’s no incentive to get a job if the person next to me who does exactly the same job, is getting paid more than me because my money gets docked because of POCA. If I thought the (confiscation) order was a true reflection of what I made from my crimes then maybe I could get me head around it, but it wasn’t. The figures they bounced around were complete fantasy.

In the above extract Ryan uses the term 'steal' to describe the salary deductions. This is important because he is of the understanding that the confiscation figures have been inaccurately calculated and therefore the confiscation of his assets or legitimate wages is perceived as unlawful. When this insight is considered within the context of policy language, instead of applying the term 'asset recovery', which implies a level of restoration and legitimacy, 'asset [mis]appropriation' may better describe the reality of the confiscation process.

In the above extract Ryan also highlights a potential psychological or symbolic aspect of the confiscation punishment, in which a confiscation defendant's payslip is marked out as being different because of the continued anchoring to one's criminal past, an extension to the discriminative effects of the criminal conviction (Working Links, 2010).

In cases in which the amount of interest that was accruing was greater than what the defendant was able to afford to pay each month, this was also said to be demoralizing and further disincentivised the attainment of legitimate employment, as Frank begins to explain:

...now with the interest that is being added, I'm not gunna be able to pay enough to even cover the interest each month. Now what position does that put me in? I'm just paying money that's never gunna get any lower and all it's gunna do is keep on increasing cos I don't earn enough to pay the interest alone. So I'm actually thinking whether it is actually worth me working and slogging me guts out because in the end it is gunna come to no avail...

These findings would appear to be consistent with the Norwegian and Danish literature which asserts that 'legal debt'⁴⁴ negatively impacts upon an individual's motivation to find legitimate employment

⁴⁴ The term used in Norway to describe debts owed to the state: fines, penalties, compensation payments, forfeits and confiscation debt.

(Todd-Kvam, 2019; Olesen, 2016). In order to appreciate the consequences of what Frank is asserting here it is necessary to consider the wider benefits of employment which include a source of legitimate income, the formation of a new identity (Maruna, 2006) and the development of new pro-social relationships (McNeill, 2016). Therefore, it would appear that in disincentivising legitimate employment, POCA could represent a significant desistance barrier.

Moreover, several of the research participants also discussed how they were wary of acquiring any further assets whilst they still had an outstanding confiscation debt through fear of them being confiscated, as Sophie explains:

It's the uncertainty of it all. Even now I don't know where I stand. Do I get a job? Do I buy another house or are they just gunna come and take it all away again? It feels a bit like snakes and ladders, yeh know, you get out of prison, get a job, get a house and then they come along and take it off you again and your right back at the beginning again.

And similarly for Ryan:

I don't get it. There's no incentive for me to be legit is there? I might be able to get me head around it if there were some light at the end of the tunnel but there isn't.

It would appear then that the uncertainty that the confiscation enforcement stage elicits within the defendant, a combination of accruing interest which locks in the punishment and the on-going threat posed under section 22 powers, has a dispiriting effect that thwarts aspiration. However, as a result of not acquiring any further assets, a number of research participants discussed how this would in effect disadvantage their children further, as Daniel begins to explain:

Me son, I don't think he's ever going to see anything from me. All parents pass something down to their kids (inheritance). I'm not going to be able to pass anything down because I'm not going to have anything.

It was not clear whether Daniel was asserting that he will not have any assets available for his son to inherit because of section 22 powers or because he would refrain from attaining any assets as a way to frustrate the confiscation process. Either way the end result remains the same. However, from a desistance perspective, the constraining of generativity pursuits through long-term financial incapacitation is likely to hinder the desistance process (Maruna, 2006; Todd-Kvam, 2019). Further, in addition to the constraining effects upon leaving any inheritance to their own children, a number of research participants discussed how their confiscation predicament had forced them to consider their confiscation debt within the context of any potential inheritance that they may receive in the future, as Dave explains:

Well yeh cos I was talking about this the other day with my girlfriend and we were discussing how it all could play out if we got married or one of our parents died and we received some inheritance. It makes me sick thinking about it, like, when my parents pass away, then I don't think that it is right that the money which they leave to me, which they have worked hard all their life for, should be taken for the proceeds of crime. That's wrong! And if I got married then that could affect my partner's inheritance when her mother passes away, when they have absolutely no connection to me or my offences, and that money has clearly not been made through crime, it has come about through years and years of hard work by our parents...

And similarly for Sophie:

I mean this is a discussion that me and my mum were having. She actually said to me, errm, does she need to change her will, put something in there where she leaves mine in a trust until my crimes are spent? I don't know where it lies in terms of inheritance, and there lies the problem really cos nobody can give you a straight answer. Errm, I mean surely they shouldn't be able to take your inheritance away, the money that your parents have worked hard for! Errm, you ask different people, different solicitors and they will all give you a different answer because the real answer is that they just don't know.

Again, these two examples highlight the level of uncertainty that characterises the confiscation punishment, not fully knowing when or if a particular course of action will play out or not, and the level of speculation that follows in response to that uncertainty. For Sophie, her uncertainty was compounded because the people who should have been able to answer her questions in regard to

confiscation law, her legal defence, were unable to provide a straight answer, a theme that was also consistent within the research. It is not known whether this arose out of legal incompetence or because her legal representatives were unable to provide a straight answer because confiscation law does not specifically detail such eventualities, but the option to carry out such actions is available because of the significantly wide drafting of confiscation law.

For Wayne, the burden of his outstanding benefit figure and an awareness that this may be recoverable from any future inheritance he receives, compelled him to take evasive action:

So, I will never put anything in my name. I've told me parents to leave everything in their will to me brother and he can sort me out and then that way they can't get their sticky little paws on it. On paper, I will make sure I never have anything, that's how it has to be.

In the following example Wayne, referring to his co-defendant Daniel, discusses how the interest and the burden of his on-going POCA payment plan discourages him from doing overtime at work, therefore, inhibiting social advancement:

It's like he said to me last week, he often gets offered overtime at work but there's no point in him doing it because he loses a percentage of it to POCA. Yet does the amount he owes go down, does it fuck! The opposite, it goes up with interest.

Reflecting on his experience Dave discusses how he and his partner, in order to preserve his girlfriend's [legitimate] assets, decided that it would not be in their best interests to jointly purchase a home through fear of it being confiscated at a later date:

My girlfriends father died last year, and he left her some inheritance and she bought a house with it. Now she bought a terraced house, it was like a hundred and thirty thousand, but I was eligible to take out a mortgage and together we could of got a much better, a much bigger house, but there was that fear that if we go into this together and then the government comes along and confiscates the house, then she's not going to thank me for

that is she? So it causes massive arguments because it's holding her back as well as me and we want to do things together because we have been a couple for a while.

Whilst this could be interpreted as the confiscation punishment impeding social progress, it could also be viewed as an avoidance technique so as to frustrate asset recovery. However, like many of the other research participants, Dave's resistance to the confiscation regime stems from an experiential understanding that his confiscation debt was miscalculated and is now partly made up from accrued interest. Therefore, it would appear then that his resistance stems from the procedural injustice he experienced during the investigative and judicial stages of the POCA process. It is in consideration of this that it could be inferred that Dave is not necessarily resisting the confiscation system as a way to frustrate the system, more that he is trying to survive it because he believes that the way in which the punishment has been constructed and applied is deeply unjust.

Dave then went onto explain how his confiscation predicament 'forces' him to make life choices which he would perhaps not normally have made had he not been subject to an on-going confiscation punishment:

We've spoke about getting married but then all of my debt falls onto her if we get married as the system then sees us as a unit. So you are forced into not getting married to protect her and, again, it causes massive arguments [...] So effectively we are in a relationship, but that relationship is off the books in terms of the government and all that.

Having to take evasive action in order to 'survive' the confiscation punishment was a prominent theme within the research. Marcus provides us with further insight as to how it has affected his life:

...you can't fucking live a normal life at all, even though I've done me sentence, even if I paid this, this realisable figure, you still need to duck and dive as such because of the benefit figure waiting in the background. Not ducking and diving illegally, but you can't have anything in yeh name. You can't live a completely straight life. Its fucking mad. Yeh fucked! I can't have anything around me cos I'm frightened of, err, losing everything that

I've worked for, you know, going buying something straight and thinking, sat in the house, that it could be took any second. Fuck that! So it makes you have to change the way yeh live yeh life, even if you wanted to go completely legit you can't, do yeh know what I mean?

And similarly for Karl and Frank:

I will never put anything in my name again, that's how it makes yeh. So rather than encouraging yeh to be a straight member and go through the right channels, pay yeh taxes, pay yeh dues, it encourages yeh to be dodgy and not have anything in yeh name.

I've just gone under the radar, I don't have anything in me name, I'm not registered as living anywhere and that's the way it is.

In the following example Jo explains what going 'under the radar' involves:

...and people do the default sentences and come out to pay the money because the default sentence doesn't wipe the debt, does it? Its hanging over people's heads indefinitely. And then you go underground to try and escape the CPS finding you; you don't put yourself on an electoral register, you don't open a bank account, you don't put anything in your name, so you can hide from them. I know enough people like that, they go underground. Well they don't go underground, they get forced underground. They don't go back to formal work, they do cash in hand work or they open up businesses under somebody else's name so that they can create a smokescreen and become invisible because they want to move on, but the system wants to nail you down for your past and hold you there.

Living in such a way would appear to be contrary to pro-social living and further disadvantage the already disadvantaged ex-offender (House of Commons Work and Pensions Committee, 2016).

These findings would appear to correlate with Olesen's (2017) assertion that 'legal debt' may elicit anti-social behaviours such as avoiding income reporting or avoiding the use of institutions that allow the State to track an individual's financial transactions.

Several of the participants discussed how their pension fund had been included as part of their prosecution's assessment of realisable assets, as Harry explains:

... the proceeds of crime should only be assets that you acquired from your crime, whereas all the money that went into my pension pot was put in from when I was eighteen, and that was all proved (to be legitimate), yeh know, but they said it was an asset that I've got and so it could be taken.

Again, it would appear that the confiscation of an individual's pension would be permitted because the confiscation system in England and Wales adopts an *in personam* approach, which in effect means that the confiscation order is made against the individual rather than against property (*in rem*). The consequence of this is that it does not matter which assets are realised, even if they have been legitimately acquired, as the individual has a legal obligation to satisfy the confiscation debt in full. However, aside from the immorality of denying a person their [legitimately] acquired pension, Eddie points out that a consequence of depriving an individual of their pension means that the government will then have to support that pensioner with benefits:

I think it's wrong that they could take yeh pension, when you've already been punished. But they wanna make sure that you grow old in poverty, miserable and angry, alone. Why would they do that? What does it say about us as a country? I've said it before, it doesn't make a great deal of sense to me to take it off yeh with one hand but then they have to give it yeh back with the other in benefits. It's stupid.

In summary, what this section of the chapter has begun to expose is that the on-going oppression of the confiscation punishment can 'force' individuals to make life-choices that in less oppressive circumstances they might not have chosen. Importantly, these 'choices' would be considered inconsistent with pro-social living and desistance and are choices that are likely to disadvantage and marginalise the confiscation defendant further. As revealed, several of the research participants had taken a course of action that enabled them to become untraceable, or as Jo describes "invisible", as a way to survive the confiscation regime. However, the consequence of this is that the impact of the confiscation process, in eliciting a situation in which these individuals no longer occupy a place within

mainstream society, has far exceeded the intended deprivation, which was alleged to be the confiscation of their illegitimate material belongings, raising questions around the legitimacy of the confiscation punishment.

6.4 — The Impact Upon the Defendant's Opportunity to Reintegrate and GoStraight.

"Fuck it!"

A key theme which emerged from within the research indicated that being subject to the confiscation punishment impacts upon life choices and opportunities to reintegrate back into society. This is clearly connected to many of the themes established thus far.⁴⁵ In the following example Eddie begins to discuss the added structural barriers that a confiscation defendant faces when they are released from prison, further piercing the rehabilitative guise of State punishment:

Well it's like I say, err, getting on in life after yeh come out ov prison is hard enough. It's like having a big flashing neon sign on yeh head with offender written on it. Try getting a job with this sign on yeh head. It's impossible. Well imagine it when you've got POCA as well to contend with, yeh know, having to take time off work all the time to attend court or going to get legal advice or advice off the citizens advice bureau. And then you get sent back to prison on this POCA. Well who's gunna keep the job open for yeh till you come out? Nobody! They need people that are reliable not people that have to take days off here and there so they can sort their POCA out or go to court. But none of this gets discussed when they are all banging on about rehabilitation.

Here, Eddie makes the point that the on-going requirement to attend POCA-related solicitor appointments and court proceedings, which as revealed in the previous chapter can go on for many

⁴⁵ The disadvantaging effects of POCA upon prison sentence progression; the destabilising effects of being sent back to prison, or having a prison sentence extended through the imposition of the default sentence; the inescapability of the confiscation punishment due to added interest; the disincentivising effects upon attaining employment due to POCA salary deductions; the sense of injustice of losing a family home based on inaccurate confiscation figures; the continuing threat of bailiffs; the risk posed to after-acquired legitimate assets; the threat posed to future inheritance.

years, makes a confiscation defendant unreliable and, therefore, less attractive to a potential employer. Therefore, this would suggest that the procedural element of the confiscation legal process subjects a confiscation defendant to a heightened level of disadvantage. It is important to consider this finding amongst an understanding that as a probationer also, the confiscation defendant will have other supervision licence commitments to comply with such as regular reporting, programme attendance, unpaid work, and, therefore, the cumulative effect of these demands could make the confiscation defendant appear to be a riskier prospect for employers in terms of reliability.

For Sonia, whilst she came to the same conclusion as Eddie, that POCA represents a significant structural barrier for rehabilitation and reintegration, she arrives at that conclusion differently. She highlights that factors that derive from the confiscation punishment, such as the feeling of inescapability, hopelessness, and uncertainty, cause interfamilial stress which places a strain upon those relationships:

So how if the prison system or the justice system is supposed to be about keeping families together and rehabilitation and not reoffending and making a new start and putting all this behind yeh, how can you mentally put something behind you that is never ending, it just doesn't make any sense whatsoever [...] There's just so much uncertainty attached to this POCA thing and it invokes so much stress for the whole family, and although this would never happen to us because we are such a close family, but you can understand why other families might think, 'I can't cope with this so I'm gunna walk away'. So all the spiel about trying to keep families together, rehabilitating prisoners so they can live crime-free lives, don't fit with the POCA.

One of the most prominent themes to emerge from the research was that the confiscation punishment drives the defendant back into offending. Here Daniel explains that the disadvantaging effects of confiscation salary deductions makes the return to crime option more feasible and attractive:

I can see why some lads might just think 'fuck it, it's not worth working for nothing and living in constant fear of being sent back to prison and always being debted up to them, when yeh could go back to drug dealing and make some money that would enable yeh to pay the confiscation order off. I mean what's the risk of going back to drug dealing? The worst-case scenario is that yeh get caught and go back to jail, the exact same outcome of not drug dealing isn't it because I'm being sent back to jail anyway on the proceeds of crime [...] What choice do yeh have when you are staring down the barrel of a five or ten year stretch because of it? What have you got to lose? I'm not a gambling man myself but I can see how that might be a gamble that people are forced into taking.

Despite the rational choice nature of Daniel's explanation, he does provide a psycho-social insight into the POCA-mindset, revealing how choices become greatly constrained and future offending is rationalised in the hope that it will provide them with a way out of their confiscation predicament. It would also appear from analysing Daniel's extract that the result of not having a way out of their oppressive POCA circumstances is that a defendant may adopt a 'nothing to lose' mentality. Therefore, this example begins to deconstruct the deterrence objective of POCA. Furthermore, this example also suggests that the cumulative effects generated through the ongoing threat of further imprisonment, added interest upon the confiscation debt and confiscation of after-acquired legitimate assets, could trigger what Halsey et al. (2016) describe as a 'fuck it' moment in which desistance derails (see also Todd-kvam, 2019).

In analysing Daniel's case it would appear that the assemblage of two key characteristics of the confiscation punishment, the sense of injustice that it elicits and the inescapability of the punishment, forces him to conclude that the prospect of returning to crime is not an unintended consequence of the confiscation regime:

It's as if they wanna push me back into crime, because unless I win the lottery that's the only way I'm gunna be able to pay this thing off. Maybe that's the idea?

It would appear that Eddie assigns the same factors as Daniel as to why a confiscation defendant would return to crime:

Well you can see why people would go back to crime to pay it off can't yeh? What are you supposed to do when it's hanging over yeh with no way out? It's extortion what they're doing [...] So people will go back to crime won't they to pay this fine off because there's no other way around it. Think about it, if yeh POCA is for ridiculous amounts of money and the interest on it is ridiculous and you haven't got the money because the confiscation order was calculated all wrong, then when they get that letter telling them that they are at risk of being sent back to prison again because of the interest, then that message on the letter gets translated into something different, something like 'you need to make some serious money fast and it doesn't matter how, otherwise you are going to spend the rest of yeh life in and out of jail on POCA'.

It would also appear that for Eddie, returning to crime would be the normative response for the POCA defendant faced with such an impossible and oppressive predicament, *"The question should not be whether yeh would go back to crime, but why wouldn't yeh?"*

For Declan, in addition to all the factors already mentioned, he argues that it is the disparity between his earning potential and the rate that his order increases with interest that constrains choice:

But to make things worse the courts want this silly amount of money on the POCA when we've not made anything like what they are suggesting, it's fucking nuts! I mean I've done my default sentence which was an extra three-years, but the fuckers kept sending me letters saying that I still owe the money and its going up with interest and if I don't get in touch to arrange payment then they are gunna send me back to prison. I mean where am I supposed to get that kind of money from? What job pays yeh that kind of money other than drug dealing? Err, the truth is the interest on me confiscation order is more than me brother earns, legit! That's fucking crazy isn't it? What do they think people are gunna do when they are being threatened with prison if they don't pay it? Of course they are going to go back to dealing (drugs). It's not like we could get a legit job that would pay us enough to pay it off is it?

In a similar vein Dave discusses the insurmountable task that a confiscation defendant faces:

So how is a normal man who has just come out of prison, who if he is lucky enough to get a job is probably only going to get a normal low-paid job, a factory job, a labouring job somewhere on a building site, something like that, so how are they going to be able to

afford this crippling debt? It's just never going to happen unless you turn back to crime so basically, it's almost like State-funded crime cos yeh have to go back to crime to pay the State and then they arrest yeh for that again and then they will do you for another proceeds of crime. It's just a big circle really where they recycle the same individuals again and again not giving them a chance to go straight when they get out.

In not being able to see a way out of his confiscation predicament, Dave views the confiscation system as a tool used by the State to recycle offenders. This would appear to correlate with Foucault's (1977) 'circuit of delinquency' theory in which he asserts that punishment recycles the same offenders. This is a discussion that will be revisited in the following chapter.

For Jo, she explained that such was her desperation not to have to serve an additional default sentence that she was prepared to loan the money:

Listen, the other alternative if my dad hadn't had borrowed me the money would have been to do the default or just take a loan from a "friend" (uses her index and middle fingers to indicate quotation marks) and we know how that plays out don't we? That has to be paid back and before you know it you're back in the game.

Based on Jo's extract, this would suggest that the pressure to satisfy the confiscation order and avoid the default sentence for those that do not have the means, could push them into a situation that increases their risk of reoffending. Whilst Jo was able to loan the money from a relative, other confiscation defendants may not be in such a fortunate position.

For Jacob, he considered his confiscation predicament within the context of [not] being able to start afresh:

Yes, the 2.7 million is a remaining debt that stands for the remainder of my life. I did ask them the question, because I am an entrepreneur and I wanted to start a business, err, and he explained to me that running a business by itself is no problem as long as my probation would agree to it, err, but he said that be aware that if the business becomes successful, the CPS can always come after you for the outstanding amount of the confiscation order. So at that time I said to my solicitor that "I can prove that the money

that is earned is legitimate, it is not coming from crime because we both know that I don't have a dime left", and he said that "they have the right under current legislation to come back to you and ask for it". And I said, "so that means that I cannot be seen to be successful", which does not make any sense to me; what is the system here in the UK all about? I thought that they wanted you to come out of prison and be successful, earn money legitimately and then pay lots of tax on it? This doesn't make any sense to me, why they would try to impede my progress in life. And I said [to the solicitor], "do I have to go the Bermuda way?" (register the business offshore so as to conceal any profits not only from the tax man but from POCA) and he said, "I cannot advise you on that". So it is a never-ending punishment that makes little sense and the benefit figure, which is not often spoke about, can really damage you in the long-term I think. So this brings me round to thinking that POCA punishment is purely about retribution, nothing to do with rehabilitation or restoration it's pure, pure punitive. Its punishment, punishment, punishment!

This example begins to reveal how the 'Mr and Mrs Bigs', because of their privileged positions of wealth and power, are able to find ways to frustrate the confiscation system in its attempts to recover the outstanding confiscation debt, by depositing their profits offshore.

The debasement of rehabilitative objectives within the CJS is further evidenced by an understanding that, despite the primary role of probation staff being to support offenders reintegrate back into society so that they do not reoffend, it was said that the probation service has no awareness of what the confiscation punishment involves and how it could potentially derail desistance, as Ryan explains:

The amount of times over the years when I have been sat with me probation officer and they are like, "why don't you do this?", or asking, "whether I have done that?" and I've tried to explain to them that it is not in my interest to do so because of me POCA. And she stares at me every time as if I'm a wrong'un (usually used to refer to a sex offender or a police informer) or something and the rest of the appointment involves me explaining to her what POCA is. But it doesn't matter how many times I explain to her about POCA because she just doesn't get it. She just can't absorb what I'm saying to her because it doesn't fit neatly with what she wants me to do on me sentence plan. She sees that as me being difficult when I'm not being difficult, I'm just simply explaining to her that it is not in my interest to get a job because anything I earn is going to be confiscated [...] She doesn't believe that they can make the figures up and then persecute yeh for the rest of yeh life with it. What chance have yeh got if yeh probation officer doesn't believe yeh? It's just a constant battle trying to explain me predicament to them. I quickly learnt that I needed to avoid confrontation with her and the way to do that was by playing the game. I just simply

tell her what she wants to hear now. Huh, you have to lie to get through it because they are not prepared to deal with the truth. I honestly believe that they have absolutely no idea about POCA, no idea whatsoever!

It is clear from Ryan's experience that, in failing to understand the magnitude of the confiscation punishment and how it shapes a defendant's choices and reality on release from prison, this led to a complete breakdown in trust. Karl details a similar experience with probation:

They are clueless, they are clueless! And basically if they are being honest they don't give a shit! When I told them about this POCA, cos they didn't even know that I had one, they said "what's POCA?" They didn't even know what it was, they hadn't even heard of it. This is somebody that is getting paid to support me on release from prison but the biggest thing in my life at that time was this whole POCA thing and they hadn't even heard of it.

Whilst the perception of the probation service as being incompetent may not be exclusive to the confiscation defendant, this disconnect between the probation worker and the probationer is perhaps more problematic considering the findings in this chapter, which have highlighted the increased risk of recidivism due to their on-going confiscation punishment.

It is in light of the findings within this section of the chapter, which have revealed how being subject to a confiscation order disadvantages an offender in relation to exiting crime and reintegrating back into society, our focus is drawn towards the contradictory nature of criminal justice policies in England and Wales. At a time when rehabilitation is enjoying a renaissance within penal policy (MOJ, 2013; 2016a; 2016b; 2017; 2018), confiscation policy would appear to be working against such policy objectives. This section of the chapter has also revealed the criminogenic nature of POCA, an area of discussion that will be revisited in the final chapter.

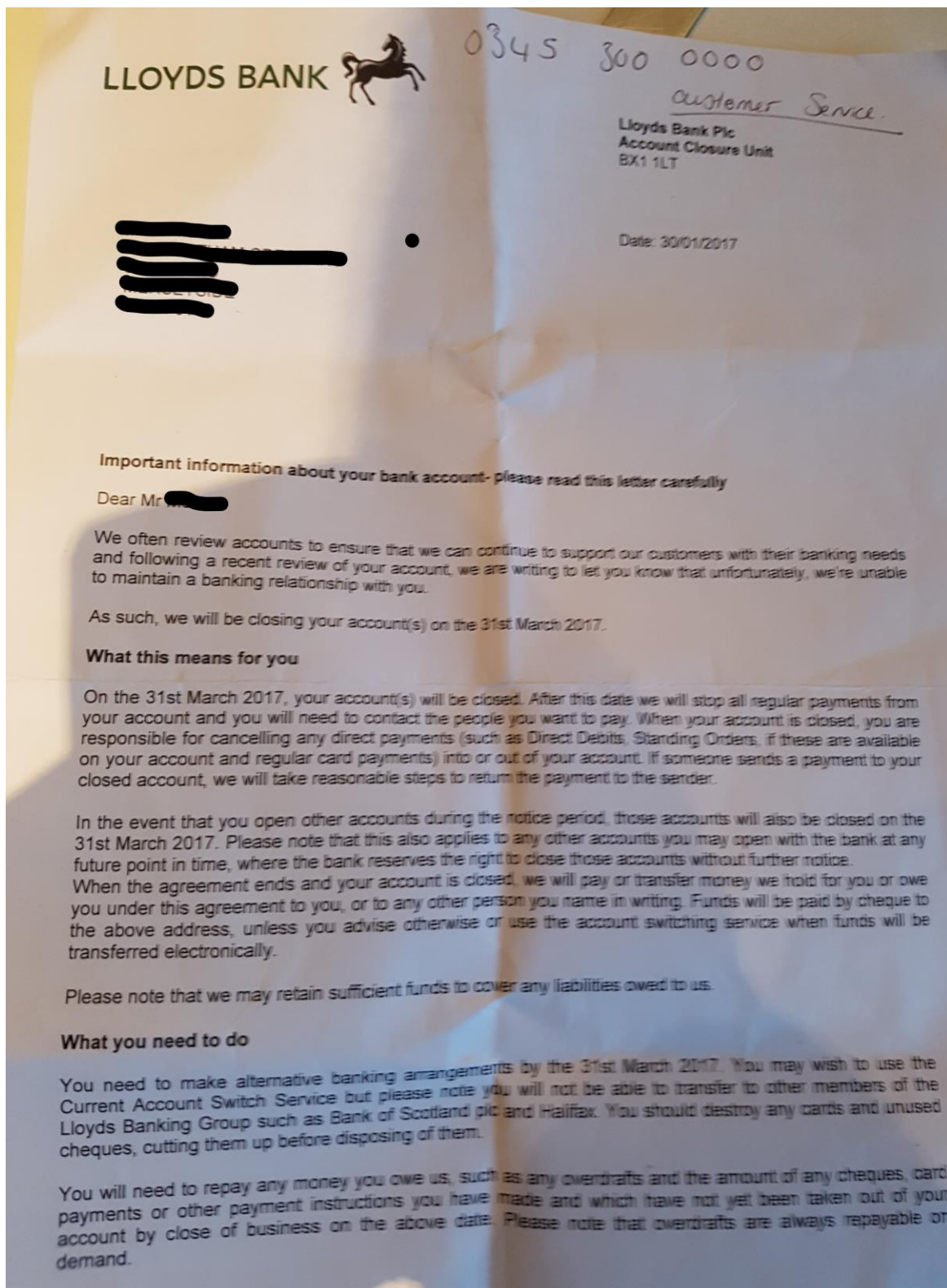
6.4.1 - The Impact of Banking De-Risking Policy

As part of AML legislation in the UK, banks are expected to carry out due diligence checks to ensure that money is not being laundered through their accounts (Rees et al., 2012). In following the developments in Daniel's case, he explained that after he had served his prison default sentence he was able to agree a payment plan with the court based upon his affordability. He then set up a direct debit from his personal bank account to HMCTS for the agreed amount each month. Shortly after doing so Daniel received a letter from Lloyds Bank Account Closure Unit informing him that they were closing his account (See figure 13):

Well obviously, I phoned them up to find out why, yeh know, why are they closing my account after years of banking with them. I phoned them up several times, but no one would give me a straight answer. I mean I had worked it out for myself by this point, but I wanted to hear it from them. It had to be because of me POCA because that was the only thing that had changed in me account. The moment I set up a direct debit with the court, within a couple of weeks they had decided to shut my account. Yeh see, it shows up as Her Majesty's Court and Tribunal Service on the direct debit form, so they know it's a payment to the courts. I'd read about this happening in an article a few years earlier to people suspected of laundering money for terrorists, but I wasn't expecting it to happen to me, I couldn't believe it. I'm just an HGV⁴⁶ driver who works for an agency who wants to make these payments to make this POCA go away.

⁴⁶ Heavy Goods Vehicle

Figure 13: a copy of Daniel's letter from his bank informing him that they are closing his account



Whilst it cannot be known for certain, because the bank would not disclose the actual reason to Daniel as to why they were closing his account, it would suggest that the bank had assessed Daniel as presenting a risk, not necessarily because he was potentially involved in crime or because suspicious funds were going through his account, but because of his criminal past ten years earlier. Ironically, the trigger for his bank account closure was him setting up the direct debit to pay his confiscation order. It would appear that as the name of the recipients account was titled as 'HMCTS NW Confiscations' (See figure 14), in making a direct debit payment to such an account triggers an alert within the bank's suspicious activity software, which the bank's financial reporting officer is then required to process under money laundering regulations.

Figure 14 - The reverse side of a HMCTS confiscation letter which details how to make payment

PAYMENTS

CHEQUE / POSTAL ORDERS

Cheque or Postal Orders need to be made payable to **HMCTS** and sent to:

HMCTS Confiscations
PO Box 817
Liverpool
L69 2AF

CASH PAYMENTS

Cash payments can be made at any Natwest Bank, our bank account details are as follows:

Account name: HMCTS NW Confiscations
Account No. 27051714
Sort Code: 56-00-33

You must **ALWAYS** quote your reference number when making payments.

Do not send cash payments through the post; this office is not liable for loss.

CREDIT / DEBIT CARD PAYMENTS

Credit/Debit Card payments can be made by telephoning **0151 471 1048/1049/1050/1051**.

PLEASE REMEMBER TO QUOTE ACCOUNT NUMBERS THIS WILL ENABLE US TO LOCATE YOUR CONFISCATION ORDER.

Page 2

Having been blacklisted, Daniel went onto explain that opening an account with another bank was difficult:

I mean that's no easy task making arrangements to transfer banks and ensuring that you still manage to meet all your monthly payments. But it was worse than that, err, Lloyds bank is part of a wider banking group which meant I was automatically barred from opening another account with loads of other high street banks. I had me partner helping me, trying to open a bank account elsewhere because by this point I'd completely lost it, I was ready for doing something stupid. It was like the system was trying its best to make it as difficult as possible. It's as if they want you to go back to crime, they make it that difficult. All the time I was thinking to meself, well if I can't sort a bank account then I can't be paid from me job cos yeh need to have a bank account to work these days don't yeh? [...] is it any wonder why somebody facing this situation might just think, err, 'fuck this, I've had enough of being treated like shit, being treated like a human football whilst the system kicks the shit out ov yeh, I'm going back to crime'. That's how I see it, every day that was the thoughts that were running through my mind. What's the point in trying, the system is stacked against me?

Here it would appear that the up-hill struggle had taken its toll upon Daniel and had it not been for the support of his partner he may have relapsed back into offending. This is consistent with the desistance literature which asserts that forming strong and supportive bonds with significant others can help desistance from crime (Sampson and Laub, 1992; Mills and Codd, 2008; Healy, 2010; MOJ, 2013). Despite being a protective factor for Daniel, throughout the research there has been significant evidence to illustrate the extent in which the confiscation punishment has encroached upon his partner and placed considerable strain upon their relationship. Therefore, this would suggest that the effects of the confiscation punishment could erode one of the most important protective factors.

Daniel went on to explain that in the end his partner managed to find him a bank, but this was with a non-high street bank:

So, this went on for weeks and in the end me girlfriend found me an account, err, 'Cash-Plus' business account I think it was called. It's an online account and they proper have yeh

pants down (rip you off). Every transaction there is a two-pound fee, yeh have to pay sixty-nine pounds a years for yeh card to draw money out, if yeh lose yeh card then it's another sixty-nine pounds, you don't get a cheque book, so really, it's just some shit-arse account where they are able to charge you whatever they want because they know that if your using their accounts then you must be desperate.

This highlights another level of disadvantage and legalised discrimination that the confiscation defendant experiences. For Daniel, the residual effect of his 'de-risking' ordeal is that he had to get his mother to process the POCA direct debit through her account:

I wasn't going to risk setting another direct debit with this new bank in case the same thing happened, so me mum makes the payment every month for me, yeh know, which is a joke in itself because I'm a grown man, I'm forty-seven years old and me mum has to make payments for me.

In addition to potentially putting his mother's account at risk this could erode Daniel's self-esteem, self-efficacy and agency, factors also considered important for desistance (Maruna, 2006; Healy, 2010). Whilst Daniel was the only research participant that stated that their bank account had been closed, its disadvantaging effects within contemporary society are significant. This will be discussed further in the following chapter.

6.5 - Reflections of the Confiscation Punishment.

"It's like the new form of torture"

Several of the research participants pointed out that confiscation is not like any other form of punishment that they had experienced and so it was difficult for them to put into words the unconventional way in which it operates and the depth of their despair in being subjected to it. In the

following extract Eddie begins to consider the gravity of his offence, cannabis cultivation, amongst his overall punishment, highlighting the disproportionate nature of it:

Well I've had a blip, I've had a blip. It's like, how can I say, I'm fifty-seven years old and getting arrested and letting yeh family down, isn't that punishment in itself? Yeh know all the hurt, the headache and the shame I've brought on the family surely that's enough punishment in itself, but I've then been sent to prison which I think was over the top. But the real pain of it all is definitely the POCA, that's turned everybody's life upside down. That's what's causing the most pain, and for what? Because I was growing a few plants, which in lots of other countries is now legal, well that just doesn't seem fair to me.

At risk of rationalizing his offence (Sykes and Matza, 1957), Eddie does capture the disproportionate nature of his overall punishment when the gravity of his offence is considered (Von Hirsch, 1993).

On analysis of the narratives it becomes apparent that the research participants felt the confiscation punishment was unjust and, in an attempt to convey the extent of their injustice and hardship that is caused by both the confiscation process and its ensuing punishment, some respondents utilised emotive comparisons or analogies. One such example is provided by Eddie:

It feels a bit like we have gone back hundreds and hundreds of years to the medieval times when the lords or the so-called noblemen claimed the right to take the virginity of a peasant women on their wedding night. Yeh know, err, in other words they could just do whatever they wanted. Well that's what this feels like, it seems like they can just make the rules up and come and take whatever they want, it's crazy.

Both 'torture' and 'persecution' were adjectives that featured prominently within the narratives, captured here by Dave:

It's like the new form of torture isn't it? You don't have to actually hold someone down and hurt them with instruments of torture, you can just persecute them by constantly threatening to send them to prison and take their family home off them and it drives people to ruin.

And similarly for Enrique:

You can't really defend a proceeds of crime, there is no negotiation. It's a draconian law. You can't reason with them and it doesn't matter what yeh say to them; they know what they want and no matter what they will get it, even if it means destroying a family - it doesn't matter. It's like a tax specifically for criminals, err, yeh know, you've committed a crime so yeh now have to pay this tax for the rest of yeh life. Yeh paying for it for the rest of yeh life and that's not what this law was meant to do. When yeh sit back and think about it, it sounds like some kind of Hitler ruling where they can come and take all yeh possessions and there is nothing yeh can do about it. Criminals have become the modern-day Jew and the State are the Nazis. Ten, twenty, thirty years on they are gunna come and take yeh family's possessions off yeh, yeh kid's inheritance, and there is nothing you can do about it. That's Nazi persecution right there!

Here Enrique discursively highlights a number of important issues. Firstly, he reinforces the idea that confiscation law has been constructed in a way that makes it particularly difficult to defend against. Secondly, he describes the confiscation punishment as a life-long tax for offenders due to the accruing interest on the unpaid confiscation debt. However, in making the correlation between the Nazi regime and the POCA process it would appear that Enrique is highlighting the abdication of the State to honour its commitment to the rule of law, especially by pointing out that it is the children who are ultimately forced to endure the long-term effects of the punishment, a theme that will also be returned to in the discussion chapter.

The frequency in which the word 'persecution' was used within the narratives (41 times throughout the research and featured in 12 of the 23 interviews) to describe their confiscation experiences, suggests that the research participants consider the punishment to be fundamentally unjust and disproportionate. This is reinforced in the knowledge that such individuals are no strangers to adversity, disadvantage or trauma having previously been through the care system, mistreated by the police or served time in prison (sometimes on multiple occasions).

Consequently, Eddie, a first-time offender, begins to question the proportionality of the confiscation punishment:

I've got to the age of fifty-seven and I've never been arrested before in me life and this is the biggest mistake I've ever done in me life. Yeh know I'm a worker; I've worked all me life to get by and I made one mistake. But there's no recognition of that is there with POCA, I've never had an arrest for anything before not even for a parking ticket. Yet they want to drive me and me family out of me home. Persecution!

Here Eddie identifies an important distinguishing feature of the confiscation legal process; its failure to acknowledge a first-offence as a mitigating factor, a key sentencing principle within criminal law (Ashworth and Horder, 2013), signifying a further punitive dimension to the confiscation punishment.

As a way to gauge the disproportionality of their punishment it would appear that the punished look towards the severity of punishment received for other types of offences for in/consistency, as was the case for Sonia:

...well if you attack somebody or run somebody over or rape somebody or kill somebody you get one trial but when an offence involves money you get two trials, what's that all about? [...]. That's a double punishment, well in fact its more than that because they add interest onto your order and then pursue you for that on top of your order.

In order to appreciate the point that Sonia is making it is necessary to acknowledge that the post-conviction confiscation defendant, having already been punished for the predicate offence with a punishment that is otherwise considered to be 'commensurate' to the harm caused by their offence, is then subjected to a confiscation order, which was largely perceived as an 'additional punishment' reserved exclusively for acquisitive offenders. Adding a further level of punishment by way of confiscation order to financially motivated offences, whilst the 'pariah' offences such as rape and paedophilia are excluded from such a punishment, would appear to add to their sense of injustice.

A term that was frequently used to describe the confiscation punishment within the research was that it is a 'double punishment', as was the case for Derek:

I've already been punished by sending me to prison, so this feels like a double-punishment, I'm being punished twice.

And similarly for Jo:

It's like I've been sentenced to imprisonment and sentenced to a financial penalty, that seems like a double punishment to me. It felt that way anyway because an offence in which financial gain has been made is dealt with more severely than a violent offence. I guess it wouldn't be so bad if they were confiscating criminal money but they're not, they want everything!

However, for Ryan describing it as a double punishment fails to capture the entirety of the confiscation punishment:

I've heard somebody describe it as a double punishment but it's not, it's much more than that because like what happened to my mate it can split the family up cos it's a constant source of tension in a relationship, they can keep sending yeh back to prison, err, it messes with yeh mental health for sure, it makes yeh bitter, it punishes the whole family and so on.

What becomes clear in this section of the chapter is that confiscation is perceived as an added form of punishment, raising questions centred upon proportionality, justifications of punishment and legitimacy.

6.6 — The Emotional and Psychological Effects of POCA.

“No Karl; No POCA”

Whilst the previous section of this chapter begun to reveal the impact of the confiscation punishment for desistance and reintegration, this sub-chapter will discuss the emotional and psychological effects of being subject to the confiscation punishment.

For Jo, the emotional and psychological impact of her punishment and how it impacted on her children was more painful than the material or physical impact of the confiscation punishment. Consequently, guilt featured significantly within her emotional and psychological pain:

Yeh know, the guilt was paralysing in prison when it really hit me that my lifestyle choices had ended up damaging the people that I loved the most in the world. Genuinely, I felt suicidal at times. I couldn't breathe.

However, guilt was also said to affect the family also, as Sonia explains:

And then there's the fact that as a family you have to all put your life on hold whilst this is going on don't yeh, cos whilst he is languishing in prison, for the want of a better word, you can't think about going on holiday with the kids because you sit their thinking 'well could we put that five hundred quid towards the POCA?' even though it wouldn't make a slight bit of difference because it would just get eaten up by the interest that is being added. But you are consumed with guilt cos your thinking about going on holiday and he's sat in prison being persecuted on this POCA thing.

Sonia raises an important dimension of the confiscation punishment for the family on the outside, the psychological burden of guilt, compelling her to put her family's lives on hold so as to not add to her brother's sense of deprivation. Once again this is a dimension of the confiscation punishment that has so far failed to arise within the existing literature.

A theme that was consistent within the research was the paranoia effects of being subjected to long-term financial scrutiny, as Ryan explains:

The problem with this POCA thing is that it consumes yeh, it becomes everything. You see everything through the lens of POCA, 'If I do this then this might happen, if I do that then they might come and take this away', and so on and so forth. Your whole life becomes POCA. I sometimes think it has drove me insane because it has made me detach from the outside world. It does that. I don't even go to the gym anymore because I'm paranoid that they are watching my every step and if they see me at the gym they are going to want to know where that money came from [...] because I'm living in this constant world of POCA paranoia it affects everybody, it puts everybody's life on hold.

And similarly for Kevin:

It makes you completely paranoid because yeh think to yourself that every transaction in yeh bank or every time yeh buy something, it's being tracked [...] If a letter comes through the door or I get a phone call I am suspicious as to what the real, yeh know, what's it really all about. Is it Sky (TV) trying to get information from me on behalf of POCA? Is it me bank asking questions for them [HMCTS]? It makes you completely paranoid and then that begins to impact on everybody else around yeh. So my girlfriend has to lie cos I'm not down as living at her address in case anything comes back to her. It forces yeh to lie, and one lie leads to several more lies to cover up that lie and before you know it, you get tangled up in this web of lies. I'm not sure what's the truth anymore. [...] So yeh, if we are booking a holiday, I've got one eye on my POCA thinking 'will this attract attention?' 'Will it bring them knocking at my door?' Does that make sense? I'm always thinking about POCA in everything I do.

It would appear then that the long-term effects of trying to survive the confiscation punishment, having to lie and conceal to protect against section 22 powers, is that it can induce a sense of precautionary paranoia in that it forces the individual to take evasive action so as to protect themselves from what could happen in the future. It would also appear that this sense of paranoia is heightened because the confiscation defendant does not actually know when they are being financially surveilled, or who or how the financial scrutiny is being conducted, and so they descend into a state of constant suspicion, as Wayne explains:

I don't trust any of them, banks, car showrooms, estate agents, any of them. They're probably all feeding back info to POCA and so yeh have to be careful [...] it's not a nice way

to live yeh life if I'm being honest because it makes you appear dodgy when I'm not dodgy, I'm just not prepared to let them come and take stuff that has been bought with legit money, there's a difference...

In the following example Daniel provides an insight into the psychological effect of receiving a confiscation letter from the court demanding payment:

...the letter goes on to say that if I don't pay the outstanding balance within fourteen days they will instruct a, errm, debt recovery agency to remove goods. Errm, I remember this letter arriving and thinking to myself, 'merry fucking Christmas!' It arrived in December and all I could think about was this letter and I started to drink on the evenings again to help take my mind off it and, err, as it always does when these letters arrive, it caused loads of tension and arguments with me and the girlfriend. [...] So let's get this right, they add nearly thirteen grand of interest to the order and then threaten yeh with a private debt recovery agency who are then going to add their costs on top, that can't be right can it? This is suicide stuff, err, push a man to the edge and the outcome is not going to be pleasant.

It would appear then that the cumulative effect of being subject to such an oppressive and persistent form of punishment, compounded by an increasing sense of injustice, inescapability and helplessness, is that it takes its toll upon the well-being of the confiscation defendant. As a coping mechanism Daniel states that he begun to drink alcohol and use sleeping tablets to help him switch off, both of which are not conducive to his occupation; heavy goods lorry driver. Therefore, the cumulative stress of the confiscation punishment and his subsequent coping methods could affect his ability to work safely and competently. Therefore, this begins to highlight another avenue of disadvantage that arises out of the confiscation punishment. The use of alcohol as a coping mechanism was also reported by Karl:

I can't sleep at night thinking about it. I will go to bed because I'm tired and then I will start thinking about POCA and then ping, I'm awake, my heart starts pounding and my anxiety goes through the roof, err, I start sweating and I can't get to sleep. So I end up going back downstairs, having a couple of cans of beer to self-medicate and put the tele on to try and distract my mind, and cos I've fell asleep on the couch and had a shit sleep, err, I'm knackered then the next day. So it completely takes over yeh life..... For me it's an abuse, it's an abuse, a mental abuse!

In addition to the psychological and emotional effects of the confiscation punishment, Karl explains that this is compounded by a sense of guilt knowing that his criminal actions are what triggered the imposition of the confiscation punishment, and which led to the hardship and pain experienced by his family:

And the mental health issues are horrific as a result of this POCA because as well as having to deal with the threat of being sent back to prison and losing yeh family home, but then I'm having to deal with all the guilt of having put me family through all this and them having lost everything [...] They've come and took my family's home away and I'm full of anger and guilt and frustration because of it so I needed to get some help cos I was having to take all kind of medicines to help me sleep and deal with me depression and anxiety.

A number of participants discussed how they could see how the cumulative effects, the unrelenting nature and the level of guilt and self-loathing induced by the confiscation punishment could lead to suicide, as Jo explains:

It's like a triple punishment with the trauma of being sent to prison and being separated from my kids and then having to deal with this whole proceeds of crime ordeal which brings a whole load of stress and tension. But to then lose your family home on top all seems a little too excessive to me. Can you imagine the guilt I was carrying knowing all the trauma that I have caused my children? If you push people to the edge then they have nothing to lose, do you know what I mean? And that will mean different things to different people, yeh? For some people that might be depression, self-harm and suicide and for others it might mean reoffending. Either way it encourages desperation cos you're in a nothing to lose situation.

And similarly for Sophie:

...in between feelings of guilt and shame, anger and, err frustration, desperation you, errm, you just get lost and, errm, you could really do some serious damage to yourself thinking about it all because there is absolutely nothing you can do about it. It's awful, all sorts of thoughts go through yeh head, you're so helpless so yeh think what else can I do. You think If I go away the whole situation will go away.

It would appear that both Jo and Sophie are suggesting that as the confiscation punishment offers no visible way out, suicide presents itself as a solution. Ryan also viewed suicide as a way to prevent any further confiscation hardship and pain for his family:

And the worst of it is that there is no end to it is there. I can't envisage a life without POCA being in it. Will my last Months, weeks, days of my life be filled with dark thoughts of POCA? Really? Will mine and my wife's final years be in poverty because of it (sighs and shakes his head). It makes me sad just thinking about it and brings me back around to the question, 'how do I bring an end to this situation? How can I protect me wife and (child)'? And every time it brings me back to the same answer; suicide! (pauses for a moment, sits forward and hunches his back as his voice quavers indicating that suicide is clearly something that he has considered).

And similarly for Karl:

... I have thought about committing suicide because yeh think, if I'm not here then, yeh know, that solves the problem. And I still struggle with it. I still struggle with it now. Err, you can only be kicked in the teeth so many times in life [...] if I'm not here then me family don't have to go through the stigma of being involved with someone that has been criminal and, and this POCA thing goes away. No Karl; No POCA! and me family can be left alone to get on with their lives without that constant fear that they are gunna come and post another court letter through the door or something.

This poignant statement provides an insight into the depth of Karl's despair and the level of vulnerability the confiscation punishment can elicit. For Kobler and Stotland (1964: 1), an apparent suicidal attempt may be a frantic and desperate attempt to 'solve problems of living' (in Scott and Codd, 2010: 91), as reflected in Karl's suicidal ideation: 'No Karl. No POCA!'

For Derek, he draws a comparison between the confiscation punishment and corporal/capital punishment, however, instead of inflicting pain and torture on the body he points out that the confiscation punishment is a punishment from within:

...and it is right up there with capital punishment or corporal punishment. Yeh? Just because they are not physically torturing somebody in the street or giving somebody a lethal injection doesn't mean that it doesn't have the same outcome. This is the silent

corporal punishment, it tortures the mind and soul until you just can't take anymore and then you end your own life!

Here Derek appears to make a connection between the slow and enduring characteristic of the confiscation punishment that has been discussed earlier in the findings and suicidal ideation. As Clough (2007) points out, emotional and psychological affect has a disruptive capacity that influences our perception of the world and can influence our behaviours in turn, and this would appear to be what is occurring here; the loss of hope and the sense of inescapability. The literature on suicide asserts that feelings of hopelessness, defeat, entrapment, burdensomeness, unlovability, unbearability, unsolvability, thwarted belongingness, and acquired capability [reductions in fear and pain sensitivity sufficient to overcome self-preservation reflexes] are all linked to suicidal ideation and suicidal attempts (Siddaway et al., 2019). Whilst the terminology differs slightly, there is a chilling parallelism between the feelings linked to suicide and those in which the research participants said characterised their experience of the confiscation punishment and, therefore, it is of no surprise that many of the research participants revealed that they were suffering from depression, anxiety and suicidal ideation.

Here Declan draws upon the confiscation experience of somebody he knew in prison to highlight the affect that the confiscation punishment had upon him:

There was one lad who lost absolutely everything, I mean fuckin everything! His business went bust cos of the restraint order on his assets, he lost his fuckin home, his, err, savings, his marriage broke down cos of the pressure of it all and, err, me mate who lives round his way said that he heard that he had took his own life. So this shit is killing people. It rots away at people's lives until yeh break one way or another.

One of the research participants sadly passed away just months after taking part in the research.

Whilst his death appears to have occurred through natural causes, in his interview the residual life-

changing effects of the confiscation punishment became apparent and, unfortunately, these residual effects greatly shaped Jacob's life in the years leading up to his death:

God damnit, I lost so much! I lost my wife, I lost whatever I had in material items, legitimate assets that I had worked for as well, for which I didn't care about when I was in prison, but when I came out, all of a sudden, I did care because I had nothing. Fifty-years of age with nothing to show for it. I came out, err, still with the threat of a default sentence and I came out with the thought that I would be for the rest of my life in debt for the remaining money.

Jacob then went on to sum up his confiscation experience:

What hurts the most is the loss of my relationships with my wife, my daughter and my two children in the Netherlands, that is the part that I am struggling to deal with. I'm lonely. That's what confiscation is really all about, it confiscates your assets of course but it also confiscates yeh life, yeh relationships, your hope, yeh soul, the things that mean to be human, yeh? I'm a resourceful and intelligent person so I can always replace the material items in my life, but the damage done to my personal relationships, all the stress and headache that my family are still going through cannot be fixed. It has split me and my wife up because she was not prepared to give up her assets in France, errm, she put those assets above my freedom if you like, so, so yes it has split the family up. I now live in a small bedsit above a shop and I'm really lonely. As you can probably tell I try to be an upbeat person, but the reality is I'm broken inside and I'm not sure if that will ever get fixed.

In Jacob's example he captures the dehumanizing characteristics of the confiscation punishment: the loss of hope, relationships and soul; the denial of meaningful life or what Scott (2018) describes as a 'social death'. Again, these important issues will be discussed further in the final chapter of this thesis.

6.7 - Summary

In building upon the findings presented in the previous chapter, this chapter has begun to reveal the long-term impact of not being able to satisfy a confiscation order that has been grossly miscalculated; the default sentence, added interest upon the debt, the loss of the family home, the disincentivising

and debilitating effects, and the psychological and emotional effects of the punishment. In doing so issues centred upon proportionality, justice, the legality and legitimacy of the confiscation punishment and the true purpose of this punitive form of modern-day punishment have arose. These issues will be discussed further in the following chapter.

Chapter Seven: Discussion of the Research Findings

The way I would put it is, if you were going to come up with a piece of legislation which is designed to be pretty useless in the majority of cases, this is what you would implement. It is designed to fail (Kennedy Talbot Q.C., BBC Radio Wales, 2016: 21mins).

7.1 – Introduction

Whilst a plethora of findings have emerged from within this research, this thesis identifies seven key findings which featured most prominently within the narratives:

- The post-conviction confiscation punishment represents a ‘double punishment’ that is disproportionate and indefinite.
- The post-conviction confiscation punishment is disproportionately used against relatively low-to-mid level offenders rather than ‘serious and organised’ criminals.
- The way in which POCA has been constructed, a hybrid of civil and criminal law, and the inclusion of several key legislative provisions, has enabled confiscation law to circumnavigate due process safeguards, disadvantaging the confiscation defendant at every stage of the legal process and, therefore, undermining the rule of law and the pursuit of justice.
- That the way in which confiscation law has been drafted allows for the [theft] ‘confiscation’ of legitimate assets; after-acquired assets; assets that are after-acquired jointly with somebody who has no connection to any criminal offences; and, confiscate assets and monies that are passed down via inheritance.
- The pain and disadvantage inflicted by way of the confiscation punishment is not confined to the defendant but is experienced disproportionately by the family.

- The ineffectiveness of Human Rights legislation to protect people's rights.
- The criminogenic nature of the confiscation punishment.

These seven key findings will now be discussed in the following five sections of this chapter so as to illustrate that the post-conviction confiscation regime is not dysfunctioning, but fundamentally flawed and, therefore, it is beyond reform, allowing a case for its abolition to be developed.

7.2 – An Imaginary Penalty.

Imaginary penalties according to Carlen (2008) are policies and practices which fail to achieve their stated objectives, yet the agents responsible for their development and implementation persist in 'manufacturing an elaborate system of costly institutional practices "as if" all objectives are realisable' (Carlen, 2008: 1). This section of the chapter will now consider the research findings within the context of the four stated policy objectives of POCA as captured in the PIU report (2000) as a way to understand whether POCA can be determined as an imaginary penalty.

The primary policy objective of POCA - send out the message that crime does not pay (PIU, 2000: 5) – suggests that the confiscation punishment has a communicative function and the message conveyed will disincentivise financially motivated crime. There was no evidence from within this research to suggest that the confiscation defendant had taken away from their confiscation experience the notion that 'crime does not pay', despite the punitiveness of their experiences. Instead it would appear that a different message is conveyed, one that highlights the limitations of confiscation policy, as Wayne (research participant) explains:

POCA is only effective against those that have assets to recover, it doesn't do as it says on the tin. It doesn't necessarily target those that have profited from crime and anybody that

is involved in crime these days and is switched on would make sure that they can't be connected to any assets, everything goes into somebody else's name.

Based upon the research findings, these measures are disproportionately used against relatively low-to-mid-level offenders whose assets are either negligible, untraceable or they have already been dissipated, it would appear that the suggested communicative or deterrent value of confiscation policy is unlikely. For such a deterrent message to be conveyed effectively the confiscation punishment would need to be certain, severe and swift (Von Hirsch et al., 2009). However, as this research has revealed, the distinguishing characteristics of the confiscation punishment are uncertainty, severe and drawn out. This research also revealed that, not only was there no evidence to suggest a deterrence effect, but it revealed that the confiscation punishment is criminogenic. Additionally, confiscation policy assumes that peoples' motivations for engaging in financial crimes are all the same, greed, failing to recognise that some people commit financial crimes for other reasons such as societal 'strain' (Merton, 1938) or necessity. As the social problems which give rise to a significant amount of crime (poverty, unequal access to legitimate opportunities, mental health issues and addiction) have not only not been addressed but have become further entrenched due to a decade of austerity measures (Cooper and Whyte, 2017), then there is nothing to suggest that motivations of 'necessity' or strain have changed. Therefore, as there was no evidence to suggest that confiscation policy was having a positive communicative effect, this thesis concludes that the confiscation regime is failing to achieve this objective.

The second objective of POCA is that the confiscation of assets will prevent criminals from funding further criminality (PIU, 2000: 5). In light of the research findings, that this punishment is disproportionately imposed upon low-to-mid-level offenders who use their 'profits' for 'day-to-day'

living, rather than their more senior counterparts who are likely to have the financial capital to reinvest their profits, then it would appear logical to infer that confiscation policy will have had little impact in preventing the reinvestment of funds into further crime. Furthermore, this thesis argues that confiscating the profits from low-to-mid-level offenders is likely to have the same impact upon crime as it would if no confiscation punishment was inflicted because low-to-mid-level losses are likely to be factored in as an 'operational cost' expected by those who actually 'organize' and finance crime from above – business as normal.

There was also no evidence from within this research to suggest that confiscation policy has had any long-term impact on the third objective - remove negative role models in communities. As this thesis has revealed, confiscation policy can and does remove assets, both illegitimate and legitimate ones, from offenders that are visible at the street level. However, there was no suggestion from within the findings that this has had any long-term effect in terms of crime reduction. Instead, as confiscation policy fails to recognise the pivotal role that 'demand' plays within the drug market, it is likely that the removal of such individuals from a community, will be viewed as an opportunity for those 'waiting in the wings'. Furthermore, in inflicting grossly inflated confiscation orders upon such individuals it is likely that this only adds to their status, and the message conveyed to those individuals that confiscation policy suggests are easily influenced is that 'crime pays'.

The fourth objective of POCA - decrease the risk of instability in financial markets (PIU, 2000: 5) – this objective assumes that confiscation powers are going to be used against criminals who have accumulated significant wealth, those who are able to afford to invest their profits in legitimate markets. Whilst this research only discovered one participant who had benefited from their crimes to the extent that they were able to invest significantly within the financial markets (£millions), there

were other participants who stated that they had 'legitimate' businesses at the time of their arrest. This thesis acknowledges that, if these individuals have used criminal funds to start-up or sustain their 'legitimate' businesses, then this would provide them with an unfair advantage over those that do not have such funds to invest, and that this presents a risk in terms of destabilising the free-market economy, and preventing up-ward social mobility for those looking to get a foothold on the ladder legitimately. However, this research, in revealing that these special powers are being disproportionately used against relatively low-to-mid-level offenders, rather than those that benefit the greatest from crime and, therefore, those who have the social, human and financial capital to invest in real estate, stocks and shares or form large profitable companies, then the greatest risk to the destabilisation of the financial markets persists under current post-conviction confiscation policy. Therefore, based upon these research findings, it is expected that confiscation policy has had a limited impact upon this objective and will continue to do so.

Therefore, in concluding that the confiscation system is failing to meet its own objectives whilst those responsible for its development and implementation persist "as if" all objectives are realisable', this thesis considers the post-conviction confiscation punishment to be an 'imaginary penalty' (Carlen, 2008: 1). However, of equal concern is that, instead of acknowledging the gross failures of the confiscation regime to meet its own objectives and rationale, the regime uses these powers against individuals that it was never intended for 'as if' this is incidental and acceptable. This 'sleight of hand' deceives the public by using these special powers for purposes other than what they were intended for and, therefore, undermines democracy and further erodes the legitimacy of the State. As Bingham (2011) points out, from a rule of law perspective, powers should be used for the purposes in which they were conferred for.

This thesis acknowledges that POCA represents just one of a series of imaginary penalties that have characterised our criminal processing system over the years (Hope, 2008; Edwards and Hughes, 2008; Sim, 2008; Jefferson, 2008), and whilst they all might operate differently, it is important to point out that the confiscation punishment sits within a wider trend of State policies that fail to meet their objectives.

In piercing the confiscation chimera, this thesis proposes that there are alternative hidden functions that are driving this new form of punishment. An obvious function that may be said to account for the confiscation punishment would be its capacity to generate revenue. However, as this research has argued, the amount of money generated is nominal in comparison to the amount which is ordered by the court, therefore undermining the credibility of such a function. Nevertheless, this research has also revealed that the regime generates grossly inflated confiscation figures and then adds interest upon that debt before pursuing the debt under section 22 powers and, therefore, its revenue raising function has to be understood within the context of the 'long-game', an assertion made previously by Bullock (2014). This research revealed how the revenue is collected, often via an attachment of earnings order, and because the debt tends to increase at a rate greater than the defendant is able to pay it due to accruing interest, this punishment acts as a life-time tax for the defendant. When this is considered alongside an understanding that law enforcement agencies can retain a percentage of all assets collected under the asset recovery incentivisation scheme (ARIS), then the revenue generating capacities of the confiscation regime begin to appear more sinister. Therefore, this thesis echoes Naylor's (2007: 27) concerns, that this could have the effect of turning law enforcement agencies into 'self-financing bounty-hunting organizations'. When this is considered within the wider context of austerity and ever-diminishing public budgets, the pressure to generate alternative sources of funding

so as to preserve jobs, risks distorting policing priorities by 'shift[ing] attention from violent to wealthy offenders', whilst also increasing the risk of police corruption (ibid: 32).

However, in order to appreciate the scale of this long-term revenue raising function this thesis draws upon the NAO (2013: 14) figures which state that of the 6,392 orders that were imposed in the year 2012-13, which totalled £1.6 billion in benefit amount ordered, £318 million was deemed 'available' for immediate recovery, of which just £58.7 million was actually recovered. However, in the same year £74.8 million was recovered from orders imposed in previous years, highlighting the extent of the regime's capacity to retrieve after-acquired and legitimate assets and exposing its long-term revenue function.

The monetization of the offender is nothing new, the offender has generated significant revenue for the ever-burgeoning prison industrial complex and the fine has long been an established form of punishment. However, punishment by way of fine has, generally, stood alone as a form of redress, whereas the confiscation punishment represents an additional form of punishment to that inflicted for the predicate offence and, therefore, has the effect of making the penal system significantly more punitive and, based upon the default ratio exposed in this research, will no doubt have the long-term effect of expanding the prison population. This thesis also notes that the monetary punishment by way of post-conviction confiscation represents a seismic shift in the way punishment is inflicted. It has not replaced the old system which has relied heavily upon incarceration and community punishment, and its creation has not come in response to any noticeable increase in crime, it is simply an additional form of punishment and an expansion of the penal apparatus (Garland, 2001) that generates revenue.

The accounts from this research revealed another hidden function of confiscation policy; its surveillance function. In revealing that the accruing interest upon the outstanding confiscation debt at a rate greater than the defendant is able to pay through their legitimate earnings allows for the punishment to be 'locked-in' for life, enabling State agencies to financially surveil the confiscation defendant indefinitely. Importantly, this research has also illustrated that the financial surveillance is not contained to the defendant but can extend to third party individuals as their finances tend to be interwoven with the defendant's. Therefore, this thesis argues that the confiscation punishment has a panopticon capacity which can extend beyond the offender (Foucault, 1977). Whilst Foucault suggested that the 'all-seeing disciplinary gaze' within the prison has a self-regulatory function (ibid: 201), there was no evidence within the research to suggest that confiscation policy has this effect. On the contrary, there was an abundance of evidence to suggest that it had the opposite effect, in that the defendant adapted their ways of living so that they could evade the surveillance of POCA. On the surface, the suggestion that the State is surveilling the confiscation defendant may appear sinister or conspiratorial, however, as highlighted in chapter two, this function was actually disclosed by the then National Lead Officer for Serious and Organised Crime, Mick Creedon, whilst providing evidence to the Public Accounts Committee (2016a: 6): *'The important thing that POCA offers is lifetime offender management'*. Whilst he failed to expand on what he meant by lifetime offender management, this thesis has revealed how this life-time offender management function operates and the devastating impact it can have upon the lives of those that are subjected to it, by 'managing' them through its wider mechanisms of surveillance, such as the bank. Therefore this 'lifetime offender management' function also represents a significant net widening (Cohen, 1985; Garland, 2001) effect because, historically, lifetime offender management was once a criminal justice response that was reserved for the most serious and prolific of offenders who remained on life-licence. However, this thesis has

revealed that anybody who does not have the means to satisfy their inaccurately and grossly inflated confiscation order, regardless of the severity of the offence or their offending history, they will be subject to life-time offender management under the confiscation punishment. This may undermine the whole sentencing framework which is otherwise guided by the principle of proportionality (Ashworth, 2015). This finding also suggests that confiscation policy is a further State-sanctioned tool of penal exclusion that divides those groups of individuals who are permitted to live in de-regulated freedom, from those that must be heavily controlled (Garland, 2001).

This research, in revealing that the confiscation process disadvantages the defendant throughout their prison sentence in relation to accessing privileges said to support desistance (Hillier and Mews, 2018); that it places further strain upon relationships because of the activation of the prison default sentence; that by adding interest at a rate greater than an individual is able to pay through their legitimate wages makes the punishment indefinite; and that the regime confiscates after-acquired legitimate assets not just from the defendant but also from their partners, suggests that such structural barriers represent a third possible hidden function of POCA – to propel the confiscation defendant back into offending so that the criminal processing machine, with its ever-increasing private beneficiaries, can prosper (Sim, 2009; Scott, 2016a, 2018). This thesis comes to this conclusion on the basis that there would appear no other logical explanation as to why the State would make the transition away from a life of crime so difficult. Therefore this hidden function would also appear to confirm Foucault's (1977) theory that punishment has a circuitry function that recycles the same offenders, and in doing so ensuring that the 'problem populations' continue to be segregated (Garland, 2001).

In summary, in revealing that the confiscation system not only persists but is continually expanding despite its abject failure to achieve its professed objectives, and in revealing several alternative and

perverse functions of the confiscation system, this thesis has begun to delegitimise the post-conviction confiscation punishment, a theme that will gain further traction throughout this chapter.

7.3 – Procedural Injustice

This thesis concludes that, whilst unfairness was said to characterise every stage of the confiscation process, the greatest injustice of the confiscation regime is the manner in which the confiscation figures are miscalculated. This critical moment results in the defendant not being able to satisfy their order, which in turn results in the activation of the default prison sentence, interest being accrued upon the outstanding confiscation debt, which then enables the State to confiscate after-acquired legitimate assets. Therefore, the findings of this research builds upon Karen Bullock's (2014) research, conducted with 100 financial investigators which revealed the practices that gave rise to inflated confiscation figures. Bullock concluded that the confiscation figures constructed by the financial investigators were 'airy fairy ... up in the air...peter pan' calculations that bear little resemblance to what profit is made from crime and, therefore, the foundations of the post-conviction confiscation regime are 'built on sand' (ibid: 52-63):

Far from representing the 'profit' generated from crime these values are constructs founded in the relationships between legislation, the discretionary practice of police officers and financial investigators, organisational restrictions and constraints and informal negotiation and compromise between defence and prosecution (ibid: 45).

The accounts contained in this research compliment her research by exposing the long-term and devastating consequences of such malpractice not just upon the defendant but also upon the family. On further analysis of the findings, this research also revealed the consequences of using a gross benefit calculation to determine the proceeds of crime rather than a net profit approach. It revealed

that within the gross benefit vacuum, exists a space for significant financial investigative discretion, once again chiming with Bullock's (2014) findings. Within this discretionary space assumptions can be made as to the value of assets, with little chance of the defendant being able to rebut those assumptions, and no legal obligation for the court to consider the operational expenses incurred by the offender of 'doing business', despite such expenses having a significant bearing upon the offender's actual profit margins. These are the conditions of possibility necessary for wildly inaccurate confiscation figures to be constructed, facilitated by the adoption of a civil threshold of proof and the reversal of the burden of proof. If the burden of proof lay with the prosecution as it does in a criminal trial and the assertions of the prosecution had to be proven beyond reasonable doubt in the presence of a jury, this thesis argues that the prosecution would be unable to proffer such grossly inaccurate confiscation figures because they would be found to be unsafe in any competent courtroom which made the effort to scrutinise them. Therefore, it is argued that the consequence of circumventing due process safeguards is that judicial accountability is greatly eroded, allowing unsubstantiated allegations and assumptions to be advanced in the knowledge that they will not be met with the same level of resistance that they would if they were presented in a criminal trial, posing a calamitous threat to the integrity of the British criminal justice system.

This thesis acknowledges the moral reasons why it might be considered problematic to take into account the costs incurred of an individual's criminality as if it was a legitimate business. However, in considering the findings of this research which have illustrated, in great detail, the long-term pains and hardships caused, not only to the defendant but also to their families, then it becomes apparent that the ethical tensions of adopting a net profit approach are a necessary consequence of pursuing justice and should be embraced rather than avoided.

This finding also needs to be considered within the knowledge that the Hodgson committee (1984) recommended that a net profit system should be adopted, and this recommendation was dismissed when the DTOA 1986 was drafted. In choosing to dismiss this recommendation, and in light of the research findings which have revealed the consequences of that choice, this thesis argues that this was likely to be one of the provisions that the legislature considered necessary to be able to grossly inflate confiscation figures so as to generate revenue for the State, hence the decision to retain it.

A number of other provisions were highlighted within this research that were said to contribute to the inflation of the confiscation figures and, therefore, fuel the defendant's sense of injustice. In particular, the hidden asset assumption and tainted gift provisions were said to distort the 'available' amount figure, with hidden asset assumptions being described as 'impossible' to defend against and the tainted gift assertion, whilst in some cases accurate, were said to be assets that were often unrecoverable by the defendant. In leading to the construction of an 'available' amount that they were unable to pay, this led to the activation of the default sentence, which does not expunge the confiscation debt, and then interest was accrued upon their orders, having devastating consequences for the defendant and their families. In terms of the benefit figure, however, it was the criminal lifestyle assumptions that was said to be the most damaging and difficult provision to defend against from the confines of a prison cell. The importance of these provisions is that their use leads to the construction of figures that fail to reflect the reality of the profits generated from the defendant's crime/s, correlating with the expert evidence provided to the Home Affairs Select Committee (2016b: 25):

I think I would also remove the criminal lifestyle provisions. I would remove the assumptions that flow from that, because that is a further route to massively inflating the benefit figure (Tim Owen Q.C.).

Again, this research revealed that such provisions are enabled because of the lowered threshold of proof which allows for the prosecution's assumptions to be accepted, not because they are necessarily accurate, but because the defendant has been unable to rebut them, highlighting the devastating significance of the civil dimension of confiscation law, a concern previously raised by Richard Fisher Q.C:

...assets that the court has found the defendant to have but found the defendant to have those by the defendant's own failure to persuade the court that he does not have them. He is in that position of having that burden of proof to prove the negative..... the credibility of the defendant being shot through—so when it comes around for confiscation and he or she says, "It has passed through my hands, but I do not have it any longer," the chances, perhaps, of them being believed on that point are limited. That is what may then result in a higher order being made. (House of Commons Home Affairs Committee 2016b: 20).

Furthermore, the criminal lifestyle assumption was another provision that some of the Hodgson Committee⁴⁷ (1984) objected to but was included nevertheless when the DTOA 1986 was drafted. Again, this thesis considers this a key provision in the process of grossly inflating confiscation figures so as to generate long-term revenue for the State.

The unlawfulness and immorality of fabricating inaccurate confiscation orders which then accrue interest so that the State is able to control people through debt pierces the utilitarian 'cloak of respectability' that this system has been shrouded within, and that the subsequent imposition of an attachment of earnings order creates a form of modern-day servitude, a tax upon the criminal [or upon some criminals], leaving the confiscation defendant suppressed in a position of social, political and economic disadvantage.

⁴⁷ Namely Andrew Nicol and Clive Soley

Whilst revealing the processes and provisions which facilitate the construction of grossly inaccurate confiscation figures is considered a key finding of this research, it is greatly enhanced by the revelations which explain why the confiscation defendant then 'agrees' to such grossly inaccurate figures. In revealing that the prosecution adopts tactics such as threatening to criminalize family members, and in doing so violating the defendant's right to a fair trial (article 6 ECHR), this further reinforces the argument already posited within this chapter; that the application of this act of State punishment is unlawful.

Other reasons why such figures were 'agreed' to include: the practical difficulties of preparing a confiscation defence from the confines of a prison cell greatly hindered the defendant in preparing their legal defence, making it more difficult to rebut the assumptions advanced by the prosecution; some stated that they agreed through submission - the longevity of the confiscation investigative and legal process had taken its toll upon the defendant and their families; and, some stated that they were desperate to get their order finalized so as to prevent it from further disadvantaging them in terms of key prison sentence privileges such as de-categorisation, home leaves, ROTLS, electronic tag. Therefore, in constraining the capacity and the autonomy of the confiscation defendant to defend their case fairly and through choice, this thesis understands that, from a rule of law perspective, this would also be considered unlawful (Ashworth and Horder, 2013). For Helm (2019), perverse 'incentives' to plead guilty should be found to violate fair trial rights, especially as such incentives may disproportionately influence vulnerable defendants. Further, in revealing that most of the research participants considered their legal representation as either inadequately resourced to match the complexity of their case or that their legal teams were inept to deal with the complexity of confiscation law, then this thesis has also begun to challenge the idea that providing free legal advice is a sufficient safeguard that can protect against injustice. This becomes more problematic in the knowledge that

several research participants reported that they were denied the opportunity to commission a private legal defence with expertise in confiscation proceedings because their assets had been placed under restraint, further constraining the defendant's capacity and autonomy to defend their confiscation case.

From a normative perspective, such a response may appear illogical in the sense that it is guilt-affirming and in agreeing to a confiscation order that one could not pay was never likely to improve their confiscation predicament. However, as has been revealed, by the time this 'choice' has been made a confiscation defendant has had to endure months and often years of dealing with their confiscation case and the disadvantages that ensue. Furthermore, based upon the court observations undertaken within the fieldwork phase of this study, it is also perhaps a misconception to think that whether the defendant agrees to the confiscation order is a determining factor as to whether it is imposed. The heightened level of powerlessness that is experienced by the confiscation defendant, due to the hybrid construction of confiscation law which disadvantages the defendant at every stage of the legislative process, determines that the defendant is unable to resist the prosecution's assertions. Therefore, what this research is suggesting is that the confiscation defendant, compelled by the need to bring the pain, hardship and misery caused to themselves and their family to an end, expedite proceedings by accepting inaccurate assertions advanced by the prosecution.

This research also revealed that defending a confiscation order from the confines of a prison cell was considered particularly difficult. Whilst it is accepted that many offenders have to prepare their criminal defence case from within prison, aided by legal visits, what this thesis is arguing is that the level of complexity involved in defending a confiscation case is much more demanding, especially

when it involves multiple businesses or personal bank accounts, third-party interests or trawling through paperwork and bank-statements dating back six years [and sometimes longer].

The accounts also demonstrated that the very nature of post-conviction confiscation means that the prior conviction violates the presumption of innocence during a confiscation trial. The presumption of innocence is an important due process principle because, as Ashworth and Horder (2013: 71) point out, it acts as a 'counterweight to the immense power and resources of the State' when compared to the relatively powerless position of the defendant. This research has revealed that the consequence of this is that the defendant, when rebutting the assumptions advanced by the prosecution, unofficially, has to prove beyond reasonable doubt, rather than on the balance of probabilities, because the court is unlikely to accept evidence proven to the lowered threshold from a convicted offender whose character is tainted. Therefore, this research, in revealing that there are two evidential thresholds at play within a confiscation trial: a civil 'on the balance of probabilities' threshold that allows for assumptions to be applied by the prosecution, and a criminal 'beyond reasonable doubt' threshold for the defendant when rebutting the prosecutions assumptions, further evidences how the defendant is significantly disadvantaged within a confiscation trial. This finding supports the oral evidence provided by Richard Fisher Q.C. to the Home Affairs Committee (2016b: 11), evidence which failed to make it to their report when it was published:

the defendant's credibility is shot through and, therefore, whatever he says in evidence, he is going to struggle to get a judge to believe him when that is the same judge who has presided over his trial, seen him convicted and is sentencing him. In that sense, of course, there is an issue.

Whilst it is accepted that defendants are often disadvantaged within the legal process and that power imbalances are an inherent feature in all court proceedings, the evidence from this research suggests

that the civil/criminal hybridity of the confiscation case, which allows due process safeguards to be circumnavigated, presents a spectacularly heightened level of disadvantage for the defendant.

The rule of law is further undermined when the findings of this research are considered within the context of criminal law. If key evidence is presented within a criminal trial which is considered to be contaminated, found to be unsubstantiated or when confessions are extracted through coercion, then such evidence would be considered inadmissible and, unless there is further key evidence from the prosecution, the defendant would be acquitted because the infliction of punishment on weak evidence would be considered unjust and unlawful. In the context of this research, in revealing how confiscation figures are routinely and intentionally miscalculated and revealing how the defendant is coerced into agreeing to those figures, this thesis concludes that such evidence is tainted and, therefore, the confiscation punishment that follows is unlawful.

For Kennedy (2004), he argues that asset recovery powers are important for maintaining the rule of law in the UK. Whilst this thesis accepts that the rule of law can be undermined when certain sections of society are not held to account, whether this be the 'serious and organised' threat that the official discourse alludes to, large corporations that engage in aggressive 'tax avoidance' or politicians who misappropriate their expenses. However, based on the findings of this research, it foresees that with every step taken that distances our judicial system from the rule of law, it moves ever closer towards a system of tyranny, not to restoring confidence in the rule of law.

The findings within this thesis strongly correlate with Sir Ivan Lawrence's Q.C. (2008) assessment of the confiscation system, who despite being one of the original protagonists of the UK's confiscation legislation, later become one of its strongest critics. He concluded, from a jurisprudential perspective, that the legislation was 'more draconian and manifestly unjust than anything ever devised by the State

in modern times', punishes an offender 'severely twice for the same offence' and 'these new laws appear to occupy some parallel legal universe which has no apparent relationship with the normal rules of criminal process' (ibid: 22). Consequently, he concluded that it is a law which is so 'contemptuous of our traditional ethical standards' and is, therefore, a 'blot on the UK's reputation as a nation whose laws attain only the highest standards' (ibid: 24).

In summary, it would appear that, such is the State's willingness to achieve the hidden functions of confiscation discussed earlier in this chapter, that it is prepared to work within the margins of the law [and beyond], a space where the law can be manipulated to their advantage. From an authoritarian perspective, this may appear reasonable, innovative or justified (Kennedy, 2004), however, from a rule of law, justice or democratic perspective, such practice is problematic. This thesis concludes that, in weaponizing confiscation law with provisions that greatly disadvantage the defendant and in choosing to circumvent typical due process safeguards, the confiscation process cannot be considered fair as the 'procedural dice' are so disproportionately loaded in favour of the prosecution (Bingham, 2011: 90).

7.4. – [Un]serious and [dis]organised criminals: The reality of Who the Post-Conviction Confiscation Punishment is Used Against?

A key aim of this research was to identify what types of people or what types of offences confiscation powers were being used against. It is expected that if these measures were being used against serious and organised criminals, as alleged, then the expectation is that the confiscation orders imposed would be significant in value. However, the evidence from this research suggests that the way in which the system has been 'rigged', up-values the amount of profit a criminal is said to have benefited from, falsely creating the impression that these individuals are 'serious and organised' criminals, when often

they are not. It is through analysing the profiles and biographies of the individuals that took part in this research that this assertion is made and instead it would appear that they would otherwise be considered as relatively low-to-mid-level offenders. This assertion is supported by the fact that most of them received confiscation orders of less than £50,000, and whilst it is accepted that this is still a considerable sum of money when considered against the national average salary, which is estimated to be approximately £29,588 (ONS, 2018), it does not appear to correlate with the kind of 'champagne lifestyle' wealth that is alluded to within confiscation policy.

It is also worth pointing out that even for those research participants whose confiscation orders were in excess of £50,000, they strongly contested the computation of their confiscation figures, stating that they were grossly inaccurate due to the provisions contained within POCA that allow for confiscation figures to be greatly inflated (criminal lifestyle and hidden asset assumptions, tainted gifts, gross benefit calculations). This suggests that even in cases in which the confiscation figures are considerable, because of the way they are [mis]calculated, these cannot be used as a reliable indicator as to whether POCA is actually being used against 'serious and organised' crime. The aim here is not to minimise or rationalise the harm that is created by lower-level offending or contest that profit is made from such crimes. Instead the aim here is to demystify the effectiveness of these measures to meet its policy objectives outlined in chapter two and to expose how the confiscation process constructs relatively low-to-mid-level offenders as the 'Mr and Mrs Bigs', so as to obscure the reality that current confiscation policy is ill-suited to meet its own policy objectives.

Furthermore, the financial status of these participants would appear to be consistent with NAO statistics (2013: 15) which revealed that out of the 52,029 confiscation orders made since 1987, 45% of orders imposed (24,011) were for amounts of £1,000 or less and 83% (42,602) were for orders

£25,000 or under, compared to just 261 orders for orders £1,000,000 or more, which equates to just 0.5 per cent. Together these findings reveal that these special powers are being used disproportionately against low-to-mid-level criminals, or what might be more accurately termed [un]serious and [dis]organised criminals.

In using these powers against individuals that they were not intended for begins to raise significant questions about the legitimacy of the legislation. For Sproat (2009: 147), this contradiction within the confiscation rhetoric suggests that the confiscation agency is either incompetent in tackling organised crime or the threat of organised crime has been grossly exaggerated to justify the introduction of powers that might not otherwise have been granted and this, for him:

raises huge questions about the trustworthiness and morality of those politicians and 'professionals' who use their extra-ordinary threat of 'organised crime' to manufacture consent for their (often extra-ordinary) measures.

Based upon the findings within this research it would appear that the claims that this threat can be addressed via these powers have also been greatly overstated, and as a way to compensate for its failings, these powers are being disproportionately wielded against relatively low-level offenders.

This thesis is not suggesting that there is not a threat posed from serious and organised crime, it is simply stating that the threat is greatly overstated, amplified, for the purpose of public appeal and it is from there where things become possible that were once not – the legitimization of aggressive and intrusive confiscation powers (Cohen, 2011). The responses that are put forward, regardless of whether they present a risk to judicial conventional protocols or civil and human rights, are then considered necessary and proportionate to the enormity of the threat posed.

In addition to establishing that these special powers are being disproportionately used against relatively low-to-mid-level offenders, this thesis has also revealed the significant disadvantages experienced by the confiscation defendant who does not have the social and economic capital to instruct a private and competent legal defence. When this is considered alongside the idea that for those individuals who are fortunate enough to have the social and economic capital to instruct the best solicitors, barristers and accountants to represent their case, the chances of successfully defending their order would be thought to be significantly increased. Such individuals, in being able to mediate the confiscation figures down through their 'fancy' lawyers will, in essence, be able to buy their way out of the confiscation punishment, in a way that those defendants without competent legal counsel would not be able to, highlighting an inequitable access to justice within the confiscation system. From an egalitarian or a moral perspective, a system which applies the confiscation punishment in such a discriminatively manner, is said to lack legitimacy (Sim, 2009; Scott and Flynn, 2014).

In summary, based upon the evidence presented in this thesis, whether by intent or default, the confiscation regime adopts a 'low-hanging fruit' approach because such offenders are more accessible and are less able to successfully defend themselves. That is not to say that the regime does not attempt to use confiscation laws against the 'Mr or Mrs Bigs', rather that post-conviction confiscation legislation is rarely likely to be able to impact on such individuals because of their capacity to avoid detection and, in the unlikely event of arrest, they are able to commission a legal defence that will enable them to buy their way out of the punishment. Therefore, in drawing such a conclusion, this thesis also concludes that the confiscation punishment is predicated upon and reproductive of structural inequalities which enable the rich to get richer, whilst the poor gets prison (Reiman, 2001).

7.5 – Unlawful State Violence

The findings of this research illustrate that the post-conviction confiscation punishment represents a 'double punishment'. It is inflicted as an additional punishment to the punishment inflicted for the predicate offence, despite no further offence being committed. When this is considered within the context of Flew's (1954) definition of punishment, which states that punishment must be inflicted in response to an offence, then it becomes difficult to conceptualize this additional punishment as a form of 'legitimate' State punishment (Hudson, 2003b). This assertion is reinforced by an understanding that in order for punishment to be understood as punishment and not some other form of violence, then it must be inflicted upon the offender (Flew, 1954) and this thesis has provided significant evidence which illustrates how the confiscation punishment bears down disproportionately upon the [innocent] family. It is not known whether the infliction of pain, disadvantage and hardship upon the family is a collateral damage effect or whether it is intentional on the basis that the family are perceived as the defendant's 'Achilles heel'; by applying pressure and pain upon the family the defendant will comply with the confiscation demands so as to protect them, regardless of whether the demands are illegitimate. Nevertheless, whether it is intended or not, the infliction of considerable pain, hardship and disadvantage upon the innocent not only breaches the rule of law (Bingham, 2011), but it provides an insight into the dehumanised and uncompassionate nature of the confiscation punishment. Whilst some may assign a level of desert upon the confiscation defendant's family members of adult age on the basis that they 'must have known that they were breaking the law' or 'they benefitted from the proceeds', this cannot be asserted for the children whose innocence is absolute. The infliction of pain, hardship and disadvantage upon children, the powerless, on the basis that their parents have contravened the law represents a sad indictment of our society.

Therefore, in exposing the reality of the post-conviction punishment within the context of Flew's (1954) definition of what constitutes punishment, the post-conviction confiscation punishment cannot be understood as a punishment; its cruel, unwarranted, disproportionate and illegitimate nature equates to an act of State violence (Scott, 2016a). Therefore, it is necessary from this point forward, within this thesis, to substitute the term 'punishment' with 'unlawful State violence' when making reference to the confiscation punishment. This is because the term 'punishment' legitimizes and conceals the reality of the pain, hardship and disadvantage that is inflicted by the confiscation regime and fails to acknowledge that the confiscation punishment is predicated upon grossly inaccurate confiscation figures which, this thesis argues, makes it unlawful.

Therefore, in revealing that this unlawful act of State violence does not constitute punishment and highlighting an arbitrary abuse of State powers that violate the rule of law, it is argued that the system of governance in England and Wales is experiencing a regressive shift away from a system of 'democracy' to a system of tyrannical rule (Bingham, 2011), or as Lea (2004: 93) describes, a shift towards the 'remedievalisation' of the CJS, to a time when law and punishment, and those that govern it, were not moored by the rule of law, and the level of punishment inflicted bore little relationship to the gravity of the offence.

This thesis also concludes that whilst there are many pains and hardships generated directly from this act of unlawful State violence, there are some distinctive features that characterise it. This thesis refers to these features as the 'pains of confiscation': a sense of hopelessness, a sense of inescapability, a deep sense of procedural unfairness, a sense of uncertainty and a sense of disproportion. Whilst 'unpleasantness' is considered an inherent feature of punishment (Flew, 1954; Canton 2017), these pains are additional and compound the pains already inflicted as a result of the

punishment for the predicate offence (Sykes, 1958) and, therefore, the confiscation ‘punishment’ represents a particularly cruel and unusual act of State violence. In revealing these pains of confiscation, this thesis notes some similarities with other ‘new’ forms of punishment that are beginning to dominate the way in which punishment is inflicted. Punishments which are disproportionately punitive, intrusive, violate human rights, and are characterised by uncertainty, indeterminacy and the loss of hope. These new forms of punishment include: IPP sentences (now abolished as they were deemed to be unlawful- Beard, 2019), joint enterprise law (see Williams and Clarke, 2016; Hulley et al., 2019) and the criminalization and deportation of foreign national prisoners (see de Noronha, 2018). Whilst these dehumanising and overly punitive forms of punishment are the product of decades of neo-liberalism and harsh law and order politics (Sim, 2009; Garland, 2001), it would appear that this is only likely to intensify under the rule of the newly elected Prime Minister, Boris Johnson, as he announces a package of harsh law and order measures which include the creation of a further 10,000 prison places (GOV.UK, 2019c), a further £100 million to improve ‘security’ in prisons (GOV.UK, 2019d), £85 million for the CPS (GOV.UK, 2019e) and the recruitment of 20,000 new police officers (GOV.UK, 2019b), at a time when wider public spending has been decimated for over a decade (Cooper and Whyte, 2017).

Ideologically, it is suggested that human rights legislation will act as a safeguard against such arbitrary abuses of power that result in the types of injustices that this thesis has exposed. However, this research has shown this not to be the case. For example, under Article 8 of the ECHR, everyone has the right to respect for their private and family life, their home and their correspondence. However, this human right is denied to certain individuals and in certain circumstances:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (European Council of Europe (Date Not Provided: 11).

Whilst this clause may override the defendant's right to engage Article 8, however, this thesis has revealed that in doing so, it does so in a way that intrudes upon the rights of the [innocent] family members who clearly engage Article 8 protections. Therefore, this thesis argues that in violating the rights of the children in particular, this cruel form of State violence is as immoral as much as it is unlawful.

This research has also revealed that after-acquired and jointly-obtained assets can be confiscated, even though the defendant's partner is innocent and even if their contribution to the assets derives from legitimate earnings. When this is considered under Article 1 of Protocol 1 of the ECHR, which stipulates that every natural or legal person is entitled to the peaceful enjoyment of hers/his possessions, this also constitutes a violation of human rights. In further interrogating the findings within the context of Human Rights legislation it becomes apparent that other protections are violated such as Article 3, the prohibition of torture, on the basis that the narratives elicited within the research detail how this form of unlawful State violence deliberately causes 'very serious and cruel suffering', both physically and mentally and not just upon the defendant but also upon the family. Further, in not providing an eventual termination point to the punishment, despite the defendant's commitment to become a law-biding citizen, confiscation represents a torturous, humiliating and undignified form of unlawful State violence that banishes the defendant to the margins of society where the defendant is driven to despair.

When the research findings contained in chapter six are considered, that the confiscation defendant is compelled to carry out labour so as to be able to make on-going confiscation payments, in an attempt to avoid reincarceration or the removal of private and legitimate property, then this would appear to constitute a form of servitude; a violation of Article 4 - the prohibition of slavery and forced labour.

In terms of Article 6, the right to a fair trial, it would appear that this right is circumnavigated because the confiscation defendant is not charged with a criminal offence (Rees et al., 2012), highlighting the consequences for the rule of law of the hybrid construction of confiscation law and the impotence of human rights legislation to do as it should.

In revealing that confiscation orders are imposed based upon grossly inflated confiscation figures that are unable to be satisfied, this thesis argues that the confiscation of goods, activation of the prison default sentence, the adding of interest on the unpaid amount and the subsequent confiscation of after-acquired legitimate assets and wages amounts to a violation of an individual's right to liberty and security under Article 5 of the Human Rights Act 1998.

The ineffectiveness of Human Rights legislation becomes further apparent when the research findings are considered within the context of David Scott's (2018: 164) 'spirit of death' theory. For example, in revealing that the confiscation defendant is often subjected to a longer term of imprisonment because of their inability to satisfy their grossly inflated confiscation order, they are, therefore, subjected to an increased risk of all three forms of death – civil, social and corporeal. In terms of civil death specifically, this research has revealed that the hybrid construction of confiscation law negates many of the defendant's legal and human rights, and these deprivations are extended upon the [innocent] families. Further, whilst Scott notes that the ECHR has acted as a 'life-support machine' (in terms of the prisoner's right to life) (ibid: 165), this thesis argues that the failure of the ECHR to protect the

confiscation defendant and their families from a further level of pain, disadvantage and hardship, which this thesis has shown to have devastating consequences, the ECHR 'life-support machine' has been well and truly switched off under confiscation law. In further analysing the research findings within the context of social death, in which Scott (ibid: 164) asserts that a meaningful experience in life is characterized by strong human relationships, active social participation and strong social bonds, the same things that this research has revealed the confiscation punishment erodes, this thesis concludes that the confiscation defendant is sentenced to an increased exposure to social death. Finally, this research has also illustrated that the confiscation defendant is subjected to an increased risk of corporeal death due to the emotional and psychological impact of this exceptionally oppressive act of State violence, which is felt to be inescapable and said to elicit feelings of guilt, worthlessness, hopelessness, self-loathing and suicidal ideation, making them what Scott (2018: 163) describes as 'death-bound-subjects'. This thesis has also shown how via the civil and social death of the confiscation defendant, their potential corporeal death is considered much less socially, legally or politically significant, evidenced by the absence of research conducted with such individuals or any acknowledgement within the existing literature that these are the potential effects of being POCA'd.

However, this thesis seeks to make a contribution to Scott's (2018) 'spirit of death' theory by adding a further category that is experienced by the confiscation defendant; economic death. The confiscation defendant is unlawfully locked-in to the confiscation debt by way of the accruing interest and then obligated to make payments via their legitimate earnings, at rates which are likely to impoverish the defendant, and which were said to have a disincentivising effect in terms of securing legitimate employment. Therefore, this thesis argues that the confiscation defendant is condemned to an 'economic death', a life in the margins of society, where *"It's as if you don't exist, you're dead financially"* (Sophie - research participant). Therefore, this thesis concludes that the triumvirate of

‘deaths’ inflicted through imprisonment are mirrored, intensified and extended by this act of unlawful State violence otherwise known as the confiscation ‘punishment’.

When the assertions advanced thus far in this chapter are considered (that it represents a ‘double-punishment’ inflicted despite no further offence being committed which can then be followed by a further prison sentence of up to 14 years without remission in default; that it is inflicted upon the [innocent] families; that the punishment tariff for financial crimes has been significantly increased out of sync with other forms of criminal activity; the disconnection between the gravity of the offence and the severity of the punishment) within the context of a retributivist philosophy, a philosophy centred upon principles of desert and proportionality, which asserts that the offender (as well as the victim) has rights, including the right to go free once they have repaid their debt to society (Von Hirsch, 1993), it becomes apparent that this philosophy is unable to account for this particularly cruel act of State violence.

However, when the confiscation punishment is considered within the context of a reductivist philosophy of punishment the debate is not so straight forward. Whilst this thesis acknowledges that the pathway to desistance is littered with structural barriers that greatly constrain agency, this thesis has identified a number of further structural barriers that make the desistance journey increasingly more difficult for the confiscation defendant. Firstly, this research revealed the temporal significance of when the confiscation proceedings are experienced. It was highlighted that it is inflicted and experienced at the point of conviction, usually when the individual is in prison for their predicate offence and, therefore, instead of preparing for a life beyond prison, the confiscation defendant was drawn into an ‘all-consuming’ legal battle which required them to focus solely upon preparing their confiscation defence. This research also revealed that, in having to deal with their confiscation case,

because of the procedural injustice experienced (Tyler, 2003), the defendant was often consumed by feelings of anger and frustration, emotional states that are not considered conducive to a 'rehabilitative culture' within prison (Mann et al., 2018). The significance of this is that the arrival within prison can represent a liminal period within some offender's lives, a period that can be characterised by 'introspection, ambiguity and social withdrawal' but it is also a time when 'personal transformation and growth can occur' (Healy, 2010: 35), and where 'early-stage desistance beliefs may be cultivated' (Bullock et al., 2019: 409). However, this research revealed that prison sentence progression and access to privileges that are considered conducive to early-stage desistance progression, such as ROTLs (Hillier and Mews, 2018), is impeded, delayed and sometimes denied for the confiscation defendant. Furthermore, this research also revealed that, in being 'anchored' to one's past psychologically and emotionally, the confiscation punishment hinders the defendant's opportunity to begin the process of identity change, key for both primary and secondary desistance (Maruna et al., 2004; Maruna, 2006). As they were being 'anchored' within their past for the purpose of recalling facts related to their financial past, this appeared to deny them the opportunity to reflect on their past behaviours for the purpose of repentance or developing empathy, so that they can begin to appreciate how their actions have impacted upon the lives of their victims, also considered important for reformation (Duff, 2001) and desistance (Maruna, 2006). This research also revealed the propensity of the confiscation punishment to create the conditions of possibility for reoffending by eroding protective factors that are widely considered important for desistance (Sampson and Laub, 1993). For example, social bond theory asserts that desistance is more likely to occur when an individual has a strong emotional attachment to attaining and maintaining societal goals such as employment, marriage and parenthood. They argue that for a bond to be developed between an individual and society that is likely to support desistance, then the individual needs to believe that

they can attain such social attachments via legitimate means. Their theory also suggests that when this bond is weakened or broken, offending is more likely to occur (ibid). Therefore, from a social bond perspective, in revealing that the confiscation punishment undermines efforts to develop such social bonds, whether that be by placing further financial strains upon relationships or by disincentivising the attainment of legitimate employment, the increased risk of reoffending becomes apparent. Furthermore, employment is considered important for desistance because it can provide a purpose to a person's life and it can help an ex-offender develop new pro-social relationships, both of which can support identity change and the shift towards secondary and tertiary desistance (McNeill, 2016). Importantly, employment provides a desister with a source of legitimate income which will aid the process of responsabilization, encouraging them to sustain themselves, support their families, and make tax contributions, which helps to shift their social status from 'burden' to societal asset, again important for self-esteem, identity and ameliorating societal stigma.

This research illustrated that the indefinite threat to after-acquired legitimate assets posed under confiscation law banishes the confiscation defendant to a life within the margins of society and, therefore, disadvantages them in the process. This correlates with Pleggenkuhle's (2018) assertion that 'legal financial obligations'⁴⁸ in America, which are imposed upon an offender when they are released from prison, can perpetuate poor economic circumstances, further magnify reintegration challenges, act as a mechanism for social exclusion and, consequently, hinder opportunities for upward social mobility. Whilst the practical day-to-day effects of being forced to live within the margins of society are obvious, these are also likely to have long-term implications for identity and self-esteem as our sense of self is shaped by the circumstances that we find ourselves in (Sayer, 2011).

⁴⁸ Such as a fine, payment to the victim harm fund, court costs, supervision fees, treatment programme costs, costs for polygraph tests and the costs of jail stays

When this is considered amongst Paulo Freire's (1996) assertion, that it is the internalization of the myth of worthlessness and inferiority that prevents humans from elevating themselves because it leads to a doomed sense of self and curtailed horizons of freedom, then we can begin to see the wider effects of the confiscation punishment, affects that previous to this research have not been acknowledged.

Once again it is important to highlight an important distinction between the long-term experience of this act of State violence and other forms of penal punishment. For example, when a prisoner completes their custodial sentence and their remaining license, or a probationer finishes their community order, the official punishment stage is widely considered complete and they are, in principle anyway, permitted to continue with their lives free from the gaze and control of the criminal justice system. Their societal status shifts from 'offender' or 'prisoner' to 'ex-offender', and whilst this is still a demeaning label that allows for stigma and societal discrimination to be experienced, it does reflect a degree of progress in terms of societal positioning. However, because the enforcement stage of the confiscation punishment is in many cases an on-going [and often indefinite] process, that is reinforced by the receipt of court letters demanding payment and threatening reincarceration, the status of the confiscation defendant remains suspended within an 'offender' status and this was said to have implications for how they viewed themselves, identity, self-esteem, well-being, aspirations and the defendant's dignity. As Maruna points out, excessive punishment not only causes resentment but renders them worthless and worthlessness is a debilitating status that allows for the internalisation of a condemnation script (Maruna 2006).

In revealing the reality of the confiscation punishment and the extent of pain and hardship that arises from it for both the defendant and their families, this research has also provided an insight into the

desperate and constrained conditions in which their 'choices' are made. As Jo (research participant) pointed out, such oppression can lead to a 'nothing to lose' mentality where reoffending begins to be the most attractive or viable option available. As Halsey et al. (2016: 1) point out, giving up crime is a fragile project from which 'fuck it' moments can occur and desistance is derailed, not necessarily because of an individual's desire to reoffend, but because their emotional and agentic capacity to desist from crime is overwhelmed. Similarly, Rusche (2014: 255) argues that when faced with extreme economic adversity, the kind of economic adversity that this research has shown to characterize the confiscation punishment, the 'capacity for resistance' is greatly reduced in order to survive. Importantly, Rusche acknowledges how structural forces create the conditions for reoffending and, therefore, this thesis would argue that the confiscation defendant, in being placed in such an oppressive financial position, is 'thrown into the path of crime' and, therefore, they have a reduced level of culpability in any future crimes they go on to commit (ibid).

In exploring other psychosocial reasons as to why a confiscation defendant may gravitate back towards offending it is important to acknowledge the disempowering nature of the confiscation punishment, a process that this research has revealed to greatly debilitate. On analysis of the narratives, such was the level of despair of the defendant that the idea of reoffending appeared to offer them a place of refuge, certainty and liberation from the oppression of the otherwise inescapable confiscation punishment. With most other legitimate avenues closed off, it appeared that the notion of re-engaging in offending was perceived as empowering, like they were doing something proactive to alleviate the strains induced by their confiscation predicament. Although this was not explicitly asserted as an explanation for why they might find themselves in a state of reoffending, there was an apparent shift in the tone of their voices and the body language of the research participants whenever such eventualities were discussed, a shift which appeared to indicate that they felt liberated by the

prospect of taking back some ownership over their lives, even if this meant living on the margins of society.

Furthermore, in a capitalist society where success is determined by material possessions, humans are socialized to prosper, yet for those who are denied the opportunity to prosper legitimately because of the long-term effects of this act of State violence, it would appear that the confiscation defendant may experience 'strain' (Merton, 1938). Strain is said to occur when an individual is prevented from acquiring cultural or social goals legitimately, and in response some people will resort to whatever means necessary in order to attain those goals (ibid). Whilst strain theory was developed so as to explain how some individuals find themselves committing crime, this thesis asserts a variation of this theory in that it has revealed that in response to the on-going hardship and disadvantage caused by the confiscation punishment, the confiscation defendant is denied the opportunity to attain social goals via legitimate means, due to accruing interest and section 22 powers. Whilst Merton provides five possible modes of adaptation to these strains, it would appear that none adequately account for the response of the confiscation defendant. As this research has revealed, the confiscation defendant is not necessarily rejecting the institutionalised means of attaining cultural goals, they would accept and internalise the institutionalised means of attaining them if they were then able to retain those goals (assets) once they had been achieved. Therefore, in failing to account for the uniqueness of the confiscation defendant's situation within Merton's typology, this thesis proposes a sixth category titled 'survivor'. The survivor, like the conformist, accepts the cultural goals and accepts the institutionalised means of attaining them, but in response to their oppressive confiscation situation, they are forced to adopt avoidance responses such as living 'off-radar', expelled to the margins of society, where they avoid putting assets in their name, work cash-in-hand and are not able to get married. Whilst these could be described as deviant behaviours consistent with the 'innovator', this

thesis rejects that the confiscation defendant has 'chosen' the path of deviance, instead they have been forced into a position which requires them to react in such a way in order to survive, an instinctual reaction when the human is placed under threat.

Therefore, a number of motives have been revealed within this research as to why the confiscation defendant may find themselves returning to crime – to survive or to try and find a way out of the confiscation predicament. However, this thesis argues that these motives are not the 'causes' of reoffending. The causes stem directly from how the confiscation punishment is experienced: procedural injustice, oppression, uncertainty and the sense of inescapability. However, the motives provide the impetus or the justification for reoffending (Mills, 1940).

Being able to create a life away from offending is also made more difficult because of the labelling effects of punishment which are said to stigmatize individuals and, in the process, make it more difficult for them to conform to a law-abiding life in the future (Becker, 1963; Davies and Tanner, 2003). As Cavadino et al. (2013) point out, if the non-criminal lifestyle is closed to the ex-offender because of a debilitating label, the criminal world is only too prepared to welcome them back. Whilst the research participants did not specifically reveal any labelling effects to the confiscation punishment this might be because they did not see them as such. For example, several of the research participants discussed how being labelled as a 'flight-risk' by prison officials denied them of their opportunity to decategorize. The widespread labelling of the confiscation defendant as a 'flight-risk' implies that all confiscation defendants must have significant wealth to be able to abscond, allowing for all confiscation defendants to be disadvantaged whilst reinforcing the misconception that confiscation measures are being used against the 'Mr and Mrs Bigs'. Based upon the narratives analysed which highlight the default ratio (48%) of this cohort, which could be viewed as an indicator

that they do not have access to significant funds, treating all confiscation defendants as if they present a flight-risk is likely to disadvantage a large proportion of confiscation defendants unnecessarily.

It was also revealed within the research that the confiscation defendant can find themselves further disadvantaged when their bank account is terminated as part of the bank's de-risking policy and that there are no systems in place for a defendant to challenge the risk label or evidence that their 'risk' has been reduced. Therefore, the risk label is one that once it is applied by the bank is permanent, despite the civic importance of a bank account within contemporary western society, exposing another aspect of the indefinite nature of the confiscation punishment that makes reintegration back into mainstream society exceptionally difficult. This is also an example of the net widening and social control functions of the confiscation and money laundering apparatus (Cohen, 1985; Garland, 2001).

Despite this being an exploratory piece of research which set out to understand the impact of the confiscation punishment, rather than identify a causal relationship between confiscation punishment and reoffending, it would have been difficult to ignore the prevalence with which the research participants highlighted such a link. This thesis acknowledges that recidivism is not contingent upon an individual being subject to a POCA, as statistics reveal many offenders who are not subject to confiscation proceedings will go onto reoffend anyway (MOJ, 2019), and lots of people who are also subject to the oppressiveness of the confiscation punishment will somehow find a way to resist the structural push to reoffend. What is being highlighted here is the conditions of possibility that being subject to the confiscation punishment manifest and which this thesis argues, further constrains the confiscation defendant's 'choices'. Moreover, in further disadvantaging the confiscation defendant and closing off access to legitimate avenues in the process which, therefore, increases the risk of reoffending and heightens the risk of further victimisation, the true character of confiscation policy is

revealed, correlating with Pasculli's (2017) assertion that the law itself can be criminogenic. The importance of revealing the criminogenic nature of confiscation policy is that it disqualifies any pretence that these special powers are justified on the grounds of 'public protection'.

In terms of deterrence, despite such claims featuring heavily within the official discourse of POCA (PIU, 2000), there was no evidence from within this research to suggest that the defendant would be deterred from reoffending directly because of the confiscation 'punishment'. On the contrary, this research has revealed that the pressure to raise, often, significant amounts of money quickly, so as to prevent the imposition of the default sentence, creates the conditions of possibility for future offending, especially as the defendant has very few, if any, alternative options that would enable them to raise such funds legitimately. Therefore, the findings correlate with much of the existing literature which has been critical of the specific deterrence properties of post-conviction confiscation (Bowles et al., 2005; Dorn and South 1990; Sproat, 2009; Bullock, 2010, Bullock and Lister, 2014; Lea, 2004; Ulph, 2010; Levi and Osofsky, 1995), but the significance of this research is that it has exposed the processes which cause this paradoxical effect. Additionally, there was little reference within the research to a general deterrence effect. However, in drawing on a number of media articles within the literature review phase of this research, it becomes apparent that the media portrays a contrasting picture of the confiscation landscape, with some articles suggesting that the confiscation regime is effectively targeting the 'Mr Bigs' (Jaleel, 2013), whilst other articles highlight the incompetence of the regime to recover assets (Britton, 2017). Therefore, in conveying such conflicting messages to the public it is difficult to know if there is a general deterrence effect and whether such 'messages' influence an individual's decision as to whether they take a particular course of action. As Canton (2017) points out, if there is a general deterrence effect, it is likely to be with the ones most unlikely to commit the crime in the first place. It could also be argued that the way in which offenders learn

about the prospects of certain punishments, and how best to circumnavigate them, is from their criminal peers, not through media platforms. As this research revealed, the message likely to be conveyed through such lines of communication is that in order to avoid the grasp of the confiscation punishment, it is best not to have traceable assets. Finally, it could also be argued that, in failing to report any noticeable reductions in financially motivated crime (NAO, 2016), this provides an insight into the reality that the general deterrence capacities of confiscation are not as positive as the policy rhetoric would suggest.

This research has also revealed that the level of punishment administered under POCA is determined by the amount of financial gain that the court alleges an individual to have profited, and not the severity of the offence or the amount of harm caused by the predicate offence, therefore, it would appear logical to assume that POCA does not have a marginal deterrence effect. For example, a lesser sentence would not be imposed under confiscation law for somebody who sold class C drugs rather than class A drugs, where there is an assumption that class A drugs are more harmful than class C, and so there is no incentive to choose a less severe crime in terms of harm. Whilst the moral and practical implications of this are obvious, this highlights a significant tension in confiscation law and a deviation from typical sentencing practice that proclaims to increase punishment severity in line with the harmfulness of the offence. Whilst it might not be the intention of policy makers to create policy that is harmful, nonetheless, this is a good example of how policy makers wrongly assume that the message conveyed in their policies and its corresponding laws, will be the same message received by its intended targets. This could be addressed through evidence-led policy that has been informed by research that consults with those individuals whom the message is targeted at, research that could expose such incongruities, reinforcing the value of this thesis.

Based upon the research findings it could be interpreted that this act of State violence does have some incapacitative properties. By imposing grossly inflated confiscation orders, which then accrue interest, the confiscation defendant is propelled into a life-time of State-imposed debt, revealing a financial incapacitative function of the confiscation punishment. However, like prison, this thesis argues that the confiscation punishment is only likely to temporarily incapacitate the offender, and, as this research has revealed, due to the sense of procedural injustice (Tyler, 2003) that characterises the confiscation process, the defendant is likely to feel aggrieved and seek to recover their losses by re-engaging with their criminal pursuits at a later stage. Moreover, where this research makes a valuable contribution to knowledge regarding incapacitation is in revealing the extent as to which the imposition of a grossly miscalculated confiscation order converts into an extended period of incarceration. As this research revealed, 48% of the research participants were either serving or had served a default prison sentence at the time the research was conducted, a figure that would have increased to 52% had Derek not absconded. This indicates that the confiscation punishment has a significant incapacitative effect by extending the time individuals are forced to stay in prison, an insight that is not discussed within the existing literature and not accurately represented in official statistics. For example, it would appear that the data provided in a FOI request to the MOJ ([see appendix B](#)), which suggests that out of the 69,151 confiscation orders that have been imposed since the law was enacted in 2003, just 2,821 have led to a default custodial sentence. However, on further analysis, it would appear that the system for recording default sentences is only able to record those confiscation defendants who are reincarcerated and does not account for those defendants whom have had their prison sentence extended because they were in prison at the time when their default sentence was activated. This is an important discovery because it reinforces the unreliability of official statistics, highlights that the confiscation default sentence ratio is significantly higher than is being posited, and

it reveals that instead of recovering money the confiscation system is further adding to the financial burden that is the CJS. However, whilst this finding may be considered indicative of an incapacitative effect, this thesis points out that it only comes about as a result of grossly inflating confiscation orders that the defendant is then unable to satisfy and, therefore, this thesis considers this to be 'unlawful incapacitation'. In revealing the 'unlawful incapacitation' characteristic of POCA, this thesis argues that this nullifies the incapacitative justification for the confiscation 'punishment' on the basis that if confiscation orders reflected the actual benefit made from crime and the actual amount of assets available, then the incapacitative function of the confiscation regime would be greatly negated.

Therefore, in identifying that it does not have a deterrence, rehabilitative or a legitimate incapacitative effect, this thesis concludes that a reductivist philosophy of punishment cannot account for, or justify, this act of unlawful State violence. Moreover, when these findings are considered from a utilitarian lens, which argues that punishment is justified if the harm that it prevents is greater than the harm in which it inflicts on the individual, despite causing significant harm to the defendant and their families, this increases the risk of reoffending and, therefore, further victimisation and so rather than prevent greater harm, it is the cause of it.

In failing to have a philosophical underpinning, a base that can guide the confiscation punishment in policy and practice, the confiscation system is forced to rely upon its rationale and its objectives, which have been shown within this thesis to be both unachievable and contradictory to wider penal objectives. It is thought that this situation has arisen because at the conception stage of confiscation policy, confiscation ideology has directed its construction, rather than engaging in a discussion based upon the philosophies of punishment, resulting in over thirty-five years of failed confiscation policy.

In summary, a number of conclusions have been drawn thus far in this chapter. Firstly, that confiscation cannot be understood as a punishment but constitutes an act of unlawful State violence. Secondly, that human rights legislation fails to protect those that are subject to this form of unlawful State violence and their [innocent] families. Thirdly, that a retributivist philosophy fails to account for the exceptionally punitive nature of the confiscation punishment; the extent of the harm caused by it is disproportionate, underserved and unjust. Fourthly, whilst a reductivist philosophy justifies punishment based upon its capacity to reduce future crime by way of deterrence, incapacitation and rehabilitation (Hudson, 2003a), this thesis has concluded that the confiscation punishment is more likely to create the conditions of possibility for reoffending to occur. Therefore, this thesis concludes that neither philosophy can adequately account for the confiscation punishment and its 'true' purpose or role within society has to be understood within the context of its hidden functions of revenue generation, lifetime offender management and the recycling of offenders.

7.6 – Legitimacy of POCA and the State.

As discussed in chapter three, in order to determine the legitimacy of the confiscation punishment this thesis would analyse its findings within the context of three perspectives of legitimacy. The first account is Tom Tyler's (2006) procedural justice framework in which he asserts that issues of process dominate our evaluations of authority. He also argues that people who receive outcomes that they regard as unfavourable, such as being sent to prison or being served with a confiscation order, are more willing to accept those outcomes, if they are arrived at by procedures which they regard as being fair, when they are treated with dignity and they have their rights acknowledged (ibid). For him, these are the influencing factors as to whether a law or an authority is perceived as legitimate and legitimacy plays a pivotal role in shaping compliance (ibid). As discussed earlier in this chapter, this research has

illustrated that the confiscation process is characterised by injustice, that the defendant and their families are subject to a degrading form of “torture”, and the defendant’s and their family’s rights are violated. Therefore, this thesis concludes that the confiscation defendant and their families perceive confiscation law, and the State in its capacity to administer punishment fairly, as illegitimate. However, rather than this sense of illegitimacy shaping compliance as Tyler suggests, it is the gross [mis]calculation of confiscation figures that prevents the defendant from ‘complying’ with their confiscation order, an important distinction.

The second account called upon is Scott and Flynn’s (2014: 213) criteria, in which they argue that the legitimacy of the State to punish is eroded when punishment induces social harms beyond those which are officially intended; infringes upon human rights; when dehumanising penal regimes become endemic within operational practice; when tolerable pain thresholds are exceeded; or when punishment is entirely misapplied and inappropriately punishes certain categories of harm or wrongdoers. This thesis has evidenced that this form of unlawful State violence induces significant social harm upon the defendant, their families and, due to its criminogenic nature, upon wider society. It has shown that it violates several human and civil rights, rights that the State has condemned [some] other countries for violating, exposing the hypocrisy of our government and which undermines its capacity to judge the conduct of other countries in terms of human rights violations. This thesis has also shown that this act of unlawful State violence represents a dehumanising penal regime that is experienced in addition to the dehumanising penal regime for the predicate offence and that the level of pain, hardship and disadvantage experienced by the defendant and their [innocent] families fractures relationships, confiscates hope, and induces feelings of anxiety, depression and suicidal ideation. This research has also revealed how the loose drafting of confiscation law facilitates its ‘misapplication’ and that it disproportionately punishes low-to-mid-level offenders who are thought

to had made financial gain from their offending whilst sexual, violent, driving-related deaths, corporate negligence, environmental and health and safety offences are punished under ordinary criminal procedures and dispensed with by way of a single punishment. Therefore, in satisfying Scott and Flynn's criteria, this thesis concludes that the legitimacy of the State to punish is eroded.

The third account considered important in determining the legitimacy of the confiscation punishment is Bingham's (2011) work centred upon the rule of law. In his work, Bingham outlines a number of principles that the State is expected to adhere to so as to remain legitimate in its governance and social order role, and when processes are exposed as not adhering to these principles, then he argues that the State is in violation of the rule of law and the legitimacy of the State to punish would be considered weak. It has been shown that the obfuscated and overly complex nature of confiscation law renders it largely inaccessible to the confiscation defendant, and this obscurity is exacerbated by its loose drafting, resulting in the defendant not receiving definitive answers from their legal representation in relation to many aspects of confiscation law. This is further exacerbated by the incompetence and the lack of resource available under legal aid for confiscation cases, with a number of research participants reporting that they had been denied legal aid representation and were, therefore, expected to represent themselves. When these revelations are considered within the context of principle one of Bingham's rule of law - the law should be clear, accessible and intelligible and without undue difficulty, we should be able to find out what the law is (ibid) – it becomes evident that confiscation law falls significantly short of this threshold.

Drawing upon official data which highlighted that less than 1% of all offences committed in 2014-15 led to a confiscation order (Home Affairs Committee, 2016a), and drawing upon Bullock's (2014) research which highlighted the discretionary powers held by financial investigators, this thesis has

shown that the confiscation process is governed by significant discretion, therefore, contravening the second principle of Bingham's rule of law - we should be governed by law and not discretion (Bingham, 2011). Again this appears to be a consequence of the loose drafting of confiscation law.

This research has also revealed how confiscation law has been constructed in such a way that enables the pursuit of justice to be supplanted by the State's insatiable desire to target and punish certain groups of individuals, individuals that they creatively label as 'serious and organised', a term which this research has found to be synonymous with anybody who has been found to have made money illegitimately. However, at the same time, this research asserts that because of the positions of privilege that certain sections of our society benefit from and the biased nature of the CJS, the confiscation punishment is never likely to affect those who actually have considerable wealth and status, or be able to curtail their criminality, because they will be able to buy their way out of the confiscation punishment in ways that the lower-level defendants will never be able to; a clear breach of principle three - there should be equity before the law (ibid).

This research has illustrated how these special powers are being disproportionately used upon low-to-mid level offenders, rather than 'serious and organised' criminals and they confiscate legitimately acquired assets, therefore, they are not being used for the purposes of which they have been conferred upon, contravening principle four Bingham's rule of law - the exercise of power should be used for the purposes of which they have been conferred upon (ibid).

Whilst principle five is not relevant to confiscation proceedings,⁴⁹ this thesis has shown that the law has failed to provide adequate protection of fundamental human rights for both the defendant and

⁴⁹ The law should offer a place for disputes to be resolved

their [innocent] families, therefore, contravening principle six - the law must afford adequate protection of fundamental human rights (ibid).

There is significant evidence from within this study to illustrate that the State is failing to provide a fair trial including: the circumnavigation of due process safeguards; the use of assumptions to determine confiscation figures; the inadequate legal representation afforded to the confiscation defendant; and, the unethical coercive techniques adopted by the prosecution so that the defendant 'agrees' to their grossly inflated confiscation figures; therefore contravening principle seven - the State should provide a fair trial (ibid).

Whilst principle eight stipulates that the State has an obligation to comply with its national and international laws, which includes enforcing its confiscation laws, it must do so in a way that complies with the rule of law and human rights legislation, which this thesis has shown not to be the case. Therefore, this thesis concludes that in violating Bingham's principles of the rule of law, the legitimacy of the State in its capacity to punish justly is diminished.

Furthermore, when the illegitimacy assertion is considered alongside both Levi and Osofsky's (1995) and Bullock's (2014) research, which provided insights into how the confiscation system operates and is perceived from those that work within the confiscation regime, insights that also revealed the problematic nature of confiscation, then it can be assumed that the crisis of legitimacy that has been evidenced by those on the outside, is also reflected from within. Additionally, in revealing the true iatrogenic nature of the confiscation punishment and revealing that the public was deceived into thinking that these special powers were designed so as to be used against 'serious and organised' criminals, and that they would be used to confiscate illegitimate assets when they are being used to confiscate legitimate assets also, the legitimacy of the State, as perceived by its citizens, will also be

greatly diminished. Therefore, in being perceived as illegitimate by all three parties concerned, this thesis concludes that post-conviction confiscation is an illegitimate act of State violence and, therefore, the legitimacy of the State in its capacity to punish is eroded.

7.7 – Reform or Abolition?

In light of the discussion that has taken place thus far in this chapter it is necessary to consider whether the post-conviction confiscation regime is in need of reform or abolition. Whilst increasing the financial threshold in which these special powers are used may help safeguard against their use in some lower level cases, in light of the research findings which have revealed the perverse way in which confiscation figures are grossly inflated, increasing the threshold may instead further fuel the malpractice of financial investigators.

It is expected that the reforms which could have the most significant impact upon the confiscation regime would be to apply a criminal standard of proof, a confiscation system based upon net profit rather than gross profit and an adequately resourced legal aid system which provides the POCA defendant with legal representation that specialises in POCA. It is felt that these measures would, as much as possible, enable the confiscation regime to generate confiscation figures that more accurately reflect the actual profits derived from crime, and in turn reduce the unlawful activation of default sentences, reduce the amount of interest accrued and address all the subsequent issues that this thesis has revealed stem from the gross inflation of confiscation figures.

However, philosophically, this thesis argues that the post-conviction confiscation punishment would still be unjust on the basis that the confiscation defendant has already been punished with a punishment considered proportionate to the gravity of the offence and the further punishment by

way of confiscation, regardless of whether it accurately reflects the profits of crime, represents an additional punishment. If the punishment for the predicate offence was to be eradicated and replaced by a confiscation punishment that is procedurally just then there might be a legitimate case for its reform. However, if this was to occur it is feared that, due to the social capital and financial capacity of the rich and powerful, these individuals/organisations would be able to obscure their 'illegitimate' profits offshore beyond the gaze of the authorities, as is largely the case now (Evertsson, 2019), enabling them to commission the best accountants and legal experts to represent them, and in effect be able to buy their way out of the confiscation punishment in ways in which those less privileged would not be able to, once again resulting in an unequal access to justice (Bingham, 2011). Therefore, in determining that the post-conviction punishment cannot be reformed and applied equally this thesis concludes that it should be abolished so as to maintain the integrity of the rule of law (ibid).

7.8 – Summary.

These five thematic sub-sections have discussed the findings within the context of the literature reviewed in chapters two and three. This chapter has concluded that the disproportionate nature of the punishment discounts it from being aligned with a retributivist philosophy and, despite official claims which suggest otherwise, this thesis has also found no evidence to suggest that the confiscation punishment has the capacity to reduce crime in any substantial way, again discounting any suggestion that the confiscation punishment can be accounted for within a reductionist philosophy.

In revealing the perverse nature of confiscation powers which allows for the confiscation of legitimate assets; after-acquired assets; assets that are after-acquired jointly with somebody who has no connection to any criminal offences; and, even confiscate assets and monies that are passed down via inheritance, this chapter concludes that the principle in which these special powers were legitimized upon - the recovery of 'ill-gotten' gains – is a charade. This chapter has concluded that this act of unlawful State violence is being used disproportionately upon low-to-mid level offenders, despite these special powers being legitimized on the basis that they were to be used against 'serious and organised' criminals. This chapter has also concluded that this penalty represents a 'double punishment' despite no further offences being committed and it has shown that the abject failings of the legislation to meet its wider objectives. Most notably, this research has revealed the criminogenic properties of the regime and its capacity to bring undue pain, hardship and disadvantage upon the [innocent] families of the defendant. These lived realities of being subject to this act of unlawful State violence are compounded by the governments failings to observe their human rights and, therefore, this thesis concludes that the post-conviction confiscation regime lacks legitimacy, as does the State in its capacity to punish fairly.

Therefore, this chapter has illustrated the extent of the problems that are inherent within the post-conviction confiscation regime, concluding that it is not malfunctioning, but is fundamentally flawed, and these flaws are so deeply built into the fabric of the confiscation regime, that it would be difficult, if not impossible, to rectify by way of reform. Therefore, it is argued that, in light of the research findings, this act of unlawful State violence must be abolished.

Chapter Eight: Conclusion.

As soon as men [sic] decide that all means are permitted to fight an evil then their good becomes indistinguishable from the evil that they set out to destroy (Christopher Dawson in Bingham, 2011: 159).

As outlined in chapter one, the aims of this research were as follows: to capture the impact of post-conviction confiscation legislation on the defendant and their families; to explore what offences this legislation targets and who is it being used against; to critically examine the relationship between the aims of the legislation and its lived reality; and to reignite a wider debate around the philosophies of punishment.

In meeting these research aims this thesis has made a significant contribution to knowledge that is threefold: empirical, methodological and theoretical. Empirically, it has confirmed, provided evidence and provided a deeper understanding of the challenges to POCA policy. Whilst some of these challenges had been previously noted by other commentators, particularly academics and legal practitioners, they tended to be anecdotal and based upon individual perspectives rather than grounded in evidence, allowing for them to be largely ignored by politicians, policy makers and the legislature. This thesis has also revealed new understandings of how this act of unlawful State violence is experienced, empirical evidence which illustrates that contemporary forms of punishment cannot be explained by way of retributivist or reductivist justifications, and as a result reignited a discussion centred upon the aims and justifications of punishment. This empirical contribution to knowledge has been further enriched by identifying the hidden and more sinister surveillance and revenue generating functions of the POCA regime.

The methodological contribution to knowledge made by this thesis is also of great significance. A number of factors combined have supported this contribution. Firstly, the study has demonstrated how the unique positionality of the researcher, in this case a personal insight into the lived reality of the CJS and the post-conviction confiscation punishment in particular, can prove invaluable in shaping critical social research. In combining this aspect of positionality carefully with the second factor, the considered choice of research method, the power of reflective and critical analysis of narrative accounts has been demonstrated. Finally the grounding of the wider research strategy in a critical social research approach has been essential. By drawing on the reflections and dialogue of other academics using principles of humanity, social justice, democracy, equality, empowerment and emancipation, this has enabled this research to successfully engage and learn from the hidden voices of those subject to this act of unlawful State violence, ensuring that the perspectives of both the defendant's and their families are finally part of any evaluation of the POCA legislation, and providing a platform for which this study can 'speak truth to power' (Scruton, 2007).

This thesis also makes two key theoretical contributions to knowledge. Firstly, based upon the findings of this research, this thesis has asserted that the post-conviction confiscation punishment cannot be conceptualised as a form of legitimate punishment but an act of unlawful State violence. It has shown that the post-conviction confiscation punishment inflicts unacceptable levels of pain upon the defendant despite no further offence being committed, and that this pain and suffering is not confined to the defendant but disproportionately bears down upon their innocent family members, therefore, failing to meet the basic definitions of punishment as outlined by Flew (1954). Whilst Scott (2016a) defined State violence as a form of coercive power which produces violent outcomes, this thesis emphasises the 'unlawful' nature of this penalty on the grounds that its infliction is based upon grossly inflated confiscation figures and is, therefore, unlawful in the same way it would be unlawful if the

courts were to convict and sentence a defendant for murder if their actual offence was grievous bodily harm. In revealing the iatrogenic nature of this act of State violence and contextualising it within Scott's (2018) concept of the 'spirit of death', this thesis has further highlighted its disproportionate and unlawful character. It is also considered an unlawful act of State violence on the basis that it violates a number of human rights, rights which the State is supposed to observe so as to safeguard against the arbitrary use of its powers and prevent unlawful levels of pain, hardship and suffering being inflicted. Further, it is considered unlawful on the basis that the State is excessively and arbitrarily wielding its powers, and in so doing flouting the rule of law (Bingham, 2011). As Frans Timmermans, the European Commission's second-in-command, pointed out at the European parliament, when a country substitutes the rule of law for the 'rule by law', it ceases to be a nation founded upon the principles of democracy and instead it begins to take the shape of a dictatorship (Zsiros, 2019).

The second theoretical contribution to knowledge that this thesis makes is by exposing this act of unlawful State violence as an imaginary penalty (Carlen, 2008). This thesis has highlighted the disconnect between confiscation rhetoric and its lived reality, and despite significant evidence to illustrate that POCA fails to achieve its stated objectives, instead of addressing those shortfalls, those tasked with its construction, development and implementation address themselves to its principles and 'persist in manufacturing an elaborate system of costly institutional practices "as if" all objectives are realisable' (ibid: 1). Importantly, whilst exposing the imaginary nature of confiscation rhetoric, this thesis has effectively demonstrated that its harmful effects are real and inescapable. Again, the State, in neglecting its duty to use its powers for the purposes in which they were conferred upon, breaches the rule of law (Bingham, 2011), reinforcing the assertion that this act of State violence is unlawful. These empirical and theoretical contributions to knowledge have created a new

understanding of the post-conviction confiscation punishment [act of unlawful State violence] that challenges the hegemonic stranglehold that the State has maintained [and benefited from] for the past three decades.

In providing a platform for the voices of those who are subject to the confiscation punishment to be heard, this thesis has enabled the confiscation defendant and their families to become visible. Whilst it is hoped that this thesis will leave a welcoming 'stain upon the silence' (Hillyard et al., 2004), a silence that has persisted for over thirty- five years, it is also hoped that it will also illuminate new directions for research that can capitalise on these early findings, further expose the iatrogenic capacities of the confiscation machine and further explore 'who' this punishment is used against, strengthening the call for its abolition. The need for further research that can enhance these findings is considered essential because, despite revealing widespread procedural injustice, political malfeasance and exposed the confiscation system for what it really is, a State-run system of iatrogenic harm, this thesis recognises that in order to bring about the necessary change, it requires us to call upon the same powers and legal apparatus that have constructed, 'legitimized' and misapplied these special powers to concede the harmful effects of their actions, and then set about a strategy of redress. Therefore this is a call to action for all researchers with a conscience and a desire to expose and challenge hegemonic control and unlawful State violence. It is felt that this research represents a 'springboard' from which further research can be carried out, using mixed-methodologies if possible, that could offer greater specificity and develop a better understanding of the scale of harm caused by this unlawful act of State violence. The type of specificity that is being alluded to here, for example, is research that drills down further to expose whether there is a class, race or gender distinction in how the confiscation punishment is applied and experienced, especially because at several points within this research, it would appear that a gendered, racialized and class specific impact was present. From

a critical research perspective these are vitally important revelations that demand further investigation and analysis.

Finally, whilst this thesis has made a significant contribution to knowledge, perhaps its most significant achievement is that it has provided a space for the POCA'd community to seek answers, find solace and it has empowered them to speak out so that their individual and collective voices can be heard publicly. Whilst the voices of those that formed the initial research cohort have been foregrounded within this thesis, it is crucial to acknowledge that these voices only begin to scratch the surface as to the prevalence of this act of unlawful State violence. This is exemplified by the amount of people that continue to reach out and share their painful POCA experiences in response to the Russell Webster article that was published over two years ago (Fletcher,2017). These conversations not only confirm the research findings contained within this thesis but also indicate that the pain, hardship, disadvantage and injustice that characterises this act of unlawful State violence is intensifying. Therefore, this thesis will conclude by allowing some of their voices and experiences to be heard:

1) The wife of a POCA defendant – Date her husband was convicted: 2010 - Date of correspondence: February 2019

Whilst I agree that money, houses even cars and other assets should be seized as a result of crime, further making the (now ex-criminal) continue to pay post prison is detrimental to the families and the health of these people. This means the sentence imposed is more than a few years and instead stretches out and reaches as an entire life sentence [...] They seized his home, cars and other assets and he was sentenced to 6 years imprisonment [...] Yet still they insist on paying £110 a week and we just don't have it! We have nearly sold everything we own and we are in debt to everyone we know. I am angry at this system.... Why should I be punished, why should our kids be punished? [...] My husband even said to them that being on bail and innocent and being forced to pay for something he can't afford and should be legally signed off work due to health, that crime would be his only way to pay. We are both being punished for something we haven't done, so maybe we should be doing what he's accused of! [...] We have 6 children between us, all are suffering.... So it's me that is suffering, someone with a clean record is being punished.... Some days I wonder why we are even still living this existence - no one cares how much it kills us!

2) Date of Conviction: 2004 - Date of correspondence: August 2019

I was taken to court in April 2004 for un-repaid overpayments in housing benefit between 1998 and 2001. This was considered housing benefit fraud due to my failure to repay. In Sept 2004 I was sentenced to probation and community service.... Although my local council were offered compensation prior to the start of hearings, and again by the judge in sentencing, but it was refused as the council were keen to exercise new powers under POCA 2002 and a confiscation order was duly sought and achieved in later hearings to the sum of almost 20k.

I did not ever have this sum at disposal but unfortunately my first legal representative showed a remarkable lack of knowledge and failed to request a breakdown of income/ outgoing from me during the course of the court proceedings... No affidavit concerning my finances was ever submitted by him, and the court was led to believe that I had assets hidden away. The upshot was that I served 12 months default sentence in 2007 and my debt including interest now stands at almost 40k as I have never had the funds and have simply made monthly payments.

I will never be able to satisfy the debt. I am now 56 years old. Additionally any failure in making instalments can again result in the default sentence being applied. I have in essence had no peace of mind since 2004, and never will have as the debt is increasing. As a result I have what is essentially a life sentence for a debt of less than 12k housing benefit fraud.

Even though I have documents from a different solicitor attesting to the presence of professional misconduct in my case, I did not have the financial means to pursue a court action, so nothing has ever been done to try to redress the wrong done in the gross miscalculation of my assets...

[\(see appendix D for further correspondence\)](#)

Bibliography

Alldrige, P. (2011) 'The Limits of Confiscation', *Criminal Law Review*, 11, pp. 827-843.

Alldrige, P. (2014) 'The Proceeds of Crime Law Since 2003 - Two Key Areas', *Criminal Law review*, 3, pp. 171-188.

Amatrudo, A. (2009) *Criminology and Political Theory*, London: Sage Publications Ltd.

Anderson, S.E. (2016) 'The value of 'bearing witness' to desistance', *Probation Journal*, 63(4) pp. 408-424.

Andrews, M. (2013) 'Never the last word: revisiting data', in Andrews, M., Squire, C. and Tamboukou, M. (eds) *Doing narrative research*, London: Sage Publications Ltd, pp. 205-222.

Ashworth, A. (2015) *Sentencing and Criminal Justice*, 2nd edn, Cambridge: Cambridge University Press.

Ashworth, A. and Horder, J. (2013) *Principles of Criminal Law*, 7th edn, Oxford: Oxford University Press.

Banks, C. (2013) *Criminal Justice Ethics: theory and Practice*, 3rd edn, California: Sage Publications.

Bean, P. (1981) *Punishment: A Philosophical and Criminological Inquiry*, Oxford: Martin Robertson.

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*, New York: Free Press.

Bedingfield, D. and Sallon, C. (1993) 'Drugs, Money and the Law', *Criminal Law Review*. pp. 165-173.

Bingham, T. (2011). *The Rule of Law*, London: Penguin Books Ltd.

Bin-Salama, W.K. (1998) *Confiscation Orders: Procedures Against Drug Trafficking Offences*, PhD. Thesis, Loughborough University.

Boffey, D. (2019) 'Dutch court blocks extradition of man to 'inhumane' UK prisons', *The Guardian*, [Online] 10th May. [Accessed 19th August 2019]
<https://www.theguardian.com/world/2019/may/10/dutch-court-blocks-extradition-of-man-to-inhumane-uk-prisons>

Bona, E. (2019) 'Rolex and Versace among luxury brands seized under 'gangster tax'', *Liverpool Echo*, [Online] 7th June. [Accessed 20th June 2019]
<https://www.liverpoolecho.co.uk/news/liverpool-news/rolex-versace-among-luxury-brands-16389262>

Boonin, D. (2008) *The Problem of Punishment*, New York: Cambridge University Press.

Bottoms, A. (1995) 'The Philosophy and Politics of Punishment and Sentencing', in Clarkson, C. and Morgan, R. (eds) *The Politics of Sentencing Reform*, Oxford: Clarendon Press.

Boucht, J. (2017) *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds*, London: Hart Publishing.

Bowles, R., Faure, M. and Garoupa, N. (2005) 'Forfeiture of Illegal Gain: An Economic Perspective', *Oxford Journal of Legal Studies*, 25(2) pp. 275-295.

Box, S. (1987) *Recession, Crime and Punishment*, Hampshire: The Macmillan Press.

Braun, V., and Clarke, V. (2006). 'Using thematic analysis in psychology'. *Qualitative Research in Psychology*, 3, pp. 77-101.

Britton, P. (2017) 'Drug smugglers who made more than £7m each are ordered to pay back just £1', *Manchester Evening News*, [Online] 11th November [Accessed 6th February 2018] <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/drug-smugglers-crime-proceeds-salford-13888734>

Bryman, A. (2012) *Social Research Methods*, 4th edn, Oxford: Oxford University Press.

Bullock, K.A., Mann, D., Street, R. and Coxon, C. (2009) *Examining attrition in confiscating the proceeds of crime: Research Report 17*, London: Home Office.

Bullock, K.A. (2010) 'Enforcing Financial Penalties: The Case of Confiscation Orders', *The Howard Journal*, 49(4), pp. 328-339.

Bullock, K.A. (2014) 'Criminal benefit, the confiscation order and the post-conviction confiscation regime', *Crime, Law and Social Change*, 62 (1), pp. 45-64.

Bullock, K.A. and Lister, S. (2014) 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality', in King, C. and Walker, C. (eds) *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Farnham: Ashgate.

Bullock, K.A., Bunce, A. and McCarthy, D. (2019) 'Making Good in Unpromising Places: The Development and Cultivation of Redemption Scripts Among Long-Term Prisoners', *International Journal of Offender Therapy and Comparative Criminology*, 63 (3) pp. 406-423.

Burns, E. (2010) 'Developing Email Interview Practices in Qualitative Research', *Sociological Research Online*, 15 (4), pp. 1-8.

Burr, V. (2015) *Social Constructionism*, 3rd edn, East Sussex: Routledge.

Cameron, D. (2016) Prime Minister's Speech: *Prison Reform*. 8th February. <https://www.gov.uk/government/speeches/prison-reform-prime-ministers-speech>

Canton, R. (2017) *Why Punish: An Introduction to the Philosophy of Punishment*. London: Palgrave.

Carlen, P. (1989) 'Crime, inequality and sentencing', in Carlen, P. and Cook, D. (eds) *Paying for Crime*, Milton Keynes: Open University Press.

Carlen, P. (2008) *Imaginary Penalties*, Devon: Willan Publishing.

Cavadino, M., Dignan, J. and Mair, G. (2013) *The Penal System: An Introduction*, 5th edn. London: Sage Publications Ltd.

Chadwick, K. (1996) *"Out of the darkness into light": A Critical Evaluation of Scottish Prison Reorganisation for Long Term Imprisonment 1988 To the Present*, PhD. Thesis, The Open University.

Chamberlain, J.M. (2013) *Understanding Criminological Research: A Guide to Data Analysis*, London: Sage Publications Ltd.

Clarke, R., Chadwick, K. and Williams, P. (2017). 'Critical Social Research as a 'Site of Resistance': Reflections on Relationships, Power and Positionality', *Justice, Power and Resistance*, 1 (2), pp. 261-282.

Clemmer, D. (1940) *The Prison Community*, Boston, M.A.: The Christopher Publishing House.

Clough, P. (2007) *The Affective Turn: Theorizing the Social*, Durham and London: Duke University Press.

Codd, H. (1998) 'Prisoners' Families: The 'Forgotten Victims'', *Probation Journal*, 45 (3): pp. 148–54.

Cohen, S. (1985) *Visions of Social Control*, Cambridge: Polity.

Cohen, S. (2011) *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*. London: Routledge, (E-book).

Coleman, R. and Sim, J. (2005). 'Contemporary Statecraft and the 'Punitive Obsession': A Critique of the New Penology Thesis', in Pratt, J., Brown, D., Hallsworth, S., Brown, M. and Morrison, W. (eds.) *The New Punitiveness: Current Trends, Theories and Perspectives*. Cullompton: Willan Publishing, pp. 101-118.

Coleman, R., Sim, J., Tombs, S. and Whyte, D. (2009) *State, Power, Crime*, London: Sage Publications Ltd.

Cooper, V. and Whyte, D. eds (2017) *The Violence of Austerity*, London: Pluto Press.

Copes, H. and Hochstetler, A. (2010) 'Interviewing the Incarcerated: Pitfalls and Promises', in Bernasco, W. (ed) *Offenders on Offending: Learning about Crime from Criminals*, Devon: Willan Publishing.

Cram, F. (2013) 'Understanding the Proceeds of Crime Act 2002: Cash Seizure and Frontline Policing', *The Howard Journal*, 52 (2), pp. 121 - 131.

Crotty, M. (1998) *The Foundations of Social Research: meaning and perspective in the research process*, London: Sage Publications.

Crowe (2019) *The Financial Cost of Fraud 2018: The latest data from around the world*, London: Crowe [Online] [accessed on 3rd September 2019]
<https://www.crowe.com/uk/croweuk/-/media/Crowe/Firms/Europe/uk/CroweUK/PDF-publications/Financial-Cost-of-Fraud-2018.pdf?la=en-GB&hash=D31EB55CC66BF1842140E001C98DBABA336DFA28>

Davies, S. and Tanner, J. (2003) 'The Long Arm of the Law: Effects of Labelling on Employment', *The Sociological Quarterly*, 44 (3), pp. 385-404.

de Noronha, L. (2018) 'The Figure of the 'Foreign Criminal': Race, Gender and the FNP' in Bhatia, M., Poynting, S. and Tufail, W. (eds) *Media, Crime and Racism*. Cham: Palgrave Studies in Crime, Media and Culture, pp. 337- 358.

Denscombe, M. (2010) *Ground Rules for Social research: Guidelines for Good Practice*, 2nd edn, Berkshire: Open University Press.

Denzin, N. and Lincoln, Y. (2008) *Collecting and Interpreting Qualitative Materials*, London: Sage Publications Ltd.

Dobson, J. (2015) 'Don't mention the P word' *The Hidden Consequences of Imprisonment for Prisoners' Children*, PhD. Thesis, University of Bolton.

Dorn, N. and South, N. (1990) 'Drug Markets and Law Enforcement', *British Journal of Criminology*, 30 (2) pp. 171-188.

Dorn, N., Murji, K. and South, N. (1992) *Traffickers: Drug Markets and Law Enforcement*, London: Routledge.

Duff, R.A. (2001) *Punishment, Communication and Community*, Oxford: Oxford University Press.

Duff, R.A. and Garland, D. (1994) *A Reader on Punishment*, Oxford: Oxford University Press.

Duff, R.A., Marshall, S., Dobash, R. and Dobash, R. (1994) *Penal Theory and Practice: Tradition and innovation in criminal justice*, Manchester: Manchester University Press.

Durkheim, E. (1933/2012) *The Division of Labor in Society*, Connecticut: Martino Fine Books.

Durkheim, E. (1973) *Moral Education: A Study in the theory & Application of the Sociology of Education*, New York: The Free Press.

Easton, S. and Piper, C. (2016) *Sentencing and Punishment*, 4th edn, Oxford: Oxford University Press.

Edwards, A. and Hughes, G. (2008) 'Inventing Community Safety', in Carlen, P. (ed) *Imaginary Penalties*, Devon: Willan Publishing, pp. 64-83.

Eklblom, P. (1997) 'Gearing Up Against Crime: A Dynamic Framework to Help Designers Keep up with the Adaptive Criminal in a Changing World', *International Journal of Risk, Security and Crime Prevention*, 2, pp.249–265.

Equality and Human Rights Commission (2019) *What Are Human Rights?* 19th June. [Online] [Accessed 21st August 2019] <https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>

European Council of Europe (Date Not Provided) *European Convention on Human Rights*, Publisher Details Not Available. [Online] [Accessed 12th June 2017] https://www.echr.coe.int/Documents/Convention_ENG.pdf

Evertsson, N. (2019) 'Corporate Tax Avoidance and Neutralization Techniques: A Case Study on the Panama Papers', *Critical Criminology*, p 1- 18.

Farooq, M.B. and De Villiers, C. (2017) 'Telephonic Qualitative Research Interviews, When to Consider Them and How to do Them', *Meditari Accountancy Research*, 25 (2), pp. 291-316. [Online] https://repository.up.ac.za/bitstream/handle/2263/61466/Farooq_Telephonic_2017.pdf?sequence=1&isAllowed=y

Farrington, D.P., Coid, J.W., Harnett, L., Jolliffe, D., Soteriou, N., Turner, R. and West, D.J. (2006) *Criminal careers up to age 50 and life success up to age 48: New findings from the Cambridge Study in Delinquent Development*. Research Study No.299. London: Home Office.

Feeley, M. and Simon, J. (1992) 'The new penology: notes on the emerging strategy for corrections', *Criminology*, 30, pp. 449-475.

Fisher, J. and Kwan, J.B. (2018) 'Confiscation: Deprivatory and Not Punitive – Back to the Way We Were'. *Criminal Law Review*, 3, pp. 192-201.

Fitzgerald, M. and Sim, J. (1982) *British prisons*. Oxford: Basil Blackwell.

Fletcher, C. (2017) *How asset confiscation prevents rehabilitation*, Russell Webster's Criminal Justice Website. [Online] 4th October <http://www.russellwebster.com/how-asset-confiscation-prevents-rehabilitation/>

Flew, A. (1954) 'The Justification of Punishment', *Philosophy*. Cambridge University Press, 29 (111), pp. 291–307.

Foucault, M. (1977) *Discipline and Punish: The Birth of The Prison*. London: The Penguin Group.

Foucault, M. (1980) *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, Gordon, C (ed), New York: Pantheon Books.

Freire, P. (1996) *Pedagogy of the Oppressed*, London: Penguin Books Ltd.

Gallant, M. and King, C. (2013) 'The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland', *Common Law World Review*, 42, pp. 9-109.

Garland, D. (1985) *Punishment and Welfare*, Aldershot: Gower.

Garland, D. (1990) *Punishment and Modern Society: A Study in Social Theory*, Oxford: Oxford University Press.

Garland, D. (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford: Oxford University Press.

Garland, D. (2018) 'Theoretical advances and problems in the sociology of punishment', *Punishment & Society*, 20 (1), pp. 8-33.

Giles, A. (2013) 'The Assessment of Benefit Under Part 2 of the Proceeds of Crime Act 2002: A Sledgehammer to Crack a Nut?', *Plymouth Law and Criminal Justice Review*, 1, pp. 85-109.

Glaser, B.G. and Strauss, A.L. (1967) *The discovery of grounded theory: Strategies for qualitative research*, New York: Aldine Transaction.

Glueck, S. and Glueck, E. (1937) *Later criminal careers*, New York: Kraus.

Glueck, S. and Glueck, E. (1940) *Juvenile Delinquents Grown Up*. New York: Commonwealth Fund.

Goring, C. (1919) *The English convict*, London: His Majesty's Stationary Office.

GOV.UK (2019a) *Official Statistics - Prison population figures: 2019* [online], Available at <https://www.gov.uk/government/statistics/prison-population-figures-2019> (Accessed 28th August 2019).

GOV.UK (2019b) *Prime Minister Launches Police Recruitment Drive: Press Release*. [Online] Published 29th July, Available at <https://www.gov.uk/government/news/prime-minister-launches-police-recruitment-drive> (Accessed 17th August 2019).

GOV.UK (2019c) *10,000 Extra Prison Places to Keep the Public Safe: Press Release*. [Online] Published 11th August, Available at <https://www.gov.uk/government/news/10-000-extra-prison-places-to-keep-the-public-safe> (Accessed 17th August 2019).

GOV.UK (2019d) *£100 Million Crackdown on Crime in Prison: Press Release*. [Online] Published 13th August, Available at <https://www.gov.uk/government/news/100-million-crackdown-on-crime-in-prison> (Accessed 17th August 2019).

GOV.UK (2019e) *PM Launches Sentencing Review to Look at Most Dangerous and Prolific Offenders: Press Release*. [Online] Published 12th August, Available at <https://www.gov.uk/government/news/pm-launches-sentencing-review-to-look-at-most-dangerous-and-prolific-offenders> (Accessed 17th August 2019).

Greener, I. (2011) *Designing Social Research: A Guide for the Bewildered*, London: SAGE Publications Ltd.

Gubrium, J.F. and Holstein, J.A. (2001) *Handbook of Interview Research*, London: SAGE Publications.

Halsey, M., Armstrong, R. and Wright, S. (2016), 'F* ck It!': Matza and the Mood of Fatalism in the Desistance Process', *British Journal of Criminology*, 57: pp. 1041–60.

Harriot, P. (2019) *Prison Reform Trust: Prisoner Policy Network - What do you need to make the best use of your time in custody?* Research fieldnotes.

Healy, D. (2010) *The Dynamics of Desistance: Charting Pathways through Change*, Devon: Willan Publishing.

Hedström, P., Swedberg, R. and Udén, L. (1998) 'Popper's Situational Analysis and Contemporary Sociology', *Philosophy of the Social Sciences*, 28. pp. 339–364.

Helm, R. K. (2019), 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial', *Journal of Law and Society*, 46. pp. 423-447.

Hendry, J. and King, C. (2017) 'Expediency, Legitimacy, and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids', *Criminal Law and Philosophy*, 11 (4). pp. 733-757.

Herzog, H. (2012) 'Interview location and its social meaning', in Gubrium, J.F., Holstein, J.A., Marvasti, A.B. and McKinney, K.D. *The Sage Handbook of Interview research: The Complexity of the Craft*, 2nd edn, Thousand Oaks: SAGE Publications, pp. 207-218.

Hillier, J. and Mews, A. (2018) *The reoffending impact of increased release of prisoners on Temporary Licence: Analytical Summary 2018*, London: MOJ, [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709123/rotl-report.pdf (Accessed on 21st May 2019).

Hillyard, P. and Percy-Smith, J. (1989) 'The Coercive State Revisited', *Parliamentary Affairs*, 42 (4), pp. 533–547.

Hillyard, P., Sim, J., Tombs, S. and Whyte, D. (2004). 'Leaving a Stain Upon the Silence: Contemporary Criminology and the Politics of Dissent', *The British Journal of Criminology*, 44 (3), pp. 369–390.

HLPR (2019) *Strategic Vision and Priorities: 2019–2024* [online] Available at <https://howardleague.org/wp-content/uploads/2019/04/Strategic-plan-2019-to-2024.pdf> (Accessed 4th June 2019).

HMCIP (2017) *Report on an unannounced inspection of HMP Liverpool*, London: HMSO [Online] Available at <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2018/01/HMP-Liverpool-Web-2017.pdf> (Accessed 31st May 2019).

HMCIP (2019) *HM Chief Inspector of Prisons for England and Wales Annual Report 2018–19*. HC 2469. London: HMSO [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814689/hmip-annual-report-2018-19.pdf (Accessed on 23rd August 2019).

HMCTS (2018) *HM Courts & Tribunals Service Trust Statement 2017-18*, HC 1332, London: MOJ [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727389/HMCTS_Trust_Statement_2017-18_PRINT_FINAL.PDF (Accessed on 3rd August 2019).

Hobbs, D. and Antonopoulos, G.A. (2013) 'Endemic to the species: ordering the 'other' via organised crime', *Global Crime*, 14 (1), pp. 27–51.

Hodgson, D. (1984) *The Profits of Crime and Their Recovery: A Report of a Committee Chaired by D. Hodgson*, Heinemann: London.

House of Commons Home Affairs Committee (2016a) *Proceeds of Crime, Fifth Report of Session 2016–17*, HC 25, London: HMSO.

House of Commons Home Affairs Committee (2016b) *Oral evidence: Proceeds of crime*, Tuesday 8th March. HC 771.

House of Commons Home Affairs Committee (2016c) *Oral evidence: Proceeds of crime*, Tuesday 3rd May, HC 771.

House of Commons Home Affairs Committee (2016d) *Oral evidence: Proceeds of crime*, Tuesday 24th May 2016, HC 25.

House of Commons Public Accounts Committee (2014) *Confiscation Orders: Forty-ninth Report of Session 2013–14*. HC 942. London: HMSO.

House of Commons Public Accounts Committee (2016a) *Confiscation orders: progress review, Seventh Report of Session 2016–17*, HC 124, London: HMSO.

House of Commons Public Accounts Committee (2016b) *Oral evidence: Confiscation Orders: progress review*, Monday 18th April, HC 915.

House of Commons Public Accounts Committee (2016c) *Oral evidence: Confiscation orders: progress review*, Tuesday 3rd May, HC 915.

Home Office (2015) *Asset Recovery Incentivisation Scheme: Review*. [Online] Available at https://data.parliament.uk/DepositedPapers/Files/DEP2015-0223/ARIS_Review_Report_unmarked.pdf (Accessed 16th March 2019).

House of Commons Work and Pensions Committee (2016) *Support for ex-offenders*, HC 58. London: HMSO. [Online] Available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/58/58.pdf> (Accessed 25th May 2018)

Hope, T. (2008) 'The First Casualty: Evidence and Governance in a War Against Crime' in Carlen, P. (ed) *Imaginary Penalties*, Devon: Willan Publishing. pp. 45-63.

HSBC (2018) *HSBC Holdings plc Annual Report and Accounts 2018*. London: HSBC Holdings plc.

Hudson, B. (1987) *Justice Through Punishment*. London: Macmillan.

Hudson, B. (2003a) *Understanding Justice: An introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, 2nd edn, Buckingham: Open University Press.

Hudson, B. (2003b) *Justice in the Risk Society*, London: Sage Publications Ltd.

Hulley, S., Crewe, B. and Wright, S. (2019) 'Making Sense of 'Joint Enterprise' for Murder: Legal Legitimacy or Instrumental Acquiescence?' *British Journal of Criminology*, pp. 1-19.

Jaleel, G. (2013) 'Curtis Warren Must Pay £198m in 28 Days or Face Another 10 Years in Jail, *Liverpool Echo*, [Online] Published 6th November, Available at <https://www.liverpoolecho.co.uk/news/liverpool-news/liverpool-druglord-curtis-warren-must-6274561> (Accessed 29th May 2019).

Jefferson, A.M. (2008) 'Imaginary Reform: Changing the Postcolonial Prison' in Carlen, P. (ed) *Imaginary Penalties*, Devon: Willan Publishing. pp. 157-171.

Joint Committee on Human Rights (2019) *The Right to Family Life: Children Whose Mothers are in Prison - Twenty-Second Report of Session 2017–19*, HC 1610, HL 411. [Online] Available at <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1610/1610.pdf> (Accessed 5th September 2019)

Kennedy, A. (2004) 'Justifying the Civil Recovery of Criminal Proceeds', *Journal of Financial Crime*, 12 (1), pp. 8-23.

King, C. (2014) 'Civil Forfeiture and article 6 of the ECHR: Due Process Implications for England and Wales and Ireland', *Legal Studies*, 34 (3), pp. 371-394.

King, C. and Walker, C. (2014) *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Farnham: Ashgate.

Kivdeh, S. (2013) *Confiscation Orders or Hidden Sentences*, Master's degree Thesis: University of Cambridge.

Kvale, S. (1996) *Interviews: An Introduction to Qualitative Research Interviewing*, London: Sage Publications.

Labour Party (1997) *The Labour Party Manifesto 1997: New Labour because Britain deserves better*, [Online] Available at <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> (Accessed 15th September 2018)

Lammy, D. (2017) *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*. Publisher Details Not Available, [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf (Accessed 6th March 2018).

Lawrence, I. (2008) 'Draconian and manifestly unjust: How the confiscation regime has developed', *Amicus Curiae*. 76, pp. 22-24.

Lea, J. (2004) 'Hitting Criminals Where it Hurts: Organised Crime and the Erosion of Due Process', *Cambrian Law Review*, 35, pp. 81-95.

Levi, M. (1998) 'Perspectives on 'Organised Crime': An Overview', *The Howard Journal*, 37 (4). pp. 335–345.

Levi, M. (2009) 'Suite Revenge?: The Shaping of Folk Devils and Moral Panics about White-Collar Crimes', *The British Journal of Criminology*, 49 (1), pp 48–67.

Levi, M. (2014) 'Thinking about organised crime', *The RUSI Journal*, 159 (1) , pp. 6-14.

Levi, M. and Osofsky, L. (1995) *Investigating, seizing and confiscating the proceeds of crime*, Police Research Group - Crime Detection & Prevention Series: 61, London: Home Office Police Department.

Lewis-Beck, M.S., Bryman, A. and Futing Liao, T. (2004) *The Sage Encyclopedia of Social Science Research Methods*, Thousand Oaks: Sage Publications.

Liberty (2011) *Liberty's Response to the Home Office's Proposals on More Effective Responses to Anti-Social Behaviour*. Unknown place of Publication: Liberty [online] Available at <https://www.libertyhumanrights.org.uk/sites/default/files/liberty-s-response-to-the-home-office-s-consultation-on-more-effective-respo.pdf> (Accessed on 14th March 2018).

Mann, R., Howard, F.F. and Tew, J. (2018) 'What is a rehabilitative prison culture?' *Prison Service Journal*, 235. pp. 3-9.

Margaret Thatcher Foundation. (1985) *Press Conference visiting Customs and Excise at Heathrow*. [online] Available at <http://www.margaretthatcher.org/document/106113> (accessed 27th June 2016).

Martin, J. and Storey, T. (2015) *Unlocking criminal law*, 5th edn, London: Routledge.

Maruna, S. (1999) 'Desistance and Development: The Psychosocial Process of 'going Straight'', *The British Society of Criminology*, 2, pp. 1-25.

Maruna, S (2006) *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*, Washington: American Psychological Association.

Maruna, S., LeBel, T.P., Mitchell, N. and Naples M. (2004), 'Pygmalion in the Reintegration Process: Desistance from Crime Through the Looking Glass', *Psychology, Crime and Law*, 10. pp. 271-81.

Maruna, S. and Matravers, A. (2007) 'N=1: Criminology and the Person', *Theoretical Criminology*, 11 (4), pp. 427-442.

Mason, J. (2002) *Qualitative Researching*, 2nd edn, London: Sage Publications Ltd.

Mathieson, T. (2006) *Prison on Trial*. 3rd edn, Winchester: Waterside Press.

McCahill, E. (2018) 'Identity of mystery banker's wife who spent £16million in Harrods REVEALED', *Mirror* [online] Published 10th October, Available at <https://www.mirror.co.uk/news/uk-news/identity-mystery-bankers-wife-who-13394935> (Accessed on 2nd March 2019).

McLaughlin, E., Muncie, J. and Hughes, G. (2001) 'The Permanent Revolution: New Labour and the Modernization of Criminal Justice', *Criminal Justice: An International Journal of Policy and Practice*, 3 (3), pp. 301–18.

McNeill, F. (2009) *Towards Effective Practice in Offender Supervision*. Report 01/09, University of Glasgow: The Scottish Centre for Crime and Justice Research. [Online] Available at https://www.sccjr.ac.uk/wp-content/uploads/2012/10/McNeil_Towards.pdf (Accessed on 27th July 2018).

McNeill, F. (2016), 'Desistance and Criminal Justice in Scotland', in Croall, H., Mooney, G. and Munro, M. (eds.), *Crime, Justice and Society in Scotland*, Oxon: Routledge, pp. 200-215.

Merton, R. (1938). 'Social Structure and Anomie', *American Sociological Review*, 3 (5) pp. 672–682.

Mills, A. and Codd, H. (2008) 'Prisoners' families and offender management: Mobilising social capital', *Probation Journal*, 55 (1) pp. 9-24.

Mills, C. W. (1940) 'Situating Actions and Vocabularies of Motive', *American Sociological Review*, 5 (6), pp. 904-913.

Minson, S. (2017) *Briefing Paper: The Impact of maternal imprisonment upon a child's wellbeing and their relationship with their mother: Findings from 'Who cares? Analysing the place of children in maternal sentencing decisions in England and Wales'*. Oxford: University of Oxford. [Online] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067653 (Accessed on 21st September 2018)

Mitchell, A., Hinton, M. and Taylor, S. (1992) *Confiscation*, London: Sweet & Maxwell.

Moffitt, T. (1993) 'Life-course persistent' and 'adolescent-limited' antisocial behaviour: A developmental taxonomy', *Psychological Review*, 100, pp. 674-701.

MOJ (2013) *Transforming Rehabilitation: A Strategy for Reform*, London: HMSO [Online] Available at <https://consult.justice.gov.uk/digital-communications/transforming-rehabilitation/results/transforming-rehabilitation-response.pdf> (Accessed 24th August 2017).

MOJ (2016a) *Unlocking Potential A review of education in prison*, London: HMSO. [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524013/education-review-report.pdf (Accessed on 24th August 2017).

MOJ (2016b) *Prison Safety and Reform*, Cm 9350, London: HMSO. [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565014/cm-9350-prison-safety-and-reform-web.pdf (Accessed on 24th August 2017).

MOJ (2017a) *The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime*, HMSO: London [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642244/farmer-review-report.pdf (Accessed 4th May 2019).

MOJ (2018a) *Education and Employment Strategy*, Cm 9621, London: HMSO. [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/642244/farmer-review-report.pdf

[ent_data/file/710406/education-and-employment-strategy-2018.pdf](#) (Accessed on 14th January 2019).

MOJ (2018b) *Criminal Justice Statistics quarterly, England and Wales, July 2017 to June 2018*, [Online] (Published 15th November) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769693/criminal-justice-statistics-quarterly-june-2018.pdf (Accessed 24th March 2019).

MOJ (2019) *Proven Reoffending Statistics Quarterly Bulletin, April 2017 to June 2017*, HMSO: London [Online] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797439/proven_reoffending_bulletin_April_to_June_17.pdf (Accessed 24th August 2019).

Morris, N. (2006) 'Blair's 'Frenzied Law Making' : A New Offence for Every Day Spent in Office', *The Independent*, [online] (Published 16th August) Available at <https://www.independent.co.uk/news/uk/politics/blairs-frenzied-law-making-a-new-offence-for-every-day-spent-in-office-412072.html> (Accessed on 24th April 2018).

Murphy, J.G. (1973) 'Marxism and Retribution' in Duff, R.A. and Garland, D. (eds) (1994) *A Reader on Punishment*. Oxford: Oxford University Press.

NAO (2007) *The Assets Recovery Agency*, HC 253, London: HMSO [online] Available at <https://www.nao.org.uk/wp-content/uploads/2007/02/0607253.pdf> (Accessed on 24th January 2018).

NAO (2013) *Confiscation Orders*, HC 738, London: HMSO [online] Available at <https://www.nao.org.uk/wp-content/uploads/2013/12/10318-001-Confiscation-Book.pdf> (Accessed on 12th October).

NAO (2016) *Confiscation Orders: Progress Review*, HC 886, London: HMSO [online] Available at <https://www.nao.org.uk/wp-content/uploads/2016/03/Confiscation-orders-progress-review.pdf> (Accessed 21st January 2017).

NAO (2019) *Transforming Rehabilitation: Progress review*, HC 1986, London: HMSO [Online] Available at <https://www.nao.org.uk/wp-content/uploads/2019/02/Transforming-Rehabilitation-Progress-review-Summary.pdf> (Accessed on 18th August 2019).

Naylor, R.T. (1999) 'Wash-Out: A Critique of Follow-The-Money Method in Crime Control Policy', *Crime, Law and Social Change*, 32 pp. 1-57.

Naylor, R.T. (2007) 'Criminal Profits, Terror Dollars, and Nonsense', *Crime and Justice International*, 23 (101), pp. 27-33.

NCA (2018) *National Strategic Assessment of Serious and Organised Crime 2018*, London: NCA.

Neate, R. (2016) 'HSBC escaped US money-laundering charges after Osborne's intervention', *The Guardian*, [online] (Published 11th July) <https://www.theguardian.com/business/2016/jul/11/hsbc-us-money-laundering-george-osborne-report> (Accessed on 24th March 2017).

Nicol, A. (1988) 'Confiscation of the Profits of Crime', *Journal of Criminal Law*, pp.75-83.

Noaks, L. and Wincup, E. (2004) *Criminological Research: Understanding Qualitative Methods*, London: Sage Publications.

Novick, G. (2008). 'Is There a Bias Against Telephone Interviews in Qualitative Research?' *Research in Nursing & Health*, 31, pp. 391-398.

Olesen, A. (2016), 'Debt as a Criminal Risk Factor in Denmark', *Oñati Socio-Legal Series*, 6 pp.676–706.

Olesen. A. (2017), 'Released to the "battlefield" of the Danish welfare state: A battle between support and personal responsibility' in Smith, P.S. and Ugelvik, T. (eds.) *Scandinavian Penal History, Culture and Prison Practice*, London: Springer Nature. pp. 271–95.

ONS (2018) *Employee earnings in the UK: 2018*, [Online] (Published 25th October) Available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2018> (Accessed 11th January 2019).

Paoli, L. (2002) 'The paradoxes of organized crime', *Crime, Law & Social Change*, 37, pp.51–97.

Parliament UK (2014) *Criminals choosing jail rather than pay confiscation orders*, [Online] (Published 21st March) Available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/confiscation-orders-report-publication-sub/> (Accessed 3rd May 2016).

Pasculli, L. (2017) *How the Law Itself can be a Corrupting, Criminal Force – and What can be Done About it*. The Conversation. [Online] (Published 20th December) Available at <http://theconversation.com/how-the-law-itself-can-be-a-corrupting-criminal-force-and-what-can-be-done-about-it-85287> (Accessed on 5th January 2018).

PIU. (2000) *Recovering the Proceeds of Crime*: London: Cabinet Office.

Pleggenkuhle, B. (2017) 'The Financial Cost of a Criminal Conviction: Context and Consequences', *Criminal Justice and Behaviour*, 45 (1) pp. 121-145.

Pogarsky, G. and Piquero, A.R. (2003) 'Can Punishment Encourage Offending? Investigating the "Resetting Effect"', *Journal of Research in Crime and Delinquency*, 40 (1), pp. 95-120.

Pratt, J. (2002) *Punishment and Civilization*. London: Sage Publications Ltd.

Rees, E., Fisher, R. and Thomas, R. (2012) *Blackstone's Guide to The Proceeds of Crime Act 2002*. (4th edn) Oxford: Oxford University Press.

Reiman, J. (2001) *The Rich Get Richer and The Poor Get Prison: Ideology, Class, and Criminal Justice*, 6th edn, Massachusetts: Allyn & Bacon.

Robinson, G. and Crow, I. (2009) *Offender Rehabilitation: Theory, Research and Practice*, London: Sage Publications Ltd.

Rusche, G. (2014) 'Labor Market and Penal Sanction: Thoughts on the Sociology of Criminal Justice', *Social Justice*, 40 (1), pp. 252-264.

Rusche, G. and Kirchheimer, O. (1968) *Punishment and Social Structure*, New York: Russell and Russell.

Ryder, N. (2013) 'To Confiscate or not to confiscate? A comparative analysis of the confiscation of the proceeds of crime legislation in the United States of America and the United Kingdom', *Journal of Business Law*, 8, pp.767-798.

Sampson, R.J. and Laub, J.H. (1992) 'Crime and deviance in the life course', *Annual Review of Sociology*, 18, pp. 63-84.

Sampson, R.J. and Laub, J.H. (1993) *Crime in the Making: Pathways and Turning Points Through Life*, London: Harvard University Press.

Sayer, A. (2011) *Why Things Matter to People: Social Science, Values and Ethical Life*, Cambridge: Cambridge University Press.

Scott, D. (2008) *Penology*, London: Sage publications Ltd.

Scott, D. and Codd, H. (2010) *Controversial Issues in Prison*, Berkshire: Open University Press.

Scott, D (2013a) *Rehumanising the Other and the meaning of justice: An Essay on the contribution of Barbara Hudson*.

Scott, D. (2016a) *Emancipatory Politics and Praxis: An anthology of essays written for the European Group for the Study of Deviance and Social Control 2013-16*, London: EG Press Limited.

Scott, D. (2016b) 'State Violence' in Taylor, P., Corteen, K. and Morley, S. (eds) *Companion to State Power and Civil Liberties*, Bristol: Policy Press.

Scott, D. (2018) *Against Imprisonment: An Anthology of Abolitionist Essays*, Hampshire: Waterside Press Ltd.

Scott, D. and Flynn, N. (2014) *Prisons & Punishment: The Essentials*, 2nd edn, London: Sage Publications Ltd.

Scott, D. and Sim, J. (2018) *Prisons: Dangerous for Whom?* Centre for the Study of Crime, Criminalisation and Social Exclusion, Liverpool: Liverpool John Moores University. [Online] <https://ccseljmu.wordpress.com/2018/09/20/prisons-dangerous-for-whom/> Available at (Accessed 15th March 2019).

Scruton, P. (2007) *Power, Conflict and Criminalisation*, London: Routledge.

Scruton, P. (2016) *Hillsborough: The Truth*, 2nd edn, London: Transworld Publishers.

Scruton, P. and Chadwick, K. (2012) 'Critical Research', in McLaughlin, E and Muncie, J. (eds), *The Sage Dictionary of Criminology*, 3rd edn, London: Sage Publications Ltd. pp.107-109.

Sedwill, M. (2016) Written Evidence from the Home Office. Public Accounts Committee: Confiscation Orders Progress Review [online] Available at <https://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Public%20Accounts/Confiscation%20Orders%20progress%20review/written/31684.html> (Accessed 3rd December 2016).

Sentencing Guidelines Council (2008) Magistrates' Court Sentencing Guidelines: Definitive Guideline, [online] Available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sept-2015-MCSG-pdf1.pdf> (Accessed 15th December 2019).

Siddaway, A.P., Wood, A.E., O'Carroll, R.E. and O'Connor, R.C. (2019) 'Characterizing Self-injurious Cognitions: Development and Validation of the Suicide Attempt Beliefs Scale (SABS) and the Non-suicidal Self-injury Beliefs Scale (NSIBS)', *Psychological Assessment*, 31 (5) pp. 592-608.

Sim, J. (2008) 'Pain and Punishment: the real and the Imaginary in Penal Institutions' in Carlen, P. (ed) *Imaginary Penalties*, Devon: Willan Publishing. pp. 135-156.

Sim, J. (2009) *Punishments and Prisons: Power and the Carceral State*, London: Sage Publications Ltd.

Sim, J. (2012) 'Abolitionism', in McLaughlin, E and Muncie, J. (eds) *The Sage Dictionary of Criminology*, 3rd edn, London: Sage Publications Ltd. pp.2-4.

Slater, J (2017) 'Social Constructionism', in Allen, M. (ed.) *The Sage Encyclopedia of Communication Research Methods*, Thousand Oaks: SAGE Publications, pp. 1624-1628.

Solicitors Regulation Authority (2018) *SRA Handbook*, [Online] (Published 6th December) Available at <https://www.sra.org.uk/solicitors/handbook/code/> (Accessed 9th August 2019).

Sproat, P.A. (2009) 'To What Extent is the UK's Anti-Money Laundering and Asset Recovery Regime used Against Organised Crime?' *Journal of Money Laundering Control*, 12 (2) pp.134-150.

Swaaningen, R.V. (2012) 'Abolition', in McLaughlin, E and Muncie, J. (eds), *The Sage Dictionary of Criminology*, 3rd edn, London: Sage Publications Ltd. pp.1-2.

Sykes, G.M. (1958) *The society of captives*, Princeton, NJ: Princeton University Press.

Sykes, G. and Matza, D. (1957) 'Techniques of Neutralization: A Theory of Delinquency', *American Sociological Review*, 22 (6) pp. 664-670.

Talbot, K. (2016) Proceeds of Crime Act. [Radio] BBC Radio Wales: Eye on Wales Series, Aired 2nd November.

Taylor, S., Jones, P., Ettlinger, S. and Hudson, J. (2015) *Waste crime: Tackling Britain's dirty secret*, London: Environmental Services Association Education Trust [Online] Available at http://www.esauk.org/application/files/4515/3589/6453/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf (accessed on 3rd March 2019).

Todd-Kvam, J. (2019) 'An Unpaid Debt to Society: How 'Punishment Debt' Affects Reintegration and Desistance from Crime in Norway', *The British Journal of Criminology*, 59 (5) pp. 1266-1286.

Tonry, M. (ed.) (1994) *Proportionality, Parsimony, and Interchangeability of Punishments*, Manchester: Manchester University Press.

Transform Justice (2019) *Rehabilitation Programmes – Do We Know Whether They Work?* [Online] (Published 4th June) Available at <http://www.transformjustice.org.uk/rehabilitation-programmes-do-we-know-whether-they-work/> (Accessed on 9th June 2019).

Tyler, T.R. (2003) 'Procedural Justice, Legitimacy, and the Effective Rule of Law', *Crime and Justice*, 30, pp. 283–357.

Tyler, T.R. (2006). 'Legitimacy and legitimation', *Annual Review of Psychology*, 57, pp. 375-400.

Ulph, J. (2010) 'Confiscation Orders, Human Rights and Penal Measures', *Law Quarterly Review*, 126, pp. 251 - 279.

United Nations Convention Against Transnational Organized Crime (2000) *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, Austria: United Nations Office on Drugs and Crime. [online] Available at <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> (Accessed 17th August 2016).

Von Hirsch, A. (1993) *Censure and Sanctions*, Oxford: Oxford University Press.

Von Hirsch, A., Bottoms, A.E., Burney, E. and Wikström, P. (2009) 'Deterrent Sentencing as a Crime Prevention Strategy' in Ashworth, A., Von Hirsch, A. and Roberts, J. (eds), *Principled Sentencing*, 3rd edn, Oxford: Hart Publishing.

Volokh, A. (1997) 'N Guilty Men', *University of Pennsylvania Law Review*, 146 (1), pp.173–216.

Wacquant, L. (2009) *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Durham and London: Duke University Press.

Wakeman, S. (2014) 'Fieldwork, Biography and Emotion: Doing Criminological Autoethnography', *The British Journal of Criminology*, 54 pp. 705-721.

Walters, R. (2009) 'The State, Knowledge production and Criminology', in Coleman, R., Sim, J., Tombs, S. and Whyte, D. (Eds.) *State, Power, Crime*. London: SAGE Publications Ltd.

Wengraf, T. (2004) *The Biographic-Narrative Interpretive Method (BNIM)-short-guide*, Middlesex University and University of East London.

Wengraf, T. (2006) *Qualitative Research Interviewing*, London: Sage Publications Ltd.

Williams, P. and Clarke, R. (2016). *Dangerous Associations: Joint enterprise, gangs and racism*, London: Centre for Crime and Justice Studies.

Williams, P. and Clarke, R (2018) 'The Black Criminal Other as an Object of Social Control', *Social Sciences*. 7 (11), pp.234-234.

Williams, R. (2012) 'Former Labour MP Margaret Moran escapes jail and criminal conviction despite fiddling £53,000 of expenses from taxpayer', *The Independent* [online]

(Published 14th December) Available at <https://www.independent.co.uk/news/uk/politics/former-labour-mp-margaret-moran-escapes-jail-and-criminal-conviction-despite-fiddling-53000-of-8414037.html> (Accessed 14th March 2019).

Winch, D. (2016) Written evidence submitted by David Winch (Chartered Accountant): Home Affairs Committee: Proceeds of Crime [online] Available at <https://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Home%20Affairs/Proceeds%20of%20crime/written/30234.html> (Accessed 18th December 2016)

Wood, H. (2016a) *Enforcing Criminal Confiscation Orders: From Policy to Practice*, London: Royal United Services Institute for Defence and Security Studies.

Wood, H. (2016b) *The Big Payback: Examining Changes in the Criminal Confiscation Orders Enforcement Landscape*, London: Royal United Services Institute for Defence and Security Studies.

Working Links (2010) *Prejudiced: Tagged for life – A research report into employer attitudes towards ex-offenders*, London: Working Links.

Wright, A. (2006) *Organised Crime*, Devon: Willian Publishing.

Young, L. (2014) *The Young Review: Improving outcomes for young black and/or Muslim men in the Criminal Justice System – Final Report*, Publisher Details Not Available, [Online] Available at https://www.equalcjs.org.uk/sites/default/files/articles/clinks_young-review_report_dec2014.pdf (Accessed 19th April 2018).

Zander, M. (1989) *Confiscation and Forfeiture Law: English and American Comparisons*, London: The Police Foundation.

Zsiros, S. (2019) *'Either we have the rule of law or we have the rule by law. Then we are a dictatorship'*, Euronews, [online] (Published 5th September) Available at <https://www.euronews.com/2019/09/05/either-we-have-the-rule-of-law-or-we-have-the-rule-by-law-then-we-are-a-dictatorship> (Accessed 9th September 2019).

Appendix A: Research Participant Information Sheet and Consent Form



Manchester
Metropolitan
University

DEPARTMENT OF SOCIOLOGY – CRIMINOLOGY

Craig Fletcher – PhD Student - 06439268

I am a PhD student at Manchester Metropolitan University. I am conducting research as part of my PhD and I would greatly appreciate your participation in this project. Please read this information sheet carefully and discuss it with others if you wish. Please ask me if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part. Thank you for reading this.

Study Title: Proceeds of Crime Act 2002: The impact on desistance and the legitimacy of punishment.

Aims of the research:

- To explore the impact of confiscation legislation on offenders and their families
- To better understand whether confiscation figures are being accurately calculated and if not are defendants being subjected to a further custodial sentence in default
- To better understand whether being subjected to a confiscation order has any implications on your decision to move away from offending

Recent legislation was introduced (The Serious Crime Act 2015) that has strengthened existing confiscation legislation without carrying out any research into the potential impact of such decisions. This research aims to plug that gap and by gaining a greater understanding and it is hoped that the true impact of confiscation orders will be revealed. This research will be completed in 2018

Invitation:

You are being invited to consider taking part in the research study: **Proceeds of Crime Act 2002: The impact on desistance and the legitimacy of punishment.** This project is being undertaken by PhD student – Craig Fletcher and supervised by Dr. Kathryn Chadwick.

Why have I been chosen?

You have been chosen because you have, or are currently being, subjected to confiscation procedures or you are a family member of somebody that has been subjected to confiscation procedures.

Do I have to take part?

You are free to decide whether you take part or not. If you decide to take part you will be asked to sign two consent forms, one is for you to keep and the other is for our records. **You are free to withdraw from this study at any time and without giving reasons.**

What will happen if I take part?

If you decide to take part you will be invited to meet with the researcher to be interviewed for approximately one hour. The interview will be asking about your experiences in relation to the criteria in the aims of the research section above. Interviews will be tape recorded with your permission, but the recording will be safely stored and destroyed at the end of the research. Only the researcher will have access to the original tape recordings. Our interview can take place at a time and place that is suitable for you. Depending on your circumstances this may be on a prison visit, your workplace if suitable or a cafe. There would be no traveling involved on your part as the researcher is prepared to travel to you.

If I take part what will I have to do?

If you agree to take part I would like you to be interviewed by myself on a one-to-one basis for approximately one hour with me asking some questions about your experience of confiscation orders and you answering them accordingly.

What are the benefits (if any) of taking part?

You will have the chance to talk to someone about your experiences of confiscation orders and the impact it has had on your life. Your vital contributions will help construct the findings of this piece of research and these findings could potentially capture the attention of academics, policy makers and criminal justice practitioners alike in the hope that this otherwise absent perspective can begin to be considered.

What are the risks of taking part?

Because of the nature of what we are talking about (your past and your experiences which may have been unpleasant for you or your family) there is a chance that this may become distressing or frustrating. If these kinds of discussions/feelings arise I will help you to find someone you can speak with so that you are not left dealing with these feelings alone. Additionally you are able to terminate the interview at any point if you find it distressing.

How will information about me be used?

Information gained from interviews will be typed up and sorted into 'themes'. This means I will be reading all the information I gather together and seeing if there are shared patterns in people's

experiences. The results will be anonymised, collated and written up into a Thesis and then submitted to Manchester Metropolitan University for marking. When the study is completed the original interview recordings will be destroyed. None of the interview content will be used again without your permission.

All personal details will remain confidential and be anonymised.

Who will have access to information about me?

The comments you share with me will be used to help me write my thesis. Only I will have access to the original interview records. **I may use some direct quotes from you in my thesis but these will be anonymised to ensure that you cannot be identified.** Interview data will be stored securely on a password protected data storage device which will be kept in a safe when not in use. It would be difficult to identify you from the data because it will be coded.

Information received during our interview will be treated confidentially, however, **I do have to work within the law and so offers of confidentiality may sometimes be overridden.** For example: If you are telling me that you are planning future criminal activity or abuse either to yourself or to someone else or you tell me that you are having suicidal thoughts then **I must act on this.**

Can I read your results?

Yes you can access not only your results but the complete set of results that will be submitted as part of this piece of research after it has been submitted and marked. This is expected to be sometime towards the end of 2018. If this is something you would like then please let me know and I will arrange for you to be able to access it.

Who is overseeing the research that I am carrying out?

This research study is being overseen by Dr. Kathryn Chadwick, a senior university lecturer at Manchester Metropolitan University

What if there is a problem?

If you have a concern about any aspect of this study you can speak to the researcher who will do their best to answer your questions. You should contact Craig Fletcher at craig.p.fletcher@stu.mmu.ac.uk. Alternatively, if you do not wish to contact the researcher you may contact his supervisor Dr Kathryn Chadwick, Senior lecturer in criminology on 0161 2475972 or k.chadwick@mmu.ac.uk

Do not hesitate to contact me with any questions or in case you are interested in taking part



Manchester
Metropolitan
University

DEPARTMENT OF SOCIOLOGY – CRIMINOLOGY

CONSENT FORM

Title of project: Proceeds of Crime Act 2002: The impact on desistance and the legitimacy of punishment.

Name of Researcher: Craig Fletcher

Please Tick Box

1. I confirm that I have read and understand the information sheet attached for the above study and I have had the opportunity to consider the information, ask any questions and have had these answered satisfactorily. I acknowledge the risks associated with the study and they have been explained to me. ☐
2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, without my legal rights being affected ☐
3. I agree to take part in the study ☐
4. I understand the data collected about me during this study will be anonymised before it is submitted for marking ☐
5. I agree to being audio recorded ☐

Name of Participant

Date

Signature

Appendix B: MOJ FOI Request



Ministry
of Justice

Mr Craig Fletcher
craig.p.fletcher@stu.mmu.ac.uk

Data Access & Compliance Unit
Ministry of Justice
102 Petty France
London
SW1H 9AJ

data.access@justice.gsi.gov.uk

2 March 2018

Dear Mr Fletcher,

Freedom of Information Act (FOIA) Request – FOI 180202005

Thank you for your request dated 15 January 2018 and clarification on 2 February 2018 in which you asked for the following information from the Ministry of Justice (MoJ):

“I am currently doing some research into the impact of the Proceeds of Crime Act 2002 and under the Freedom of Information Act 2000 I would like to request the following information please:

- 1. How many offenders have been served with a confiscation order under the Proceeds of Crime Act 2002 since its inception?**
- 2. What are the demographics of those individuals? (race, ethnicity, age, gender etc)**
- 3. Can you provide data which identifies what offence categories triggered those confiscation orders and how many within each of those offence categories?**
- 4. How many people since the introduction of the Proceeds of Crime Act 2002 have failed to satisfy their confiscation debt and had their default sentence activated?**
- 5. What is the total amount of time spent in custody as a result of those default sentences?**

“I can confirm that the information that I require is: How many default terms have been activated regardless of what happened after?”

Your request has been handled under the FOIA.

I can confirm that the MoJ holds some of the information that you have asked for.

- Q1 = 69,151 confiscation orders made under Proceeds of Crime Act 2002 (POCA) since its inception. We cannot say how many offenders have been served with a confiscation order as one offender may have been served with more than one confiscation order.
- Q2 = The MoJ does not hold any information in the scope of your request. This is because there is no legal or business requirement for MoJ to do so and we are not the appropriate authority to contact on this subject. You may wish to contact the law enforcement agencies as they may hold some of the information you requested.
- Q3 = offence data is provided in the table below
- Q4 = Default sentences imposed is provided below (2,821)

| Confiscation Orders: Proceeds of Crime Act 2002 | Commitment Warrant Issued | | Grand Total |
|---|---------------------------|--------------|---------------|
| | No | Yes | |
| Primary Offence type | | | |
| Arms Trafficking | 66 | 2 | 68 |
| Bribery and Corruption | 48 | 1 | 49 |
| Burglary / Theft | 5496 | 172 | 5668 |
| Counterfeiting / Intellectual Property / Forgery | 1118 | 60 | 1178 |
| Drug Trafficking | 38572 | 1376 | 39948 |
| Excise Duty Fraud | 807 | 57 | 864 |
| Handling Stolen Goods | 834 | 29 | 863 |
| Human Trafficking | 224 | 43 | 267 |
| Intellectual Property Crime | 151 | 1 | 152 |
| Money Laundering - Drugs | 2183 | 109 | 2292 |
| Money Laundering - Other | 3256 | 187 | 3443 |
| Other Crime | 1135 | 56 | 1191 |
| Other Fraud / Embezzlement / Deception / Crimes of dishonesty | 8297 | 394 | 8691 |
| Pimps and Brothels / Prostitution / Pornography | 444 | 25 | 469 |
| Robbery | 859 | 91 | 950 |
| Slavery / Servitude / Forced or Compulsory Labour | 5 | | 5 |
| Tax and Benefit Fraud | 2077 | 154 | 2231 |
| Terrorism | 13 | 1 | 14 |
| Trading Standards Offences | 193 | 8 | 201 |
| Unknown | 135 | 15 | 150 |
| VAT Fraud | 352 | 35 | 387 |
| Vehicle Offences | 65 | 5 | 70 |
| Grand Total: | 66,330 | 2,821 | 69,151 |

- Question 5 - we are not able to provide the information due to the following hurdles on the Prison NOMIS Application system:

- 1) We are not able to differentiate between lodged warrants and confiscation orders on the Prison NOMIS Application System, they are all inputted as imprisonment in default of fine in legal information, sentences.
- 2) We won't be able to determine how long someone has been in custody for a confiscation order. Unlike lodged warrants, which are terms in default of a fine (so they serve days instead of paying the fine), confiscation orders have to be paid irrespective of what term is paid and interest is accrued daily.

The source of the information is the Joint Asset Recovery Database (JARD) which is a multi agency government database. Confiscation orders are one of the key mechanisms available to the Government to deprive criminals of the proceeds of their crimes. The value of the

order imposed, which is often very high, is based on the criminal benefit attributed to the crime and may, therefore, exceed the value of realisable assets that are known to the Court at the time of imposition. Crucially, an outstanding order stops the criminal benefitting from the proceeds of crime and ensures that, if the assets are discovered in the future, they can be seized.

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gsi.gov.uk

Data Access and Compliance Unit, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

J Baruah
Knowledge and Information Liaison Officer
National Compliance and Enforcement Service

Appendix C: Short Biographies of the Research Participants From the Initial Research Cohort

1 - Kerry: Kerry is the wife of a confiscation defendant whose husband (Jon) was convicted of fraud to the value of £54,000. He was ordered to serve twelve months in custody for his predicate offence. They have five children together. At the time of Jon's arrest, they had 'legitimate' businesses (the offence took place through their business). Jon was arrested in 2007, charged in 2009, convicted in 2010, and the confiscation case was finalised in 2015. During those eight years Kerry's and Jon's personal and business bank accounts and assets were placed under restraint. Jon and Kerry have no previous convictions. Their confiscation order was for £472,000 and at the time of interview Jon was facing the imposition of a default prison sentence as he was unable to meet the demands of his confiscation order. Kerry came to the attention of the researcher via her solicitor. Jon's confiscation case is ongoing...

2 – Daniel: Daniel was known to me from my criminal past. He was arrested in 2007 for drug supply offences and sentenced to nine years in prison. Daniel has a son. His benefit figure was in the region of £700,000 but his available amount was £42,427.09 and was not finalised until December 2010. His confiscation order consisted of both tainted gifts and hidden asset assumptions. Daniel served a default sentence for failing to satisfy his confiscation order in full. I was able to follow Daniel's confiscation proceedings and he allowed me to interview him on two further occasions providing a more longitudinal insight into the impact of Daniel's confiscation punishment. I also accompanied Daniel to court for one of his confiscation court appearances. His confiscation case is ongoing...

3 – Sonia: Sonia's brother (Brendan) had been sentenced to eight years in prison for fraud which he was serving at the time Sonia agreed to take part in the research. A £200,000 confiscation order was

imposed which Brendan was unable to satisfy and, therefore, a period of two years and nine months had been added to his prison sentence in default. Sonia agreed to take part in the research having been heavily involved in helping Brendan prepare his confiscation defence and supported him and his family both emotionally and financially during his time in prison. Brendan is married with children and is in his fifties. His confiscation case is ongoing...

4 – Harry: Harry, a qualified accountant, was convicted in 2012 for fraud offences and sentenced to five years in prison. He was given a confiscation order composing of a £500,000 benefit figure with a £1 available amount. Harry was in his sixties at the time of his interview and he reported having both diabetes and a heart condition. Harry has four step-children. As Harry's benefit figure remains outstanding his case is ongoing...

5 – Marcus: Marcus was sentenced to eleven years in prison for drug offences. He was hit with a £14 million benefit figure and £51,000 available amount. He subsequently served a six-month default sentence having failed to satisfy the available amount. Marcus is in a relationship and has children. His confiscation case is ongoing...

6 – Eddie: Eddie was sentenced to eighteen-months in prison for the cultivation of cannabis. He was subsequently given a confiscation order for £19,692.30 which was to be apportioned with his two co-defendants. Eddie was fifty-seven-years old at the time of his interview and he and his wife have four children together. Having managed to satisfy his confiscation order Eddie is no longer subject to confiscation proceedings although he is not sure whether he has an outstanding benefit figure.

7 – Declan: Declan was sentenced to nine years for drug importation offences and was ordered to pay a confiscation amount of £1.2 million. Having failed to meet the demands of his confiscation order, Declan was ordered to serve an additional three years in prison. Declan was known to me from when

I was previously involved in crime. Declan was married, now divorced, and has two children. His confiscation case is on-going

8 - Enrique: Enrique's case was unique in that he had been served with two confiscation orders. His first POCA was for the supply of class A drugs and consisted of a £112,000 benefit calculation and a £48,000 available amount. He managed to pay £30,000 off his confiscation order but he was given a prison default sentence of 18-months for the outstanding £18,000. On release from prison Enrique was once again arrested for drug offences and sentenced to four-and-a-half-years in prison. He received a second POCA with an £11,000 available amount for which he served a further prison default sentence of eight-months. Enrique has a fifteen-year old son. His confiscation case is on-going...

9 – Ryan: Ryan was convicted of drug offences and received a confiscation order of £23,000 for which he subsequently served a nine-month default prison sentence. Ryan is married and has a thirteen-year old son. His confiscation case is on-going...

10 – Derek: Derek was convicted of drug offences and received a four-and-a-half-year prison sentence for his offences. A confiscation order consisting of a £235,000 benefit figure and £120,000 available amount was subsequently imposed. As he was unable to satisfy his confiscation order, and so as to avoid the prison default sentence, Derek, his wife and his child absconded and now live abroad (location unknown). Derek was known to me from when I was in prison and he agreed to speak to me about his POCA experiences via the telephone.

11 – Dawn: Dawn was the wife of Derek and she agreed to speak to me about her perspective as the wife of a confiscation defendant whose life has completely changed as a result of their POCA experiences. She also provided valuable insight into the impact their confiscation case has had on their child.

12 – Sophie: Sophie, twenty-eight years old at the time of her offence, was convicted alongside her partner of drug conspiracy offences and subsequently sentenced to three-years in prison. Her assets and bank accounts were placed under restraint and she was given a £60,000 confiscation order. Sophie's case is on-going...

13 – Karl: Karl was the co-defendant of Eddie and, therefore, convicted of the cultivation of cannabis. Karl's confiscation order consisted of his share of the £19,692.30 confiscation order imposed jointly with Eddie and another individual. Karl is married and has five children. Like Eddie, Karl is unsure whether his confiscation case is complete or whether he has an outstanding benefit figure.

14 – Jo: Jo, a mother of five children, was convicted of drug offences and sentenced to eight-years in prison. She was given a confiscation order consisting of a £60,000 benefit amount and £37,348.84 available amount. Jo's confiscation case went on for many years causing her and her family immeasurable damage before she successfully managed to appeal her case. Despite successfully satisfying her available amount, Jo has an outstanding benefit figure.

15 – Frank: Frank was sentenced to eight-years in prison for drug offences. He was subsequently hit with a confiscation order of £18,000 and as was ordered to serve a twelve-month sentence in default. His confiscation case is ongoing...

16 – Dave: Dave was convicted of drug offences and ordered to pay a confiscation order of £28,000. He was ordered to serve a default sentence of two weeks. He is in a relationship and they have a daughter together. His confiscation proceedings are on-going...

17 – Kevin: Kevin was convicted of conspiracy to supply class-B drugs and was subsequently imprisoned for eighteen-months. After contesting his confiscation figures he was able to reduce his

'available' amount to £39,000 for which he was ordered to serve a default sentence of eighteen-months. Kevin is in a relationship and now has a child. His confiscation case is still on-going...

18 – Wayne: Wayne was convicted of drug offences and was a co-defendant of Daniel. Whilst his benefit figure was said to be in excess of £100,000, as he had no realisable assets he was given a confiscation order for a nominal amount of £1. As his benefit amount remains outstanding his confiscation case is on-going...

19 – Jacob: Jacob was convicted of fraud offences and sentenced to five years and four months in custody. His benefit figure was calculated to be the total sum of the fraudulent offences; £5.9 million of which £3.2 million was deemed traceable and recoverable leaving an outstanding balance of £2.7 million. Consequently, all his assets and bank accounts were placed under restraint. He was still dealing with his confiscation case at the time of the interview and he was unsure whether he would be returned to prison in the near future if he is unable to recover the remainder of the outstanding money. Jacob is married and has a daughter and two further children from a previous relationship. Despite Jacob dying shortly after he took part in the research in December 2017, it is thought that his confiscation case is still on-going as the confiscation agency seeks to recover the outstanding debt from his estate.

20 – George: George was a convicted armed robber whose offences took place in the 1980s and 1990s before confiscation became mainstream practice. As a result he was not subject to any asset recovery measures. This case provided an opportunity to look at how the punishment of financially motivated crimes has changed since the introduction of confiscation legislation.

21 – Stephen: Stephen was sentenced to four-months in prison, suspended for twelve-months, for running an illegal waste treatment facility. He was subsequently given a confiscation order consisting

of a benefit amount of £874,392.97 and an available amount of £487,000 which he failed to satisfy within the permitted time and the prison default sentence of three-and-a-half years was activated. Stephen's confiscation case is on-going...

Appendix D: E-Mail Correspondence From the POCA'd in Response to the Russell Webster Publication

Date of correspondence: August 2019

I was taken to court in April 2004 for un-repaid overpayments in housing benefit between 1998 and 2001. This was considered housing benefit fraud due to my failure to repay. In Sept 2004 I was sentenced to probation and community service [...] I served 12 months default sentence in 2007 and my debt including interest now stands at almost 40k as I have never had the funds and have simply made monthly payments. I will never be able to satisfy the debt. I am now 56 years old. Additionally any failure in making instalments can again result in the default sentence being applied. I have in essence had no peace of mind since 2004, and never will have as the debt is increasing. As a result I have what is essentially a life sentence for a debt of less than 12k housing benefit fraud.

Date of correspondence: August 2019

I am currently subject to a confiscation order which is due to be paid by the 1st October. At the time of the hearing, the CPS agreed that I would be allowed a further extension but I would have to make the application. We are struggling to raise the money, understandably! There is no money, the money from the crime was spent on day to day living costs over 4 years ago. We have tried remortgaging, asking family but we are hitting brick walls and I am petrified of having to go back to prison as I have a husband and a 10-year-old son. Do you know how I can apply for the extra time to pay via the courts without having to involve a solicitor as we are out of money! Also, can an instalment arrangement to pay be agreed without the default sentence having to be served? Or, could they put a charge on the house until our credit rating improves in order to remortgage? [...] this really is a nightmare, effectively I am being punished twice! I've served my prison sentence and I'm currently on tag but on top of that, I have this looming. We represented ourselves at the confiscation hearing as we weren't in a financial position to pay any more in legal fees. [...] The amount I have to pay back has been set at £36,000, the default sentence 12 months. We were hoping to remortgage to raise this money, easier said than done with a criminal record and credit defaults following my incarceration. I'm really at a loss as what to do and it's making me ill, my husband and son have been through so much already.

Date of correspondence: February 2018

I wrote to you following your article last year. My son was released just a few weeks later. The impact of ongoing POCA proceedings led him to make 3 suicide attempts over Christmas and New Year. Our legal team have said the judge won't be interested in Adam's mental state. The prosecution will not disclose the evidence we need to prove our case and although we have managed to negotiate a lower figure than initially feared, Adam will still end up with a benefit figure of £171k. This from a crime that netted him a profit of a few thousand. Adam's mental state is such we aren't even consider allowing this to go to a full hearing as this would require him to give evidence.

Date of correspondence: October 2017

I am 'a victim' of the establishment (and I am sure there are many) and of the 'draconian' law of confiscation and 2002 Proceeds of Crime. My barrister told me 'they' will not get rid of it "because they are all making too much money"... Unbelievable, in a civilised country? Is this hidden corruption then? [...] My house was not a Proceed of Crime (and they knew it) it was my father's legacy, the rest of the purchase was a mortgage for £30,000. They found NO other assets (in 4 years), because there were none. You might find this a bit strange. Well it is not. All it takes is a corrupt solicitor or a lazy one colluding with the council. She later, after one year, had to withdraw from my case under 'professional Embarrassment'. I found one honest solicitor (a firm's senior partner) who put a lot of time into my case and also got a forensic accountant involved and the so-called 'criminal amount' made up by the council was cut by two thirds. As it was, I still had to sell my house after all the sacrifices I made to get the mortgage paid off [...] This finished in 2016 and had I lost my job, and am still trying to get over it. My case took over 4 years! I had 2 mental breakdowns and now have ME/CFS. I almost committed suicide. I could have ended up in prison. Yes this is possible and does happen. Bullying, intimidation threats & Extortion. Is it any wonder that there are so many people in prison now who may not be guilty of POCA, and committing suicide. Who is there to defend them when the legal aid has funding been cut? This is cruel and is bordering on evil.

Date of correspondence: October 2017

It was described to me as designed for serious crime & is actually being abused by the system. For example money it was intended from the profits made & assets gained deriving from the sale of drugs. They have all the resources they need to throw at it, both money, time, & so-called expertise. because they can! The costs to achieve it are disproportionate & genuinely hard-earned assets are confiscated, which makes a mockery of the title "Proceeds of Crime". The "criminal" already is at a disadvantage, in prison, difficult to find work & rebuild their life after, also ends up a victim of the systems manipulation of a piece of legislation that it is likely wasn't intended to be used that way. This in itself is abuse & criminal.

Date of Correspondence: February 2018

I committed a crime very stupidly 11 years ago, I had to go to the doctors today and being referred to the mental health team as I am at risk to myself. My crime even though no excuse for it was caused through many years of trauma and sexual abuse as a child and wanting to keep hold of the love I finally thought I found, I committed fraud and used the money to keep him happy so he didn't leave me. I went to prison and met many people like me who had bad childhood experiences. On leaving prison they took what I had to give straightaway and then came after me two years later and now once more they turned up 3 months ago with a restriction order on my partners house (he had no knowledge of my past), I had to be named on the house for a joint mortgage application as he had to use my salary to be able to get a mortgage. I never paid anything into his house as he purchased it outright before he even met me. I had to confess and discuss my darkest secrets and he has since suffered depression like me and he attempted suicide but thankfully failed. My past has caused so much pain to him and my kids will also be affected. Still waiting for the next step for CPS, over ten years has passed, I've

started a new life and managed to live supressing my past until now. Once more I am a criminal again all over when I was supposed to be allowed to rehabilitate.

Date of correspondence March 2018

I'm so glad I had found this. I was arrested in 2008 for a conspiracy to convert criminal property at the time I only just turn 19. I was bailed for a few years but in this time had to keep answering to bail. In 2011 I had pleaded guilty to the offence and was sent to prison for 3 years (I got early release with tag). They then came after me for POCA whilst I was serving my sentence. I had never been in trouble like this before and didn't have a clue what POCA was. To be told that if I don't get a confiscation order for £1 or give them the money they are asking for I will go back to prison. My heart stopped for a minute and couldn't believe what I was hearing. Surely this was not true? It was a nightmare I wanted to wake up from. After getting dragged back and forth from prison to attend my POCA hearing I ended up getting a £88k hidden asset confiscation order. I didn't understand how for the first offence they would say you spent vast amounts of money then in your POCA hearing they say you've hidden it. It's definitely a contradiction. I was advised that if I don't pay the £88k within so many months I would go back to prison for 20 months. Well I ended up going back to prison as I never had this money they were asking for. I had only come out of my first sentence for 6 months then back I go again. I have never had this money and at the age I committed the crime I lived for the moment. I went on holidays, bought cars, shopped at some of the luxury stores like Gucci and Louis Vuitton. I partied with my friends and took things I shouldn't be taking but it was the thing to do when your with your friends.

I was let down by my solicitors that dealt with the case as I wasn't advised to provide proof of my spend which I had. I had receipts, car finance agreements etc. Then I had passed my case to a apparently a POCA specialist to look at an appeal whilst I was serving my POCA sentence. He had all my files for over 2 years and got my hopes up. All he wanted was for me to keep signing those legal aid forms. I have now passed it onto someone else and due to see a new council. I can't afford it and it's going to cost me £600 to see a new council. Luckily enough for me I have a great family that are helping me out. Why should I be penalised for the rest of my life? I'm turning 31 this year and I'm still in this nightmare I can't wake up from. There's no excuse for what I did and yes I should be punished for what I did. I was young and naive. I didn't kill anyone yet it feels that way. At least with someone that had committed murder they would get out and move on with their lives. I had so much going for me, I was working towards going to university and I made the biggest mistake ever. I'm currently suffering from depression and anxiety. I would not wish what I'm going through on my worst enemy. If I could turn back the time then I would. I just want to be the old me again – full of life. I feel like there's no light through the tunnel. I feel like the only way out of this would be to win the lottery, appeal the confiscation or end my life. Writing this has shed a tear but after so many counselling sessions I've managed to speak about it. My confiscation is accruing interest £19 per day and I'm currently paying £20 a month that does not even touch the sides. Going to pay for this every month at the pay point is a constant reminder of what I did and knowing I can't get a mortgage or live a normal live again unless the law changes

Date of Correspondence: March 2018

Hi, I've been reading some of these post and I can't believe how many suffer depression, stress, suicidal thoughts, this is how I feel. I was sentenced to 3 and half years in prison for mortgage fraud. Whilst in prison I received a POCA which ask me to pay an amount which I did, I thought this was all over and I could continue with my life, I managed to get a bit of work and slowly build my life again 4 and half years later after I paid the first amount to my shock I was told that I have to pay more because I have a house with equity in and I owe outstanding monies. I have NOT committed any crime whilst been out but now after all this time I'm going to have to sell my house to pay the POCA, this will break me as it will leave me homeless and in a vulnerable state. I understand being punished but how can I rehabilitate and move forward if my past is preventing this

Date of correspondence: June 2018

Hello, me and my daughter has a confiscation order mine is for 9000 and my daughter's is 13000 we are both disabled and on benefits, we have a house with a mortgage which we both pay out of are benefits, we can't sale the house or we will be homeless, we can't get a loan or re-mortgage because we don't get enough money in. we are both on suicide watch because we can't take anymore all we ask is to pay monthly instalments, is there any help you can give us please thank you

Date of correspondence: June 2018

Hi my partner has a POCA. They say he had hidden assets even though he went bankrupt had his car repossessed, couldn't afford day to day bills all before he was arrested for a crime he didn't even commit. He has been in 2 yrs already and another 1 to go and now his default is 3yrs if he doesn't pay. He does not have any money nor has he. His children have not seen him for months because he is too far away and we are all suffering as is he. The solicitor is not really interested even though my partner has been sending her proof of everything and he is on the verge of a breakdown, this is like a 2nd trial it's never ending he was in an open prison for 3 months and we had weekly visits now he has moved to a [category] B prison far away again and we do not know what the hell is going on. I just don't understand why they don't allow people to move on and that they don't seem to care how many other people connected to the prisoners are also doing the prison sentence with them. The impact it has on children surely increases the chances of them either having mental/emotional issues or go on to commit crime because of the affects it had on them in their childhood.

Date of correspondence: March 2019

Myself and my partner are currently going through a confiscation order based on the judge saying we have hidden assets. I have been given an order of £97500 and my partner £95400 and he is currently serving a sentence of 3 years and 7 months. I am finishing off my community service alongside having a full-time job and 3 children. Now we committed an offence money laundering this was because my husband was out of work for a considerable number of years. This money just went through our accounts and was paid in from different countries. I put my hand up and accept my wrong doing. But punish me sensibly and not give me an amount that I cannot even think about to pay. We do not own any properties or cars, we used most of the money given to us from laundering to pay rent and live

our daily lives as I was pregnant most of that time. Now the default sentence is 18 months. What's going to happen to my children? They've already lost their dad not been home as he is still in prison. Where do I go to appeal this, who do I write to? If they feel there are hidden assets why don't they go find it and not put the burden on us? I cannot eat, sleep and really struggling not to have a mental breakdown because of my kids. I need help as I cannot afford this or go to prison for this. They did not even give an option of paying monthly, at least I could carry on working and paying it on a monthly basis alongside all my other debts. HELP.....

Date of correspondence: July 2019

I am 47 years of age and I have a confiscation owing £193,504.92 (with interest). It started off at 130,000 due to my incarceration the interest was at least £25 per day. I have been punished for a crime serving 8 years with additional 2 years added as default sentence which I have served. This is somewhat punishing me still for an unrealistic amount that I cannot afford. I work as a [occupation] and earn before tax £22,000. I live at home in my parent's house, I have 5 sons and 1 daughter, I still pay off my student loan. I am still on probation. The amount that was enforced on me is somewhat very unrealistic. I won't ever in my life time afford to ever pay this amount off. I am currently paying at least £250 a month because the assets recovery sent a letter to my employer stating they have to deduct 17% out of my pay a month. Now my boss knows my business which he shouldn't of have to, and if he wasn't a nice person I believe he would of got rid of my because of this. I come to the point that there is no point in me working now because I am throwing money in to a bottomless pit. Every job I will get the assets recovery will be writing to them and threatening them to enforce payment. I have been through the whole rehabilitation and I do not believe that giving someone this debt as an extra form of punishment. I pay my taxes 17.5% for my wages a month already so now another 17% is taken out. If I get another Job with higher pay the asset recovery will take out more of a percentage. I was convicted as conspiracy with others at least 17 or more and only 4 people got confiscation and treated us 4 as the same stating we had hidden assets. They don't even check what your personal finances are and what you can afford to pay which is unrealistic and unfair. I don't even think this is about money anymore, I believe that it is forced on some people to never rehabilitate or a heavy burden on their life forever. It seems that freedom is better than working your life off paying off bills when I can't even afford a house. So being not working will seem more beneficial for me then slaving away to a bottomless pit. Courts should reevaluate the evidence and circumstances around the person at least every couple of years and stick to realistic recoverable amount if they want people to pay.