

On 5 November 2010, the Attorney General published guidelines to prosecuting bodies on their asset recovery powers (the use of civil recovery) under POCA 2002. It makes for essential reading for anyone working and advising in this area of work. It illustrates a change in policy: where criminal proceedings are not to be or cannot take place the State will now look to confiscate assets using the lower standard without conviction.

Click here for our section on civil recovery, the work we do and the unique level of experience that we have in these cases.

[Proceeds Of Crime Act 2002 Section 2A \(Contribution to the reduction of crime\) Joint guidance given by the Secretary of State and Her Majesty's Attorney General.](#)

This guidance is given by the Secretary of State to the Serious Organised Crime Agency (SOCA), and by the Attorney General to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland, in accordance with section 2A of the Proceeds of Crime Act 2002.

In the case of the Director of Public Prosecutions for Northern Ireland, the guidance is given by the Attorney General in her capacity as Attorney General for Northern Ireland. In this guidance, as in section 2A, SOCA and the Directors are referred to as "relevant authorities".

1. The reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. However, the non-conviction based asset recovery powers available under the Act can also make an important contribution to the reduction of crime where (i) it is not feasible to secure a conviction, (ii) a conviction is obtained but a confiscation order is not made, or (iii) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.
2. In any case where proceeds of crime have been identified but it is not feasible to secure a conviction, or a conviction has been secured but no confiscation order made, relevant authorities should consider using the non conviction-based powers available under the Act.
3. In any case where it appears that a conviction might be secured, relevant authorities will consider whether or not it is in the public interest to conduct a criminal investigation and (at a later stage, if sufficient evidence is obtained) a prosecution. In these circumstances relevant authorities may also consider whether or not the public interest might be better served by using the non conviction-based powers available under the Act, applying the principle that a criminal disposal will generally make the best contribution to the reduction of crime.

4. Any assessment of where the public interest lies should include consideration of all relevant factors. The Code for Crown Prosecutors (in Northern Ireland, the Code for Prosecutors) lists some of the factors that might be relevant in deciding whether or not a prosecution is in the public interest. The same factors might also be relevant in considering, at any stage, whether or not the non conviction-based powers should be used. A vital underlying consideration is the need to retain public confidence in the criminal justice system as a whole, and in the fair and proper use of the non conviction-based powers. In particular, care must be taken not to allow an individual or body corporate to avoid a criminal investigation and prosecution by consenting to the making of a civil recovery order, in circumstances where a criminal disposal would be justified under the overriding principle that the reduction of crime is generally best served by that route, and in accordance with the public interest factors in the relevant prosecutors' Code.
5. For illustrative purposes only, the following is a non-exhaustive list of circumstances in which use of the non-conviction based powers might be appropriate because it is not feasible to secure a conviction:
 - a. The only known criminality is overseas, and there is no extra-territorial jurisdiction to pursue a criminal case in the courts of England & Wales or Northern Ireland.
 - b. There is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction.
 - c. Proceeds of crime can be identified but cannot be linked to any individual suspect or offence.
 - d. A law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction.
 - e. A criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction.
 - f. A prosecution has been conducted but has not resulted in a conviction.
6. Again for illustrative purposes only, the following is a non-exhaustive list of circumstances in which a conviction is feasible, but use of the non conviction-based powers might better serve the overall public interest:
 - a. Using non-conviction based powers better meets an urgent need to take action to prevent or stop offending which is causing immediate harm to the

public, even though this might limit the availability of evidence for a future prosecution.

- b. It is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach must be taken in order to achieve a manageable and successful prosecution.
 - c. Civil recovery represents a better deployment of resources to target someone with significant property which cannot be explained by legitimate income.
 - d. The offender is being prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the offending, so the public interest does not require a prosecution in this country.
7. These are examples, and are not intended to include all of the circumstances in which the non conviction-based powers may be used. Every case is different, and must be decided by the relevant authority on its own facts. SOCA is able to seek advice from the relevant prosecuting authority before making a decision, where necessary.
8. In using the non conviction-based powers, relevant authorities must have regard to, and seek to minimise, any potential prejudice to a related or potential criminal investigation or criminal proceedings. So far as it is practicable to do so, the relevant authority should:
- a. Liaise with any relevant law enforcement and/or prosecuting authorities before exercising any of its operational functions (other than the seizure of cash), in order to enquire whether doing so would prejudice a criminal investigation or criminal proceedings, and give due weight to any advice so received;
 - b. Keep under review the extent to which taking, continuing or refraining from any course of action has a potential to prejudice a criminal investigation or criminal proceedings and avoid such prejudice where possible; and
 - c. Ensure where possible that information relevant to a criminal investigation or criminal proceedings is disclosed to the relevant law enforcement or prosecution authority at the earliest practical opportunity.
9. This guidance does not prohibit a criminal investigation by a law enforcement authority being carried out at the same time as a civil recovery and/or tax investigation. Nor does it prevent civil recovery and/or tax proceedings being instituted where a criminal investigation by a law enforcement authority is being carried out at the same time into unrelated criminality, subject to the duty on relevant

authorities to seek to minimise prejudice to criminal investigations and proceedings. Similarly this guidance does not prohibit criminal proceedings being instituted or carried on by a prosecuting authority at the same time as a civil recovery and/or tax investigation is carried out.

10. In no circumstances may criminal and civil/tax proceedings be carried on at the same time in relation to the same criminality. Where criminal proceedings have been stayed by a court, or cannot progress for example because the defendant has absconded, they are not being carried on for the purposes of this prohibition.
11. A relevant authority may agree to accept a reduced sum in satisfaction of a civil recovery claim if satisfied that:
 - a. The sum is reasonable, having regard to all relevant circumstances including the chances of recovering the full amount claimed and the time and public funds likely to be expended in attempting to do so; and
 - b. Accepting the reduced sum would not damage public confidence.