

# **Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau**

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# Civil Forfeiture in Ireland: Two Decades of the Proceeds of Crime Act and the Criminal Assets Bureau

Colin King\*

## Introduction

Two decades have passed since Ireland adopted civil forfeiture to tackle serious/organised crime: a move that represented a radical change in criminal justice strategies and came at great cost to individual rights. Civil forfeiture allows for property to be seized by, and forfeited to, the State even in the absence of criminal conviction against the person in possession of that property. There are thus significant concerns in relation to due process and property rights. The purpose of this chapter is to explore, the law and policy of civil forfeiture in Ireland, drawing upon the extensive case-law and commentary over the course of the past two decades. The Irish model of civil forfeiture is regularly used as an exemplar of best practice in other jurisdictions - both common law and civil law,<sup>1</sup> as well as at an EU-level.<sup>2</sup> There is great merit then in examining the Irish model in some depth.

Irish authorities regularly proclaim their successes, and emphasise how civil forfeiture adheres to human rights norms. Others disagree – quite strongly. This chapter, then, offers a review of the state of the art. Before looking to the relevant legislation, the first section of this chapter explores the context behind the adoption of civil forfeiture, namely concern surrounding serious/organised crime and the associated, highly-charged, political discourse. Civil forfeiture is not a new tool, however; rather, a similar type of legislation had previously been enacted in the anti-terrorism realm, and this experience was influential in designing the Proceeds of Crime Act (POCA) in 1996. After setting out this background, the chapter moves on to consider the legislative framework adopted in both the Proceeds of Crime Act and the Criminal Assets Bureau Act, as well as the subsequent wave of legal challenges that inevitably followed.

Challenges to the legislation, on the grounds of constitutional arguments, were ultimately unsuccessful. This, then, leads on to the next section, namely a critique of: due process concerns, circumventing criminal procedural safeguards, the supposed ‘civil’ nature of civil forfeiture process, the failure of the Irish courts to operate as a check against legislative excess, interference with property rights, and the powers afforded to the Criminal Assets Bureau, as well as its limited accountability. Finally, the chapter issues a call to arms to other disciplines: much of the extant research on civil forfeiture is from law or criminology scholars. There is a need for greater insight from, or in collaboration with, other disciplines (including economics, business management, psychology, sociology) to consider issues such as effectiveness, the use of civil forfeiture in the corporate realm, and procedural fairness.

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<sup>1</sup> Eg Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders: Prepared for the US Department of Justice* (Washington DC, National Institute of Justice, 2011). In Vettori’s assessment of the ‘law in practice’ across different EU Member States civil forfeiture in Ireland was rated as: 93/100 (investigative phase), 95/100 (judicial phase), and 100/100 (disposal phase). B Vettori, *Tough on Criminal Wealth: Exploring the practice of proceeds from crime confiscation in the EU* (Dordrecht, Springer, 2006) 78.

<sup>2</sup> Eg G Mitchell, *Thematic Paper on Organised Crime. Asset Confiscation as an Instrument to Deprive Criminal Organisations of the Proceeds of their Activities* (Special Committee on Organised Crime, Corruption and Money Laundering, September 2012). For arguments in favour of a EU civil forfeiture regime, see F Alagna, ‘Non-conviction Based Confiscation: Why the EU Directive is a Missed Opportunity’ (2015) 21(4) *European Journal on Criminal Policy and Research* 447.

## I. Background

### A. The Politics of Law and Order

Over the course of the past two decades, the Irish State has been active in its efforts to tackle organised criminal activities. This proactive approach can be seen by, *inter alia*, a more restrictive approach to bail; expanded police powers relating to arrest, detention, and questioning; the establishment of an ad hoc witness protection programme; increased use of the non-jury Special Criminal Court; expanded surveillance powers; and new criminal law offences, including an offence of participating in organised crime type activities.<sup>3</sup> One of the most significant changes – and the focus of this chapter – is the adoption of civil forfeiture, accompanied by the establishment of the multi-agency Criminal Assets Bureau.<sup>4</sup> This section examines political discourse in the build up to the passing of the Proceeds of Crime Act 1996 (POCA) and the Criminal Assets Bureau Act 1996.<sup>5</sup>

In the wake of the murders of a member of An Garda Síochána (Irish police) and an investigative journalist,<sup>6</sup> political discourse was highly charged: as O'Donnell and O'Sullivan point out, these murders 'generated the conditions where a harsh response to perceived lawlessness became acceptable'.<sup>7</sup> Politicians widely spoke of 'professional thugs',<sup>8</sup> 'home grown Mafia',<sup>9</sup> and 'drug barons'.<sup>10</sup> Politicians were widely critical of perceived inadequacies in the conventional criminal process; and it was widely claimed that 'godfathers of crime'<sup>11</sup> were able to avoid arrest and conviction by virtue of operating at a remove from the coalface of criminal activity. A new criminal justice strategy – whereby the focus would be on the financial incentive of crime – came to the fore: under POCA it would now be possible for the State to seize 'criminal' assets even in the absence of criminal conviction. The enactment of this radical new procedure – civil forfeiture – was accompanied by a new multi-agency body tasked with implementing the focus on criminal money, the Criminal Assets Bureau. The rationale underpinning this shift in emphasis towards criminal money is clear:

'The conventional criminal justice system is simply not equipped to bring the so-called crime bosses to justice since they can rarely be directly linked with the execution of a crime. They can, however, be linked with the enormous profits generated by their crimes'.<sup>12</sup>

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<sup>3</sup> For discussion of such measures see: L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Oxford, Hart, 2013).

<sup>4</sup> The multi-agency nature of the Bureau is reflected in its composition, i.e. it brings together police, taxation, and revenue officials.

<sup>5</sup> Much of this discourse reflects the 'indices of change' identified by Garland: D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford, Oxford University Press, 2001).

<sup>6</sup> Detective Garda Jerry McCabe was murdered by members of a terrorist group during an armed robbery on 6 June 1996 and Veronica Guerin was murdered by a criminal gang on 26 June 1996.

<sup>7</sup> I O'Donnell and E O'Sullivan, 'The Politics of Intolerance – Irish Style' (2003) 43(1) *British Journal of Criminology* 41, 48.

<sup>8</sup> Seanad Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, 9 October 1996, vol.148, col.1547, per Senator Mulcahy.

<sup>9</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2442, per Deputy Shatter.

<sup>10</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2486, per Deputy Gregory.

<sup>11</sup> Dail Éireann, Private Members' Business – Measures Against Crime: Motion, 2 July 1996, vol 467, col 2396, per Deputy Harney.

<sup>12</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2463, per Deputy Byrne.

Similarly, in an oft-quoted passage, Deputy O'Donnell stated:

'We have given the courts power to seize the assets of those convicted of certain crimes and to restrain the assets of those facing certain criminal charges, but given the difficulties experienced in getting convictions, or even gathering evidence, a new power is needed to restrain [*sic*] the use of assets outside the context of criminal proceedings. To date we have dealt only with assets which are the fruits of past crimes. What we need to do now is prevent assets being used as the seeds of future crimes. To put it another way, if we cannot arrest the criminals, why not confiscate their assets?'<sup>13</sup>

Against this backdrop, and in a remarkably short space of time, the Proceeds of Crime Bill passed through all parliamentary stages, and was signed into law on 4 August 1996.<sup>14</sup>

## **B. Anti-Terrorism Influence**

It is often suggested that the Irish civil forfeiture provisions were directly influenced by similar measures in the United States. It is true that the US RICO legislation was highlighted by some politicians during the passage of the Proceeds of Crime Bill. For example Deputy Willie O'Dea stated:

'The notion that assets can be frozen, or that they can be frozen without anybody being convicted, is not new. Such legislation has been in operation in the United States for more than a decade. ... the United States now has legislation which allows for the forfeiture of assets which are suspected of being the proceeds of crime, even when a prosecution never ultimately takes place'.<sup>15</sup>

He continued:

'The United States ... has infinitely more draconian legislation on the seizure and forfeiture of assets and this has consistently withstood constitutional challenge. The director of the forfeiture office of the United State's Department of Justice was recently quoted as describing the asset seizure legislation in the United States as, "the most valuable and powerful we have against organised crime".'<sup>16</sup>

Such comments notwithstanding, a more influential framework was found much closer to home – in anti-terrorism legislation permitting the seizure of funds allegedly belonging to the Irish Republican Army (IRA).

The Offences Against the State (Amendment) Act 1985 was introduced, on a temporary basis,<sup>17</sup> to enable forfeiture of property held by an unlawful organisation. Under section 2 of this legislation, where the Minister for Justice was of the opinion that money held

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<sup>13</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2435, per Deputy O'Donnell.

<sup>14</sup> This was only five weeks after the death of Veronica Guerin on 26 June 1996. For further discussion of the backdrop to this legislation, see: C King, 'Hitting Back at Organised Crime: The Adoption of Civil Forfeiture in Ireland' in C King and C Walker, *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Farnham, Ashgate, 2014) 141; J Meade, 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture' (2000) 10(1) *Irish Criminal Law Journal* 11.

<sup>15</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2473, per Deputy O'Dea.

<sup>16</sup> Dail Éireann, Private Members' Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2474, per Deputy O'Dea.

<sup>17</sup> The OAS(A)A 1985 had a limited lifespan (three months), unless extended by the government. The legislation was only used on one occasion and was then allowed to lapse.

in a bank was the property of an unlawful organisation he could freeze that money and require it to be paid into the High Court. If proceedings were not brought for the return of this money within a six month period, the Minister could apply *ex parte* to the High Court for an order directing that the money be paid to the Exchequer. The OAS(A)A 1985 was signed into law on 19 February 1985 and the next day was used to freeze money (1,75 m IR£) held in a bank account in Navan, County Meath. This legislation was unsuccessfully challenged in *Clancy v Ireland*.<sup>18</sup> In a rather brief judgment, Barrington J held that, while the legislation provides for freezing, and paying into the High Court, of money without notice to the account holder, it

‘does not confiscate his property or deprive him of a fair hearing. He is entitled to claim the funds in the High Court and he is entitled to a fair hearing there though, admittedly, the onus of proof is on him to establish his title. In the event of a mistake having been made there is provision for the payment of compensation’.<sup>19</sup>

Barrington J went on to find that ‘the Act of 1985 amounts to a permissible delimitation of property rights in the interests of the common good’.<sup>20</sup> The OAS(A)A 1985, then, provided a ‘clear and direct precedent’ for the civil forfeiture provisions under POCA.<sup>21</sup>

## II. Legislative Framework

### A. Outline of the Proceeds of Crime Act

The primary legislation governing civil forfeiture in Ireland is the Proceeds of Crime Acts 1996-2005 (POCA).<sup>22</sup> At the outset, it is worth briefly distinguishing civil forfeiture from post-conviction confiscation.<sup>23</sup> Post-conviction confiscation is dependent upon successful prosecution and conviction. As such, all of the enhanced procedural protections of the criminal process apply, including, *inter alia*, the presumption of innocence and the heightened criminal standard of proof beyond reasonable doubt. At the confiscation hearing (ie when the criminal proceedings are concluded), the civil standard of proof applies.<sup>24</sup> Contrariwise, with civil forfeiture under POCA property may be seized even in the absence of criminal conviction: civil forfeiture is said to operate *in rem* (against the property), rather than *in personam* (against the individual). What follows is a brief overview of POCA. The long title to the Act provides that it is:

‘An Act to enable the High Court, as respects the proceeds of crime, to make orders for the preservation and, where appropriate, the disposal of the property concerned and to provide for related matters.’

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<sup>18</sup> [1988] IR 326. The decision in *Clancy* was considered by the Supreme Court in *Murphy v GM; Gilligan v CAB* [2001] 4 IR 113, 144-145.

<sup>19</sup> *Clancy v Ireland* [1988] IR 326, 335.

<sup>20</sup> *Clancy v Ireland* [1988] IR 326, 336.

<sup>21</sup> Dail Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2409, per Deputy O’Donoghue.

<sup>22</sup> The 1996 Act was amended by the Proceeds of Crime (Amendment) Act 2005, and that latter Act now specifies that the two Acts are together to be known as the Proceeds of Crime Acts 1996-2005.

<sup>23</sup> Criminal Justice Act, 1994. For discussion, see: M Ashe and P Reid, *Money Laundering: Risks, Liabilities and Compliance* (Dublin, FirstLaw, 2007).

<sup>24</sup> Eg: Criminal Justice Act 1994, s 4(6).

‘Proceeds of crime’ is defined as ‘any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct’.<sup>25</sup> ‘Criminal conduct’ is defined as

‘any conduct:

- (a) which constitutes an offence or more than one offence, or
- (b) which occurs outside the State and which would constitute an offence or more than one offence

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- (i) if it occurred within the State,
- (ii) if it constituted an offence under the law of the state or territory concerned, and
- (iii) if, at the time when an application is being made for an interim or interlocutory order, any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with the conduct is situated within the State’.<sup>26</sup>

Significantly, in proceedings under the Act it is not necessary for an application to relate particular proceeds to a particular crime.<sup>27</sup>

Section 2 of POCA makes provision for an interim order - a pre-trial restraint order.<sup>28</sup> The application for an interim order can be brought by a senior police officer, an authorised officer of the Revenue Commissioners, or by the Criminal Assets Bureau. If granted, this order prohibits disposal of, or otherwise dealing with, or diminishing the value of specified property.<sup>29</sup> Applications for an interim order are usually brought on an *ex parte* basis, the rationale being to ensure that assets cannot be dissipated or removed from the jurisdiction pending a full *inter partes* hearing.<sup>30</sup> An interim order can only be granted where the court is satisfied that a person is in possession or control of specified property that constitutes, or was acquired with, proceeds of crime and is of a certain minimum value (13,000 €).<sup>31</sup> The civil standard of proof applies<sup>32</sup> and belief evidence is admissible.<sup>33</sup> The court may also direct the respondent to file an affidavit specifying the property that he is in possession or control of, or his income and sources of income for a specified period (not exceeding ten years up to the date of application of the order), or both.<sup>34</sup> Documentary evidence is also admissible.<sup>35</sup> An interim order lasts for 21 days and then lapses unless an application for an interlocutory order is brought during that period.<sup>36</sup>

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<sup>25</sup> POCA, s 1(1), as substituted by POC(A)A, s 3.

<sup>26</sup> POCA, s 1(1), as inserted by POC(A)A, s 3.

<sup>27</sup> *FMcK v AF; FMcK v EH* [2005] IESC 6.

<sup>28</sup> Proceedings shall be held otherwise than in public: POCA, s 8(3).

<sup>29</sup> POCA, s 2(1), as amended by POC(A)A, s 4.

<sup>30</sup> While the risk of dissipation may be one consideration, such a risk is not a formal requirement under the Act: *FMcK v DC* [2006] IEHC 185. Jurisprudence relating to Mareva and Anton Pillar orders in the commercial field applies to *ex parte* applications under the Proceeds of Crime Act, thus there is an obligation of full disclosure on the part of the applicant: *FMcK v DC* [2006] IEHC 185. For an example of where a s.2 order was lifted for lack of full disclosure, see *CAB v Base Garage Supplies Ltd* [2013] IEHC 302.

<sup>31</sup> POCA, s 2(1).

<sup>32</sup> POCA, s 8(2).

<sup>33</sup> POCA, s 8(1). To briefly explain: the legislation permits a senior police officer or revenue official to state his/her ‘belief’ that a person is in possession or control of specified property that constitutes or stems from proceeds of crime and that the value of that property is not less than 13 000 €. If the court is satisfied that there are reasonable grounds for that belief, then it shall be admitted as evidence.

<sup>34</sup> POCA, s 9(1), as renumbered by POC(A)A, s 11. Such an affidavit is not admissible in criminal proceedings against that person or spouse, except where such proceedings relate to perjury arising from statements in the affidavit: POCA, s 9(2), as inserted by POC(A), s 11.

<sup>35</sup> POCA, s 16A, as inserted by POC(A)A, s 12.

<sup>36</sup> POCA, s 2(5). This does not require that the application be actually moved in court within the 21 day period: *FMcK v AF; FMcK v EH* [2005] IESC 6.

Section 3 of POCA provides for an interlocutory order – whilst this is described as an ‘interlocutory order’ the section 3 hearing is to be regarded as the trial of the action.<sup>37</sup> An application for an interlocutory order can be brought by a senior police officer, an authorised officer of the Revenue Commissioners, or by the Criminal Assets Bureau. Where it appears to the court that a person is in possession or control of specified property that constitutes, or was acquired with, proceeds of crime and is of a certain minimum value (13,000 €) the court shall grant an interlocutory order. Where an interlocutory order is granted, that order prohibits disposal of, or otherwise dealing with, or diminishing the value of specified property.<sup>38</sup> Here again, the civil standard of proof applies<sup>39</sup> and belief evidence is admissible.<sup>40</sup> So too may the court direct the respondent to file an affidavit specifying the property that he is in possession or control of, or his income and sources of income for a specified period (not exceeding ten years up to the date of application of the order), or both.<sup>41</sup> Documentary evidence is also admissible.<sup>42</sup> The legislation explicitly provides a safeguard that ‘the Court shall not make the order if it is satisfied that there would be a serious risk of injustice’.<sup>43</sup> A further safeguard is that, at any time when an interlocutory order is in force, the respondent or any other person claiming ownership of any of the property concerned can apply to the court to have the order varied or discharged.<sup>44</sup> Subject to being discharged, an interlocutory order normally continues until (a) the determination of an application for a disposal order in relation to the property concerned, (b) the expiration of the ordinary time for bringing an appeal from that determination, or (c) if an appeal is brought the determination or abandonment of that appeal or any further appeal or expiration of the ordinary time for bringing any further appeal.<sup>45</sup>

Before moving on, it is worth briefly mentioning situations concerning expenses incurred by a respondent. At any time while an interim or interlocutory order is in force, an application can be made to the Court to enable the discharge of reasonable living and other necessary expenses (including legal expenses in relation to proceedings under POCA) or to enable the carrying on of a business, trade, profession or other occupation to which the property concerned relates.<sup>46</sup>

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<sup>37</sup> *FJMCK v AF and JF* [2002] 1 IR 242; *FJMCK v FC, PL, and MAC*; *FJMCK v MJG, T Ltd, and E Ltd* [2001] 4 IR 521.

<sup>38</sup> POCA, s 3(1). Post-2005 there is now provision for a consent disposal order to be granted at this stage where all parties agree to such an order, in which case s 4A applies: POCA, s 3(1A), as inserted by POC(A)A, s 5. By virtue of POCA, s 8(3), a hearing under section 3 may be held *in camera*: see *CAB v MacAviation Ltd* [2010] IEHC 121.

<sup>39</sup> POCA, s 8(2).

<sup>40</sup> POCA, s 8(1). In *McK v D* [2004] 2 IR 470 McCracken J set out a step-by-step approach to be followed in proceedings under POCA. The application of this 7-step approach can be seen in, e.g., *CAB v W* [2010] IEHC 166. Cf. *P.B. v A.F.* [2012] IEHC 428, where the court declined to admit belief evidence under s.8(1).

<sup>41</sup> POCA, s 9(1), as renumbered by POC(A)A, s 11. Such an affidavit is not admissible in criminal proceedings against that person or spouse, except where such proceedings relate to perjury arising from statements in the affidavit: POCA, s 9(2), as inserted by POC(A)A, s 11.

<sup>42</sup> POCA, s 16A, as inserted by POC(A)A, s 12.

<sup>43</sup> POCA, s 3(1). There are different perspectives on this safeguard: for example Ashe and Reid describe it as ‘an important safeguard’ whereas O’Higgins is more critical, describing it as ‘a vague and intangible yardstick’. See M Ashe and P Reid, ‘Ireland: The Celtic Tiger bites – The attack on the proceeds of crime’ (2001) 4(3) *Journal of Money Laundering Control* 253, 259; M O’Higgins, ‘The Proceeds of Crime Act 1996’ (1996) *Bar Review* 12, 12. For an example of where it was argued (unsuccessfully) that the making of a s.3 order would result in a serious risk of injustice, see *CAB v O’Brien* [2010] IEHC 12.

<sup>44</sup> POCA, s 3(3). In practice, this opens the possibility for victims of crime to apply to court to have their rights recognised. For an in-depth consideration of an application under s.3(3), see *Murphy v Gilligan* [2011] IEHC 62. The Supreme Court declined to re-open this issue in *Murphy v Gilligan* [2014] IESC 43. Cf. *CAB v Kelly* [2012] IEHC 595.

<sup>45</sup> POCA, s 3(5).

<sup>46</sup> POCA, s 6(1), as amended by POC(A)A, s.8. See, eg, *MFM v MB* [1998] IEHC 174.

At any point when an interim order or an interlocutory order is in force, the court may appoint a receiver to take possession of any property to which the order relates. Subject to the court's directions, the receiver will manage, keep possession of, dispose of, or otherwise deal with any property over which he is appointed.<sup>47</sup> In practice, where a receiver is to be appointed, the Bureau Legal Officer will be appointed to this role.

Section 4 provides for a disposal order: after an interlocutory order has been in force for seven years the court, on application, may grant a disposal order directing that the property be transferred (subject to any terms and conditions specified by the court) to the Minister for Finance or to such other person as the court may determine.<sup>48</sup> While it would appear that the court has a discretion under section 4(1), section 4(2) explicitly states that the court '**shall** (*emphasis added*) make a disposal order ... unless it is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime'.<sup>49</sup> The civil standard of proof continues to apply at this stage.<sup>50</sup> The effect of a disposal order is to deprive the respondent of his rights (if any) in the property concerned and, upon the order being made, the property shall stand transferred to the Minister for Finance or other specified person.<sup>51</sup> Similar to section 3, here too there is a safeguard in that the court shall not grant a disposal order if it is satisfied that there would be a serious risk of injustice.<sup>52</sup> Post-2005, there is provision for a disposal order to be granted before the seven year period has elapsed where an application is made with the consent of all the parties concerned. The effect of such a consent disposal order is the same as an order under section 4.<sup>53</sup>

Two final points are worth mentioning: first, section 11(7) of the Statute of Limitations does not apply in relation to proceedings under the Act.<sup>54</sup> Second, compensation provisions in relation to interim, interlocutory and disposal orders are set out in section 16.<sup>55</sup>

A new section 16B was inserted by the Proceeds of Crime (Amendment) Act 2005, making provision for a corrupt enrichment order. A person is corruptly enriched if he 'derives a pecuniary or other advantage or benefit as a result of or in connection with corrupt conduct, wherever the conduct occurred'.<sup>56</sup> Where the court is satisfied that a defendant has been corruptly enriched, the court may grant a corrupt enrichment order directing the defendant to pay to the Minister for Finance, or such other person as specified by the court, an amount equivalent to the amount by which it determines that the defendant has been so enriched.<sup>57</sup> The standard of proof under this section is that applicable to civil proceedings.<sup>58</sup> Belief

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<sup>47</sup> POCA, s 7(1). The appointment of a receiver was unsuccessfully challenged in *Murphy v GM; Gilligan v CAB* [2001] 4 IR 113, 125.

<sup>48</sup> POCA, s 4(1). The hearing under s 4(1) may be adjourned for up to 2 years: POCA, s 4(7). A hearing under s 4 may be held in camera: POCA, s 8(3). For an example of s.4 in practice, see *Murphy v Gilligan* [2011] IEHC 464.

<sup>49</sup> POCA, s 4(2).

<sup>50</sup> POCA, s 8(2).

<sup>51</sup> POCA, s 4(4). The Minister may sell or otherwise dispose of any such property. Any money realised under this section shall be paid into or disposed of for the benefit of the Exchequer: POCA, s 4(5). Contrast this with the Asset Recovery Incentivisation Scheme (ARIS) in the United Kingdom.

<sup>52</sup> POCA, s 4(8). For consideration in the context of the 'family home' see *CAB v Kelly* [2012] IESC 64.

<sup>53</sup> POCA, s 4A, as inserted by POC(A)A, s 7.

<sup>54</sup> POC(A)A, s 10.

<sup>55</sup> POCA, s 16.

<sup>56</sup> POCA, s 16B(1)(a), as inserted by POC(A)A, s 12. 'Corrupt conduct' is defined as 'any conduct which at the time it occurred was an offence under the Prevention of Corruption Acts 1889 to 2001, the Official Secrets Act 1963 or the Ethics in Public Office Act 1995': POCA, s 16B(1)(b), as inserted by POC(A)A, s 12.

<sup>57</sup> POCA, s 16B(2), as inserted by POC(A)A, s 12.

<sup>58</sup> POCA, s 16B(8), as inserted by POC(A)A, s 12.

evidence is admissible.<sup>59</sup> The court may also direct the defendant to file an affidavit specifying the property owned by him, his income and sources of income, or both.<sup>60</sup> Unlike the affidavit that can be required in proceedings under section 2 (interim order) and 3 (interlocutory order), there is no time restriction here. An *ex parte* application can be brought to the court for an order prohibiting the defendant, or any other person having notice of the order, from disposing of, otherwise dealing with, or diminishing the value of the property during a specified period.<sup>61</sup>

## B. The Criminal Assets Bureau

The agency tasked with implementing POCA is the Criminal Assets Bureau (CAB).<sup>62</sup> Indeed, the establishment of such a specialised agency was described as ‘a necessary adjunct to [the] assets’ freezing Bill and is somewhat consequential to it’.<sup>63</sup> CAB is established as a body corporate with perpetual succession, an official seal, power to sue and be sued in its corporate name, and to acquire, hold and dispose of land, or an interest in land, or any other property.<sup>64</sup> CAB is headed by a senior police officer (the Chief Bureau Officer)<sup>65</sup> and adopts a multi-agency approach, with officials from An Garda Síochána (police), Revenue Commissioners (taxation), and Department of Social Protection (social welfare).<sup>66</sup> A bureau officer retains the powers and duties vested in him by virtue of his position as a Garda, a member of the Revenue Commissioners, or an officer of the Minister for Social Protection.<sup>67</sup> There are many benefits to this multi-agency approach, including pooling of professional expertise, improved management of resources, and decreased duration of investigations.<sup>68</sup> As Lemieux says, in the context of transnational police cooperation: ‘In theory the coordination of resources should allow police forces to surpass their individual capacities by improving the efficiency of operations and reducing the cost of managing investigations’.<sup>69</sup>

The multi-agency approach facilitates greater cooperation and collaboration between officials from different agencies,<sup>70</sup> sharing of powers and duties,<sup>71</sup> greater admissibility of

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<sup>59</sup> POCA, s 16B(5), as inserted by POC(A)A, s 12.

<sup>60</sup> POCA, s 16B(6)(a), as inserted by POC(A)A, s 12. Such an affidavit is not admissible in criminal proceedings against that person or spouse, except where such proceedings relate to perjury arising from statements in the affidavit: POCA, s 16B(6)(b), as inserted by POC(A)A, s 12.

<sup>61</sup> POCA, s 16B(4), as inserted by POC(A)A, s 12.

<sup>62</sup> While much of the discussion on CAB relates to civil forfeiture powers, and these powers are the focus of this chapter, it is important to realise that CAB does have significant taxation and social welfare powers too.

<sup>63</sup> Dáil Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, 25 July 1996, vol 4668, col 1031, per Deputy McCreevy.

<sup>64</sup> CABA, s 3(2). The objectives and functions of the Bureau are set out in CABA, ss 4 and 5.

<sup>65</sup> CABA, s 7.

<sup>66</sup> CABA, s 8.

<sup>67</sup> CABA, s 8(2) and (8). The rationale behind this was explained during the passage of the CAB Bill in the following terms: ‘each of the three agencies will bring their own powers and expertise to the bureau and, by means of section 8 of the Bill, will exercise these powers in a mutually supportive and concerned manner.’ Dáil Éireann, Criminal Assets Bureau Bill, 1996, Second Stage, 25 July 1996, vol 468, cols 1025 and 1026, per Minister Quinn.

<sup>68</sup> A useful analogy here can be found in international police cooperation against transnational drug trafficking: F Lemieux, ‘Tackling transnational drug trafficking effectively: assessing the outcomes of the Drug Enforcement Administration’s international cooperation initiatives’ in F Lemieux, *International Police Cooperation: Emerging issues, theory and practice* (Devon, Willan Publishing, 2010) 260.

<sup>69</sup> *Ibid* 266. Lemieux does acknowledge that ‘there are few rigorous, empirical evaluations of the performance of multi-jurisdictional teams’ (*ibid* 266). The same point can equally be made in relation to the lack of rigorous, empirical evaluation of the multi-agency Criminal Assets Bureau. It is to be hoped that criminologists or policing scholars will take up this challenge and carry out empirical review of CAB.

<sup>70</sup> CABA, s 8(5).

<sup>71</sup> CABA, s 8(6)(c).

evidence,<sup>72</sup> and sharing of information.<sup>73</sup> The CAB Act also makes provision for a bureau officer to be ‘accompanied or assisted in the exercise of [his or her] powers or duties by such other persons (including bureau officers) as [he or she] considers necessary’.<sup>74</sup> The CAB Act contains a number of provisions in relation to investigatory powers, including provision for anonymity of non-Garda bureau officers.<sup>75</sup> The Act makes provision for a search warrant to be issued by a District Court judge, where there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal conduct, or to their identity or whereabouts, is to be found in a particular place.<sup>76</sup> In situations of urgency where it is impracticable to apply to a District Court judge, a senior police officer (i.e. not below the rank of superintendent) may issue such a warrant.<sup>77</sup> Post-2005, there is provision for an ‘Order to make material available’,<sup>78</sup> a ‘tipping-off’ offence in relation to such an order,<sup>79</sup> and an order in relation to obtaining information regarding any property held in trust.<sup>80</sup> There is now provision for non-Garda bureau officers, accompanied by a Garda bureau officer, to attend at and participate in questioning a person detained pursuant to section 4 of the Criminal Justice Act 1984 or section 2 of the Criminal Justice (Drug Trafficking) Act 1996.<sup>81</sup>

A number of offences are also set out in the CAB Act. It is an offence to publish or cause to be published the fact that a person is, or was, a bureau officer or member of staff at the bureau, or is a member of the family of such a person, or the address of any such person.<sup>82</sup> It is an offence to delay, obstruct, impede, interfere with, or resist either a bureau officer in the exercise or performance of his powers or duties or a member of staff of the bureau who is accompanying or assisting such a bureau officer.<sup>83</sup> It is an offence to utter or send threats to, or in any way intimidate or menace, a bureau officer or member of staff of the bureau, or the family or either such person.<sup>84</sup> It is an offence to assault or attempt to assault a bureau officer, a member of staff of the bureau, or a family member of either such person.<sup>85</sup> Where a Garda bureau officer has reasonable cause to suspect that a person is committing, or has committed, an offence under sections 12, 13 or 15, or an offence under section 94 of the Finance Act 1983, that officer may arrest that person without warrant or require the person to give his or her name and address.<sup>86</sup> Where a person is charged with an offence under either section 13 or 15, no further proceedings (other than remanding in custody or on bail) shall be taken except by, or with the consent of, the DPP.<sup>87</sup>

### C. Legal Challenges

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<sup>72</sup> CABA, s 8(6)(d).

<sup>73</sup> CABA, s 8(5) and (7). In *CAB v Craft* [2001] 1 IR 121, 133 O’Sullivan J stated: ‘The members of the Criminal Assets Bureau are entitled to exchange information amongst themselves and clearly they would be in dereliction of duty if they failed to do this in an appropriate case’.

<sup>74</sup> CABA, s 8(6)(a).

<sup>75</sup> CABA, s 10.

<sup>76</sup> CABA, s 14(1), as substituted by Criminal Justice Act 2006, s 190.

<sup>77</sup> CABA, s 14(2) and (3).

<sup>78</sup> CABA, s 14A, as inserted by POC(A)A, s 18.

<sup>79</sup> CABA, s 14B, as inserted by POC(A)A, s 18.

<sup>80</sup> CABA, s 14C, as inserted by POC(A)A, s 18.

<sup>81</sup> CABA, s 8(6A), as inserted by Criminal Justice Act 2007, s 58.

<sup>82</sup> CABA, s 11(1).

<sup>83</sup> CABA, s 12(1).

<sup>84</sup> CABA, s 13(1).

<sup>85</sup> CABA, s 15(1).

<sup>86</sup> CABA, s 16(1).

<sup>87</sup> CABA, s 17.

Unsurprisingly, a number of legal challenges ensued, but the Irish courts have consistently upheld the constitutionality of POCA. The leading decision is the joined case of *Murphy v GM, PB, PC Ltd, GH and Gilligan v CAB*<sup>88</sup> (herein referred to as GM/ Gilligan). In that case, the Supreme Court upheld the constitutionality of the Act and also dismissed a number of challenges on non-constitutional points. The arguments advanced are worth further attention: It was argued that POCA essentially formed part of the criminal law, not the civil law, and that persons affected by this legislation were deprived of traditional criminal law safeguards.<sup>89</sup> Furthermore, it was alleged that: the Act permitted oppressive delays; the maxim *audi alteram partem* was violated; the privilege against self-incrimination was contravened; the Act was over-broad and vague; the Act violated the guarantee of private property; there was an impermissible interference with the judicial function; the Act purported to allow, or at least recognise, the possibility of an appeal from the Supreme Court to a non-specified court or authority; and, finally, the Act had retrospective effect (contrary to Article 15.5) and extraterritorial effect (contrary to Article 29.3 and 29.8).

These arguments were dismissed by the Supreme Court. The court first noted that the legislation enjoys a presumption of constitutionality,<sup>90</sup> and then addressed each of the above arguments in turn. In relation to the criminal nature of the proceedings, the court began by stating:

‘It is almost beyond argument that, if the procedures under ss. 2, 3 and 4 of the Act of 1996 constituted in substance, albeit not in form, the trial of persons on criminal charges, they would be invalid having regard to the provisions of the Constitution. The virtual absence of the presumption of innocence, the provision that the standard of proof is to be on the balance of probabilities and the admissibility of hearsay evidence taken together are inconsistent with the requirement in Article 38.1 of the Constitution that: “No person shall be tried in any criminal charge save in due course of law.” It is also clear that, if these procedures constitute the trial of a person on a criminal charge, which, depending on the value of the property, might or might not constitute a minor offence, the absence of any provision for a trial by jury of such a charge in the Act would clearly be in violation of Article 38.5 of the Constitution’.<sup>91</sup>

The key question for the court, then, was whether the procedures under POCA are criminal in nature. After reviewing a number of authorities,<sup>92</sup> the court stated that the indicia of crime are ‘conspicuously absent in the present case’<sup>93</sup> and continued:

‘in proceedings under ss. 3 and 4 of the Act of 1996, there is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a *nolle prosequi* at any stage’.<sup>94</sup>

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<sup>88</sup> [2001] 4 IR 113. This case was an appeal from separate High Court decisions in *Gilligan v CAB* [1998] 3 IR 185 and *Murphy v GM, PB, PC Ltd* [1999] IEHC 5.

<sup>89</sup> The specific safeguards mentioned were the presumption of innocence, the standard of proof, trial by jury, and the rule against double jeopardy.

<sup>90</sup> See *McDonald v Bord na gCon (no.2)* [1965] IR 217; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317.

<sup>91</sup> [2001] 4 IR 113, 135.

<sup>92</sup> Including *Attorney General v Southern Industrial Trust Ltd* (1957) 94 ILTR 161; *Melling v O’Mathghamhna* [1962] IR 1; *Clancy v Ireland* [1988] IR 326; *McLoughlin v Tuite* [1989] IR 82; and *O’Keeffe v Ferris* [1993] 3 IR 165 (HC) and [1997] 3 IR 463 (SC). The court also referred to the US decision in *United States v Ursery* (1996) 518 US 267.

<sup>93</sup> [2001] 4 IR 113, 147.

<sup>94</sup> [2001] 4 IR 113, 147.

The court further rejected the contention that the presence of *mens rea* is a pre-requisite to an order under either section 3 or 4: such ‘orders can be made even though it has not been shown to the satisfaction of the court that there was *mens rea* on the part of the person in possession or control of the property’.<sup>95</sup> The court went on to say that forfeiture of property that represents the proceeds of crime ‘is not a punishment and its operation does not require criminal procedures’.<sup>96</sup>

The argument that the Act permitted oppressive delays was swiftly dismissed by the court, since

‘the procedure under the Act is perfectly capable of being operated in such a manner as to ensure that no unreasonable delay elapses between the making of the interim order and the interlocutory order: that indeed is clearly what the Act envisaged’.<sup>97</sup>

In relation to the seven year period between the making of an interlocutory order and a disposal order, the contention that that delay is unduly oppressive was rejected as it ‘rests on the misconception’ that the application for a disposal order equates to the trial of the action. A person affected by an interlocutory order under section 3 can apply, at any point when such an order is in force, to have that order varied or discharged.<sup>98</sup>

The court also swiftly dealt with the complaint regarding the maxim *audi alteram partem*. After re-iterating that ‘it is to be presumed that the Oireachtas intended that procedures provided for under the Act would be conducted in accordance with the principles of constitutional justice and that any departure from those principles will be restrained or corrected by the courts’<sup>99</sup> it was said:

‘the court is satisfied that in any case brought under the procedures laid down by the Act, the affidavits grounding the interim and interlocutory application of necessity will indicate to the respondents the nature of the case being made on behalf of the applicant. Nor is the provision for the admission of hearsay of itself unconstitutional: it was a matter for the court hearing the application to decide what weight should be given to such evidence. The court is satisfied that there is no substance in these grounds of challenge to the constitutionality of the legislation’.<sup>100</sup>

The next ground of challenge was that there was no equality of arms given that the applicant could rely on opinion evidence whereas the respondent could not. Again, the court swiftly rejected this argument:

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<sup>95</sup> [2001] 4 IR 113, 148. See also *Murphy v Gilligan* [2011] IEHC 62, para.8 *et seq.*

<sup>96</sup> [2001] 4 IR 113, 153.

<sup>97</sup> [2001] 4 IR 113, 154.

<sup>98</sup> [2001] 4 IR 113, 154. This reasoning was applied in *Murphy v Gilligan* [2011] IEHC 62, para.12 *et seq.* It was said: ‘Insofar as the first-named respondent’s contention in relation to delay is based upon a claim that the 1996 Act mandates a seven year delay prior to a disposal application being brought and that the present proceedings have lasted for nearly seven more years and such delay is excessive, the court is satisfied that the first-named respondent cannot rely upon this contention as it was open to him at any time since the making of the s. 3 order, including during the seven year period provided for in s. 4, to bring an application under s. 3(3). It is the first-named respondent himself who chose not to commence such an application until 2009 and in those circumstances the legal authorities relied upon by the first-named respondent in relation to delay in criminal trials have no application. In criminal trials it is for the prosecution to bring matters before the court whilst in s. 3(3) applications it is for persons, such as the first-named respondent, who are affected by s. 3 orders to commence such applications. If they delay in commencing such applications they cannot seek to rely on such delay.’ (para.14)

<sup>99</sup> [2001] 4 IR 113, 154.

<sup>100</sup> [2001] 4 IR 113, 155.

‘the respondents to an application under s. 2 or s. 3 will normally be the persons in possession or control of the property and should be in a position to give evidence to the court as to its provenance without calling in aid opinion evidence’.<sup>101</sup>

The argument that the Act contravenes the privilege against self-incrimination was also dismissed:

‘Parties to civil proceedings, whatever their nature, may find themselves in a position where they are reluctant to adduce evidence beneficial to them because it might also expose them to the risk of a criminal prosecution. That factual position, however, cannot be equated to a statutory provision obliging a person to give evidence, even in circumstances where his or her evidence might be incriminating. Similarly, the fact that a person can be required to file an affidavit specifying his or her property and income cannot, on any view, be equated to a statutory provision requiring a person to adduce evidence which may incriminate him or her. The court is satisfied that these grounds of challenge are also without foundation’.<sup>102</sup>

The next argument dealt with by the court related to whether the Act was overly-broad and vague, specifically as regards the term ‘proceeds of crime’ and the court’s power not to grant an order where there is ‘a serious risk of injustice’. In relation to the former, it was said ‘in every case before an order can be made, the court must be satisfied on the balance of probabilities that on the evidence adduced to it in that particular case the property in respect of which the freezing order is sought was the proceeds of crime’.<sup>103</sup> And, in relation to the latter, it was said that while this power ‘is undoubtedly wide in its scope, that can only be in ease of the individuals whose rights may be affected and the court, in applying these provisions, will be obliged to act in accordance with the requirements of constitutional justice’.<sup>104</sup> As such, this challenge was also rejected.

Neither did the court dwell on the argument that the Act violated the guarantee of property rights under the Constitution. The court adopted the decision of Barrington J in *Clancy v Ireland*, concerning the Offences Against the State (Amendment) Act 1985, where it was held that that legislation was ‘a permissible delimitation of property rights in the interests of the common good’.<sup>105</sup> The challenge to POCA was also rejected on this ground.

The next argument to be rejected was the challenge on the ground of interference with judicial function in that the legislation requires the High Court to make an order in certain circumstances ‘it is perfectly permissible for the legislature to provide that, where certain conditions are met, the making of an order of a particular nature by a court may be mandatory rather than discretionary’.<sup>106</sup>

The court also rejected the challenge to the legislation based on the grounds of retrospective effect and extraterritorial effect:

‘The Act does not offend in any way the prohibition in Article 15.5 against declaring acts to be infringements of the law which were not so at the date of their commission. The fact that it enables the court to make orders in respect of property constituting the proceeds of crimes committed before the coming into force of the legislation is not in any sense a contravention of that prohibition’.<sup>107</sup>

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<sup>101</sup> [2001] 4 IR 113, 155.

<sup>102</sup> [2001] 4 IR 113, 156.

<sup>103</sup> [2001] 4 IR 113, 156.

<sup>104</sup> [2001] 4 IR 113, 156.

<sup>105</sup> *Clancy v Ireland* [1988] IR 326, 336.

<sup>106</sup> [2001] 4 IR 113, 156.

<sup>107</sup> [2001] 4 IR 113, 157. See also *Murphy v Gilligan* [2011] IEHC 62, para.6.2.

The court continued:

‘Nor was the fact that the legislation may be operated so as to require the compliance of citizens within the jurisdiction with orders of the court directing the transfer of property in their possession or control to a receiver appointed by the court in circumstances where the property is in another jurisdiction constitute in any way a breach of the principles of international law which the State accepts under Article 29 of the Constitution’.<sup>108</sup>

Another argument advanced was that the Act impermissibly authorised and/or recognised the possibility of an appeal from the Supreme Court to a non-specified court or authority. Again, this argument was rejected: ‘The court is satisfied that the words “or if any further appeal” in s. 2(5)(c) are, at worst, surplusage and, in accordance with well established principles of statutory construction, can be disregarded where the result would otherwise be unconstitutional or would, as in this case, produce an absurd or anomalous result’.<sup>109</sup>

Finally, the court declined to consider whether POCA conflicted with the European Convention on Human Rights, on the ground that the Convention was not then part of domestic law. The Supreme Court, accordingly, upheld the constitutionality of POCA. It will be argued in the next section, however, that the courts erred in this regard.

### III. A Critique of the Irish Model

While welcomed by some,<sup>110</sup> civil forfeiture has been heavily criticised by others as undermining due process. Lea, for example, describes the non-conviction based approach to seizing assets as ‘a frontal assault on due process’<sup>111</sup> while Gallant notes that ‘the chronic critique of asset recovery is that the takings do not, for the most part, comply with procedural and substantive rights. Regulation manages to secure title to tainted assets at the expense of the rule of law’.<sup>112</sup> Gray argues that, despite the ‘civil’ label, civil forfeiture is in fact criminal in nature and due process protections should apply.<sup>113</sup> In the Irish context, Campbell argues that CAB and POCA ‘indicate a realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual’s right to due process’.<sup>114</sup> In my own previous work, I have been critical of the use of civil processes to avoid enhanced procedural protections of the criminal process,<sup>115</sup> arguing that civil forfeiture undermines due process rights<sup>116</sup> and is a step ‘too far’.<sup>117</sup>

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<sup>108</sup> [2001] 4 IR 113, 157.

<sup>109</sup> [2001] 4 IR 113, 157.

<sup>110</sup> E.g. SD Cassella, ‘Civil Asset Recovery: The American Experience’ (2013) *EUCrim: The European Criminal Law Association’s Forum* 98; F Cassidy, ‘Targeting the Proceeds of Crime: An Irish Perspective’ in T. Greenberg *et al*, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (London, World Bank) 153; J Simser, ‘Perspectives on civil forfeiture’ in S Young, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Cheltenham, Edward Elgar, 2009) 13; A Kennedy, ‘Justifying the Civil Recovery of Criminal Proceeds’ (2004) *Journal of Financial Crime* 8.

<sup>111</sup> J Lea, ‘Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process’ (2004) 35 *Cambria Law Review* 81, 83.

<sup>112</sup> M Michelle Gallant, ‘Money laundering consequences: Recovering wealth, piercing secrecy, disrupting tax havens and distorting international law’ (2014) 17(3) *Journal of Money Laundering Control* 296, 299.

<sup>113</sup> A Gray, ‘Forfeiture Provisions and the Criminal/ Civil Divide’ (2012) 15 *New Criminal Law Review* 32; A Gray, ‘The Compatibility of Unexplained Wealth Provisions and “Civil” Forfeiture Regimes with Kable’ (2012) 12 *Queensland UT Law and Justice Journal* 18.

<sup>114</sup> L Campbell, ‘Theorising Asset Forfeiture in Ireland’ (2007) 71 *Journal of Criminal Law* 441, 455.

<sup>115</sup> C King, ‘Using civil processes in pursuit of criminal law objectives: a case study of non-conviction based asset forfeiture’ (2012) 16(4) *International Journal of Evidence and Proof* 337.

The use of the civil process - essentially as a less ‘burdensome’ alternative to the criminal process - gives rise to concern, not least that it allows the State to circumvent enhanced procedural protections that apply in the criminal process.<sup>118</sup> There are good reasons to insist upon such procedural protections in criminal proceedings: indeed the relationship between the State and the individual; the imbalance between the State’s and a defendant’s resources; the potential consequences of a guilty verdict; avoiding wrongful convictions; and respecting individual dignity and autonomy can all be cited as relevant justifications.<sup>119</sup>

My argument is that civil forfeiture, albeit purporting to be civil, ought to properly be regarded as being of a criminal nature and, therefore, should attract criminal procedural safeguards. For example, in criminal proceedings the applicable standard of proof is proof beyond reasonable doubt. In contrast under POCA, section 8(2) provides that the applicable standard of proof is the civil standard, namely the balance of probabilities. This lower standard of proof allows for criminal allegations to be tested against the civil standard of proof. As Gallant reinforces, ‘it is significantly easier to prove matters of fact and law to the civil standard of a balance of probabilities than it is to prove the same beyond a reasonable doubt’.<sup>120</sup>

So too are there concerns relating to the presumption of innocence: for example a person might be acquitted in criminal proceedings but subsequently confronted with civil forfeiture proceedings based on the very same allegations and evidence. Of course, a ‘not guilty’ verdict does not establish actual innocence – it merely establishes that the prosecution case did not establish guilt beyond reasonable doubt – but to allow civil forfeiture proceedings in such a circumstance effectively undermines that acquittal. In other words, ‘In essence, a person is being “punished” for his wrongdoing, albeit in civil proceedings, having been found “guilty”, in the eyes of both the State and his fellow citizens, of the offence for which he had been previously acquitted’.<sup>121</sup>

The circumvention of criminal procedural protections can be seen in *McK v SG*.<sup>122</sup> There, the defendant had been suspected of involvement in an armed hijacking of a truck, however he was never charged in connection with that offence. During the police investigation, a sum of money had been seized from the defendant’s home. The defendant successfully applied to the District Court for an order, under the Police Property Act 1897, directing that that money be returned to him. Subsequent to that order, proceedings were initiated under POCA, based on opinion evidence from Chief Superintendent McK and testimony from Garda O’K, who was a member of the team investigating the armed hijacking. In granting an order under section 3 of POCA, White J stated: ‘from a consideration of the evidence of Chief Superintendent McK. and the evidence of Garda O’K. I am satisfied that the Plaintiff has made out a prima facie case that the monies in question constitute directly or indirectly the proceeds of crime’. He went on to say:

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<sup>116</sup> C King, ‘Civil forfeiture and Article 6 of the ECHR: Due process implications for England and Wales and Ireland’ (2014) 34(3) *Legal Studies* 371.

<sup>117</sup> J Hendry and C King, ‘How Far Is Too Far? Theorising Non Conviction Based Asset Forfeiture’ (2015) 11(4) *International Journal of Law in Context*. 398.

<sup>118</sup> See, eg AX Fellmeth, ‘Civil and Criminal Sanctions in the Constitution and Courts’ (2005) 94(1) *Georgetown Law Journal* 1.

<sup>119</sup> See, eg A Ashworth, ‘Four threats to the presumption of innocence’ (2006) *International Journal of Evidence and Proof* 241; R Lippke, ‘Justifying the proof structure of criminal trials’ (2013) *International Journal of Evidence and Proof* 323.

<sup>120</sup> MM Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Cheltenham, Edward Elgar, 2005) 19.

<sup>121</sup> MM Gallant and C King, ‘The Seizure of Illicit Assets: Patterns of Civil Forfeiture in Canada and Ireland’ (2013) 42 *Common Law World Review* 91, 97. See also RT Naylor, ‘Wash-out: A critique of follow-the-money methods in crime control policy’ (1999) *Crime, Law and Social Change* 1, 41.

<sup>122</sup> [2006] IEHC 447.

‘I accept that the Defendant was never prosecuted in any respect in relation to the armed hijacking. Nevertheless this fact alone does not persuade me that the monies are not directly or indirectly the proceeds of crime, on the contrary, in all the circumstances of the case, I am more than satisfied, on the balance of probabilities that they are’.

This case clearly demonstrates how POCA can operate to undermine criminal procedural protections.

Much of the due process criticisms levied against POCA stem from its purported civil nature. Yet, despite it being ‘unquestionably draconian’,<sup>123</sup> the Irish courts, as we have already seen above, have upheld the constitutionality of POCA. The Irish courts, however, are more concerned with form rather than substance: as I have argued elsewhere, ‘we must look beyond the face of the legislation to consider whether the provisions of the Act are, *de facto*, concerned with criminal, as opposed to civil, matters’.<sup>124</sup>

While the legislature did intend to create a civil process, the argument advanced here is that civil forfeiture should instead be deemed a criminal process. It is lamentable that the Irish courts have failed to stand up to the legislature in this respect. The approach of the Irish courts, in granting judicial imprimatur to civil forfeiture, has been subjected to criticism. For example Campbell points out that

‘the courts have held, using somewhat circular logic, that a procedure is not a criminal process if it does not involve characteristics such as arrest or detention. However, it appears that it is the avoidance of these aspects at the stage of enactment which facilitates the depiction of forfeiture as civil. For example, while the lack of detention under the Proceeds of Crime Acts may be cited as evidence that the proceedings are not criminal, the initial classification of the process as civil in nature by the legislature has resulted in the fact that an individual may not be detained’.<sup>125</sup>

A punitive purpose underpins civil forfeiture – as illustrated in the political debates discussed above in Part I.<sup>126</sup> Retribution<sup>127</sup> and deterrence<sup>128</sup> clearly weighed on the minds of

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<sup>123</sup> *Murphy v GM, PB, PC Ltd, GH and Gilligan v CAB* [2001] 4 IR 113, 136, per Keane CJ. In *FJMcK v FC, PL, and MAC; FJMcK v MJG, T Ltd, and E Ltd* [2001] 4 IR 521, 524 Keane CJ recognised that procedures under POCA are ‘of an unusual nature and they are of course, self evidently, and it is not using excessive language to say, of a draconian nature’.

<sup>124</sup> C King, ‘Using civil processes in pursuit of criminal law objectives: a case study of non-conviction based asset forfeiture’ (2012) 16(4) *International Journal of Evidence and Proof* 337, 345.

<sup>125</sup> L Campbell, ‘The Recovery of “Criminal” Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm’ (2010) 41 *Victoria University of Wellington Law Review* 15, 23.

<sup>126</sup> See J Meade, ‘Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture’ (2000) 10(1) *Irish Criminal Law Journal* 11.

<sup>127</sup> Eg: ‘The killing of Veronica Guerin was a calculated attack on the freedom of each and every person in this country. It was an act designed to silence not alone the late Veronica Guerin but everybody who might follow in her footsteps. It was an act of unspeakable evil which was carried out for a specific and defined purpose. Veronica Guerin was killed because she investigated and wrote about organised crime. She had become a threat to criminals and to their continued enjoyment of illegally acquired assets. She was killed so that criminals could hold on to the proceeds of crime. Are we as a community ... prepared to tolerate the continued unhindered existence in our midst of people who have accumulated vast and unexplained wealth? If we are, I suggest Veronica Guerin died in vain’. D Éireann, ‘Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2405-2406, per Deputy O’Donoghue.

<sup>128</sup> Eg: ‘What we need to do now is prevent assets being used as the seeds of future crimes. To put it another way, if we cannot arrest the criminals, why not confiscate their assets?’ D Éireann, Private Members’ Business – Organised Crime (Restraint and Disposal of Illicit Assets) Bill, 1996, Second Stage, 2 July 1996, vol 467, col 2435, per Deputy O’Donnell.

politicians. And, of course, civil forfeiture proceedings can result in stigma.<sup>129</sup> While the Irish courts have suggested that civil forfeiture serves reparative purposes,<sup>130</sup> it is posited here that such proceedings primarily serve criminal law purposes and that the courts ought to have intervened to insist that criminal procedural safeguards apply in civil forfeiture proceedings.

Another area that has attracted criticism is the impact on property rights. Even before POCA was enacted in 1996, concern had been raised as to the constitutionality of seizing property in the absence of criminal conviction: it was thought that such a procedure might constitute an ‘unjust attack’ on property rights guaranteed by the Constitution.<sup>131</sup> When civil forfeiture was challenged before the courts, however, such criticisms were rejected.<sup>132</sup> It was found that civil forfeiture does not constitute an ‘unjust attack’ on property rights. Emphasis was also placed on balancing rights to property against the public interest. For example:

‘While the provisions of the Act may, indeed, affect the property rights of a respondent it does not appear to this court that they constitute an “unjust attack” under Article 40.3.2, given the fact that the State must in the first place show to the satisfaction of the court that the property in question is the proceeds of crime and that thus, *prima facie*, the respondent has no good title to it, and also given the balancing provisions built into ss.3 and 4 [of the Act].

This court would also accept that the exigencies of the common good would certainly include measures designed to prevent the accumulation and use of assets which directly or indirectly derive from criminal activities. The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held’.<sup>133</sup>

The courts have also said:

‘The issue in the present case does not raise a challenge to a valid constitutional right of property. It concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use’.<sup>134</sup>

Again, however, we are confronted with the absence of important criminal procedural safeguards: the State is depriving a person of property, on the basis that that property constitutes proceeds of crime, yet the *civil* standard of proof applies. Most people, I venture, would agree with the idea that crime should not pay; of course a person who has benefited from criminal conduct should be denied the benefit of that conduct. Yet, any such deprivation of property ought to require the higher criminal standard of proof. To say, as the Supreme Court does, that civil forfeiture under POCA ‘is not a punishment’ misrepresents the reality of the situation.

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<sup>129</sup> Eg: ‘Cab gets order to seize 146 000 € as proceeds of crime from Sligo family’ *Irish Times*, December 15, 2011; ‘Alleged criminal must forfeit house and car’ *Irish Times*, February 4, 2014.

<sup>130</sup> *Gilligan v CAB* [1998] 3 IR 185, 217-218.

<sup>131</sup> Law Reform Commission, *Report on the Confiscation of the Proceeds of Crime* (LRC 35-1991) (Dublin, Law Reform Commission, 1991) 51.

<sup>132</sup> The courts, in considering POCA, were influenced by the decision in *Clancy v Ireland* [1988] IR 326, discussed above at n18.

<sup>133</sup> *Gilligan v CAB* [1998] 3 IR 185, 237, per McGuinness J.

<sup>134</sup> *Murphy v GM, PB, PC Ltd, GH and Gilligan v CAB* [2001] 4 IR 113, 153, per Keane CJ.

The next issue to consider is the agency tasked with implementing civil forfeiture - the Criminal Assets Bureau.<sup>135</sup> That the Bureau is essentially a policing agency, with extensive powers, adds significant concern. Bureau officers retain the powers and duties that they have by virtue of their position as a Garda, a member of the Revenue Commissioners, or an officer of the Minister for Social Protection, as the case may be. There is provision for a bureau officer to be ‘accompanied or assisted in the exercise of [his or her] powers or duties by such other persons (including bureau officers) as [he or she] considers necessary’.<sup>136</sup> This is stated very broadly and would appear to include assistance by non-bureau officers. Presumably, this provision was included to enable assistance from technical experts (eg computer specialists), but the broad wording of this provision does not confine assistance to such persons. Moreover, there is no requirement as to background or training necessary before a person can accompany or assist a bureau officer.

Another concern relates to the sharing of powers: ‘A bureau officer who assists another bureau officer under [section 8(6)(a)] shall have and be conferred with the powers and duties of the first-mentioned bureau officer for the purposes of that assistance only’.<sup>137</sup> This opens the possibility<sup>138</sup> of non-police officers being bestowed with policing powers where they are assisting a Garda bureau officer. As Harfield points out (in relation to the UK Serious Organised Crime Agency<sup>139</sup>): ‘In adopting the position that police powers are no longer exclusively for police officers to execute, the Government has altered radically the relationship of the citizen to the use of police powers and the accountability inherent there’.<sup>140</sup>

A final concern to emphasise in relation to the Criminal Assets Bureau is its limited accountability. While an Annual Report is to be prepared,<sup>141</sup> these reports are inadequate in terms of being an effective accountability mechanism. Not only is the detail rather limited,<sup>142</sup> but also the national Parliament simply plays a passive role in receiving these reports.<sup>143</sup> As has been pointed out elsewhere (in relation to the UK Serious Organised Crime Agency): ‘In the absence of proper public accountability, scrutiny – whether this is through research, parliamentary committee or through openness to public debate – becomes even more important’.<sup>144</sup>

## Conclusion

The Proceeds of Crime Acts and the Criminal Assets Bureau Act have now been on the statute book for two decades, and have received a great deal of praise during that time. For

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<sup>135</sup> For a critique of the Bureau and its powers, see: C King, ‘Follow the Money Trail: “Civil” Forfeiture of “Criminal” Assets in Ireland’ in P van Duyne et al (eds), *Human Dimensions in Organised Crime, Money Laundering, and Corruption* (Nijmegen, Wolf Legal, 2013).

<sup>136</sup> CABA, s 8(6)(a).

<sup>137</sup> CABA, s 8(6)(c).

<sup>138</sup> In practice, it appears that policing powers have only been exercised by Garda bureau officers to date. I thank Frank Cassidy for this point.

<sup>139</sup> The Serious Organised Crime Agency (SOCA) has since been replaced by the National Crime Agency (NCA), but the point equally applies to that new agency.

<sup>140</sup> C Harfield, ‘SOCA: A paradigm shift in British policing’ (2006) 46(4) *British Journal of Criminology* 743, 751.

<sup>141</sup> CABA, s 21.

<sup>142</sup> Though this may be somewhat understandable: ‘For operational effectiveness and statutory confidentiality reasons the Bureau is required to keep specific details of many of its actions confidential’. Criminal Assets Bureau, *Annual Report 2005* (Dublin, Stationery Office, 2006) 7.

<sup>143</sup> For greater discussion of accountability, see M den Boer, ‘Towards an Accountability Regime for an Emerging European Policing Governance’ (2002) 12(4) *Policing and Society* 275.

<sup>144</sup> B Bowling and C Murphy, ‘Serious organised crime under New Labour’ (2007) *Criminal Justice Matters* 32, 33.

example, in 2010 the Department of Justice and Law Reform published a White Paper on Crime discussion document in which civil forfeiture powers and the multi-agency Criminal Assets Bureau were commended as a ‘very effective tool’.<sup>145</sup> That document went on to say:

‘The Bureau has been successful over the years in seizing the proceeds of criminal activity in an effective and visible manner. It represents a new form of policing designed to disrupt and disable the capacity of targeted individuals to participate in further criminal activity’.<sup>146</sup>

The Minister for Justice, Equality and Law Reform has lauded the work of the Bureau as follows:

‘The Criminal Assets Bureau has been at the forefront of the fight against organised crime, including drug trafficking, in this jurisdiction since its inception in 1996. The significant successes that the Bureau continues to achieve by its operations demonstrates the effectiveness of its approach in pursuing illegally gotten gains’.<sup>147</sup>

A note of caution must be sounded however, and this chapter has identified a number of areas that give rise to concern, not least the use of civil processes to avoid criminal procedural protections. Notwithstanding extensive criticism in this regard, the Irish courts have upheld the constitutionality of civil forfeiture, thereby giving judicial imprimatur to this hugely controversial power.

Given that civil forfeiture is here to stay, the purpose of this chapter has been to set out the ‘state of the art’ – specifically how the legislation and case-law have developed over the past two decades. The focus is very much on legal developments; indeed much of the extant literature on civil forfeiture has examined this topic from a legal and/ or criminological standpoint. Yet, there is a great deal of scope for other disciplines to contribute to debates about civil forfeiture and add fresh perspectives. For example, it would be interesting to explore the use of civil forfeiture to combat corporate wrongdoing, especially in light of difficulties in prosecuting such behaviour, and ask whether it is appropriate (or desirable) to use such a tool instead of conventional criminal processes. Another potential issue to explore relates to procedural fairness, and the experiences of those confronted by civil forfeiture actions. So too would it be interesting to examine the ‘new’ form of policing, the structures, and accountability mechanisms of the Criminal Assets Bureau. A further idea would be to consider the question of impact or effectiveness: while there has been some such work in respect of anti-money laundering or counter-terrorist financing powers,<sup>148</sup> there is a notable lack of such research in relation to asset recovery. It is hoped that this chapter will spark interest from other disciplines to bring their skillset to examine civil forfeiture measures.

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<sup>146</sup> Ibid 6.

<sup>147</sup> Dail Éireann, Written Answers – Criminal Assets Bureau, vol 661, September 24, 2008, per Minister Ahern.

<sup>148</sup> Eg: B Unger et al, *The Economic and Legal Effectiveness of the European Union’s Anti-Money Laundering Policy* (Cheltenham, Edward Elgar, 2014); M Levi, ‘Combating the Financing of Terrorism: A History and Assessment of the Control of “Threat Finance”’ (2010) 50 *British Journal of Criminology* 650.

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