



Submission to Law Commission consultation on Confiscation under Part 2 of the Proceeds of Crime Act (POCA) 2002

The Commission on Crime and Problem Gambling was launched by the Howard League for Penal Reform in June 2019. It is scheduled to run for three years and it seeks to answer three questions:

- What are the links between problem gambling and crime?
- What impact do these links have on communities and society?
- What should be done?

The Chair of the Commission, Lord Peter Goldsmith QC, leads a team of 16 Commissioners, comprising academics and professionals with expertise in the criminal justice system and public health as well as experts with knowledge of the gambling industry and lived experience of addiction.

The Law Commission consultation paper aims to consider how the existing statutory framework could be improved with the following objectives in mind:

- to improve the process by which confiscation orders are made;
- to ensure the fairness of the confiscation regime; and
- to optimise the enforcement of confiscation orders.

This submission makes a number of observations in respect of the first two of those objectives, with reference to the distinct nature of crime related to problem gambling, and to gambling disorder in particular, which the Law Commission should consider when making its final recommendations about the application of confiscation proceedings to such offences under POCA 2002. The submission also draws attention to some wider concerns which provide important context, and which highlight the potential unfairness of the confiscation regime as it is currently applied in cases involving problem gambling.

Evidence received by the Commission on Crime and Problem Gambling

The Commission recently took evidence from people with lived experience of gambling disorder and crime both as perpetrators and family members. In each case the perpetrators were engaging in long-term gambling behaviours and having exhausted legitimate funds began using funds stolen from employers despite having no previous criminal histories.

During their testimony they spoke about their experiences of the confiscation order process.

The Commission is conducting research in partnership with the Magistrates Association on magistrates' knowledge and understanding of problem gambling and crime. The findings will be published in the spring.

The distinct nature of problem gambling related offending

Severe problem gambling as a mental health disorder

Gambling disorders are classified as non-substance behavioural addictions in the Substance Related and Addictive Disorders category of latest version of the Diagnostic and Statistical Manual of Mental Disorders, known as DSM-V.¹ They have been included in the Manual since volume III. Prior to 2013, gambling disorder was known as 'pathological gambling' or 'compulsive gambling' and continues to be referred to as such by some people.

The fourth and fifth editions of the DSM include a "cautionary statement" on the forensic use of the DSM categorisation of pathological gambling/gambling disorder.¹ Nevertheless, the Commission would suggest there is scope for greater recognition to be given to gambling disorder in criminal justice proceedings. For example, where such an order exists culpability may be reduced. It is also likely that the deterrent purpose of sentence is even less likely to be effective in cases where such a disorder is present. As highlighted below, there is also often wider culpability for the offence from banks and the gambling industry which have failed to stop the use of stolen funds.

Such cases are small in number and therefore may not have come to the attention of the Law Commission in the course of their inquiry. We believe that there are distinct features of such offences which provide scope for further consideration by the Commission and where greater discretion should potentially apply in the application of Part 2 of POCA.

The nature of criminal conduct or lifestyle

The perpetrators of the types of gambling-related offences described above would typically meet the legislative criteria for behaviours constituting 'criminal conduct' as a result of their offending taking place over a period of at least six months with a total

¹ According to DSM-IV: "It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or P[a]edophilia does not imply that the condition meets legal or non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." In other words, the DSM diagnosis is not to be used to demonstrate that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability).

benefit of at least £5,000. The amounts stolen in gambling-disorder driven offences can escalate quickly and typically remain hidden for a significant time. Nevertheless, such offences differ significantly from most other acquisitive offences listed under Schedule 2 of the Act. Unlike drug trafficking, their gains rarely result in what could be regarded as a 'criminal lifestyle'. The antecedent to offending of this nature is an addiction problem as distinct from being conducted by a criminal who also gambles to launder money, for example. In the case of the former, there is typically no material benefit from the crime as the stolen funds are generally ploughed straight back into gambling or to paying off existing debts which themselves arose from gambling.

The Law Commission should consider facilitating discretion to qualify the level of benefit both where offences are related to a diagnosed gambling disorder and where other parties are considered to have had joint culpability (see below). Consideration should be given to engaging external advisers—independent of the prosecuting authority—to assess individual cases and determine whether POCA should be applied, similar to the role of Surveillance Commissioners.

Realisable assets

The Law Commission notes that the primary purpose of the confiscation regime is depriving defendants of the benefit they have gained from their relevant criminal conduct, within the limit of their means. The model of proceeds of crime confiscation typically assumes that there are realisable assets that can be retrieved to deprive them of the benefit gained.

While the general principle of recovering assets is sound, there are particular considerations in cases in which problem gambling or a gambling disorder is instrumental in the offence. In such cases, the gambler typically turns to crime to maintain their addiction once all other assets have been exhausted. The realisable assets of gamblers themselves are therefore frequently nil or limited as the stolen finances have all been consumed through gambling. There is also often significant transparency and a clear audit trail over what the gain was and where it went, unlike other crimes covered by Schedule 2 of the Act.

In addition, gambling-related offending of this nature is typically hidden from the family. The Commission on Crime and Problem Gambling has heard that often the only realisable assets are contained within the family unit and the family therefore suffer a greater penalty from the confiscation order than the perpetrator. Sufficient account is not given to the punitive impact of proceedings on secondary victims in such cases both when the order is made and for as long as the debt is owed to the state. In addition, for the perpetrator with a gambling addiction, there is a risk that the level of debt to repay would incite further offending, contrary to s.2A, in part 1 of POCA which places obligation on prosecution authorities and law enforcement agencies to exercise their powers in a way "best calculated to contribute to the reduction of crime".

The Commission on Crime and Problem Gambling also has concerns about consistency and proportionality in confiscation order proceedings for these types of offence. Evidence received by the Commission illustrates a lack of consistency by

the Crown Prosecution Service and judiciary when confiscation orders are being made. The Commission understands that these are not isolated cases. The Law Commission should specifically examine the current application of Part 2 of POCA to these cases before making its final proposals.

Co-responsibility of banks and gambling operators

The Commission on Crime and Problem Gambling would also highlight some concerns which provide important context to the question of fairness in cases involving problem gambling. In many recent cases of fraud perpetrated to fund a gambling addiction or problem, victims of the crime have received compensation from gambling companies following investigations by the Gambling Commission for social responsibility and money laundering failures. There have also been instances where banks have provided compensation. Banks and gambling companies are therefore deemed to have been implicated in the offending, for example, because they failed to scrutinise the source of funds. It does not appear to us that there is discretion within the current POCA or the Law Commission's proposals to take into account the wider culpability in the cases we are concerned about. There is a need for clarity about whether this compensation should be taken into consideration by prosecuting authorities during confiscation order proceedings and, if so how.

There are also related practical considerations which we believe should also be taken into account, in relation to the timing of the confiscation proceedings. The Law Commission's proposals favour implementing a standard six-month timetable for completing such proceedings. While we support the principle of timely justice, another of the proposals is greater collaboration between enforcement agencies. This is also to be welcomed in respect of gambling-related offences where the Gambling Commission has an enforcement role towards gambling operators which have failed to stop money laundering as described above. Nevertheless, Gambling Commission investigations can take significantly longer than six months, even where there is full disclosure and compliance with the process and/or there are clear audit trails both of the stolen funds and of gambling spends. This raises questions about the feasibility of achieving each of these proposals in such cases. We again suggest that there is scope here for discretion be applied to enable the Gambling Commission to conclude its investigations before the confiscation proceedings themselves conclude.

We thank the Law Commission for providing the opportunity to respond to its proposals and would be keen to discuss these matters further should that be considered beneficial.

16.12.2020

¹ American Psychiatric Association (2013) DSM-V