Crime and Corruption Commission
QUEENSLAND

Review of the *Criminal Proceeds Confiscation Act 2002* (Qld)

Discussion paper

November 2023

Contents

Executive summary **3**
Introduction **4**
A complex and adaptive criminal environment 4
About this review 5
A brief introduction to asset confiscation **6**
Purpose and operation of the Queensland asset confiscation regime 7
Queensland's asset confiscation mechanisms and protections 9
Preliminary observations and areas for potential reform **11**
Revising how Queensland's asset confiscation regime operates 11
Revise how candidate matters are identified 11
Resolve barriers to effective engagement and working 13
Consider involvement in the national cooperative scheme 16
Consider what resources to direct to disruptive asset confiscation regime 16
Expanding the asset confiscation mechanisms available within the regime 18
Introduce asset-focused confiscation mechanisms 18
Consider removing the link between unexplained wealth and criminal activity 20
Amending provisions that are barriers to an efficient and effective regime 21
Introduce the power to seize digital assets 21
Resolve the issue of the targeting of fraud-related assets for confiscation 24
Amend the definition of money laundering 26
How to make a submission **28**

Executive summary

Queensland's *Criminal Proceeds Confiscation Act 2002* is the state's key statute that enables asset confiscation, and which seeks to undermine the profitability of serious and organised crime.

In 2023 the Crime and Corruption Commission commenced a review of the Act, after successive reviews and inquiries identified a need for a review of the Act, or of key provisions it contains. This review seeks to progress thinking on Queensland's approach to asset confiscation to ensure that asset confiscation remains an efficient and effective strategy in a highly adaptive criminal environment.

This discussion paper provides some preliminary observations arising from the data collected and analysed to date, and identifies three areas for potential reform.

Broadly, Queensland's asset confiscation regime experiences a multitude of intersecting challenges. This paper is focused on the most significant challenges or issues identified, in connection with the following areas for potential reform:

- revising how Queensland's asset confiscation regime operates
- expanding the asset confiscation mechanisms available within the regime, and
- amending provisions that are barriers to an efficient and effective regime.

This review seeks your feedback and input, guided by the 26 questions for consideration in this paper, or on any other aspect of Queensland's asset confiscation regime that you wish to raise. Instructions are provided in *How to make a submission* on page 28.

Introduction

Asset confiscation is one element of Queensland's multifaceted response to serious and organised crime. Queensland's key statute that enables asset confiscation is the *Criminal Proceeds Confiscation Act 2002* (Qld) (CPCA). The Act's main objective is to "remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity" (s. 4(1)). The Act seeks to:

> provide an effective strategy for undermining the profitability of organised and other serious crime and … allow the State to offset associated financial and social costs. [1]

In broad terms, the CPCA authorises and empowers certain public officials to apply to Queensland's Supreme Court to restrain or forfeit assets that are believed to be derived from, or otherwise connected to, criminal offending. Assets may be restrained or forfeited following a criminal conviction, or without a criminal conviction. Confiscated assets are handled and disposed of by Queensland's Public Trustee, and the proceeds are paid to Queensland's Consolidated Fund.

In the 2022-23 financial year, orders made under the CPCA resulted in $5.2 million in property restrained and $4.3 million in property confiscated. A total of $10 million was collected based on forfeiture orders and over $90,000 based on pecuniary penalty orders.[2]

A complex and adaptive criminal environment

As one of the elements of Queensland's response to serious and organised crime, it is critical that the CPCA remains fit-for-purpose within a changing criminal environment.

Organised crime groups of all kinds are heavily involved in illicit market activities with strong links to global support chains through international networks and facilitators. Often these groups operate using sophisticated business models and expertise to produce significant financial return for those involved. Facilitators and enablers may be respected professionals within the community, who offer their expertise on a fee-for-service basis. They are typically recruited by organised crime groups through pre-existing networks which have a global reach, requiring national and international law enforcement collaboration and coordination.

Financial and criminal investigations are increasingly complex, due to a higher proportion of matters featuring criminal activities aided by professional facilitators or enablers, an offshore link or element,[3] and criminal assets that are digital in nature, including decentralised financial transactions which are difficult to trace.[4] While operational responses to this complex criminal environment exist, they require novel thought, cross-agency collaboration, and significant investment. They also require legislation that is flexible enough to respond to a highly adaptive criminal environment.

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1 Explanatory notes, Criminal Proceeds Confiscation Bill 2002, page 1.

2 Figures provided by the Queensland Office of the Director of Public Prosecutions.

3 Australian Criminal Intelligence Commission 2022, Annual Report 2020-21, pages 14-15.

4 Hughes, C. and Brown, R. 2022, Financial investigation for routine policing in Australia, *Australian Institute of Criminology*, pages 3-4.

About this review

In July 2023, the Crime and Corruption Commission (CCC) commenced this review following recognition in successive inquiries that there are significant areas for reform that a review of the CPCA should consider. This includes proposals to change organisational responsibility within the asset confiscation regime (see pages 13-15), and to make changes to the offence of money laundering (see pages 26-27).[5]

This review seeks to identify areas for reform to ensure the confiscation regime within Queensland is contemporary and effective.[6] With this review – the first since the CPCA's inception in 2002 – Queensland joins other Australian jurisdictions that have recently had their asset confiscation statutes reviewed or substantively amended.[7]

The following data sources were consulted in drafting this paper:

- four workshops with Queensland practitioners and other public sector key stakeholders (almost 30 participants from 10 different agencies)[8]
- a legal analysis of the CPCA, and other Australian asset confiscation Acts
- an intelligence brief focusing on the main threats within the criminal environment that asset confiscation regimes should respond to, and the main challenges in responding to these threats
- recent CCC records on asset confiscation matters
- selected CCC and Queensland Police Service (QPS) policy documents, and
- consultations with stakeholders of this review, including continuing engagement with workshop participants, and other Australian asset confiscation practitioners.[9]

At the time of publishing, not all official data has been obtained from relevant stakeholders. Data collection continues, and more will appear in the final report.

While this review has attempted to make the language in this paper as accessible as possible, certain sections are necessarily technical. To assist readers who are new to asset confiscation, the next section provides a brief description of asset confiscation as a concept, what Queensland's asset confiscation regime is, and how it operates. This information is designed to assist a reader when considering the section *Preliminary observations and areas for potential reform* (page 11).

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5 See Callinan, I. and Aroney, N. 2013, Review of the Crime and Misconduct Act 2001; Queensland Organised Crime Commission of Inquiry 2015, Queensland Organised Crime Commission of Inquiry: report, pages 551-552; and Parliamentary Crime and Corruption Committee 2021, *Review of the Crime and Corruption Commission's activities: report no. 106*, pages 34-35.

6 Importantly, this review does not examine the validity of asset confiscation regime as a legislative instrument or law enforcement strategy. Instead, it focuses on the operation and effectiveness of the Act and the framework that embeds it in practice.

7 In the last five years, two jurisdictions have had their asset confiscation Acts reviewed (Martin, W. 2019, Review of the Criminal Property Confiscation Act 2000 (WA); and Justice and Community Safety Directorate 2022, Statutory review of the Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020 (ACT)), and other jurisdictions have had their Acts substantively amended (i.e. New South Wales, Victoria, South Australia, Northern Territory, Australian Capital Territory and the Commonwealth).

8 Representatives from the Australian Criminal Intelligence Commission, Australian Federal Police, Australian Taxation Office, Australian Transaction Reports and Analysis Centre, Crime and Corruption Commission, Department of Justice and Attorney-General, Office of the Director of Public Prosecutions, Queensland Law Society, Queensland Police Service, and Queensland Treasury.

9 Representatives from the Australian Federal Police, Corruption and Crime Commission (WA), New South Wales Crime Commission, and Public Trustee of Queensland.

A brief introduction to asset confiscation

Asset confiscation regimes aim to attack the profitability of serious and organised crime by confiscating the assets gained from, or related to, illicit activity. Asset confiscation has been adopted in many countries internationally as a strategy to combat organised crime.[10] Australia's modern approach to asset confiscation commenced in 1987[11] with the *Proceeds of Crime Act 1987* (Cth) (POCA), which allowed for conviction-based confiscation. Since then, all jurisdictions have implemented conviction-based confiscation legislation, and in time, expanded in their scope to allow for non-conviction-based confiscation.[12]

With reference to Australian regimes, the Australian Institute of Criminology has summarised the aims and justifications for asset confiscation in Australia (see Figure 1).

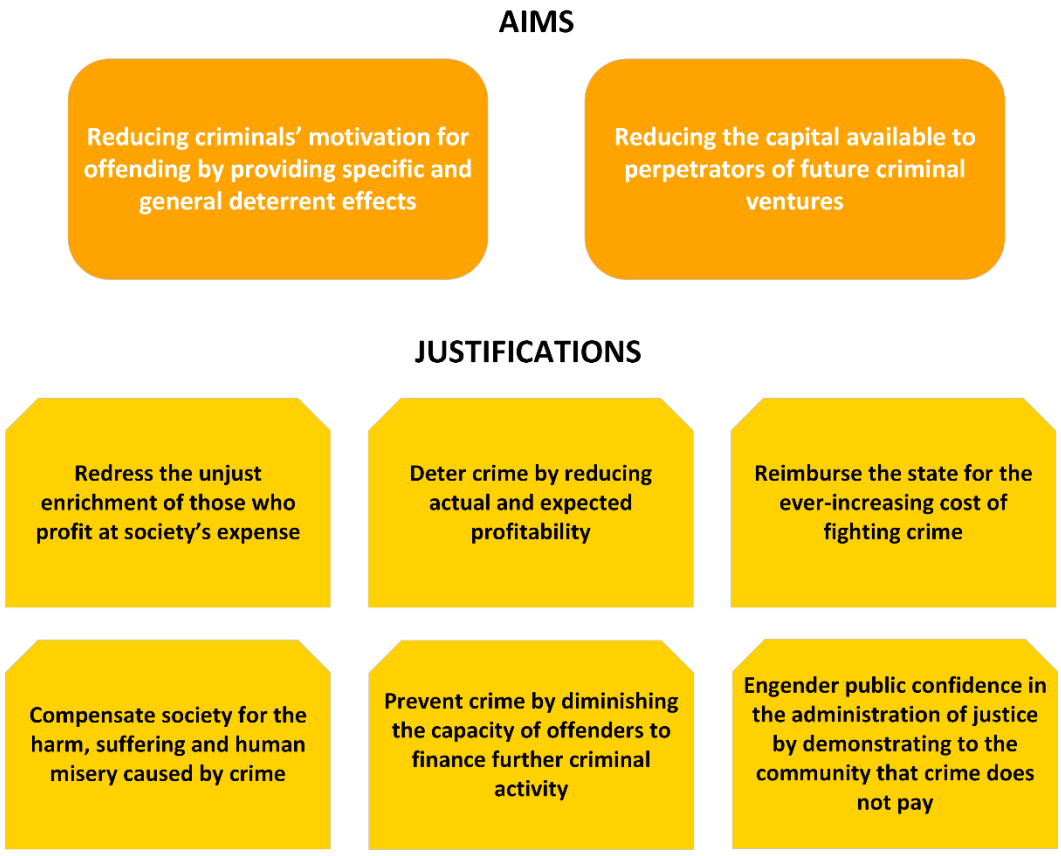

Figure 1. Aims and justifications for asset confiscation in Australia.[13]

[10] Atkinson, C., Mackenzie, S. and Hamilton-Smith, N. 2017, A systematic review of the effectiveness of asset-focussed interventions against organised crime, page 9.

[11] Noting that the *Customs Act 1901* (Cth) provided for confiscation for particular drug offences prior to this.

[12] Bartels, L. 2010, A review of confiscation schemes in Australia, Australian Institute of Criminology, pages 7-8.

[13] Adapted from A review of confiscation schemes in Australia, pages 1-2.

In Queensland, the key statute that provides for asset confiscation is the CPCA.[14] The CPCA provides for three "schemes", which were introduced in steps:[15]

- In **1989** Queensland passed the *Crimes (Confiscations) Act 1989*, which established the scheme to restrain and forfeit assets based on a criminal conviction (the conviction-based scheme).
- In **2002**, Queensland passed the CPCA, which saw the commencement of the scheme to restrain and forfeit assets without a criminal conviction, but nonetheless linked to serious crime related activity (the non-conviction-based scheme), as well as retaining the existing conviction-based scheme.
- In **2013**, Queensland added provisions to the CPCA introducing unexplained wealth confiscation, thus expanding the non-conviction-based scheme; and introducing the new serious drug offender confiscation order scheme.

This review uses the term "regime" to refer to the combination of these schemes, and the entire system of agencies, people, policies, procedures, and practices that embed the CPCA in practice.

Purpose and operation of the Queensland asset confiscation regime

As described earlier, the CPCA's main objective is to "remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity" (s. 4(1)). The other important objectives focus on:[16]

- assisting enforcement agencies to trace assets that may be criminal in nature
- impacting respondents (that is, individuals against whom confiscation action is taken) by depriving them of wealth or property that is either illegally acquired, connected to crime, or could not have been lawfully acquired, and increasing the financial risks of engaging in serious crime[17]
- enforcing orders on respondents who currently reside or have assets in Queensland, even if the order was not made in Queensland
- protecting any property that has been honestly acquired from forfeiture and other orders affecting property, and
- diverting confiscated funds from respondents, including from reinvestment in the criminal economy, into Queensland's Consolidated Fund.

The end-to-end process for asset confiscation – regardless of the specific scheme within the CPCA – can be simplified into six key stages, provided in Figure 2.[18]

[14] Asset confiscation is also authorised under other Queensland legislation (e.g. Part 5 of the *Drugs Misuse Act 1986* (Qld)), but it is outside the scope of this review.

[15] This is not an exhaustive list of amendments to Queensland's asset confiscation regime.

[16] The following dots are adapted from section 4(2) of the CPCA.

[17] Recent research by the CCC suggested that asset restraint deters individuals from reoffending, at least in the short to medium term. See: CCC 2022, Research report: the impact of proceeds of crime action on offending trajectories, page 24.

[18] In real terms, the end-to-end process for asset confiscation has many steps, and can return to earlier steps. This process has been drafted in a way to apply to all schemes under the CPCA, despite the important nuances between the schemes.

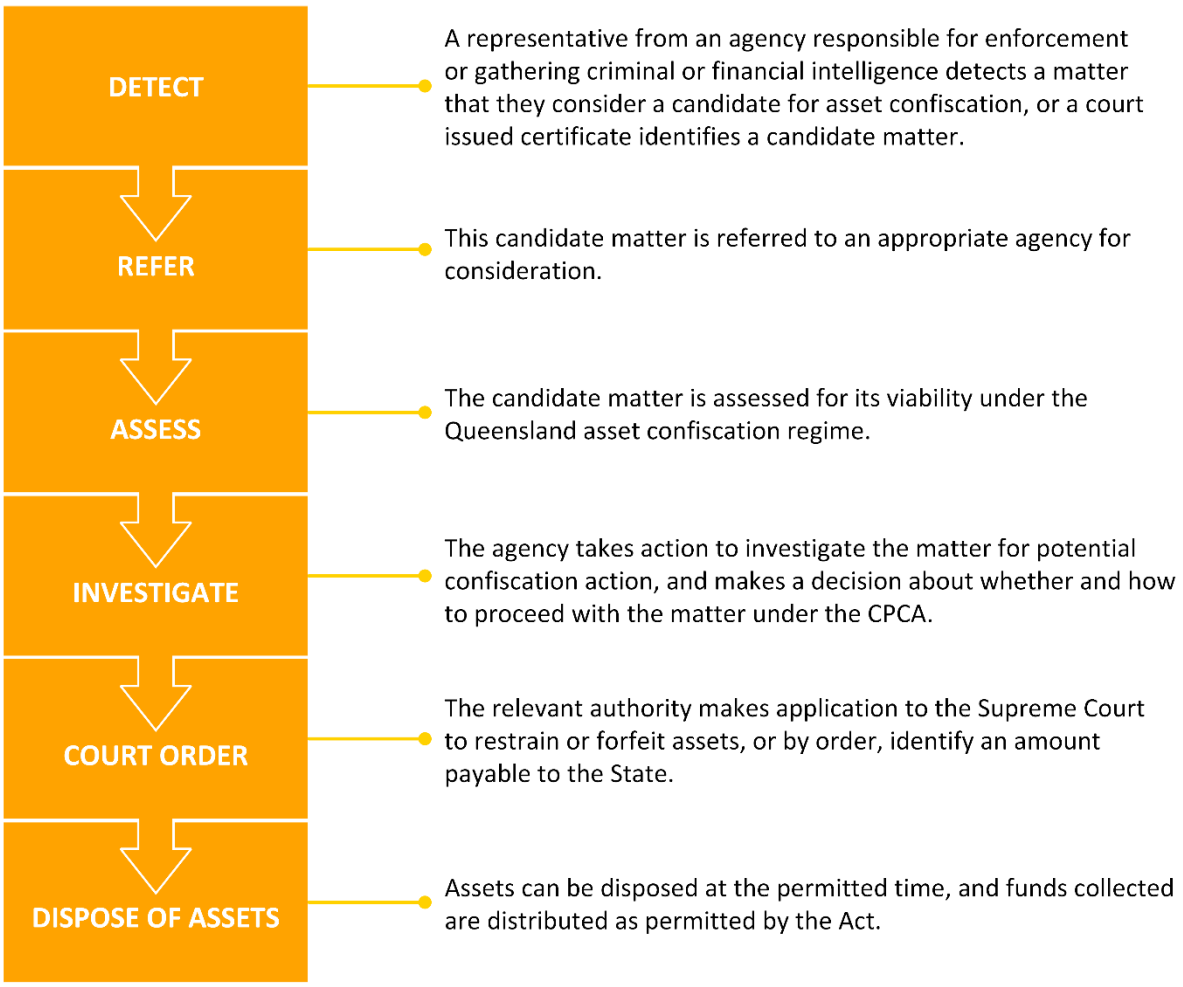

Figure 2. The end-to-end process for asset confiscation, simplified.

Responsibility for the regime's operation is distributed across five entities:[19]

- The **Queensland Police Service** (QPS) is the typical source of referrals for asset confiscation. Their work in identifying and referring candidate asset confiscation matters is critical to the success of asset confiscation matters.
- The **Crime and Corruption Commission** (CCC) administers the non-conviction-based confiscation scheme under Chapter 2 of the CPCA, and the serious drug offender confiscation scheme under Chapter 2A. In doing so, the CCC receives referrals for such matters, and assesses and investigates those matters, in preparation for applying for a court order.
- The third scheme, a conviction-based scheme under Chapter 3 of the CPCA, is administered by the **Director of Public Prosecutions** (DPP). The DPP is also the solicitor on the record for all three schemes. That is, the DPP presents applications to court on behalf of the State, for all orders under the CPCA.
- The **Supreme Court of Queensland** is responsible for hearing applications and making orders.
- The **Public Trustee of Queensland** is responsible for collecting, storing, maintaining, and disposing of assets that are the subject of an order under the CPCA.

[19] Other agencies can and do perform a role, depending on the matter, but this paper focuses on the agencies routinely involved.

Recent inquiries have raised proposals to change some organisational responsibility within the asset confiscation regime, with a view to consolidating some of the responsibility. This is described in pages 13-15.

Queensland's asset confiscation mechanisms and protections

The mechanism to restrain and confiscate assets via the CPCA is through court orders. The CPCA provides for a substantial range of orders. There are important differences between orders in the circumstances for which an application can be made (including for which scheme), and what the court must consider before making an order.

This section summarises the headline orders that the CPCA provides, and, for accessibility, they are organised into four categories:

- **Orders that preserve assets**[20] prevent assets from being sold or disposed of, as well as ensuring assets are maintained, while further investigations are undertaken or applications for confiscation are commenced. Also, the CPCA provides for related property seizure orders that authorise seizure of property restrained under a restraining order, or any other property the court considers appropriate.[21]
- **Orders that assist in an investigation**[22] that is related to restraining or confiscation orders. They include examination orders and property particular orders, which require a person to attend an examination or supply written information relating to restrained property.
- **Orders that confiscate assets, or identify an amount payable to the State** include forfeiture orders,[23] proceeds assessment orders,[24] unexplained wealth orders,[25] serious drug offender confiscation orders,[26] pecuniary penalty orders,[27] and special forfeiture orders.[28] Once these orders are made by a court, and the appeal period has ended, the confiscated assets – minus any fees, charges, and any payment allowed under the CPCA[29] – are paid to Queensland's Consolidated Fund.[30]
- **Orders that protect vulnerable or innocent parties** include orders or other provisions that seek to protect the dependants of those who will forfeit property;[31] return forfeited property that is owned by an innocent third party;[32] discharge an order if a relevant conviction is overturned or the order appealed;[33] and otherwise exclude property from orders for permitted reasons.[34]

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20 See sections 28, 93H, and 117, CPCA.

21 See sections 38A(1)(d), and 93W(1)(d), CPCA.

22 Sections 38A, 93W, 130A, CPCA.

23 See sections 56 and 146, CPCA.

24 See section 77, CPCA.

25 See section 89F, CPCA.

26 See section 93ZY, CPCA.

27 Section 178, CPCA.

28 Section 200, CPCA.

29 For instance, section 223 for the Public Trustee, and sections 230 and 214(3) for Legal Aid Queensland.

30 See section 214. Assets forfeited under the non-conviction-based schemes must be paid into Queensland's Consolidated Fund (s. 214(5)), but funds forfeited under the conviction-based scheme can be used for permitted purposes (s. 214(1)-(4)).

31 See Chapter 2, Part 5, Division 4; and Chapter 2A, Part 4, Division 4, CPCA.

32 Section 165, CPCA. The application must be made within six months of the property being forfeited to the state.

33 For instance, sections 160 and 93ZZS, CPCA.

34 For instance, see Chapter 2, Part 4, Division 2; and Chapter 3, Part 4, Division 3, CPCA.

In addition to those specific orders or provisions that offer protections, there are a range of safeguards that have a more general application. A key protection within the CPCA is the public interest provisions, which are a feature of all three schemes in the CPCA. As described in a 2020 paper by the Australian Institute of Criminology (emphasis added):[35]

> Judicial avenues for relief are imperative on rule of law grounds to appropriately supervise prosecutorial and executive confiscation discretion and to balance the impact of the legislation against its clear purposes. **The Queensland regime, for example, includes a broad judicial discretion to refuse to make any order on public interest grounds.**

As well as the public interest provisions in the CPCA, the CCC[36] and the DPP[37] are bound as a Model Litigant[38] to act independently, impartially, and fairly, having regard to the public interest. Therefore, the public interest is considered by the CCC and the DPP before an asset confiscation matter goes to court, and in the court's consideration of the matter.

Another key protection within the Queensland legal framework is the *Human Rights Act 2019* (Qld), which provides that agencies must make decisions in a way that is compatible with human rights, and authorises the Supreme Court to declare that a statutory provision can only be interpreted in a way that is compatible with human rights.[39]

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35 Skead, N. et al. 2020, Pocketing the proceeds of crime: recommendations for legislative reform, Australian Institute of Criminology, page X.

36 Section 57 of the *Crime and Corruption Act 2001* (Qld).

37 See Department of Justice and Attorney-General 2016, Director's guidelines.

38 See Department of Justice and Attorney-General 2023, Model litigant principles, page 1.

39 Section 4(b) and (g), Human Rights Act.

Preliminary observations and areas for potential reform

Queensland's asset confiscation regime experiences a multitude of intersecting challenges.[40] From the data collected and analysed to date, asset confiscation practitioners describe asset confiscation in Queensland as:

- more targeted towards lower-level individuals than they would expect
- focused more on individuals than on being led by criminal or suspicious assets
- underpinned by an Act that is complex to understand and administer
- lacking in early engagement between partner agencies, and
- having an investigator–litigator relationship that can present challenges.

Some of these matters identified require legislative reform to address, while others require change via other mechanisms, including policy, practice, or culture change. For the benefit of readability, these matters are organised into themes rather than by the mechanism of reform. This paper is focused on the most significant challenges or issues that this review has identified to date, and seeks comment on three broad areas for potential reform:

- revising how Queensland's asset confiscation regime operates
- expanding the asset confiscation mechanisms available within the regime, and
- amending provisions that are barriers to an efficient and effective regime.

This section sets out discussion on these three areas of potential reform, and poses questions for consideration.

Revising how Queensland's asset confiscation regime operates

The data collected and analysed to date suggests that Queensland's asset confiscation regime would benefit from substantial reform to its operating model. This section describes four elements: how candidate matters are identified for assessment by asset confiscation investigators; how key agencies within the asset confiscation regime work together; the value of Queensland participating in a national cooperative scheme; and how to resource a disruptive asset confiscation regime.

The questions for consideration are listed on page 17.

Revise how candidate matters are identified

In workshops, practitioners described a consistent message about the current targeting of the asset confiscation regime: it is characterised by declining numbers of referrals, declining number of orders, declining value of forfeited assets, and increasing prevalence of lower-level individuals as respondents against whom confiscation action is taken. The volume and quality of candidate matters considered for asset confiscation schemes are a pivotal part of the regime's disruptive impact.

This review proposes two ways to improve the volume and quality of matters for consideration for asset confiscation: earlier and closer engagement with referring investigators, and diversifying the pathway to identify candidate matters for asset confiscation.

The potential reforms in this section relate to new ways of operating, and neither requires legislative change.

[40] It is not within the scope of this review to identify or isolate the impacts of individual issues or challenges, relative to other issues or challenges identified.

Earlier and closer engagement between crime-focused and asset-focused investigators

From discussions in workshops and stakeholder engagement, there is an opportunity for asset confiscation practitioners at the CCC to learn of candidate matters for asset confiscation from QPS investigation teams much earlier than is current practice. Asset confiscation practitioners and enforcement agency representatives alike expressed:

- the importance of early engagement
- a belief that late engagement was detrimental to the timeliness and outcomes of confiscation matters, considering that financial investigation can be complex and lengthy, and that timing is pivotal to prevent the asset being sold or disposed of, and
- an appetite for earlier engagement and closer relationships between the crime investigators and asset confiscation practitioners, provided that sufficient information security was maintained.

Consulting with some asset confiscation teams around Australia, this review understands that early engagement is critical to the success of the scheme. Earlier engagement may be facilitated in a range of ways, including:

- considering the composition of capabilities within asset confiscation teams and the information-sharing benefits that composition offers including, for example:
    - secondees from other relevant agencies, which can improve timely information-sharing
    - intelligence analysts to assist with identification of appropriate candidate matters, and
    - sworn police to facilitate a close link with substantive crime investigations, and
- leveraging existing inter-agency forums that share information on crime operations and intelligence.

Diversifying the pathway to identify candidate matters for asset confiscation

At workshops, participants expressed a view that the CCC should play a far bigger role than it does presently in identifying candidate matters for asset confiscation. In 2021, one asset confiscation matter for the non-conviction-based part of the regime was generated by the CCC; the overwhelming majority were referred by the QPS.

Elsewhere in Australia, more effort is expended on self-generating matters than exists in Queensland. For instance:

- building awareness with relevant entities, to encourage diverse referral sources (public-facing public sector officials, anonymous tipoffs), not just police, particularly regarding candidate matters for unexplained wealth
- prioritising intelligence generation and sharing about asset confiscation matters, and
- considering the composition of the asset confiscation team, to encourage information sharing and access to wider data sources and expertise.

Revising how candidate matters are identified – through earlier and closer engagement between crime-focused and asset-focused investigators and diversifying the pathway to identify candidate matters for asset confiscation – is likely to improve the volume and significance of candidate matters considered by asset confiscation investigators.

However, this may increase the costs of administering the regime by increasing:

- the time to undertake education and engagement work with a larger number of relevant entities, intelligence activities, and assessments of the increased number of candidate matters received, and
- the number of higher-order targets, which may increase the time from restraint to resolution of an asset confiscation matter, as higher-order offenders may have more financial means to draw out the court process; and requiring more specialist input in investigations (e.g. where the assets include cryptocurrency).

The costs of administering Queensland's asset confiscation regime is explored again on page 16.

Resolve barriers to effective engagement and working

This review has identified some barriers to effective engagement and working in Queensland's asset confiscation regime. Specifically, this section explores:

- deciding whether to consolidate some of the asset confiscation responsibilities, to reduce how the responsibilities are currently distributed across separate agencies
- generating a common purpose and understanding of the aims of the regime, and how key terms are to be applied, and
- resolving when and how to progress a civil proceeding, when a criminal matter is pending.

Some potential reforms in this section would require legislative change, while others would require inter-agency engagement, and new ways of operating.

Decide on whether and how to consolidate some of the asset confiscation responsibilities

This review is exploring two existing proposals to change the organisational responsibility within the asset confiscation regime. The two proposals – which have already received government support or support-in-principle – are to consolidate in one agency the responsibility for:

- asset confiscation investigation and litigation, for the non-conviction-based schemes,[41] and
- administering the non-conviction based and conviction-based schemes, including that a single agency represents the State in all court proceedings under the CPCA.[42]

Preliminary observations about the two proposals, based on the data collected and analysed to date, are described below.

For non-conviction-based schemes, consolidate the investigation–litigation roles in a single agency

The non-conviction based scheme currently operates by having the investigative function in one agency (the CCC), while the litigation function rests with another agency (the DPP). Some practitioners oppose changes to this arrangement, while other practitioners and strategic-level workshop participants supported the consolidation of the two functions in one agency.

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41 In 2016 the Queensland Government accepted in principle the Queensland Organised Crime Commission of Inquiry's (QOCCOI) recommendation to give the CCC the responsibility to litigate civil confiscation matters, thereby consolidating the investigator–litigator functions on one agency, the CCC (Recommendation 8.1).

42 This review notes that it has previously been recommended in two separate inquiries, in 2013 (Callinan, I. and Aroney, N. 2013, *Review of the Crime and Misconduct Act 2001*) and in 2016 (Department of Justice and Attorney-General 2016, *Government response: Queensland organised crime commission of inquiry's report*, Recommendation 8.1, page 16. The Parliamentary Crime and Corruption Committee also gave their support to this recommendation in 2016 (Parliamentary Crime and Corruption Committee 2016, *Review of the Crime and Corruption Commission: report no. 97*, Recommendation 26, page 95). The Queensland Government supported (Queensland Government 2016, *Review of the Crime and Corruption Commission: Queensland Government response*, page 13) or supported-in-principle (Queensland Government 2013, *Response to review of the Crime and Misconduct Commission*, page 29) those recommendations.

For those who support the change, the key argument is the close relationship that is required between investigators and litigators – the investigation necessarily continues after the litigator is engaged, and legal advice may be required at the early stages of an investigation. For example:

- Legal advice may be required to guide the early stages of an investigation and to identify suitable confiscation strategies.
- Additional investigation may be required where examination has occurred (after assets are restrained).
- Where examination of a person is required after assets are restrained, it may lead to additional investigation.
- Investigations may be required to explore a respondent's claim that the assets sought to be confiscated are from legitimate sources.

Other arguments in support of agency consolidation were that the civil confiscation scheme operates under a single strategic direction, policy environment, and risk appetite; and it creates a clearer division between prosecutions (the core function of the DPP), and any civil asset confiscation proceedings (a function of the CCC and the DPP), which often relies on some of the same evidentiary material. Also, there are different considerations which apply in undertaking a criminal prosecution and taking a civil action to recover the proceeds of crime. This may give rise to a tension between the two functions being undertaken by the DPP.

For those who opposed the change, the argument is that co-locating the investigators and litigators in the same agency may compromise the independence of legal advice provided for those matters.[43] This kind of compromise is, of course, different from the tension described above.

A range of operating models exist within Australia: in some, the investigation and litigation roles exist within the same agency, while in others the role is separated across agencies. For those that are part of a single agency, consultation with representatives of some of those agencies indicate that they manage this through adequate information barriers[44] that extend to information management access, physical location, policies and procedures, and clear and appropriate delegations. Those consultations also identified that any remaining difference of opinion between investigator and litigator – which is expected given their different roles and expertise – can be resolved efficiently when within the same agency.

Consolidating the responsibility for all schemes under the CPCA

At present Queensland's regime takes an approach to asset confiscation that is distributed amongst various agencies (see page 8). While detection and referral of a candidate matter can come via several pathways, the administration of the CPCA's schemes is largely conducted by two agencies – the CCC and the DPP (see Table 1).[45]

[43] Adequate separation would also be required for those specialists who are expert witnesses in asset confiscation matters.

[44] See for instance, Queensland Law Society 2023, Information barrier guidelines and The Law Society of New South Wales 2015, Information barrier guidelines.

[45] Despite the term "single confiscation agency", there is no suggestion to fully consolidate the end-to-end asset confiscation function from detect to dispose (see Figure 2).

Table 1. Schemes of the CPCA, and agency responsibility.

Scheme	Administered by	Solicitor on the record[46]
Non-conviction-based scheme	CCC	DPP
Serious drug offender confiscation order scheme	CCC	DPP
Conviction-based scheme	DPP	DPP

The consolidation of the responsibility of all the schemes under the CPCA, including acting on behalf of the State in legal proceedings may provide the advantages of:

- creating the ability to, in a single agency, identify high value targets, and run parallel criminal and financial investigations[47] on those targets, and ensuring that evidence is collected during the criminal investigation that also supports asset confiscation[48]
- improving agility between schemes, and to reduce or eliminate gaps in decision making about matters
- focusing the primary responsibility (and thus, accountability) for efficient, effective functioning of the regime in a single agency, and
- improving the opportunity to monitor, review, and evaluate the functioning of the regime.

Having a single agency that can use any scheme under the CPCA means that all options are available to one agency, thus making for a more agile way of working, and may be more suited to complex asset confiscation matters. However, for more straightforward conviction-based confiscation matters, it would be efficient for the DPP to continue to apply for forfeiture orders upon conviction.

This proposal would require budget reallocation to fund any change in agency responsibility, development of new inter-agency and intra-agency ways of working, and development or adaptation of adequate information barriers.

Generate a common purpose and understanding

Workshops and stakeholder consultations identified that separate agencies had different interpretations of the regime's intent, and how certain terms within the CPCA are to be understood, as well as differing risk appetites. These variations undermine consistent decision-making about the Act, and can cause frustration to practitioners from different agencies.

Participating agencies noted a lack of early engagement between the asset confiscation investigators and asset confiscation litigators. Workshop participants and stakeholders describe this lack of early engagement as detrimental to the timeliness and outcomes of confiscation matters. All parties agreed that earlier engagement and open communication will help for faster process and better outcomes.

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[46] This is performed by the DPP's Confiscations Unit, which is structurally separate from the DPP's prosecutors.

[47] Noting that the CCC is the only agency with the investigative powers (contained within the CC Act and the CPCA, as well as ordinary police powers) to achieve optimal results under all schemes.

[48] This would require a clearer division between prosecutions (which is the role of the DPP), and any civil asset confiscation proceedings (which would be the CCC's role), which often use some of the same material that appears in the prosecution's criminal brief of evidence.

Resolve when and how to progress civil proceedings, when a criminal matter is pending

While the CPCA provides for restraint and forfeiture of assets without a criminal conviction, workshops identified that non-conviction-based asset confiscation matters are routinely put on hold pending the outcome of a criminal prosecution. This is because, while a criminal charge or a criminal conviction is not required for asset confiscation, evidence to establish that a serious crime related activity occurred is required.[49] In practice, this means reliance on either a criminal conviction or proving the crime on the balance of probabilities. So while assets can be restrained and forfeited without a conviction, civil asset confiscation is nonetheless closely linked to criminal matters.

Common law generally dictates that civil matters are put in abeyance while criminal matters are resolved.[50] For asset confiscation, while this does not prevent the restraint of assets, it extends the duration from restraint to forfeiture, which can take years.

There are questions about whether putting civil asset confiscation matters into abeyance while a criminal matter is resolved should be the standard approach, and whether there are other mechanisms that could be deployed to allow the resolution of a confiscation matter before a criminal proceeding ends.

Consider involvement in the national cooperative scheme

While this review focuses on Queensland's asset confiscation regime, workshops and stakeholder consultations identified that interoperability with relevant Australian agencies is an important part of a contemporary asset confiscation regime. Specifically, the increasingly complex and borderless nature of organise crime makes information sharing and collaboration critical.

This review considered the National Cooperative Scheme on Unexplained Wealth (the National Scheme). The National Scheme, which commenced in 2018, seeks to:[51]

- enhance the ability of Commonwealth, State and Territory law enforcement agencies to trace, identify and seize assets that cannot be connected to a lawful source, and
- allow participating jurisdictions to access powerful information-gathering powers in unexplained wealth cases, including notices to financial institutions and production orders.

Queensland does not participate in the National Scheme.[52] Since 2018, there has been rapid change to the criminal environment and technology that enables organised crime, so there is benefit in re-examining Queensland's position. The National Scheme is currently under review,[53] which is a timely opportunity to re-examine the value of Queensland becoming a participating agency.

Consider what resources to direct to disruptive asset confiscation regime

As stated above, stakeholders described during workshops and consultations that Queensland's asset confiscation regime is characterised by increasing prevalence of lower-level individuals as respondents against whom confiscation action is taken, and declining value of forfeited assets. One of the contributors to this is the increasing complexity, sophistication, and professionalisation of organised crime. That is, targets with more assets are more likely to have resources to engage specialist facilitators to assist in concealing assets, and creating structures designed to hide the true ownership of assets, or to make seizure and forfeiture more difficult. For asset confiscation to have a

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49 Sections 58(1), 78(1), and 89G(1), CPCA.

50 For instance, a criminal proceeding may be undermined if settlement is reached in civil proceedings that rely on the same criminal activity and make determinations on the same facts.

51 Department of Home Affairs 2023, National cooperative scheme on unexplained wealth.

52 Queensland is a cooperating state under section 14F of the POCA, but is not a participating state.

53 Dreyfus, M. 2023, *Independent review of the National Cooperative Scheme on Unexplained Wealth*, Ministerial Statement, Commonwealth Attorney-General's Department. That review is being conducted pursuant to section 327A of the POCA.

disruptive impact on serious and organised crime in Queensland, it requires an appropriately resourced and considered operating model to meet the complexities of the current environment.

Refocusing Queensland's asset confiscation regime in the ways detailed above may have significant resource implications. This review recognises that the suggestions for reform are both important and costly to fund.

Questions for consideration

Revising how Queensland's asset confiscation regime operates

This review proposes that a working group is established to specify a new way of operating, whose role is to:

- establish a common purpose, guiding principles, process and impact measures of a contemporary asset confiscation regime for Queensland
- specify the respective responsibilities of the agencies involved in the regime, and any relationships between them for the functioning of the regime[54]
- cost the revised operating model, and
- develop an implementation plan for the operating model, identifying necessary funding.

1. What are your views on the proposed working group? Do you have an alternative?
2. Which agency should lead this working group? Which other agencies should be member of this group?

Consolidating some asset confiscation responsibilities in a single agency

3. What are your views on the two proposals described on page 13? Do you have an alternative?
4. Which agency is most appropriate to perform the functions?
5. If implemented, what internal controls should accompany either or both proposals?
6. Do the proposals create any issues from a respondent's point of view?

Resolving when and how to progress civil proceedings, when a criminal matter is pending

7. In what circumstances should a non-conviction-based asset confiscation matter be delayed, pending the outcome of a related criminal proceeding?
8. What protections or controls are required so that non-conviction-based asset confiscation proceedings do not compromise related criminal proceedings (e.g. non-publication orders, suppression orders)?
9. Does progression of non-conviction-based asset confiscation matter before the resolution of a criminal matter create any issues from a respondent's point of view?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

[54] This would involve consideration of how Queensland's asset confiscation regime relates to any national scheme or arrangement (e.g. National Cooperative Scheme on Unexplained Wealth), and any state schemes, arrangements, or groups (e.g. intelligence and policing forums).

Expanding the asset confiscation mechanisms available within the regime

The second area for potential reform relates to the confiscation mechanisms available in Queensland. Workshops and legal analysis conducted for this review identified that other jurisdictions have confiscation mechanisms to consider for Queensland's regime. Specifically:

- Queensland's asset confiscation mechanisms adopt a focus on individuals, and so does not have efficient or adequate tools when the target is the asset (e.g. such as automatic forfeiture orders or administrative forfeiture notices).
- Queensland's approach to unexplained wealth is more stringent than other jurisdictions, so offers less ability to confiscate the unexplained wealth of people who can hide their criminal activity.

The potential reforms in this section would require legislative change, and new ways of operating. The questions for consideration are listed on page 20 and 21.

Introduce asset-focused confiscation mechanisms

Queensland's confiscation regime is designed to restrain and forfeit assets related to a named individual. Where there is insufficient evidence to establish the owner of the property, or to prove the commission of a serious criminal offence, this can create a barrier to the efficient recovery of assets.[55] For instance, when police seize large sums of cash and other valuable items, the true owners may refuse to come forward or deny ownership, to avoid implicating themselves in a crime.

In this circumstance, Queensland confiscation practitioners would conduct *in rem* proceedings,[56] which follows the same confiscation process as with a named respondent. *In rem* proceedings, however, are an adaption of adversarial proceedings, despite the absence of an opponent.[57]

New South Wales (NSW) and the Australian Capital Territory (ACT) have provisions in their confiscations legislation that provide a more efficient alternative than Queensland's *in rem* proceedings. Each model is quite different in court involvement, who applies, and the reach of the powers.

An approach from NSW: Administrative forfeiture

In 2022, the NSW *Criminal Assets Recovery Act 1990* (CARA) was amended to include provisions to enable the administrative forfeiture of property that is reasonably suspected of being associated with serious crime related activity, regardless of whether the true owner of the property can be identified. "Administrative forfeiture" means that this type of confiscation mechanism does not involve the courts; the notice is issued by the NSW Crime Commission.

The provisions allow for the forfeiture of property (other than real property, which includes dwellings, buildings, land) that is seized or otherwise in possession of an investigative agency in connection with an investigation. Specifically, the NSW Crime Commission must first be reasonably satisfied that, broadly speaking, the property is illegally acquired, serious crime derived, or owned by a person who is suspected of engaging in serious crime related activity.[58]

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55 Smith, M. and Smith, R. G. 2016, *Exploring the procedural barriers to securing unexplained wealth orders in Australia*, Criminology Research Advisory Council, page 11.

56 Sections 28(3)(c) & 58(1)(b), CPCA.

57 The applicant is required to prove that a serious criminal offence has occurred within the 6-year limitation period for civil forfeiture proceedings that are conducted with or without a respondent (s. 58(1), CPCA). This contrasts with the administrative and automatic forfeiture provisions in NSW and ACT which apply a different legal standard to that what is required to be proven in forfeiture proceedings involving a respondent.

58 See section 21C of the CARA for the criteria.

If that requirement is met, the NSW Crime Commission can issue an assets forfeiture notice, which is published in several locations,[59] and if relevant, given to each person known or suspected to have a beneficial interest in the property. An assets forfeiture notice takes effect at the end of the dispute period (60 days) or, if a dispute claim is made (and it is not accepted), on the day the dispute claim is finally dismissed and the appeal period has ended, at which time the property is forfeited to the Crown.[60]

An approach from the ACT: Automatic forfeiture

The ACT's *Confiscation of Criminal Assets Act 2003* (CCA Act) contains provisions that allow for the restraint and forfeiture of "unclaimed tainted property", which covers tainted property that no person has asserted an interest in.

The term unclaimed tainted property is defined as property that "is tainted property in relation to an offence and is not claimed by anyone even if it not possible to identify the offence or an offender".[61] Property is tainted if it was derived in any way from the commission of an offence, or was used (or intended to be used) in the commission of the offence.[62] It includes, for example:

- a large amount of hydroponic equipment for growing plants found in a house suspected of being used for drug production that is not claimed by anyone, and
- a large amount of money found beneath a bridge in a bag that also contains traces of explosives.

Section 25 of the CCA Act allows for restraining orders to be made over unclaimed tainted property. The application for a restraining order must be accompanied with an affidavit by a police officer that addresses the criteria outlined in section 28, which includes a statement that (a) the police officer suspects that the property is unclaimed property and (b) the property has not been claimed by anyone.[63] The court must make a restraining order if satisfied that there are reasonable grounds for the suspicions and beliefs stated in the affidavit.[64] The property is automatically forfeited 14 days after the restraining order is made, subject to any exclusion order.[65]

In the ACT, the powers to restrain and forfeit unclaimed tainted property exist outside of the criminal and civil confiscation regimes under the CCA Act, operating under a regime known as "automatic forfeiture". Significantly, the automatic forfeiture provisions are not limited to recovering only the proceeds of crime, but extend to forfeiture of the properties used (or intended to be used) in the commission of a crime. By comparison, in Queensland there is no power to restrain or forfeit property used in the commission of a crime under the civil confiscation regime.[66]

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59 Irrespective of whether the owner of the property is known/suspected, the Commission must publish the notice in the Gazette, daily newspaper and on the NSW Crime Commission website (s. 21C(4), CARA).

60 Section 21F, CARA.

61 Section 11, CCA Act.

62 Section 10, CCA Act.

63 Sections 25 and 28, CCA Act.

64 Section 30, CCA Act.

65 Section 62, CCA Act.

66 The power to confiscate property used (or intended to be used) in the commission of a crime is only available pursuant to criminal forfeiture provisions, such as under Chapter 3 of the CPCA or under the Drugs Misuse Act.

Questions for consideration

10. What are your views on Queensland's current range of asset confiscation mechanisms?
11. Should Queensland have confiscation mechanisms for automatic or administrative forfeiture? If yes, what should be the features of Queensland's approach, including adequate protections?
12. Are there any other confiscation mechanisms that you believe should be included in the CPCA?
13. Are there any confiscation mechanisms that you believe should be removed from the CPCA?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

Consider removing the link between unexplained wealth and criminal activity

In Queensland, unexplained wealth orders require proof of a nexus between the individual and a serious crime related activity.[67] While the legislation states that a "reasonable suspicion" is enough and that the suspicion does not need to relate to a specific crime, in practice viable proceedings require admissible evidence of a respondent's link to a serious crime related activity.[68] This can be challenging because, in the current criminal environment – such as professionalisation of organised crime, increased sophistication and encrypted technologies, and the difficulty in discovering and investigating movements in some assets – those who make the most profit from organised crime often have the greatest "distance" from those who are the most likely to be detected for offences. Therefore, there is an increasing set of circumstances where Queensland's unexplained wealth orders are not meeting the complexities of the contemporary criminal environment.

South Australia (SA), Western Australia (WA) and the Northern Territory (NT) have unexplained wealth provisions that do not require evidence to link the unexplained wealth to criminal activity. These differences between Queensland and those jurisdictions are explored below.

In Queensland, the Supreme Court must make an unexplained wealth order if it is satisfied there is a reasonable suspicion that:

- a person has either engaged in serious crime related activity, *or* acquired (whether knowingly or not) property from a serious crime related activity of someone else, and
- any of the person's current or previous wealth was acquired unlawfully.[69]

The Court may only refuse to make the order if it is not in the public interest to do so.[70]

In contrast with Queensland's approach:

- In WA and the NT the court need only be satisfied that the individual's total wealth is greater than his or her lawfully acquired wealth.[71] Upon being satisfied of such, the court must make an unexplained wealth declaration; there is no discretion to do otherwise.
- In SA, the court is required to conduct an assessment of the individual's wealth to determine if any part has not been lawfully acquired.[72] If the court finds that any components of an

[67] Section 89G(1)(a), CPCA.
[68] Sections 891(a) and (3), CPCA.
[69] Section 89G(1), CPCA.
[70] Section 89G(2), CPCA.
[71] Section 12(1), *Criminal Property Confiscation Act 2000* (WA); Section 71(1) *Criminal Property Forfeiture Act 2002* (NT).
[72] Section 9(2) *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA).

individual's wealth were not lawfully acquired, the court may make an unexplained wealth order. The court has a discretion to reduce the amount payable under the order or to decline to make the order if it would be manifestly unjust to do so.[73]

In each of these jurisdictions the burden of proof is on the individual to establish the wealth was lawfully acquired.[74] In Queensland, that burden only shifts to an individual once the State has satisfied the suspicion that their wealth was unlawfully acquired.

Questions for consideration

14. What are your views on Queensland's current features of unexplained wealth orders?
15. Should that order type continue to require a nexus between the individual and serious crime related activity? If not, what should be the features of Queensland's approach, including adequate protections?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

Amending provisions that are barriers to an efficient and effective regime

The third area for potential reform relates to provisions that create challenges for asset confiscation practitioners, and may be undermining the regime's impact. Some aspects of the CPCA are no longer fit-for-purpose in the current criminal environment. Changes that may improve the regime's disruptive and deterrent impact are:

- the ability to seize digital assets (including cryptocurrency), to prevent their dissipation before restraint
- resolution of the issue of the targeting of fraud-related assets for confiscation, and
- amendment of key definitions in the Act, including offences.

The potential reforms in this section would require legislative change, inter-agency engagement, and new ways of operating. The questions for consideration are listed on page 23, 25, and 27.

Introduce the power to seize digital assets

Digital assets, which includes cryptocurrencies, coins, or tokens, are a feature of the contemporary criminal environment.[75] The CPCA was drafted well before digital assets came into existence and it is relevant to explore if, or to what extent, the Queensland regime is responsive to digital assets.

While the CPCA does not use the terms "cryptocurrency" or "cryptoasset" [76] or "digital asset", digital assets are captured by the definition of property that the CPCA uses.[77] Therefore, under the CPCA,

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73 Section 9(3) Serious and Organised Crime (Unexplained Wealth) Act.

74 Section 12(2) Criminal Property Confiscation Act (WA); Section 71(2) Criminal Property Forfeiture Act (NT); Section 9(7) Serious and Organised Crime (Unexplained Wealth) Act (SA); Section 89L, CPCA.

75 Fintel Alliance 2022, *Preventing the criminal abuse of digital currencies*; and Transparency International 2023, *Cryptocurrencies, corruption and organised crime: implications of the growing use of cryptocurrencies in enabling illicit finance and a corruption*.

76 The Australian Taxation Office (ATO) describes cryptoassests as "a subset of digital assets that use cryptography to protect digital data and distributed ledger technology to record transactions. See ATO 2023, *What are crypto assets?*.

77 Section 19 of the CPCA, which largely relies on the definition of property in the *Acts Interpretation Act 1954* (Qld). That Act provides "property means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action".

digital assets can be restrained and forfeited. Cryptocurrency can and has been handled by the Public Trustee post-forfeiture. There is a legislative gap, however, in seizure of digital assets (see Text box 1 for more detailed description).

In Queensland, there are currently no specific provisions for investigative agencies to seize digital assets or to facilitate effective seizure of digital assets. As digital assets are, by their nature, very easy to move or hide, the ability to seize those assets at the time of a search warrant being executed is pivotal to having an asset that can be restrained at the time an application under the CPCA is made to the Supreme Court.[78,79]

Text box 1. Describing the gap in the seizure of digital assets.

The *Crime and Corruption Act 2001* (Qld) (CC Act) and the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) contain relevant provisions that enable the seizure of "things".[80] "Things" refers to tangible things (or things in possession) that can be found at a place the Commission or the police are exercising the relevant power. "Things" does not cover a "chose in action" (or things in action) or other types of property that is not tangible, such as digital assets.

The distinction is important because it means only tangible property can be seized under the CC Act or the PPRA powers, but all types of property can be restrained and forfeited under the CPCA. Digital assets can therefore be restrained but not seized. Compare with tangible things (or things in possession) such as cash and electronic hardware, which can be both restrained and seized.

The power to seize a digital asset

As cryptocurrencies are being used pervasively in organised crime,[81] the inability to seize digital assets is a critical gap in Queensland's asset confiscation regime. The insertion of a provision similar to section 92A of the *Confiscation Act 1997* (Vic) in the PPRA and CC Act would provide police and commission officers with the express power to seize digital assets and other digital assets during a search warrant and allow officers to take measures to secure control over those assets. It would require the insertion of a new definition of "digital asset" in Schedule 2 of the CC Act and section 149A of the PPRA. Some consequential amendments throughout the CC Act and PPRA should also be considered to include the newly defined term "digital asset" into relevant provisions. For example, provisions relating to powers of police officers and commission officers under search warrants in sections 157 of the PPRA and section 92 of the CC Act.

Legislative change is an important step in improving the digital asset-readiness in asset confiscation, but significant challenges remain in locating the digital assets for seizure or restraint. Any legislative changes would need to be accompanied by technological, policy, and practice changes, to allow seizure of cryptocurrency at the point of identification.

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78 Note that there is a technical inability to "freeze" cryptocurrency. For the asset to be restrained, it needs to be transferred to a wallet that cannot be accessed by the respondent (which involves altering property rights).

79 Noting that digital assets can be highly volatile in their value, the UK has proposed legislative change to "Enable detained cryptoassets, or those which have been frozen in a wallet, to be converted to cash pending the outcome of a final forfeiture hearing. This is to safeguard against significant fluctuations in market value." From Government of the United Kingdom 2023, Policy paper: factsheet: cryptoassets - legislation.

80 For example, under the CC Act, sections 110 and 110A powers to seize evidence refer to "things". Under the PPRA, section 157(1)(h) provides police with power to seize a 'thing'.

81 Cyber Security Industry Advisory Committee 2022, *Exploring cryptocurrency*, page 6.

The power to obtain access information about the digital asset

While Victoria's section 92A authorises police to do certain things to secure and seize digital assets, it does not contemplate the situation where information to access the digital asset is only known to the suspect or offender. This shortcoming is addressed to some extent by sections 80A and 80B of the Confiscation Act, which allows police to direct a person to provide any information or assistance that is reasonably necessary to access data from a computer or data storage device.

Queensland has similar provisions, but with important gaps. Sections 154 and 154A of the PPRA and sections 88A and 88B of the CC Act ensure that officers can gain access to the data that is stored on mobile phones, computers and other electronic devices after the physical device has been seized. These sections require a person to provide access to the device, and any necessary access information to the device, and allow an officer to gain access to, examine, make a copy of, or convert information if required, from the device.

These sections, however, refer to "digital device", which does not include digital assets.

- A digital device is a: "device on which information may be stored or accessed electronically; and includes a computer, memory stick, portable hard drive, smart phone and tablet computer".
- Victoria's definition of digital asset, by comparison, is: "a digital representation of value, or contractual rights, that may be transferred, stored or traded electronically".

This review considers that one option is to make amendments such that the relevant sections of the PPRA and the CC Act[82] so that those provisions expand their application to include digital assets, as well as an accompanying definition of digital asset.

The offence of failing to provide access information about the digital asset

In Queensland, if a person fails to provide access information to access a digital device, that constitutes a criminal offence and carries a maximum penalty of five years imprisonment.[83] If amendments to the PPRA and CC Act provisions expand their application to include digital assets (as well as an accompanying definition of digital asset), consideration should be given to a suitable offence provision.[84]

Questions for consideration

16. What are your views on Queensland's ability to restrain and forfeit, but not seize, digital assets?

17. What are your views on the proposal to make legislative amendments that enable police and Commission officers to seize and obtain access information for digital assets? What protections should accompany such a change?

18. What are your views on an associated offence provision for failing to provide access information? What protections should accompany such a change?

19. Are there alternative approaches to consider?

20. Do the proposals create any issues from a respondent's point of view?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

[82] Sections 154 and 154A of the PPRA and sections 88A and 88B of the CC Act.

[83] Section 205A *Criminal Code Act 1899* (Qld).

[84] Whether that be under section 205A Criminal Code Act or elsewhere.

Resolve the issue of the targeting of fraud-related assets for confiscation

The Australian Institute of Criminology assess that cost of serious and organised crime in Australia is between $24.8 and $60.1 billion (in 2020-21).[85] While illicit drug activity is the most costly organised criminal activity ($16.5 billion), organised fraud is the second most costly to Australia ($9.4 billion).

The CPCA requires net funds from confiscated property to be paid into the Queensland Consolidated Fund. For confiscated funds arising from non-conviction-based asset confiscation, there is no mechanism for attribution of those funds to identified victims of crime, or any other specified purposes.[86] Of course, it is not one of the objects of the Act to restore confiscated funds to victims of crime.[87] As a matter of practice,[88] the State does not normally act to restrain and confiscate the property of fraud offenders where there is an identifiable victim, because a victim has existing redress to restitution or compensation as ancillary orders in a criminal proceeding[89] or via private civil litigation. The unintended consequence is that fraud offenders may retain their crime-related assets for want of a criminal conviction or private action (which requires knowledge, will and means), or disburse those assets before such a conviction or private action can be commenced.

At least two different inquiries in Queensland have recently explored the law enforcement response to fraud offenders, and their victims:

- In 2015 the Queensland Organised Crime Commission of Inquiry recommended that, for assets forfeited under the criminal asset confiscation scheme[90] "the Queensland Government consider establishing a scheme to allow the victims of serious frauds to apply for compensation from property forfeited to the State". The Government accepted the recommendation and announced that Department of Justice and Attorney-General and Queensland Treasury "will consider the establishment of such a scheme and report to the Attorney-General on its findings."[91] A confiscated asset fund may be a suitable mechanism to allow the restraint of property of fraud offenders ahead of potential restitution orders, and Text box 2 provides some examples of how confiscated assets can be directed in other jurisdictions.
- In 2023, in the Inquiry into Support provided to Victims of Crime, Recommendations 14 and 16 related to an urgent review of the financial assistance scheme, including that the review consider the scheme's expansion to be eligible to victims of fraud and other property crime.[92] The Government supported this recommendation in principle, observing that the objective of the financial assistance scheme was to assist victims of violent crime in their recovery and did not constitute a compensation scheme. The Government did, however, state that "[t]he review of the Financial Assistance Scheme will include consideration of the assistance needs of victims of property crime, existing programs and support and other options to enhance recovery for these victims."[93]

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85 AIC Statistical Report 38, Russell G Smith Amelia Hickman: "Estimating the costs of serious and organised crime in Australia, 2020–21", 2022.

86 Section 214, CPCA.

87 See section 4, CPCA.

88 Serious fraud offenders are only proceeded against for non-conviction-based asset confiscation by the State in exceptional cases. For instance, if the state was the entity defrauded, such as in the $16 million fraud on Queensland Health. https://www.ccc.qld.gov.au/publications/fraud-financial-management-and-accountability-queensland-public-sector-examination-how

89 Section 35, *Penalties and Sentences Act 1992* (Qld).

90 Chapter 3, CPCA.

91 Department of Justice and Attorney-General 2016, *Government response: Queensland organised crime commission of inquiry's report*, page 13.

92 Legal Affairs and Safety Committee 2023, *Inquiry into support provided to victims of crime*, page 23.

93 Queensland Government 2023, *Inquiry into support provided to victims of crime: Queensland Government response*, page 9.

Text box 2. Australian examples of how confiscated assets fund can be directed.

The **Commonwealth POCA** allows confiscated funds to be returned to the Australian community to prevent and lessen the harms caused by crime.[94] Disposed assets are paid to the Confiscated Assets Account, which is overseen by the Australian Financial Security Authority as the Official Trustee (which also managing confiscated assets in general). These funds can be used to support community programs such as the National DNA Program for Unidentified and Missing Persons.[95]

The **NSW CARA** allows for confiscated funds to be paid for a range of purposes, including the Victims Support Fund (for victims of violence or modern slavery),[96] and "other amounts in aid of law enforcement, victims support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation of drug education as directed by the Treasurer in consultation with the Minister."[97]

The **Victorian Confiscations Act** allows confiscated funds to be sent to crime prevention and victims' aid fund,[98] which the Minister permit to be used for crime prevention programs or criminological research, or from which eligible victims can make a claim to the Victims of Crime Assistance Tribunal.

This review acknowledges that resolving this matter may be a significant reform for Queensland's asset confiscation regime and approach to victims' compensation, and implementation would require significant planning and investment.

Questions for consideration

21. What are your views on the Queensland's approach to confiscated assets, including to victim-based offending?
22. What are your views on how confiscated funds should be, or should not be, used?
23. Is there a model for confiscated funds that you would propose as a viable option for Queensland?
24. Are there alternatives to consider?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

94 Section 298, POCA.
95 Australian Federal Police 2023, *Taking the profit out of crime*, page 1.
96 Section 32(3)(c) of the CARA; Victims Services 2023, Eligibility criteria, page 1.
97 Section 32(3), Criminal Assets Recovery Act 1990 (NSW).
98 Section 134 of the Confiscations Act; Justice and Community Safety 2023, Asset confiscation, page 1.

Amend the definition of money laundering

Some challenges with the money laundering offence have been raised. In 2021, the CCC submitted to the Parliamentary Crime and Corruption Committee (PCCC)'s five-yearly review that the offence of money laundering in section 250 of the CPCA should be reviewed.[99] The PCCC agreed, noting that such a review will require public consultation. The Government supported the recommendation and committed to conducting a consultation with key stakeholders as part of a review of section 250.[100]

The existing offence of money laundering is complex,[101] unwieldy, and rarely used to prosecute those who seek to conceal or deal in the proceeds of criminal activity, or as a basis to confiscate criminal assets under any of the CPCA's schemes.

The definition of money laundering in the CPCA is concerned with activities that involve dealing with – directly or indirectly – or concealing tainted property. The definition of tainted property is found in section 104 of the CPCA and is confusing, self-referential, or circular in that tainted property is effectively defined to include property that is tainted property.[102]

The definition of money laundering in other jurisdictions is dealt with very differently. Those definitions are simplified and clear. For instance, approaches taken by the Commonwealth, NSW, and Victorian Acts:

- offer clearer definitions that adequately separate the concepts of proceeds of crime and the properties used (or intended to be used) in the commission of a crime,[103] and
- do not have the same issues as Queensland's tainted property definition.[104]

Outside the circular reference in the definition of tainted property, the only property captured by the term in the CPCA is property to be used or intended to be used in connection with the commission of a criminal offence, or property derived from such property. This narrow linkage of tainted property to predicate offending is outdated. Specifically, it does not represent the modern reality of money laundering activity, which is increasingly professionalised and available "as a service" in a global marketplace.

In 2021, the Commonwealth enacted amendments to improve and clarify measures for targeting evolving criminal business models to address the behaviour of modern money laundering networks by:

- capturing money controllers through an extension of the offence of money laundering to persons who recklessly cause another person to deal with relevant money or other property, and
- creating new offences in relation to proceeds of general crime to overcome difficulties in linking money or other property to a specific indictable offence,[105] and capturing concealing behaviour to disguise specified attributes of relevant property.

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99 PCCC 2021, *Review of the Crime and Corruption Commission's activities: report no. 106*, pages 34-35.

100 Queensland Government 2021, *Review of the Crime and Corruption Commission's activities: Queensland Government's response*, pages 4-5.

101 The money laundering offence (s. 250, CPCA) refers to tainted property (defined at s. 104), which refers to a confiscation offence (defined at s. 99), which refers to serious criminal offence (defined at s. 17).

102 While there have been sentence appeals where an offender has pleaded guilty to an offence of money laundering, it does not appear that the definition of money laundering in section 250 has been the subject of judicial consideration. Also, the tainted property examples provided in Schedule 1 Part 3 of the CPCA do not include an example of "tainted property" for the purpose of money laundering (i.e. for the purpose of s. 104(1)(d) or (e)).

103 See section 400.4(1)(b)(i) proceeds of crime and (ii) instrument of crime of the *Criminal Code Act 1901* (Cth)), NSW (see sections 193A, 193B and 193D of the *Crimes Act 1900* (NSW)) and Victoria (see sections 193, 194 and 195A of the *Crimes Act 1958* (Vic)).

104 Section 193C of the Crimes Act (NSW), section 195 of the Crimes Act (Vic) and section 400.9 of the Criminal Code Act (Cth) are preferred models.

105 And provides consistency with the 2015 decision of the NSW Court of Appeal in *Lin v The Queen* [2015] NSWCCA 204.

These amendments focused on money laundering networks which are:

> typically led by "controllers" who issue directions to others to deal with particular money or other property. They intentionally keep these individuals ignorant of its criminal origins while themselves operating at an arm's length to avoid criminal liability. The criminal origins of money or other property is also typically obscured through complex legal and administrative arrangements, strict information compartmentalisation, encrypted communication services, and other methodologies employed to severely frustrate law enforcement's efforts to identify predicate offending (and therefore show that money or property is the proceeds of crime)… [The amendments] also target individuals who remain wilfully blind to the nature and origins of criminal assets that they deal with as a means of avoiding money laundering offences".[106]

Following the Commonwealth amendments, NSW amended their money laundering offences to achieve similar outcomes.[107] Features of the Commonwealth legislation also warrant consideration for Queensland.[108] If the offences (money laundering and possession of property suspected of being tainted) are amended, there should be holistic consideration of similar offences.[109]

Questions for consideration

25. What are your views on amending the offence of money laundering, drawing on approaches taken by the Commonwealth, New South Wales, and Victorian Acts listed above?

26. Are there additional considerations or unintended consequences to consider?

Please see *How to make a submission*, on page 28. In your responses, please give necessary regard to Queensland's Human Rights Act.

[106] Explanatory Memorandum to the Crimes Legislation Amendment (Economic Disruption) Bill 2020, page 2.

[107] See 193BA Crimes Act (NSW), and section 400.4(1A) of the Criminal Code Act (Cth).

[108] Workshops identified that the various challenges with the money laundering offence in the CPCA have resulted in a preference for the Commonwealth money laundering offence to be charged in Queensland, which has implications for what powers Queensland police can use in investigating these offences.

[109] This may include, for instance, the other offences that criminalise possessing tainted property (e.g. ss. 15-17 *Summary Offences Act 2005* (Qld), s. 433 Criminal Code Act (Qld)), and their penalties relative to other jurisdictions (e.g. penalties provided at s. 252, CPCA, relative to s. 193C of the Crimes Act (NSW) and 400.9 of the Criminal Code Act (Cth)).

How to make a submission

To make a submission to the CCC, please email CPCA.Review@ccc.qld.gov.au by 22 December 2023.

The CCC may refer to or quote directly from submissions in publications about this review, and may also publish submissions. If you believe your submission, or part of your submission, should be confidential, please indicate this clearly.

Email: **CPCA.Review@ccc.qld.gov.au**

Does your submission contain allegations of corrupt conduct or report a crime?

The submission process is not an avenue to make a complaint about corrupt conduct or to report a crime. We are obligated to refer submissions which contain allegations of corrupt conduct to our complaints team, and submissions that report a crime to the Queensland Police Service.

If you would like to make a complaint about suspected corruption, get information about the types of matters that the CCC deals with, or learn about how to make a complaint, this information is available on the CCC's website: www.ccc.qld.gov.au/complainants. To report a crime, contact the Queensland Police Service.

Information Privacy and the Right to Information

Your submission will be made available in full to the members of the review team for the purpose of carrying out this legislative review and will be managed in accordance with the *Information Privacy Act 2009* (Qld). We will regard the information you provide as public, unless you tell us you would like your submission to be treated confidentially, or we determine your submission should be confidential for other reasons.

All submissions are subject to disclosure under the *Right to Information Act 2009* (Qld) and applications to access submissions will be determined in accordance with that Act.

Questions about this review

Questions about this review should be emailed to the review team at CPCA.Review@ccc.qld.gov.au.

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