Chapter 9

Asset Recovery: Substantive or Symbolic?

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Introduction

1986 was significant for would-be financial miscreants across the world as this was the year when money laundering, or more specifically laundering the proceeds of crime, became criminalised within international law[1]. Crime money is an asset, whereas money laundering is a process emanating from an associated criminal activity. It can be argued that there already existed a criminal legal framework appropriate for prosecuting the underlying predicate offence that gives rise to the funds to be laundered. Sharman[2] goes on to point out that since 1986, '170 states have criminalised money laundering, and most ...have set up specialised agencies to combat it'. It is, therefore, salutary to observe the resultant global expansion in the legislative framework together with its attendant agencies of enforcement. Over the 20-year period since the creation of the FATF in 1989, there has been a small explosion in the number of governmental and quasi-government agencies that have added anti-money laundering legislation (AML) to their existing mandate or, significantly, have come into existence specifically as a result of AML legislation.

The arrival in the UK of the Proceeds of Crime Act 2002 ('POCA'), and specifically sections 327-329 as amended by the Serious Organised Crime and Police Act 2005 (SOCPA), was widely regarded as contributing a significant weapon to the armoury deployed in the fight against crime. This Act provided a far wider range of powers, beyond anti-money laundering ('AML') provisions, covering not only criminal[3] but also civil recovery.[4] For a government focused on proving the adage that 'crime does not pay', it provided the recovery agency with 'powers that were so extensive it could even seize assets from people who had

[1] Cribb, N., "Tracing and Confiscating the Proceeds of Crime" (2004) 11(2) *Journal of Financial Crime* 168 at p.172; Sharman, J., "Power and Discourse in Policy Diffusion: Anti-Money Laundering in Developing States" (2008) 52 *International Studies Quarterly* 635 at p.635.

[2] Footnote 1.

[3] Parts 2-4, Proceeds of Crime Act 2002.

[4] Part 5, Proceeds of Crime Act 2002.

not been convicted of any crime'.[5] AML was grounded in the presumption that criminals could be dissuaded from engaging in socially undesirable activity simply by making it unprofitable to pursue. The mantra of the incoming Blair government, set out in the Labour Party Manifesto 1997, promised to be 'tough on crime and tough on the causes of crime', and this mantra became embedded in the philosophy of relevant government departments. The Home Office[6] commented that 'seizing criminals' assets . . . is a key tool of law enforcement. It reduces crime, . .. and ensures (and shows) that crime does not pay'. Similarly, Gottschalk,[7] writing for the Home Office asserted that 'The confiscation of criminal assets by the Courts forms a key part of efforts to tackle the criminal economy and crime more generally'. Indeed, as noted by HM Treasury, the purpose of the AML regulation was to 'change the economics of crime by increasing both the costs and the risks of laundering.'[8] This appealingly simple approach relies, however, on the presumption that those bent on law-breaking are reactive to external forces in a predictable and predetermined way. Further, it is assumed that laundering could be separated as an activity, discrete from any predicate offence, thus 'They consider criminals rational cost-benefit calculators and presume that money laundering is a profession unto itself'.[9] Such presumptions of rationality[10] sit within the normative framework of law-making, whereby rules are established that are reflective of the dominant discourse and transgressions dealt with such that the environment is orderly, independent and, importantly, predictable. However, this response ignores the complexity and frequent irrationality of the perpetrator.

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[5] BBC, *'Crime assets agency "ill-planned"'* < http://news.bbe.co.uk/go/pr/-/1/hi/uk_politics/7040680.stm, 11 October 2007> (accessed 15/6/2011).

[6] Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority: Cutting Crime, Reducing Re-offending and Protecting the Public* (Stationery Office, London, 2008) at p. 36

[7] Gottschalk, E., *Public attitudes to asset recovery and awareness of the Community Cashback Scheme - results from an opinion poll* (Research and Analysis Unit, Home Office, September 2010) at p. 1, http://www.homeoffice.gov.uk/publications/about-us/public-opinion-polls/community-cashback-poll?view=Binary (accessed 22/6/2011)

[8] HM Treasury *Money Laundering Regulations 2001*, Final Regulatory Impact Assessment, London, 2001, at paragraph 48

[9] Blickman, T., *Countering Illicit and Unregulated Money Flows: Money Laundering, Tax Evasion and Financial Regulation,* (2009) Crime & Globalisation Debate Papers TNI Briefing Series December, <http://www.tni.org/sites/www.tni.org/files/download/crime3_0.pdf> at p. 10.

[10] Gerner-Beuerle, C., "In Search of Rationality in Company Law" (2010) 73(6) *The Modern Law Review* 1048 provides an interesting discussion of the differing disciplinary definitions of the term at p. 1052

> 'Thus the criminal came to be viewed not as a complex product of psycho-socio-economic conditions but as a simple cost-benefit calculator. It followed that crime could be addressed by merely tilting the likely outcome of such a calculation to reduce the potential profitability of the criminal's actions, and to incapacitate (by stripping away economic assets as well as by imprisonment) those who failed to heed the initial warning'.[11]

Although it is theoretically valid to consider the sociological context of anti-money laundering legislation, legislators appeared content to make assumptions about the behaviours and responses of those whose action such legislation seeks *a priori* to modify. Thus, consistent with the ideas of sociologist Emile Durkheim, 'a violation incites the non-violators (society as a whole) to cling together in opposition to the violation, reaffirming that society's bond and its adherence to certain norms'.[12]

Despite such argument, there are some[13] who continue to view civil asset recovery as having a beneficial role as a deterrent to money laundering simply because 'profit motivates most criminals'.[14] Cribb goes on to justify asset recovery on the grounds that: reinvestment of such assets perpetuates a cycle of crime; imprisonment is insufficient as criminals either continue to operate their enterprises from prison or re-establish them on release; and lack of fairness to the majority of law abiding individuals. Such arguments are fairly well rehearsed, and a substantially similar set appear in Gottschalk, although the latter, reporting on a survey of public opinion, does note that awareness of asset recovery was generally low.[15] There can be little doubt, therefore, as to the intention of the legislation whereby:

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[11] Naylor, R.T., "Towards a general theory of profit-driven crimes" (2003) 43 *British Journal of Criminology* 81 as cited in Bosworth-Davies, R., "Money Laundering – Chapter Four" (2007) (1) *Journal of Money Laundering Control*, 66, at p. 88.

[12] Refer to < http://durkheim.itgo.com/crime.html > (accessed 23/6/2011).

[13] Cribb, N., op. cit footnote 1; Simser, J., "Money laundering and asset cloaking techniques" (2008) 11(1) *Journal of Money Laundering Control*, 15.

[14] Cribb, N., footnote 1 at p. 169.

[15] Gottschalk, footnote 7 at p. 1.

> 'Acquisition, use, possession, disguise, concealment, conversion, transfer or removal from one country to another of the benefit of any criminal conduct can be money laundering. Even an attempt to do any of these things, or becoming involved in an arrangement which facilitates them can constitute a money laundering offence'[16]

and

> 'Put simply, POCA makes it possible to seize cash from a suspected criminal and places the onus on that individual to prove that the money has been acquired legitimately. Confiscation orders, reflecting the value of criminal proceeds, can be made against those who commit any of a wide range of offences or can be shown to engage in a 'criminal lifestyle'. The Act also creates an all-encompassing web to catch anyone who moves, hides, converts or otherwise has possession of cash or property that represent the proceeds of crime.[17]

Under POCA, a criminal can be subject to a cash seizure, a restraint and may also witness the removal, via a court recovery order, of the proceeds of his crime. If these prove unsuccessful, he can also find himself relieved of any physical assets through civil recovery. It is salutary to observe, as stated by Chamberlain,[18] that 'the criminal route should not be used if the primary aim is to secure return of the assets', arguing that criminal prosecutions, requiring proof beyond reasonable doubt, should be designed to secure conviction rather than recover assets. Civil proceedings, on the other hand, put the evidential onus on the defendant, as they should easily be able to prove how they acquired the asset in question. This switch in burden of proof (allied with a lower standard of proof) means they 'cannot, as in criminal proceedings, sit back in silence and rely on reasonable doubt'.[19]

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[16] Crown Prosecution Service *"Money Laundering Offences – Part 7 Proceeds of Crime Act 2002 updated 06/02/2008"* Proceeds of Crime Act Money Laundering Offences: Legal Guidance at p. 6. <http://cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/> (accessed 14/5/2011).

[17]Her Majesty's Inspectorate of Court Administration (HMICA), *"Payback Time, Joint Review of Asset Recovery since the Proceeds of Crime Act 2002",* 2004 < http://www.hmica.gov.uk/files/Full.pdf> at p. 8.

[18] Chamberlain, K., "Recovering the Proceeds of Corruption" (2002) 6(2) *Journal of Money Laundering Control* 157 at p. 157.

[19] Lusty, D., "Civil Forfeiture of Proceeds of Crime in Australia" (2002) 5(4) *Journal of Money Laundering Control* 345 at p. 345.

Agency bias, legitimacy and fact restructuring

Within an economic paradigm (and social welfare economics in particular), legislation is justified on the grounds that it addresses negative externalities[20] in such a way as to increase overall social welfare, assuming that government intervention is taken as being cost-neutral. However, as argued by Hantke-Domas,[21] such an assumption frequently does not hold in practice as the legislative framework cannot be extended in the absence of incurring positive transaction costs. These will arise through the necessary creation of new agencies of government tasked with responsibility for enforcement of such legislation. It is perfectly rational that, once created, such agencies will ensure that they not only justify their existence but that demand for their service is also continued. Hence, Chong and López-de-Silanes, quoting Rahn, draw attention to the ludicrous situation of 'the police creating increased demand for their services by inventing new crimes'.[22]

Indeed, 'the definitions of the "headline" laundering offences are now so wide that almost any financial transaction is capable of being laundering, if some of the money or other property in fact has its provenance in crime'.[23] By simply broadening the definition,[24] the problem becomes bigger, attracting greater public attention. Combine with this trend the ascription of the overwhelming importance of function whereby POCA was feted as combining within a single piece of legislation 'the law governing investigations, money laundering offences and confiscation' [25] and, ingeniously, the result is that a rationale is

[20] Within classical economics markets are presumed to be efficient, intervention through legislation takes place to correct market inefficiencies such as information asymmetry.

[21] Hantke-Domas, M., "The Public Interest Theory of Regulation: non-existence or misinterpretation" (2003) 15 *European Journal of Law and Economics* 165.

[22] Chong, A. and López-de-Silanes, F., *Money Laundering and its Regulation* (Inter-American Development Bank, Washington, D.C., 2007), at p. 5 citing Rahn, R., "*The case against Federalising Airport Security"* (Cato Institute, Washington DC, 2001), < www.cato.org/pub_display.php?pub_id=3865 (accessed 12/3/2009).

[23] Alldridge, P., "Money Laundering and Globalization" (2008) 35(4) *Journal of Law and Society* 437 at p. 442.

[24] Van Duyne, P., "Money Laundering Policy: Fears and Facts", in van Duyne, P., Von Lampe, K., and Newell, J., (eds) *Criminal Finances and Organising Crime in Europe* (Wolf Legal Publishers, Nijmegen, 2003).

[25] Cribb, N., footnote 1 p. 179.

supplied for yet further resources, such that the entire system become self-reinforcing.[26] Thus, objectivity becomes supplanted by perception 'since decisions are determined by what a decision maker perceives rather than what might objectively be the case'.[27]

In part, such behaviour may be rationalised as legitimacy-seeking activity by the agencies involved.[28] Legitimacy is a construct applied within business and accounting literature. Legitimacy means a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions'.[29] This interpretation is reinforced elsewhere; for example, Stanley[30] in a discussion of financial market regulation refers to its role in terms of 'applied legitimation'. Consistent with Boyne,[31] the organisational structures that come into being gain their legitimacy through the wider support of the law-abiding majority.

Spencer and Broad[32] invoke an interesting dimension to the criminal policy-making framework by reference to the work of Van Duyne and Vander Beken.[33]

> 'They argue that the fear of organised crime or the articulation of the threat of organised crime interacts with what can be described as "knowledge based policy making", much of which seems to be the restructuring of the "facts" to fit with the articulated fear.'

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[26] Alldridge, P., footnote 23.

[27] Hoffmann, V., Trautmann, T. and Hamprecht, J., "Regulatory Uncertainty: A Reason to Postpone Investments? Not Necessarily" (2009) 46(7) *Journal of Management Studies* 1227 at p. 1229.

[28] Oliveria, J., Rodrigues, L., and Craig, R., "Voluntary risk reporting to enhance institutional and organisational legitimacy" (2011) 19(3) *Journal of Financial Regulation and Compliance* 271.

[29] Suchman, M., "Managing Legitimacy: Strategic and Institutional Approaches" (1995) 20(3) *Academy of Management Journal* 571, at p. 574.

[30] Stanley, C., "Mavericks at the Casino: Legal and ethical indeterminacy in the financial markets" (1994) 2(2) *The Journal of Asset Protection and Financial Crime* 137, at p. 137.

[31] Boyne, R., *Subject, Society and Culture,* (Sage, London , 2001).

[32] Spencer, J., and Broad, R., "*Lifting the veil on SOCA and the UKHTC: Policymaking responses to organised crime"* in van Duyne, P., Antonopoulos, A., Harvey, J., Maljevic, A., Vander Beken, T., von Lampe, K., (Eds) *Cross-Border Crime Inroads On Integrity In Europe,* (Wolf Legal, Tilburg, 2010), at p.263.

[33] Van Duyne, P., and Vander Beken, T., "The incantations of EU Crime Policy Making" (2009) 51 *Crime, Law and Social Change* 261.

A similar approach can be extrapolated to the field of asset recovery where one can observe a desire to achieve something tangible that can be used as *ex post* justification of such 'threat'; and what better way to demonstrate the 'threat' of organised crime and money laundering than by pointing to the vast perceived wealth that is accumulated and thus available for recovery. Of relevance here is the work of Dubourg and Prichard[34] in which they estimate 'the value of additional criminal assets theoretically available for seizure is about £2bn per year in the UK, with more than £3bn of revenue sent overseas annually'. The authors do note, however, that their calculations are rather more reliant on judgement than on 'hard evidence', arguing that it was better to provide estimates rather than force policy-makers to operate in a vacuum. However, it is equally valid to point out that a 'vacuum' might provide a preferable basis for policy-making than inaccurate guesswork contrarily presented as fact. Sadly too often, the original *caveats* of the authors are disassociated from subsequent repetition of the apparent 'facts'. Is it coincidental that the derived values are curiously similar to those reported by HM Treasury,[35] whereby unsophisticated extrapolation is used to arrive at a figure of £2-3 billion of laundered money, with the further identification of 'criminal "capital formation" – that is assets invested in a possible seizable form of about £5 billion, £3 billion of which is exported overseas'.[36] From a methodological perspective, it remains unclear how any of these numbers have been derived.

Scattered evidence

In the light of these estimates, it is no small wonder that the expectations for asset recovery performance were set at unrealistically high levels. Giddy at the thought of such assets ripe for recovery, targets were set for law enforcement agencies to recover £250m in

[34] Dubourg, R., and Prichard, S., (Eds) *Organised crime: revenues, economic and social costs, and criminal assets available for seizure* (Home Office, London, 2008) http://www.homeoffice.gov.uk/about-us/freedom-of-information/released-information1/foi-archive-crime/9886.pdf?view=Binary> (accessed 9/9/2010), at p. 57.

[35] H.M. Treasury, *"The financial challenge to crime and terrorism"* February, (2007) < www.hm-treasury.gov.uk> (accessed 9/9/2010), at p. 29.

[36] H.M. Treasury footnote 35 at p. 8.

2009-10 with, more significantly, a longer-term goal of up to £1 billion.[37] In reality, despite such a lofty aspiration, the practical application of the money laundering and asset recovery regime proved more modest in achievement, an outcome compounded by the unanticipated costs associated with civil recovery cases.

The result, as calculated by Sproat,[38] was that for the financial year 2005/2006 the estimated cost of recovering every £1 was £3.73, clearly, a far from attractive outcome. Harvey and Lau[39] were equally critical of outcomes. Using data from both the Assets Recovery Agency ('ARA') and the Home Office, they indicated that those criminals apprehended and subjected to POCA were far from financially sophisticated individuals. It remained unproven that they were intent on undermining the integrity of the financial system. They appeared to be more often small level operators, the recovery of whose assets (through multiple small level payments) placed considerable burden onto the legal system. As they reported, across the range of agencies with asset recovery powers, the median value of amounts remitted onto JARD (Joint Assets Recovery Database) over the period 2003 – 2006 fell in the range of between £300 and £500. They were, however, somewhat sympathetic to the challenges faced by the ARA in working with what appeared to the dregs of prior failed criminal cases.

> 'The Agency commented at the start that the referring law enforcement agencies referred old criminal cases which had either been "thrown out" by the criminal courts or for which there was insufficient evidence to bring a criminal prosecution. They are handed over to the ARA to pursue a new civil case but are often so old that effectively the ARA had to re-start the investigation'.[40]

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[37] Home Office *Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority: Cutting Crime, Reducing Re-offending and Protecting the Public"* (London: Home Office, 2008), at p. 36

[38] Sproat, P., "The new policing of assets and the new assets of policing: A tentative financial cost-benefit analysis of the UK's anti-money laundering and asset recovery regime" (2007) 10(3) *Journal of Money Laundering Control* 277.

[39] Harvey, J., and Lau, S., "Crime-money Records, Recovery and their Meaning" in van Duyne, P., Harvey, J., Maljevic, A., von Lampe, K., Miroslav, S (eds), *"European crime-markets at cross-roads: Extended and extending criminal Europe"* (Wolf Legal, Tilburg, 2008).

[40] Harvey, J., and Lau, S., footnote 39 at pp. 298-299.

With the government stung into action and wishing to be seen to respond to subsequent criticism of the work of the Agency,[41] it was inevitable that there would be changes given that the 'ARA had cost £65m over four years but seized assets worth £23m'.[42] The result was that, in April, 2008, its civil recovery activity was absorbed into the Serious Organised Crime Agency ('SOCA'). SOCA (created in April, 2006) had been given the heady mandate to recover the proceeds of crime alongside tackling drug, immigration and other organised crime.

The 2008/9 SOCA Annual Report refers to the opinion expressed by the SARs Committee[43] that 'SOCA continued to perform well and that the model and approach taken was now recognised internationally as an example of global best practice'.[44] Despite this positive spin and given that SOCA was the product of a merger between multiple agencies, there was little indication that time had been taken to address pre-identified operational problems within its constituent organisations. An interview carried out by the author in 2008 with an officer from SOCA indicated that NCIS (the previous UK Financial Intelligence Unit) was a poorly run organisation with a large number of staff seconded from law enforcement agencies as well as from Customs. Further, the interviewee indicated that the latter organisation had been subject to criticism over crime investigation, thus it was 'three poor organisations creating one big one'.[45] Potential inefficiencies arising from political solutions are perhaps illustrated through looking at the operational cost structure of the

[41] Fleming, M., "UK law enforcement agency use and management of suspicious activity reports: Towards determining the value of the regime", (2005), University College London, 30th June; Lander, S., *Review of the suspicious activity reports regime (the SARs Review)* (SOCA, 2006); Kennedy, A., "An Evaluation of the recovery of criminal proceeds in the United Kingdom" (2007) 10(1) *Journal of Money Laundering Control* 33

[42] BBC "*Crime assets agency 'ill-planned'*", < http://news.bbe.co.uk/go/pr/-/1/hi/uk_politics/7040680.stm,11th October, 2007>, (accessed 9/9/10).

[43] SARs Regime Committee produces an annual review of the operation and performance of the SARs Regime Membership of this Committee consists of: SOCA; Association of Chief Police Officers; British Bankers' Association; Financial Services Authority; Her Majesty's (HM) Revenue & Customs; HM Treasury; Home Office; Institute of Chartered Accountants in England and Wales; Law Society of England and Wales; Metropolitan Police Service; and National Terrorist Financial Investigation Unit.

[44] Serious Organised Crime Agency *Annual Report 2008/9*, http://www.soca.gov.uk/about-soca/library, (accessed 9/9/10), at p. 31.

[45] Harvey and Lau, footnote 39 at p. 193.

regime which indicated a 48 per cent jump in funding from £282.8m to £419.4m between 2005/6 and 2006/7 following the creation of the merged entity.[46]

Compounding the problem of the higher running costs, Rider[47] indicated that the poor performance of the old ARA continued into the new SOCA: 'it was revealed that SOCA has seized only £1 from organised crime for every £15 in its budget. Indeed on this basis the abolished Asset Recovery Agency (ARA) looks like a good investment!' He does, however, defend the ARA, arguing that asset recovery provides only one part of the story (presumably having in mind the value of 'disruption') and that the extreme caution within the Agency in opening itself to inspection (as illustrated later in this chapter) could be seen as a compromise to its integrity.

Public data from SOCA shown in Table 9.1 provides details of funds recovered since its inception. Assuming the figures relate to funds remitted into government accounts, the data provided indicate the total amounts recovered via criminal and civil proceedings from 2006/7 to 2008/9. It is important to note that restraints can be placed for any hypothetical value of assets 'frozen' in advance of investigation, so the important information refers to the eventual confiscation orders imposed by the courts. As explained by SOCA, restraint orders precede confiscation orders and are put in place to prevent disposal of assets prior to trial and these figures are, therefore, all estimates. Within POCA there is a 'benefit test' used to determine 'benefit' received from a criminal lifestyle. However, it is the courts that decide the amount available to be subject to such order based on their assessment of presented evidence. It is recognised that not all orders granted may be recovered in reality. However, court judgements are now viewed as being 'sharper' as prosecutors have more experience of investigation such that data presented to the court is more accurate, hence it is suggested that the proportion of recovery is now much higher than at the inception of POCA.[48]

[46] Calculated from the statement of accounts for the component agencies for 2005/6 and from the SOCA Annual Report for 2006/7.

[47] Rider, B., "Cost Effectiveness - a two edged sword!" (2009) 12(4) *Journal of Money Laundering Control*, Editorial at p. i.

[48] Information provided to the author by SOCA.

Table 9.1 Asset recovery[49]

£ millions	2006/7	2007/8	2008/9
Cash seizure	3.3	8.0	9.2
Restraint orders	27.2	46.8	128.8
Confiscation orders	14.5	11.6	29.7
Civil recovery	n/a	n/a	16.7

As with the comparison of costs pre- and post agency creation, it is interesting to compare this information to the data previously obtained from the Home Office that provided totals for asset recovery receipts remitted into the consolidated fund from all authorities with asset recovery powers.[50] This indicates that for the fiscal year prior to the inception of SOCA, cash seizures totalled £20.2m with confiscation orders of £25.5m. While allowing for the existence of data anomalies and differences in recording it is interesting to consider this in light of the cost data in Table 9.1, apparently providing support for the comments of Rider.

A peek through the door

Heeding Rider's call for accessibility, several attempts were made by the author to gain access through the doors of SOCA. The most recent of these commenced during 2008 when an initial e-mail request to SOCA was simply ignored. Granted this may have been due to the complexity of the data that had been requested (designed to mirror information that, in 2004, had previously been made available to the author from ARA).

A subsequent request in February 2009, through a named contact met with greater success and was forwarded within the organisation to a person 'who remembered the original request'. However, the eventual response received was that: 'We cannot provide this information. If you require further information on asset recovery performance (in general)

[49] SOCA, footnote 40 at p. 32.

[50] This includes: the Asset Recovery Agency including all Regional Asset Recovery Teams; HMRC enforcement and compliance; the National Crime Squad (formed in 1998 and merged into SOCA in 2006); the National Criminal Intelligence Service (NCIS) (formed in 1992 and merged into SOCA in 2006); and SOCA.

you will need to submit a FOI request to the Home Office'.[51] A second attempt through a different source was made in October of that year which enabled contact with a different operational part of the organisation. This person had apparently been copied into the original request and responded to the author that the direction to pursue the FIO route (to which there had been no response) had been incorrect. This response prompted a subsequent exchange of e-mails over a two-month period from December 2009 through to February 2010. While there was an evident willingness to assist, the major problem that the request had posed for the organisation derived from their perceived responsibilities under data protection laws. The respondent reported that previously sought legal interpretation led the Agency to conclude that the data requested by the author could not be released without the individual permission of all relevant organisations with joint responsibility for the content of the Joint Asset Recovery Database (JARD). Given the numbers involved, the adoption of this interpretation essentially removes the possibility of any download of data from this crucial database to a third party.

Eventually, after requiring greater specificity around both the data required and its proposed application, SOCA agreed that more generic aggregate data could be made available. This was sent to the author in the form of a number of data tables supported by an underlying explanation, however there was, perhaps not unreasonably, concern expressed to ensure that the information was fully explained and thus correctly interpreted. Thus, the sender also requested that the author contacted them for further discussion upon receipt.

The data provided was in fact generic data produced for the Asset Recovery Working Group (ARWG). As pointed out by the SOCA correspondent,

> 'This group is a collection of "senior practitioners" and policy people from SOCA, HMRC, NPIA, ACPO, Home Office, DWP and others. Its purpose is "To deliver HMG's asset recovery vision by mainstreaming asset recovery activities" - in essence it is the main forum for organisations involved in asset recovery work to share problems and best practice'.[52]

[51] E-mail correspondence with author dated 31 March 2009.

[52] E-mail to author dated February 1, 2010.

The data provided had been extracted from their internal Management Information System end of year report for 2008/09, and the receipts data in relation to England, Wales and Northern Ireland had been checked (and presumably reconciled) with Home Office data as at February 2010. It remains a source of confusion that the information supplied by SOCA with respect to asset recovery receipts could not be reconciled with that reported in Table 9.1 taken from published SOCA sources.

There was interest to see if this information could be reconciled with, and thus be used to update, an earlier asset recovery study undertaken by the author.[53] This study had looked at databases held by both the Home Office (in respect of cash seizure, forfeiture and asset recovery arising from the criminal recovery processes) and by the UK ARA for civil recovery only. Unfortunately, the information available from SOCA lacked the rich detail of the ARA data, so for the time being such information remains beyond the scrutiny of academics. It should, however, have been possible to revisit and update the information from the Home Office with that supplied through SOCA as both are drawing from the same JARD database. The original study covered a three-year period from 2003/4 to 2005/6. It was therefore considered valuable to extract from this, data that would be comparable with the content of the tables provided by SOCA, one of which is presented in Table 9.2 below.

As explained by the respondent, Table 9.2 shows both cash seizures made together with their actual cash forfeiture orders granted. There is known to be attrition between actual seizures and orders granted reflecting two dimensions: (i) that the value of cash seized might well be estimated when entered onto the database rather than actually counted; and (ii) some of the cash may *ex post* have to be returned to the owner. It was stated that users of these figures are aware of the potential inaccuracy of the value of cash seizures and thus do not generalise from them.

[53] Harvey, J., and Lau, S., 2008 footnote 39. It should be noted that the majority of the information reported here was not published as part of the original paper.

Table 9.2 POCA cash seizure and forfeiture breakdown 2004 – 2009 (SOCA data)

	2004/05	2005/06	2006/07	2007/08	2008/09
Cash Seizure (Volume)	1,318	1,295	2,274	5,103	6,108
Cash Seizure (Value £m)	39.4	62.8	52.5	68.4	106.7
Cash Forfeiture orders granted (Volume)	590	790	1,152	2,598	3,223
Cash Forfeiture orders granted[54] (Value £m)	21.7	30.7	31.2	33.8	39.4
Cash Receipts (Value £m)	19.8	30.4	31.8	31.5	39.8

The comparable information extracted from the earlier Home Office data is produced in Table 9.3 below. Focusing, for example, on the cash forfeiture orders granted, frustratingly, there is no consistency between these two sets of data.

Table 9.3 Cash seizure and forfeiture orders granted and entered on JARD 2003 – 2006 (Home Office data)

	2003/4	2004/5	2005/6
Cash Seizure (Volume)	242	666	546
Cash Seizure (Value £m)	12.9	28.1	75.3
Cash Forfeiture orders granted (Volume)	302	407	884
Cash Forfeiture orders (Value £m)	19.0	17.7	33.2

Table 9.4 illustrates the magnitude of the errors between the two data sets. It is assumed that the information provided by SOCA is likely to be the more accurate since they are custodians of the data base. It was hypothesised that prior years may also include orders made under a wider range of legislation, although this does not appear to aid interpretation. Alternatively, figures for prior years might have been updated and hence subsequently revised or there might have been error in download and transcription in the original data.

[54] As provided by SOCA, the time-lag between order and remittance and the occasional variation resulting from the appeals process means that there is a discrepancy between the value of orders obtained in a year and the value of receipts (indicated as cash receipts on the next line) 'banked' in the same time-frame.

Table 9.4 Cash seizure data discrepancy between SOCA and Home Office[55]

Difference between the two sources	2004/5	2005/6
Cash Seizure (Volume)	652	749
Cash Seizure (Value £m)	11.3	(12.5)
Cash Forfeiture orders granted (Volume)	183	(94)
Cash Forfeiture orders (Value £m)	4.0	(2.5)

As noted, in addition to cash seizure and forfeiture, SOCA is also able to make use of confiscation orders. An interpretation of the information supplied by SOCA and contained in Table 9.5 was supplied to the author. Confiscation orders granted by the courts will remain open until they have been fully paid and can be then closed. Thus, they can remain open for some time either because the court has agreed payment by instalments or because sums do not exist to be recovered. The latter was said to have occurred as a result of: the criminal having transferred ownership; or holding assets with third party interest; or having assets held offshore. Presumably, however, it might also arise as a result of the order applied for from the courts having been over-estimated in the first place. Therefore, there is expected to be a discrepancy between orders obtained and receipts recovered because in addition the flows recorded may well arise from different cases.

This information was also obtained as part of the earlier data provided by the Home Office work and this is presented in Table 9.5, for comparison with the data provided directly by SOCA shown in Table 9.6. Once again and as illustrated in Table 9.7, for the two years of overlapping data, there is inconsistency between the two data sets that frustrates the efforts made to interpret the accuracy and reliability of the information.

Table 9.5 Volume and value of confiscation orders granted and entered onto JARD, 2003 – 2006 (Home Office data)

	2003/4	2004/5	2005/6
Confiscation orders obtained (Volume)	1,554	2,596	3,935
Confiscation orders obtained (Value £m)	105.1	130.3	143.0
Confiscation receipts entered onto JARD (Value £m)	22.4	66.8	61.4

[55] Values expressed as SOCA data less Home Office for Table 9.4 and Table 9.7

Table 9.6 POCA confiscation orders obtained 2004-2009 (SOCA data)

	2004/05	2005/06	2006/07	2007/08	2008/09
Confiscation orders obtained (volume)	2,425	3,703	4,062	5,065	5,790
Value of confiscation orders obtained[56] (value £m net of compensation payments to victim)	129.3	126.9	152.1	202.9	216.0
Confiscation receipts (value £m)[57]	54.0	61.3	77.8	96.3	89.1

Table 9.7 Confiscation data discrepancy between SOCA and Home Office

Difference between the two sources	2004/5	2005/6
Confiscation orders obtained (volume)	(171)	(232)
Confiscation orders obtained (value £m)	(1.0)	(16.1)
Confiscation receipts (value £m)	(12.8)	(0.1)

Irrespective of attempts to reconcile data sets, focusing on the information provided by SOCA indicates that there has been a significant increase in the volumes of cash seizures and in the volume of confiscation orders in recent years (Tables 9.2 and 9.6). It is interesting, however, to consider the average value of seizure (as shown in Table 9.8). Despite the apparent increase in activity, the average size of each seizure is tending to decrease, and consistent with earlier findings, this trend might suggest that those being apprehended under the legislation are the less sophisticated operators.

[56] This is the value of the order at the point it is granted by the court.

[57] The confiscation receipts are not directly comparable with the confiscation orders for reasons explained above.

Table 9.8 Average asset recovery for cash seizures and confiscation orders[58]

	2004/05	2005/06	2006/07	2007/08	2008/09
Cash Seizure (volume)	1,318	1,295	2,274	5,103	6,108
Cash Seizure (value £m)	39.4	62.8	52.5	68.4	106.7
Mean value (£)	29,894	48,494	23,087	13,404	17,469
Cash forfeiture orders (volume)	590	790	1,152	2,598	3,223
Cash forfeiture orders (value £m)	21.7	30.7	31.2	33.8	39.4
Mean value (£)	36,780	38,861	27,083	13,010	12,225
Confiscation orders (volume)	2,425	3,703	4,062	5,065	5,790
Confiscation orders (value £m)	129.3	126.9	152.1	202.9	216.0
Mean value (£)	53,320	34,270	37,445	40,059	37,306

A further area of interest is the source of generation of the assets recovered, that is, the predicate offence. It was possible to interrogate the recovery data by offence type and severity, something that had been missing from the original analysis of Harvey and Lau.[59] This provides an indication of cash forfeiture and confiscation orders volume and value for the year 2008/9. The data from SOCA is presented according to the NIM (The National Intelligence Model) classification.[60] As explained by the respondent, the NIM classification is used across law enforcement and thus more widely than just the JARD database as it is a recognised way of grouping work at different levels of significance. Mostly, the NIM classification used in asset recovery will have been determined by the existing operational investigation underway in relation to the predicate offence. To a certain extent the classification could be 'subjective' to the officer entering the data, but decisions will be made

[58] SOCA data supplied to author.

[59] Harvey, J., and Lau, S., 2008 footnote 39.

[60] As published by NCIS in 2000, it makes the following distinctions. Level 1: Local issues – usually the crimes, criminals, and other problems affecting a basic command unit or small force area. The scope of the crimes will be wide ranging from low value thefts to great seriousness such as murder. Level 2: Cross border issues – usually the actions of a criminal or other specific problems affecting more than one basic command unit. Problems may affect a group of basic command units, neighbouring forces or a group of forces. Issues will be capable of resolution by Forces, perhaps with support from national agencies. Level 3: Serious and organised crime – usually operating on a national and international scale, requiring identification by proactive means and response primarily through targeting operations by dedicated units and a preventative response on a national basis.

in the light of this NIM classification. Of course there could still be definitional inconsistency over classification of the predicate crime which is determined by the reporting agency, especially since there are some 4,000 users of JARD over a range of organisations. For example, it is unclear as to the precise difference (if any) between 'drug trafficking' and 'money laundering drugs'.

From the data presented in Tables 9.9 to 9.11, the greatest number of orders emanate from drug trafficking with the major source of orders (54%) being at the lower classification NIM level 1, that is local level issues. This finding again indicates something of an absence of sophistication and is consistent with the data included in Table 9.8. Although it must be acknowledged that there remain a significant number of cases that are unallocated and simply left as 'others', it would be reasonable to expect that the average size of each recovery would increase through the various NIM levels, with larger recoveries being made at NIM level 3 ('Serious and organised crime – usually operating on a national and international scale') than at NIM 1 and for the most part, this outcome is found to be the case. It is evident that a significant proportion of assets are recovered from drug related crime. Recovery from fraud is on a low scale and could well arise from welfare benefit rather than sophisticated financial fraud. There appears little recovered from other areas of criminal activity.

Table 9.9 POCA Volume of cash forfeiture by NIM level and offence type financial year 2008/9[61]

	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	707	315	243	109	63	95	6	39	161	**1,738**
NIM Level 2	172	69	78	25	13	40	4	14	33	**448**
NIM Level 3	37	47	103	7	4	4	2	18	11	**233**
Others	203	73	223	67	30	35	2	14	157	**804**
Total	**1,119**	**504**	**647**	**208**	**110**	**174**	**14**	**85**	**362**	**3,223**

Table 9.10 POCA Value of cash forfeiture (£m) by NIM level and offence type financial year 2008/09

£ millions	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	3.4	1.3	1.8	0.5	0.3	0.5	0.0	0.2	1.0	**9.15**
NIM Level 2	2.3	1.3	3.0	0.1	0.0	0.1	0.0	0.1	0.4	**7.25**
NIM Level 3	1.9	2.8	3.0	0.1	0.0	0.0	0.0	0.1	0.1	**8.04**
Others	2.1	1.1	7.5	0.8	0.6	0.1	0.1	0.1	2.6	**14.96**
Total	**9.67**	**6.50**	**15.26**	**1.50**	**0.97**	**0.76**	**0.13**	**0.51**	**4.11**	**39.40**

[61] Data for this and all subsequent tables supplied to the author by SOCA (Tables 7.9 to 7.14).

Table 9.11 Average size (£) of forfeiture by NIM level

£	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	4,809	4,127	7,407	4,587	4,767	5,263	..	5,128	6,211	4,809
NIM Level 2	13,372	18,841	38,461	4,000	..	2,500	..	7,143	12,121	13,372
NIM Level 3	51,551	59,574	29,126	14,286	..	..	..	5,555	9,091	51,551
Others	13,345	15,068	33,632	11,940	20,000	2,857	50,000	7,143	16,561	13,345
Total	4,809	4,127	7,407	4,587	4,767	5,263	..	5,128	6,211	4,809

In addition to more detailed information in relation to cash forfeiture, SOCA also supplied data on confiscation orders granted, although these do not necessarily imply funds have been recovered. Details of the volume of these orders are presented in Table 9.12, with corresponding values shown in Table 9.13, and average recoveries in Table 9.14. There is greater evidence of a progression in average value here than in the case of cash seizures. However, it is to be borne in mind that the amounts relate to court orders, and there is no concrete evidence that these sums either existed or were indeed collected. It is interesting to observe the activity around tax evasion/fraud, although as the majority of cases appear to be at NIM level 1, it could be that the emphasis is on tax recovery rather than fraud.

Table 9.12 Volume of confiscation orders obtained by NIM level and offence type financial year 2008/09

£	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	1979	71	74	494	115	403	2	25	34	3,197
NIM Level 2	485	57	102	172	51	112	4	39	27	1,049
NIM Level 3	420	26	27	150	14	24	1	20	50	732
Others	357	17	53	196	38	97	1	11	42	812
Total	3,241	171	256	1,012	218	636	8	95	153	5,790

Table 9.13 Value of confiscation orders obtained (inclusive of compensation) by NIM level and offence type financial year 2008/09

£	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	11.8	1.3	3.2	15.5	2.2	4.6	0.1	0.9	1.4	41.1
NIM Level 2	11.9	3.2	10.2	19.5	2.0	4.4	0.0	1.2	2.2	54.6
NIM Level 3	23.9	14.1	7.3	43.1	0.4	0.4	0.0	2.5	4.2	95.8
Others	6.3	1.3	3.0	38.5	1.0	1.3	0.0	0.4	1.3	53.1
Total	53.9	19.9	23.8	116.6	5.5	10.7	0.1	4.9	9.2	244.7

Table 9.14 Average size of confiscation order by NIM level (£) 2008/09

£	Drug Trafficking	ML Drugs	ML Other	Fraud/Tax Evasion	Counterfeit and Handling Stolen Goods	Burglary Robbery	Terrorism Arms	Prostitution and People Trafficking	Others	Total
NIM Level 1	5,963	18,310	43,243	3,036	19,130	11,414	50,000	36,000	41,176	5,963
NIM Level 2	24,563	56,140	100,000	113,372	39,216	39,286	..	30,769	81,481	24,563
NIM Level 3	56,905	542,308	270,370	287,333	28,571	16,667	..	125,000	84,000	56,905
Others	17,647	76,471	56,604	196,429	26,316	13,402	..	36,364	30,952	17,647
Total	5,963	18,310	43,243	3,036	19,130	11,414	50,000	36,000	41,176	5,963

Although appreciative of the fact that this data has been shared, it does not really enable interrogation by the author of the asset recovery database to the extent that had been hoped. One issue for academics working in this field is undoubtedly around the fact that JARD may have been originally constituted to serve a different purpose. Thus, much of the data is for operational issues that have a different objective to understanding asset recovery. It is also to be assumed that the size of the database must now be significant, making it difficult to extract meaningful information.

Discussion

The logical reasoning for asset recovery laws is that depriving criminals of the proceeds of crime will makes crime less attractive to commit whilst at the same time providing signals to deter other would-be criminal entrepreneurs. However, there is a growing body of evidence[62] that has suggested that although this tactic makes sense in theory it does not necessarily hold up in practice. The original analysis of ARA data by Harvey and Lau[63] concluded that the evidence on the sums recovered suggested criminal activity on a somewhat modest financial scale. Levi[64] supported this view of a complete lack of sophistication evident amongst techniques of laundering. Clearly, crime reduction involves a different focus than asset recovery, and we should endorse whole heartedly Levi's call for an evaluation within this context. No one enquires about the 'vast annual gap between estimated proceeds of crime (both stocks and flows) and asset forfeitures/taxes on crime'.[65] Does the evidence supplied by SOCA indicate that their activity in relation to asset recovery is indeed substantive? It would be valuable for SOCA to open wider the door on asset recovery to shed greater light not only on this area but also on their wider activities.

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[62] Alldridge, P., *Money Laundering Law: Forfeiture, confiscation, civil recovery, criminal laundering and taxation of the proceeds of crime,* (Hart Publishing, Oxford, 2003); Reuter, P. & Truman, E., 'Anti-money laundering overkill? It's time to ask how well the system is working' (2005) *The International Economy* 55; Harvey, J., 'Just how effective is money laundering legislation' (2008) 21(3) *Security Journal* 189.

[63] Harvey, J., and Lau, S., 2008 footnote 39.

[64] Levi, M. 'New frontiers of criminal liability: Money laundering and proceeds of crime' (2000) 3(3) *Journal of Money Laundering Control* 223.

[65] Levi, M., '*Pecunia non olet*? The control of money-laundering revisited' in Bovenkerk, F and Levi, M (eds) *The Organised Crime Community* (New York, Springer, 2007) 161, at p. 177.

Harvey[66] noted the view of police that prosecutions brought under POCA would have been, and could be, far higher – they are expensive to pursue and are merely capped by the resources put into the investigations. There is evidence to suggest, however, that anti-money laundering legislation is not quite as effective and easy to implement as may have been suggested by the government in some of its earlier policy papers. While there are clear gaps in the knowledge of the current academic literature by virtue of lack of access, it is suggested that the amounts available for recovery are less than accurate, skewing performance expectations placed upon those tasked with its recovery.

As a final point, it is worth revisiting the words of Fleming[67] who suggested 'a more effective and informing approach to the data held would be to enable interrogation of the data with specific policy informing questions'. How very true.

[66] Harvey, J., "Policing criminal money flows: the role of law enforcement – paragons or pariahs?" in van Duyne, P., Harvey, J., Maljevic, A., von Lampe, K., Miroslav, S.(eds) *Crime, money and criminal mobility in Europe* (Wolf Legal, Tilburg, 2009).

[67] Fleming, M., *"UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards determining the value of the regime*" (University College, London, 30th June, 2005) at p. 15.