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Unexplained Wealth Orders

Global Lessons for the UK Ahead of Implementation

Florence Keen



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Executive Summary

THE CRIMINAL FINANCES Act 2017, which received Royal Assent in April 2017, introduces a new investigatory power to law enforcement in the form of Unexplained Wealth Orders (UWOs), which will require respondents to explain the source of their wealth if they are a Political Exposed Person (PEP) outside the European Economic Area or if there are reasonable grounds to suspect that the respondent is or has been involved in serious crime; if there is clear inconsistency in their apparent legal income and their visible assets in the UK; and if the value of the asset is greater than £50,000. A UWO can be granted only if all three tests are met. Enforcement authorities must apply to the High Court for the order, which can then make this assessment.

The powers extend the UK's current non-conviction-based asset recovery regime contained within the Proceeds of Crime Act (POCA) 2002, and seeks to address the difficulties law enforcement currently faces when trying to gather evidence on the wealth of serious criminals and corrupt officials in the UK and from other jurisdictions.

The powers are thus aimed at those suspected to be involved in serious and organised crime, as well as foreign politicians and officials (and their associates). In addition to relieving the state of the requirement to prove a criminal charge, the state is also not required to prove that the property in question is the instrument or the proceeds of crime, with the burden shifting onto the respondent to show that their assets have been obtained through legal means. The UK is already one of only a handful of jurisdictions worldwide that have adopted asset confiscation in the civil sphere, in large part due to the perception of civil recovery as an infringement on civil liberties in other territories. This further extension of the powers has, however, been lauded by many as the most effective way to pursue criminal assets, and prevent the economic and social harms created by the laundering of illicit funds through the property market.

This paper provides a background to the introduction of UWOs, explaining the current civil recovery regime contained within POCA 2002, and why the introduction of these new powers was felt necessary in the current climate. Specifically, it shows how the optimum conditions for gathering evidence to support cross-border civil recovery claims are often difficult to achieve, particularly against highly organised and well-resourced domestic suspected criminals or against foreign PEPs. This paper provides a detailed account of the UWOs introduced in the Criminal Finances Act 2017, noting the government's rationale behind them, and outlining some of the practicalities involved in using them.

Second, it assesses the non-conviction-based asset recovery regimes of the Republic of Ireland and Australia as case studies – both of which hold comparable 'reverse burden of proof' mechanisms, but which differ in their recovery success rates. The Republic of Ireland's regime, led by the Criminal Assets Bureau, is multidisciplinary. It draws on a range of officials in different

agencies that have been seen to efficiently share information and utilise resources when using non-conviction-based asset recovery, and holds impressive figures with regard to civil confiscation. Other factors of note include the political climate the asset recovery regime came into, namely that public opinion had been mobilised into supporting stringent crime laws in the wake of high-profile murders committed by organised crime groups.

Australia, conversely, has yielded mixed results, with UWOs having been introduced at both the Commonwealth and state level. Given the scope of UWOs, and subtle differences depending on each territory, evaluating their merit is complex. Overall, total confiscation rates have been low, with the Commonwealth yet to achieve any successful UWOs. This has been attributed to a number of factors: a lack of expertise in financial investigations and resource allocation; inter-agency disputes; and a degree of judicial reserve, meaning that the orders were not prioritised.

After examining the potentially important lessons learned from these jurisdictions, as well as the UK's current civil recovery architecture, it is clear that, upon the commencement of the Criminal Finances Act later this year, the success of UWOs will be dependent on a number of variables. The UK government should take note of these variables, which include:

- **Expertise and necessary allocation of skills:** Because the targets of UWOs are those involved in serious and organised crime and foreign PEPs involved in corruption, cases will be highly complex. This will require skilled financial investigators with an established track record in civil recovery, with talent harnessed and retained in relevant agencies.
- **Inter-agency cooperation:** In the UK, the powers will be available to a range of government agencies, which will need to be joined up in order to be effective. As evidenced by the Australian experience, a lack of clarity around agency roles and responsibilities can cause notable difficulties; although the Republic of Ireland's Criminal Assets Bureau has managed to share information across agencies to great effect.
- **Appropriate resource allocation:** Without a certain level of investment from the UK government, UWOs will simply not be used. Financial support will be required throughout investigations and court hearings, particularly in light of the financial resources at the disposal of those who will be the targets of UWOs. Sensible allocation of the Asset Recovery Incentivisation Scheme is also recommended as a more effective way of providing additional funding for financial investigators. Prosecutorial support must also be a priority, with the Crown Prosecution Service an essential part of this picture which must be supported both financially and legally.
- **Political will:** Underpinning the above must be the genuine political will and resolve to ensure that UWOs do not sit untouched on the statute books. This will require leadership from the government if the UK is to see any success.

UWOs could certainly prove to be a powerful tool in efforts to tackle attempts to invest the proceeds of serious and organised crime and corruption in the UK. This paper is intended to help key stakeholders and observers understand both the complexity of UWOs and their viability – if the appropriate level of commitment from the government is given.

Introduction

THE CRIMINAL FINANCES Act 2017¹ will give UK law enforcement agencies and their partners enhanced powers to recover the proceeds of crime, tackle money laundering, tax evasion and corruption, and combat the financing of terrorism. The Act contains provisions for Unexplained Wealth Orders (UWOs), which create a new investigative tool requiring individuals to explain the source of their wealth to enforcement authorities if there are reasonable grounds for suspecting that there is a discrepancy between their known income and the assets on display.² An order can be made under the conditions that:

- The respondent is a Politically Exposed Person (PEP)³ outside the European Economic Area (EEA); or there are reasonable grounds to suspect the respondent has been involved in serious crime.
- The respondent's known income is insufficient to obtain the asset.
- The value of the asset is greater than £50,000.⁴

Targeted at those involved in grand corruption or in serious crime, the provision extends the UK's current non-conviction-based asset recovery architecture (explained later in the paper), contained within Part 5 of the Proceeds of Crime Act (POCA) 2002, to presume that, where no reasonable explanation is offered on the origin of property, it is deemed to be 'recoverable property'.⁵ In this instance, the enforcement authority can consider whether or not to take further action against the property, which may include recovering the property using the civil recovery powers provided in Part 5 of POCA.

UWO provisions come after a series of public statements from the government relating to asset recovery as a means of improving law enforcement's response to corruption and serious crime: the government's *UK Anti-Corruption Plan*, published in 2014, cited among its immediate priorities the need to 'strengthen our law enforcement response so that we can pursue, more effectively, those who engage in corruption or launder their corrupt funds in the UK'.⁶ This echoed measures set out in the Home Office's Serious and Organised Crime Strategy 2013,⁷ which committed to the strengthening of POCA and the recovery of hidden assets overseas. The *National Security Strategy and Strategic Defence and Security Review 2015* (SDSR) cemented

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1. Home Office, 'Criminal Finances Bill Receives Royal Assent', 27 April 2017.
 2. Enforcement authorities must make an application for the order to the High Court.
 3. According to section 362B (7) of the Proceeds of Crime Act 2002, a PEP is an individual who has been entrusted with prominent public functions by an international organisation or state outside the UK or the European Economic Area (EEA). It also includes family members and associates.
 4. Rachel Davies, 'Unexplained Wealth Orders: A Brief Guide', *Transparency International UK*, 30 May 2017.
 5. 'Proceeds of Crime Act (POCA) 2002 (UK)', Part 5.
 6. HM Government, *UK Anti-Corruption Plan* (London: The Stationery Office, 2014), p. 8.
 7. HM Government, *Serious and Organised Crime Strategy*, Cm8715 (London: The Stationery Office, 2013).

this, committing to ‘new measures to make the UK a more hostile place for those seeking to move, hide or use the proceeds of crime and corruption or to evade sanctions’.⁸

The introduction of UWOs has the potential to represent a major shift in UK anti-crime efforts, and could theoretically diminish the ease with which organised criminals and corrupt officials launder the proceeds of crime through the UK. This could possibly lead to it acting both as a deterrent to criminals, as well as setting a strong example for other jurisdictions to follow.

That said, there are a number of hurdles which must be overcome if UWOs are to be a success. This paper will explore the practicalities of UWOs once they are operational, beginning with an assessment of the current asset-confiscation framework that exists in the UK, and why it was felt necessary to introduce this additional investigative power. In doing so, the paper considers the experience of two other jurisdictions: Australia and the Republic of Ireland, which both already have analogous provisions in relation to non-conviction-based asset recovery, which reverse the ‘burden of proof’ requiring individuals to explain the source of their wealth. While neither jurisdiction contains legislative instruments that precisely match those which the UK is introducing, there may be important lessons to be learned about the principle of ‘reverse burden’-based asset recovery systems.

The author conducted desk-based research and non-attributable interviews with key experts from the academic, legal and law enforcement community. Based on the findings, the paper assesses the barriers in the current legal framework that UWOs hope to overcome, and in doing so will outline how the UK government is most likely to deliver the hoped-for impact via UWOs once the Criminal Finances Act is commenced.

8. HM Government, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom*, Cm9161 (London: The Stationery Office, 2015), p. 42.

I. Corruption and Serious Crime: Economic and Social Harms

T HAS LONG been recognised that corruption and serious crime threaten the UK's national security, economic prosperity and reputation on the world stage. In 2014, then Home Secretary Theresa May stated that 'cracking down on corruption, and working to recover stolen assets, is an issue which has increasingly gained international importance and is one we must continue to work hard on'.¹ This sentiment was echoed at the global Anti-Corruption Summit in May 2016, hosted by then Prime Minister David Cameron, in which representatives of 43 countries and seven international organisations signed the Global Declaration Against Corruption.² This committed the signatories to pursuing and punishing those who have profited from corruption, by actively enforcing anti-corruption laws, tracking down stolen assets and returning them to their legitimate owners, and ensuring that there will be no impunity for corruption.

Although precise figures are impossible to obtain, the IMF has estimated that the amount of money laundered globally equates to between 2% and 5% of global GDP annually.³ This means between \$800 billion and \$2 trillion being illegally funnelled through the system, which, regardless of a margin of error, is staggering. It is clear that substantial amounts of this money ends up laundered through the UK. The National Crime Agency (NCA) has estimated that it could be up to £90 billion per year,⁴ much of which has ended up in London's property market.⁵

The problem is not simply an economic one; there is an undeniable relationship between organised crime, corruption and political destabilisation. Money laundered by corrupt officials means less money for state resources, severely cutting into national budgets for healthcare, social services and economic infrastructure.⁶ The effects of organised crime on undermining

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1. Theresa May, 'Home Secretary Speech at Ukraine Forum on Asset Recovery', 29 April 2014.
 2. Cabinet Office and Prime Minister's Office, 'Global Declaration Against Corruption', Policy Paper, 9 December 2016.
 3. Michel Camdessus, 'Money Laundering: the Importance of International Countermeasures', speech given at the IMF in Paris, 10 February 1998.
 4. Home Office, 'Criminal Finances Bill: Unexplained Wealth Orders', Factsheet, Part 1, Chapter 1, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564467/CF_Bill_-_Factsheet_2_-_UWOs.pdf>, accessed 13 July 2017.
 5. Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (London: Transparency International UK, 2017).
 6. Transparency International UK, *Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery* (London: Transparency International UK, 2016).

the development of weak and fragile states are also evident. Recent scandals, such as the Panama Papers,⁷ and the Global Laundromat,⁸ which are likely to be just the tip of the iceberg, have brought the multinational scale of international corruption and organised crime into even sharper focus.

Vast sums of this money have ended up in real estate: the value of property in the UK under criminal investigation for allegedly being the proceeds of international corruption was £180 million between 2004 and 2015.⁹ In March 2017, Transparency International identified £4.2 billion worth of property in London deemed to have been purchased with suspicious sources.¹⁰ They also found that 52% of land titles owned by anonymous companies in London were in the boroughs of Westminster, Kensington and Chelsea, and Camden, and that 91% of overseas companies owning London land titles are registered in secrecy jurisdictions (or tax havens).¹¹ While there are also other factors to take into account, the presence of corrupt money in the property market has evidently been a contributory factor in the housing crisis by driving up prices substantially. It is in this context that the introduction of UWOs must be understood.

The UK and the Proceeds of Crime Act 2002

The UK's current response is within both the criminal and civil asset confiscation architecture expressed in POCA.¹² The legislation followed developments during the 1980s and 1990s,¹³ which culminated in an international consensus by the end of the twentieth century that asset recovery was the best possible tool with which to tackle the vast wealth accrued by organised crime, money laundering and corruption.¹⁴ Galvanised by the mantra that 'crime should not pay', jurisdictions around the world more fully began to adopt a 'follow-the-money' approach that centred on the aggressive pursuit of criminal assets, working on the logic that starving organised crime groups of their financial lifeblood diminishes their ability to sustain a criminal enterprise and thus the incentive to commit crime, and consequently reduces crime as a whole.

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7. Luke Harding, 'What Are the Panama Papers? A Guide to History's Biggest Data Leak', *The Guardian*, 5 April 2016.
 8. Luke Harding, 'The Global Laundromat: How Did it Work and Who Benefited?', *The Guardian*, 20 March 2017.
 9. House of Commons Home Affairs Committee, 'Proceeds of Crime', HC 25, Fifth Report of Session 2016–17, 15 July 2016, p. 4.
 10. Transparency International UK, *Faulty Towers*, p. 4.
 11. Transparency International UK, 'London Property: A Top Destination for Money Launderers', 2 December 2016.
 12. See POCA Part 2 for Criminal Confiscation and Part 5 for Civil Recovery.
 13. See, United Nations Office on Drugs and Crime, 'United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988', 18 December 1988; Council of Europe, 'Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime', European Treaty Series 141, 8 November 1990. This convention introduced the idea of seizing property as a response to organised crime.
 14. Edward Rees, Richard Fisher and Richard Thomas, *Blackstone's Guide to The Proceeds of Crime Act 2002*, 5th edition (Oxford: Oxford University Press, 2015).

Although the vast majority of jurisdictions have adopted post-conviction criminal confiscation regimes, a handful, including the UK, the Republic of Ireland and Australia, have gone one step further and adopted a form of asset confiscation in the civil sphere, known as ‘non-conviction-based asset recovery’. These tools share a common purpose: to ensure that criminals do not benefit from the proceeds of crime, thus removing its economic incentive; and ultimately to recover the ill-gotten gains as compensation.

Contained within Part 5 of POCA, the UK’s civil recovery provisions allow action to be taken against property (as opposed to against the person) where the enforcement authority¹⁵ can prove ‘on the balance of probabilities’ (as opposed to ‘beyond reasonable doubt’ in criminal cases) that the property was ‘obtained through unlawful conduct’. Facing the prospect of their assets being confiscated on the grounds that they represent the proceeds of crime, the respondent must refute the case made by the state in order to retain the assets.¹⁶

While there must be reasonable grounds to suspect that said property has been obtained through criminality, the civil standard is significantly lower than the criminal. It does not require a criminal conviction for the offence in question, which is why as a tool it is often considered contentious. Despite this, the major challenges of the High Court, the House of Lords and the European Court of Human Rights (ECHR) against civil recovery on human rights grounds have been defeated.¹⁷

Civil recovery has been justified not only by its *in rem* nature,¹⁸ but also by what is perceived to be the changing nature of international corruption and serious and organised crime. The ‘Mr Bigs’ at the centre of criminal enterprises tend to employ complex procedures to distance themselves from their criminality, often making it difficult to secure a conviction against them.¹⁹ The criminals targeted by civil recovery are perceived to be highly organised, employing significant time and resources to avoid detection, and are consequently often immune to traditional criminal investigations and prosecutions. Civil recovery therefore provides an additional weapon in the armoury of law enforcement when trying to recover property obtained by unlawful conduct, where criminal proceedings have proven inadequate.²⁰

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15. Currently, the NCA, the Crown Prosecution Service (CPS) or the Serious Fraud Office (SFO).
 16. Colin King, ‘Using Civil Processes in Pursuit of Criminal Law Objectives: A Case Study of Non-Conviction Based Asset Forfeiture’, *International Journal of Evidence and Proof* (Vol. 16, No. 4, 2012).
 17. See, for example, Gale and Another vs Serious Organised Crime Agency, UKSC 49, ‘Judgment of the Supreme Court’, London, 26 October 2011, <<https://www.supremecourt.uk/cases/docs/uksc-2010-0190-judgment.pdf>>, accessed 28 July 2017; and Assets Recovery Agency vs Cecil Walsh, KERC 5186, ‘Judgment’, Court of Appeal in Northern Ireland, Belfast, 26 January 2005, <http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2005/2005%20NICA%206/j_i_KERC5186.htm>, accessed 28 July 2017.
 18. Against the property, not the person.
 19. Anthony Kennedy, ‘Justifying the Civil Recovery of Criminal Proceeds’, *Journal of Financial Crime* (Vol. 12, No. 1, 2005), pp. 8–23.
 20. This has often happened when respondents have fled the jurisdiction, are deceased or where a technicality has caused the collapse of the criminal case.

Not Far Enough?

Despite Cameron's assertion in 2015 that 'London is not a place to stash your dodgy cash',²¹ evidence would suggest that the UK remains a favoured place for criminals to launder the proceeds of crime. This is in large part due to its financial stability, trusted legal system and common language, as well as its vast international footprint, which means that trillions of pounds transact each year through UK banks and their subsidiaries. It is these precise characteristics that were referenced in the government's 2015 *UK National Risk Assessment of Money Laundering and Terrorist Financing* as making the UK an attractive place to launder the proceeds of crime and corruption.²²

Thus, despite the extensive civil recovery regime in the UK, as outlined in POCA, the legislation as it stands has been unable to effectively tackle these assets. A fundamental weakness that has been identified in the current system is that the UK is dependent on mutual legal assistance from other countries in order to gather evidence in support of civil recovery claims.²³ This reliance on evidence-gathering in the country of *origin* is problematic, particularly concerning claims against assets in the UK derived from corrupt regimes, for a number of reasons: cooperative regimes come and go depending on the political climate; political will is required from jurisdictions on both sides; and an independent police and judiciary is needed with well-resourced law enforcement with asset-recovery responsibility.²⁴

Optimum conditions for gathering evidence in support of cross-border civil recovery claims are therefore rare, so countries act as 'safe havens' for criminal organisations and their assets – whether complicit or not.²⁵ This point is critical: organised crime and corruption often transcends state boundaries, particularly in an increasingly interconnected world, and without the means to gather evidence across borders even the strongest legislation will be rendered largely ineffective. It is the problem of gathering this evidence, either against highly organised and well-resourced domestic criminals or against foreign PEPs, which UWOs seek to address.

It is important to state that UWOs will not be a complete answer to the problem of gathering evidence across borders, and that difficulties with collating evidence from corrupt or non-cooperative jurisdictions is likely to remain. Respondents may well provide an explanation for their wealth that is ostensibly reasonable; rebuttal will require evidence and the judicial cooperation of the overseas jurisdiction. Moreover, even if the jurisdiction has the will to assist, it may be prevented from doing so constitutionally or legally. The majority of international money laundering conventions apply only to criminal matters, and most domestic regimes only contain criminal confiscation regimes, meaning that many jurisdictions simply do not have the legal architecture in place to recognise non-conviction based proceedings.

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- 21. David Cameron, 'Tackling Corruption: PM Speech in Singapore', speech given in Singapore, 28 July 2015.
 - 22. HM Treasury and Home Office, *UK National Risk Assessment of Money Laundering and Terrorist Financing* (London: The Stationery Office, 2015).
 - 23. Transparency International UK, *Empowering the UK to Recover Corrupt Assets*.
 - 24. *Ibid.*
 - 25. HM Government, *Serious and Organised Crime Strategy*, p. 36.

II. Unexplained Wealth Orders

THE GOVERNMENT'S 2016 *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* underpinned the key legislative elements of the Criminal Finances Act, combining the government's primary objectives regarding money laundering, terrorist finance and economic crime more broadly.¹ It was within this document that the government committed to exploring UWOs as a legal option,² and by October 2016, when the Bill was introduced to Parliament, explicit provisions for UWOs were made. Clause 1 inserts new sections 362A–362H into Chapter 2 Part 8 of POCA, defining them as:

an order requiring an individual to set out the nature and extent of their interest in the property in question and to explain how they obtained that property in cases where that person's known income does not explain ownership of that property.³

The rationale is contained within the Bill's explanatory note: primarily, that while law enforcement agencies often have reasonable grounds to suspect that identified assets are the proceeds of serious crime and corruption, POCA does not always allow them to freeze or recover certain assets due to the considerable need to rely on evidence from other countries.⁴ This reflects the fact that information needed to satisfy evidential standards is often contained in jurisdictions other than the UK – particularly in cases of grand corruption. These jurisdictions may be uncooperative, or have a weak legal framework that makes conviction more difficult. UWOs address the evidential barriers that prevent law enforcement from acting when there appears to be a substantial difference between what an individual earns and what is on display, be it property, cars or expensive artwork.

UWOs are aimed chiefly at those suspected to be involved with serious and organised crime, as well as foreign politicians and officials (and those associated with them) known as PEPs, who pose a high risk of corruption. Importantly, in the case of non-EEA PEPs and their associates, there is no requirement that they be connected with suspicion of criminality in order for them to be subjected to the orders, only that they cannot demonstrate legitimate origin of wealth. Section 362B (1-10) sets out certain requirements for making a UWO: that the value of property subject to an order is greater than £50,000; and that the court must be satisfied that there are reasonable grounds to suspect the respondent or PEP is connected to, or has been involved in, serious crime (as specified in Schedule 1 of the Serious Crime Act 2007).

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1. Home Office and HM Treasury, *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* (London: The Stationery Office, 2016).
 2. *Ibid.*, section 2.33, p. 21.
 3. 'Proceeds of Crime Act 2002', s362A(3), <<http://www.legislation.gov.uk/ukpga/2017/22/section/1/enacted>>, accessed 15 August 2017.
 4. Home Office and HM Treasury, 'Criminal Finances Bill: Explanatory Notes', <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560122/Criminal_Finances_Bill.pdf>, accessed 14 July 2017.

The critical way in which UWOs go further than the UK's current civil recovery procedure is that they not only relieve the state of proving a criminal charge (as is already the case in civil recovery), but that the state is not required to prove that the property in question is the instrument or proceeds of crime – which so often depends on mutual legal assistance from other jurisdictions. In effect, the burden is on the owner to show that the assets were gained through legitimate means.

The power to apply to the High Court for a UWO will be available to the NCA, the CPS, the Financial Conduct Authority (FCA), the SFO, the Public Prosecution Service for Northern Ireland and HM Revenue and Customs. If approved, the individual or company must respond within a certain time period, and if a reasonable explanation for the wealth is not given, or if a false explanation is given or if there is a failure to respond, the property is presumed to be 'recoverable' without any further need to link the assets to criminality.⁵ This is because any of the above responses can be used to contribute to evidence that can lead to the application of a UWO to the High Court, if law enforcement chooses to proceed.

Once the Criminal Finances Act is commenced, the real work begins: much of the success of UWOs will depend on a number of variables, including: the government's political commitment and will; correct resource allocation and expertise within law enforcement; and overcoming the likely challenges law enforcement agencies will face on human rights grounds.

The next section looks at the lessons that can be learned from unexplained wealth provisions in the Republic of Ireland and Australia, both of which act *in rem* against property that constitute the proceeds of crime without the need for a predicate offence, and which reverse the burden of proof on to the respondent.

Republic of Ireland

With the introduction of POCA and the Criminal Asset Bureau Act (CAB) (both in 1996), the Republic of Ireland became one of the first countries in Europe not only to adopt a model of non-conviction-based asset recovery, but also to create provisions analogous to the UWO which reverse the burden of proof to prove the source of the assets on to the respondent, which is where comparisons can be drawn with the UWOs being brought in under the Criminal Finances Act 2017.

It is pertinent to note from the outset that while similarities can be drawn between the UWOs being enforced in the UK and the Republic of Ireland's unexplained wealth provisions, the process in the Republic of Ireland is distinct. Even the term UWO is not recognised parlance, despite often being referred to in many discussions of their experience. Unlike the UK, the Irish legislation applies more broadly and does not additionally focus on foreign PEPs, primarily targeting persons suspected of being involved in serious and organised crime.⁶

5. Home Office, 'Criminal Finances Bill: Explanatory Notes'.

6. Natasha Reurts, 'Unexplained Wealth Orders: The Overseas Experience', *Bright Line Law*, 14 March 2017.

The Irish legislation is predicated on ‘belief evidence’, in which there must be reasonable grounds to suspect that the property is connected to the proceeds of crime, which must be admissible as evidence during proceedings. The responsibility for producing this evidence lies with the Criminal Assets Bureau (hereafter, ‘the Bureau’), and evidence can be drawn from a number of sources, such as tax returns and benefits statements.⁷ If the threshold is met, the High Court can make a Section 2 order, which requires the respondent to prove that the property is not the proceeds of criminal conduct. This applies for 21 days, unless an application under Section 3 can be brought – which can last up to seven years, during which the respondent can bring evidence to the contrary.

The picture of non-conviction-based asset recovery in the Republic of Ireland is one of relative success; in 2015, the value of assets frozen under Section 2 of POCA was €941,078.59, which equated to thirteen cases (compared with ten from 2014), although notably the asset value decreased, from €6.76 million in 2014. The Bureau, however, cite two foreign international corruption cases that commenced in 2014 and brought to full Section 3(1) hearing during 2015 as the reason for the decrease. Under Section 3, eleven cases before the High Court had orders made to the value of €7,225,091.98 in 2015,⁸ compared with a value of €1.564 million from nine cases in 2014. These figures are broadly typical for the Republic of Ireland, and while they may not appear to be substantial, they are high compared to asset-recovery counterparts in other jurisdictions. There are a number of reasons for this.

First, the climate in which POCA 1996 was introduced in the Republic of Ireland following the deaths of crime reporter Veronica Guerin and Jerry McCabe, a detective of An Garda Síochána (Irish Police – known as the Garda), at the hands of organised criminals. As one academic interviewed confirmed, these crimes were significant in that they ‘mobilised’ public opinion into supporting tough-on-crime laws.⁹ Notably, there was no major legal challenge to POCA 1996 from civil liberties and private bar organisations;¹⁰ and although prominent organisations¹¹ and academics did voice some concerns, they had no real standing to challenge the Act. There have been High Court challenges in the years since, but the legislation has proved resilient; just recently the notorious crime boss John Gilligan (connected to the murder of Guerin) lost his Supreme Court appeal¹² against the Bureau in which he challenged POCA on freezing orders

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7. Author interview with subject matter expert, London, April 2017; Anthony Kennedy, ‘Justifying the Civil Recovery of Criminal Proceeds’.
 8. Criminal Assets Bureau, ‘Criminal Assets Bureau Annual Report 2015’, p. 11, <http://www.justice.ie/en/JELR/CAB_Annual_Report_2015.pdf/Files/CAB_Annual_Report_2015.pdf>, accessed 26 July 2017.
 9. Author interview with subject matter expert, London, April 2017.
 10. Booz Allen Hamilton ‘Comparative Evaluation of Unexplained Wealth Orders’.
 11. National Council for Civil Liberties, ‘Proceeds of Crime: Consultation on Draft Legislation – The Situation in the Republic Of Ireland’, May 2001.
 12. Murphy vs. Gilligan, ‘Judgment in the Matter of the Proceeds of Crime Act 1996 and 2005’, Supreme Court of Ireland, IESC 3 (SC), 1 February 2017.

made in 1996,¹³ alleging breaches of the European Convention on Human Rights.¹⁴ More than 20 years since its inception, the Bureau is seemingly institutionalised in Irish society, with an overwhelming acceptance that despite its arguably draconian nature, it is a robust and effective tool. One academic interviewed confirmed that there was a high level of public awareness of the work of the Bureau – and are persuaded of its value to society.¹⁵

The structure of the bureau has also influenced its success. It is multidisciplinary, drawing on staff from the Garda, social welfare and revenue services. Key to its functionality is the free exchange of information between these departments. This means that top-level expertise is exploited when using its non-conviction-based asset recovery powers, ensuring that nothing is missed.¹⁶ The Bureau does not experience a high staff turnover, resulting in great consistency of knowledge and expertise surrounding the use of the laws, an essential component given the complicated nature of cases. While the Bureau's primary tool is POCA 1996, it is also able to use the powers and provisions under criminal, tax and social welfare law, with the tax element proving particularly valuable. This means that once someone is the target of the Bureau, criminal proceeds can be taxed, putting law enforcement in an extremely strong position.¹⁷

Australia

Australia's civil recovery regime is based on a federalist model. UWOs (in varying forms) have been implemented at different times, and in different territories. Much like the Irish model, Australia's regime does not focus on foreign PEPs, as will the UK's, and was broadly formed in response to organised crime and motorcycle gangs. Similarities can, however, be drawn, and without going into extensive detail, this paper provides a brief overview of the different instruments in place and assesses their effectiveness.

The first Australian territory to introduce unexplained wealth provisions was Western Australia (WA) with the Criminal Property Confiscation Act 2000, on which another, the Northern Territory (NT), modelled its Criminal Property Forfeiture Act 2002. Under these Acts, there is no requirement to show reasonable grounds for suspecting a person has committed an offence, and after the order has been made, the burden of proof is placed upon the respondent.¹⁸

Despite being deemed unsuitable by the Commonwealth government in 2006, the decision was revisited with the Crimes Legislation Amendment Bill 2009, leading in 2010 to the incorporation of UWOs into POCA 2002:

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13. Gilligan vs. Criminal Assets Bureau, 'Judgment of Mr Justice Morris', High Court of Ireland, 1 IR 526 (HC), 26 February 1997.
 14. Tim Healy, 'CAB Praised for "Determination and Dedication" as John Gilligan Loses Supreme Court Appeal', *Independent.ie*, 1 February 2017.
 15. Author interview with subject matter expert, London, April 2017.
 16. Author interview with employee of the Criminal Assets Bureau, London, March 2017.
 17. Author interview with employee of the Criminal Assets Bureau, London, March 2017.
 18. Nicolee Dixon, 'Unexplained Wealth Laws', Queensland Parliamentary Library and Research Service, August 2012.

(ba) to deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and (c) to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and (d) to prevent the reinvestment of proceeds.¹⁹

Under the Act, the High Court can make a UWO where a preliminary order has been made, and the court is not satisfied that the total wealth of the person was not derived from one or more of the following: an offence against the Commonwealth; a foreign indictable offence; and/or a state offence that has a federal aspect.²⁰

However, the Commonwealth's UWO regime necessitates an offence (such as tax crimes or money laundering) and does not require a criminal conviction before a UWO can be made. It also has an additional safeguard built in which provides three different types of orders: unexplained wealth restraining orders; preliminary unexplained wealth orders; and a final unexplained wealth order – effectively a confiscation order.²¹ The powers reside in the Criminal Assets Confiscation Taskforce (CACT), launched in 2011 to strengthen the government's pursuit of criminal assets. Led by the Australian Federal Police (AFP), the taskforce also draws upon experts from the Australian Taxation Office and the Australian Crime Commission.²²

After the introduction of UWOs by the Commonwealth government, additional Australian states introduced their own UWO provisions: South Australia (SA) has stand-alone unexplained wealth legislation; and the Serious and Organised Crime (Unexplained Wealth) Act 2009, which has broad similarities to provisions in WA and the NT. New South Wales amended the Criminal Assets Recovery Act 1990 in 2010, introducing a form of UWOs, where a higher threshold is required before the burden of proof is reversed. Under the Criminal Proceeds Confiscation and Other Acts Amendment Act 2009, Queensland introduced amendments not technically regarded as UWOs, but it created a statutory presumption that the unexplained element of a person's wealth is the proceeds of illegal activity, subject to finding that a person is engaged in serious and organised crime.²³

Given this wide scope and the subtle differences in UWOs depending on the jurisdiction, evaluating their merit for the purposes of this report is complex. The non-conviction based asset recovery regime has yielded mixed results depending on territory. WA has seen relative success: as of December 2016, there were 28 applications for UWOs, 24 of which have been successful (amounting

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19. 'Proceeds of Crime Act 2002 (Australia)', Section 5, Part 1-2, Objects, <http://www.austlii.edu.au/au/legis/cth/consol_act/poca2002160/s5.html>, accessed 9 August 2017.
 20. Lorana Bartels, 'Unexplained Wealth Laws In Australia', *Trends & Issues in Crime and Criminal Justice* (No. 395, July 2010), pp. 1–6.
 21. Natasha Reurts, 'Unexplained Wealth Orders'.
 22. Criminal Assets Confiscation Task Force, 'Taking the Profit out of Crime', 2013, <<https://www.afp.gov.au/sites/default/files/PDF/criminal-assets-confiscation-taskforce-brochure.pdf>>, accessed 27 July 2017.
 23. *Ibid.*; for a detailed overview of Australian jurisdictions' varying UWO legislation, see Booz Allen Hamilton, 'Comparative Evaluation of Unexplained Wealth Orders'.

to a confiscation figure of AUD 6.9 million²⁴). In the NT, the figure is AUD 3.5 million, and, in NSW, AUD 2.6 million.²⁵ At the Commonwealth level, no UWOs have yet been successfully imposed.

One explanation given for these low recovery rates is that funds appear to be confiscated in less controversial ways, such as through the tax system, which is notably robust in Australia. Thus, assets can be recovered for the same purpose via a different route.²⁶ However, the low success rate of UWOs in Australia is not simply explained by the fact that other legislation is stronger. Pursuing UWO cases is resource-intensive, and as demonstrated in the Republic of Ireland, success is predicated on a deep level of knowledge and expertise, which is reportedly lacking in Australia. One academic interviewed pointed to an overall ‘lack of competence’ and specialism in non-conviction-based asset recovery, with officers rotating between departments, often without having any expertise in financial investigations.²⁷ In contrast, the success of legislation in the NT has been explained by the fact that it has a relatively small population, enabling greater cooperation between agencies, and thereby harnessing the specialism of financially skilled individuals.²⁸

There is also perceived risk aversion, in which unsuccessful cases can lead to a destruction of careers, meaning law enforcement agents have avoided pursuing cases when possible.²⁹ The risk of losing a case at trial also has financial consequences, with likely requirements to pay court costs and damages, also contributing to the fact that relatively few cases are pursued.³⁰ The low use of the legislation may also have been influenced by unsympathetic courts, which have been known to look less favourably on the reverse burden of proof mechanism due to a perceived infringement on civil rights, as was reported about the courts in WA.³¹

An additional factor often cited has been historical tensions between the AFP and the Director of Public Prosecutions (DPP), with critics viewing the latter as ‘overly conservative’ when it comes to pursuing cases.³² While the law does not require a predicate offence, the DPP has attested that it must show some evidence that a person has been engaged in criminal activity, which may explain why there have been fewer cases brought.³³ The division in responsibilities between the AFP and the DPP was also somewhat unclear, and another source of friction;³⁴

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- 24. Marcus Smith and Russell G Smith, ‘Procedural Impediments to Effective Unexplained Wealth Legislation in Australia’, *Trends & Issues in Crime and Criminal Justice* (No. 523, 1 December 2016).
 - 25. *Ibid.*
 - 26. Author interview with subject matter expert, London, April 2017.
 - 27. Author interview conducted with subject matter expert, London, April 2017.
 - 28. Smith and Smith, ‘Procedural Impediments to Effective Unexplained Wealth Legislation in Australia’.
 - 29. Author interview with subject matter expert, London, April 2017.
 - 30. Smith and Smith, ‘Procedural Impediments to Effective Unexplained Wealth Legislation in Australia’.
 - 31. Booz Allen Hamilton, ‘Comparative Evaluation of Unexplained Wealth Orders’; Author interview with subject matter expert, London, April 2017.
 - 32. Booz Allen Hamilton, ‘Comparative Evaluation of Unexplained Wealth Orders’, p. 113.
 - 33. *Ibid.*
 - 34. Smith and Smith, ‘Procedural Impediments to Effective Unexplained Wealth Legislation in Australia’.

however, with the creation of the CACT in 2011, which integrated the relevant agencies, this has been partially mitigated.

It is worth remembering that Commonwealth UWO legislation is still relatively new, and therefore lacks jurisprudence. As time goes on, it is possible that the tool will become more utilised. Indeed, the Financial Action Task Force's³⁵ Mutual Evaluation Report of Australia in 2015 noted the lack of asset recovery as a clear deficiency,³⁶ which may galvanise Canberra into greater action.

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35. The Financial Action Task Force (FATF) is the global standard setter for money laundering, terrorist finance and other threats relating to the integrity of the financial system. It monitors and assesses the progress of member states based around its Recommendations.
 36. FATF, 'Anti-Money Laundering and Counter-Terrorist Financing Measures; Australia – Mutual Evaluation Report', April 2015.

III. Lessons for the UK

UPON THE COMMENCEMENT of the Criminal Finances Act, the success of UWOs will be contingent on a number of factors. Based on evidence from the UK's current regime, and the use of similar pieces of legislation in the Republic of Ireland and Australia, this paper highlights four key lessons that the government needs to take into account: expertise in non-conviction based asset recovery; inter-agency cooperation; resources; and political will.

Expertise

A consistent theme throughout the research for this paper is that the success of asset recovery (whether criminal or civil) hinges upon the expertise held within law enforcement. As demonstrated, the accomplishment of the Republic of Ireland's non-conviction based asset recovery regime owes a great deal to the fact the Bureau in charge of its implementation has not experienced a high staff turnover, thereby retaining individuals with deep knowledge of asset-recovery processes over the previous two decades. This stands in stark contrast to the situation in certain Australian territories, which have witnessed a 'revolving door' of staff moving between departments, resulting in a frequent lack of financial qualifications required to investigate the proceeds of crime.

As the UWOs that the UK is introducing are targeted at serious and organised crime and foreign PEPs involved in corruption, cases will be highly complex, making knowledge and capability even more pertinent. The individuals being targeted by the UWOs are also likely to have significant resources at their disposal with which to challenge the orders. It is almost certain that once the first UWO is issued, it will be challenged in the High Court. To prepare for this, and to ensure that law enforcement does not fall at the first hurdle, cases must be watertight, with sufficient levels of evidence to satisfy the High Court. That said, an overly cautious attitude towards pursuing UWOs and a lack of willingness to take risks may also have negative consequences, as demonstrated by the AFP.

The agencies in the UK tasked with using UWOs certainly have highly proficient individuals; however, in recent years there has been a drain of skilled financial investigators into the private sector – which offers higher salaries and benefits that the public sector simply cannot match. This is something of which the government should be mindful; retaining financial investigators with a proven track record in civil recovery will be crucial to the success rate of cases. The same must also be said of harnessing and retaining skilled proceeds of crime prosecutors, particularly those with the necessary litigation skills required to pursue UWO proceedings.

Inter-Agency Cooperation

The second element to the workability of UWOs is inter-agency cooperation. As discussed, the powers will be available to a range of government agencies in the UK, each with varying

specialisms. The Republic of Ireland's highly successful Criminal Assets Bureau, with its multi-agency basis, has demonstrated the merit in inter-governmental information sharing as a strong tool in putting together unexplained wealth provisions. Australia's federal model, on the other hand, has been chaotic at times, with agencies undercutting one another instead of working together to pursue UWOs. The UK government should take note, ensuring that the relevant agencies are joined up in order to enhance public-to-public information sharing. As described, the powers will be available to a number of different agencies and cooperation between them is crucial if UWOs are to be successful.

This also feeds into the need for clarity of mission, whereby all relevant agencies understand the rationale behind UWOs, and have a shared vision of their implementation. As demonstrated in Australia, tensions between certain agencies were fuelled by differences in their approach towards the legislation. It is the UK government's responsibility to provide this clarity.

Resources

While there are limits to the amount of money the government can reasonably be expected to spend, without a certain level of investment, UWOs will not get off the ground. Given the significant cuts to policing since 2011 (around 20%), the government's track record in this regard is not promising. Reconsideration of the investment put into financial investigations is necessary; the powers will ultimately be impotent if financial support is not committed, especially giving enforcement authorities budgetary backing to take 'test cases' as the legislation is implemented. This bolstering of resources into financial investigations is even more relevant in light of the sizeable resources that will likely be at the disposal of many of the targets of UWOs. As previously discussed, UWO cases will almost certainly be taken to the High Court and beyond¹ upon their use, which could last years, and would take up substantial costs in litigations, hearings, etc.

Sensible allocation of proceeds retrieved by the Asset Recovery Incentivisation Scheme (ARIS)² is a potential solution that requires further investigation. The setting of ARIS's 'top-slice' at approximately £5 million followed recommendations of the Criminal Finances Board in 2015, which accordingly made the use of funds more transparent. Specifically, this money has been allocated to fund investigations in key national asset recovery capabilities, including the Joint Asset Recovery Database (JARD),³ the regional Asset Confiscation Enforcement (ACE) Teams, as well as additional intelligence resources for the NCA to respond to cash-based money laundering.⁴ ARIS could, however, be used even more effectively to provide additional funding for financial investigators to be aligned to Regional Organised Crime Units to take the legislation through its test phase.

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1. For example, the Supreme Court and the European Court of Justice.
 2. Under ARIS, agencies receive 50% of whatever they recover from cash forfeiture orders, confiscation orders and civil recovery and taxation cases. The rest is invested back into the Home Office.
 3. The Joint Asset Recovery Database holds information about asset recovery cases going through the criminal justice system.
 4. House of Commons Home Affairs Committee, 'Proceeds of Crime'.

Prosecutorial support must also be prioritised. The contribution of the CPS is a crucial piece of this puzzle, without which UWOs will not get off the ground. Although UWOs are an investigative tool, they will be obtained and litigated by prosecutors in the High Court, meaning that from the outset of investigations there is a new cost burden for prosecutors that does not exist in criminal proceedings. The government must ensure that the CPS is supported both financially and legally in order to take on the extra risk that UWOs undeniably present through, for example, the government committing to underwriting the CPS's litigation risk, which would enable it to pursue UWOs in a much more unconstrained way. There is also a clear need to properly resource the process from end to end, a point demonstrated with the introduction of POCA 2002, in which additional resources provided to law enforcement were not matched for prosecutors. This consequently led to blockages, as prosecutors were unable to cope fully with the increased volume of work under static – and sometimes diminished – resources.⁵

Political Will

The final and most obvious point is that all of the above are underpinned by the political will and resolve to ensure that UWOs do not sit dormant on the statute books. The political climate during the Anti-Corruption Summit in May 2016 was ripe, but events since, namely the referendum in favour of Brexit, and the general lack of the mention of corruption in the Conservative manifesto (except for merging the SFO into the NCA⁶) calls into question the future commitment of the government in its fight against corruption. The government needs publicly to restate its commitment to UWOs, prioritising them as an element of the UK's role in tackling corruption and serious crime at the national and international level. As one lawyer commented, politicians can 'talk a good talk', but without true courage and leadership from government, the orders will not work in practice.⁷

5. Author interview with UK law enforcement, London, June 2017.

6. Since the election, this policy now appears to be off the table, and was not mentioned in the Queen's Speech in June.

7. Author interview conducted with financial crime lawyer, London, May 2017.

Conclusion

THE INTRODUCTION OF UWOs into the UK's confiscation architecture is an undeniably radical approach taken by the government, attempting to address the considerable practical difficulties in obtaining evidence in its current civil recovery regime. It may indeed prove to be a significant piece of legislation, with Transparency International UK citing it as the most important piece of anti-corruption legislation – alongside the Bribery Act 2010¹ – of the past 30 years.² The intentions are therefore admirable, and if implemented successfully and used broadly, dependent on expertise, inter-agency cooperation, resources and political will, it could make significant headway in tackling organised crime and corruption. Early interviews with law enforcement practitioners suggest that with the appropriate levels of resource and political commitment, UWOs could be an important and powerful tool in the effort to tackle serious crime and corruption in the UK.

One potential caveat that we should be wary of is the displacement factor, namely that UWOs may simply relocate the proceeds of crime to other jurisdictions with weaker asset recovery regimes. While there is little statistical evidence to back this up, it is reasonable to assume that those seeking to hide the proceeds of their crime will attempt to find other means with which to launder funds, and is something that should be monitored going forward.

Despite concerns that UWOs may simply displace criminal assets away from London to other financial centres, constraining the ease with which criminals hide their assets must be an objective to which governments aspire. This is particularly the case for the UK, which has a reputation of being a home for the proceeds of organised crime and corruption. With the introduction of UWOs, the UK has made a strong statement on the international stage, which must be recognised as a positive step. There needs to be an effort to ensure appropriate UWOs are brought successfully, while not losing sight of the underlying causes of serious crime and corruption, and making full use of the existing tools at the government's disposal.

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1. 'Bribery Act 2010 (UK)', c.23.
 2. Transparency International UK, 'Transparency International UK Press Briefing: Unexplained Wealth Orders', 13 October 2016.

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