PROCEEDINGS AT HEARING OF
DECEMBER 15, 2020

COMMISSIONER AUSTIN F. CULLEN

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THE REGISTRAR: Good morning. The hearing is now resumed, Mr. Commissioner.

THE COMMISSIONER: Yes, thank you, Madam Registrar.

Ms. Patel, do you have conduct of this portion of the hearing?

MS. PATEL: Yes. Thank you, Mr. Commissioner. Today we are hearing from two witnesses who are based in the UK, Helena Wood and Anton Moiseienko of the Royal United Service Institute.

THE COMMISSIONER: Yes.

MS. PATEL: They're both prepared to affirm.

THE COMMISSIONER: Thank you.

THE REGISTRAR: Can each of you please state your full name and spell your first name and last name for the record. I will start with Ms. Wood.

MS. WOOD: Hello. I'm Helena Wood. My first name is H-e-l-e-n-a, and my surname is W-o-o-d.

THE REGISTRAR: Thank you. And Mr. Moiseienko.

MR. MOISEIENKO: Hello. I'm Anton Moiseienko. First name A-n-t-o-n, surname, M-o-i-s-e-i-e-n-k-o.
HELENA WOOD, a witness called for the commission, affirmed.

ANTON MOISEIENKO, a witness called for the commission, affirmed.

THE COMMISSIONER: Ms. Patel.

MS. PATEL: Thank you, Mr. Commissioner.

Madam Registrar, if we can please pull up Ms. Wood's CV, which is at tab 2.

EXAMINATION BY MS. PATEL:

Q Ms. Wood, do you recognize this as a CV you provided to the Cullen Commission?

A (HW) I do.

MS. PATEL: Okay. And, Mr. Commissioner, I think that we're at exhibit 380. If we could have this marked.

THE COMMISSIONER: Very well. 380.

THE REGISTRAR: Exhibit 380.

EXHIBIT 380: Curriculum Vitae of Helena Wood

MS. PATEL: And, Madam Registrar, you can take down the CV.

Q Ms. Wood, you are an independent financial crime consultant and also an associate fellow at the Royal United Service Institute?
A (HW) That's correct.

Q And I'll just refer to that from now on as RUSI, if that's all right with you.

A (HW) Absolutely.

Q Okay. And you have been since 2015?

A (HW) That's correct, yes.

Q You've completed in that role multiple financial crime research projects both for RUSI and for the National Police Chiefs Council?

A (HW) That's right, yes.

Q Prior to that, you were with the National Crime Agency, previously the Serious Organized Crime Agency in the UK?

A (HW) That's correct.

Q Can you tell us a little bit about the work that you did there.

A (HW) Yes. A variety of roles during my time, what was the Serious and Organized Crime Agency and is now the National Crime Agency. So roles ranging from intelligence, investigations and strategy formation, including leading on strategy around civil confiscation for what was the Serious Organized Crime Agency, and also roles looking at combatting counter-narcotics in Afghanistan during the campaign around a decade
And you were a senior policy officer in the Proceeds of Crime Department in which capacity your résumé tells us you were the lead policy contributor to the home office consultation on changes to the Proceeds of Crime Act 2002 asset recovery powers.

Absolutely, yes, and that was focusing primarily on the role of civil confiscation in the UK following the closure of the Assets Recovery Agency and those powers being expanded to the Serious Organized Crime Agency and others at that time.

You've also led a UK -- you were the UK project lead on the Financial Action Task Force study into barriers to recovering criminal assets across international borders; is that right?

That's correct, yep.

And you also worked at the treasury as a project officer for the Financial Action Task Force evaluation of the UK's anti-money laundering and counter-terrorist controls?

That's correct. That was the last evaluation, not the one that's just been, but the one in 2007.
Q And I'll just mention that amongst your publications, you've authored a paper on non-criminal based confiscation in the UK for RUSI in 2019 titled "Reaching the Unreachable: Attacking the Assets of Serious and Organized Criminality in the UK in the Absence of a Conviction." Is that your publication?

A (HW) That's correct, yes.

MS. PATEL: Okay. And I'll just note for the record that it is, Mr. Commissioner, in appendix -- it's appendix C to an overview report on international publications, which is exhibit 374, I believe.

THE COMMISSIONER: Thank you.

MS. PATEL:

Q Mr. Moiseienko, you are a research -- pardon me. Let me just ask Madam Registrar to pull up your CV if we can. Thank you, Madam Registrar.

Mr. Moiseienko, you recognize this as your CV?

A (AM) Yes.

MS. PATEL: And I believe, Mr. Commissioner, if we could have this marked as the next exhibit that we're at, 381.

THE COMMISSIONER: Very well, 381.
THE REGISTRAR: Exhibit 381.

EXHIBIT 381: Curriculum Vitae of Anton Moiseienko

MS. PATEL:

Q Mr. Moiseienko, you're a research fellow at the Centre for Financial Crime and Security Studies of the Royal United Services Institute of RUSI; is that right?

A Yes, I am.

Q You’ve been a fellow since April 2019, but prior to that you were a research analyst with RUSI?

A Correct.

Q Okay. And you -- I understand that earlier in your career you were a practising lawyer in Ukraine?

A Yes, correct. I worked part-time in a Ukrainian law firm.

Q And you then received your PhD in law from Queen Mary University of London?

A Correct.

Q And you wrote a thesis relating to the imposition of immigration sanctions against individuals suspected of corrupt [indiscernible]; is that right?

A Yes, that's right.
Q And I understand that was later published as a book.

A (AM) Yes.

Q While at RUSI you, I understand, have published and conducted research on a number of topics, and I was wondering if you could just tell us a little bit about some of those areas that you focused on.

A (AM) Yes. There is a relatively broad variety of topics that I've had the chance to research while at RUSI. A substantial part of that relates to the proceeds of corruption and different ways of tackling that. For example, with the director of our centre, Tom Keatinge, I wrote a paper of the exfiltration of the proceeds of corruption from Pakistan and the role of the financial system in that.

I have also published a paper with the same co-author on the use of beneficial ownership transparency and different approaches to beneficial ownership registers that countries implement. Another significant part of my research relates to new technologies and financial crime, including risks related to financial crime in various online sectors.
ranging from cryptocurrency to e-commerce and
finally a significant portion of my work over
the recent years has related to free-trade zones
and freeports.

So as I say, it's a fairly wide range of
financial crime and occasionally illicit
trade-related matters.

Q Madam Registrar, we can take down
Mr. Moiseienko's CV now.

Mr. Moiseienko, Ms. Wood, you published --
you didn't publish, you wrote a paper for the
commission on unexplained wealth orders and,
Madam Registrar, I'm just wondering if you can
pull that up now from tab 4. Ms. Wood,
Mr. Moiseienko, do you recognize this as the
paper that you prepared for the commission?

A (HW) Yes.

(A M) Yes.

MS. PATEL: And that's "Unexplained Wealth Orders UK
Experience and Lessons For British Columbia."
And I would ask, Mr. Commissioner, if this could
be marked the next exhibit, which I believe is
382.

THE COMMISSIONER: Very well. Exhibit 382.

THE REGISTRAR: Exhibit 382.
EXHIBIT 382: Unexplained Wealth Orders: UK

Experience and Lessons for BC – October 2020

MS. PATEL: Madam Registrar, we can take that down for now.

Q Before we launch into the topic of today's evidence, which of course is unexplained wealth orders, and you've written a paper that focuses on the UK experience with unexplained wealth orders, but you also look at the experiences in other countries, notably Ireland and Australia.

Before we get into that, I was wondering, Mr. Moiseienko, if you could tell us a little bit about what RUSI is and the work that it does.

(A) RUSI or, as you said, the Royal United Service Institute, is an independent research institute based in London. It was founded in 1831 by the Duke of Wellington in order to conduct research on matters related to defence and security. It has largely retained that mandate. But over the past decade or so, the scope of work that RUSI undertakes has increased significantly in order to address new challenges to national security and defence and indeed international and global security and defence as
well. Helena and I work at the Centre for Financial Crime and Security Studies at RUSI, which is one of the research programs within the institute. And we do research on financial crime legislation, regulation, policy responses as well as occasionally operational responses. It's important to mention two things. First we don't conduct investigations, so we do work at a high level of generality looking at policy responses predominantly, as I said. And secondly we're not affiliated to any government in the UK or otherwise. So we're an independent research establishment.

Q And the Centre for Financial Crime and Security Studies that you've just mentioned, does it also look at issues around money laundering?

A (AM) Correct. That's a central part of what the centre researches.

Q I'm going to proceed into our discussion of unexplained wealth orders and to keep some order, I will proceed by directing my questions specifically at one or the other of you. I may at times get the target of my question wrong and if that's the case and if your colleague is better placed to answer the question, please
feel free to refer it to them.

So with that, Ms. Wood, I was wondering if you could start by giving us some basics -- telling us basics about unexplained wealth orders. I understand from your paper that there's a number of different powers arising under non-criminal based asset forfeiture that can be called unexplained wealth orders. So is there a common thread that can be -- that describes them?

(A) So speaking in the UK context, the unexplained wealth order is purely an investigative tool. It sits under part 8 of the Proceeds of Crime Act 2002 with a range of other investigative tools that you may be familiar with from your domestic legislation, such as production orders, disclosure orders, account monitoring orders. So it should absolutely in the UK context be seen as an investigative tool to be used to gather information and evidence to support a wider investigation. And that would be in this case in the UK under part 5 of the Proceeds of Crime Act 2002, which is the part of our legislation that holds our non-conviction based asset forfeiture legislature and regime.
And are unexplained wealth orders conceived of differently in different jurisdictions?

Yeah, that's absolutely right. I focus primarily on the UK experience, and I know Anton has looked in more detail at some of the other jurisdictions so I'll pass it over to him to talk about those aspects if I may.

Thank you.

Yes, thank you. I would add to this that there is no consistent uniform international understanding of what an unexplained wealth order is because different countries may be using the term in various ways. So any jurisdiction can create a tool that they would call an unexplained wealth order and it does not necessarily follow that in substance that would be the same as a similarly named tool in a different jurisdiction.

In terms of what we have seen from our research, I think it's helpful to think of three varieties of unexplained wealth orders. The first one is the kind of order that you would see in Australia, that's the federal or commonwealth level. If a person has wealth that exceeds that person's lawful income an order may
be served that requires that person to prove to
the civil standard the lawfulness of the
acquisition of that person's property, and
whatever proportion of the property cannot be
proven to be legitimate in that way is liable to
confiscation. That is the simplest way to
implement a tool that is often called an
unexplained wealth order.

Then you have a similar but slightly more
complicated tool of the kind that one sees in
Ireland. In Ireland you also have the reversal
of the burden of proof, but the trigger is not a
person having more wealth than they can account
for, but rather reasonable suspicion that
specific property derives from a criminal
offence, so the trigger for reversing the burden
of proof and placing it on the respondent is
quite different. And in that sense some might
argue about whether the Irish legislation is
truly an unexplained wealth order because the
trigger is not simply being unexplained wealth
but rather the enforcement agency, law
enforcement agency having reasonable suspicions
that a particular property derives from crime.

And then thirdly, the UK has opted for a
slightly more complicated still version of what it calls the unexplained wealth order and it combines what you see in Australia with an additional element on top of that. I know that we will get into more detail about how the UK model operates, but in broad terms there has to be a person with unexplained wealth, so a person whose wealth exceeds the lawful income. Other requirements have to be satisfied in order for the UWO to be issued and then the reversal in the burden of proof only happens if a person fails to provide the information that is requested by the law enforcement agency. So the road from person having more wealth than they seem to be able to have, the road from that to the reversal of the burden of proof is more complicated and convoluted in the UK. That's why I think it's helpful to think of three different models of unexplained wealth orders in different jurisdictions.

Q Thank you for that comprehensive summary. Quite a bit of material which we'll endeavour to unpack as the evidence progresses.

And I just wanted to note for the record, I know that I go back and forth between saying
unexplained wealth order or UWO. If I say UWO are we all in the same understanding that we're talking about unexplained wealth orders? Thank you. I see you're both nodding, so I'll take that as understanding.

In your paper at page 21 you say -- you refer to a study by the US law firm Booz Allen Hamilton which was conducted in 2011, a survey of unexplained wealth order regimes or civil asset forfeiture regimes around the world and there you quote that report, saying unexplained wealth order is described as:

"Any legislation that creates a presumption that a person's property constitutes the proceeds of crime."

And do you accept that as a fair generalized description of what an unexplained wealth order is, Mr. Moiseienko?

A (AM) Yes. But as I say, it's a matter of the English language in that some people might disagree with that characterization, so they could say that, for example, if one were to adopt a stricter definition of what an unexplained wealth order is, then, for instance,
category because the trigger for the reversal of
the burden of proof is not unexplained wealth
per say but some other information at the
disposal of the law enforcement agency. But for
present purposes, yes, I definitely agree with
the definition used by Booz Allen Hamilton as a
good working definition.

(HW) If I may add to that. I would say some
element of reverse onus seems to be a kind of
common feature throughout all of this
legislation. You know, the UK example differs
slightly in that it's a staged process, but the
reversed onus seems to be a key feature of
unexplained wealth orders wherever they present
themselves.

Q Thank you. Ms. Wood, I was wondering -- I'm
going to address this question in the first
instance that you -- but if you can tell us a
little bit about the origins, the international
origins of unexplained wealth orders.

A (HW) Again, I'll can kind of touch if I may on
the UK context. That's where my research and
experience lies. Certainly from the UK
experience, this wasn't a kind of government
push to go for the legislation. It was borne
out of a coalition of civil society organizations, pro bono lawyers and other interested parties forming a grouping basically on the basis of frustration -- from my personal view, frustration at the lack of progress against tackling illicit wealth in the UK, particularly that which is of corruption proceeds origin on the basis that London had become a focal point and centre for global proceeds of corruption, particularly the London real estate market.

So the onus behind the legislation in the UK came out of, again, my personal view, a frustration about this lack of progress. And a lot of work was done outside of government to look at different models and then put forward a potential model to the UK government, which they then accepted, again a personal view, but partly as a way of appeasing a kind of disquiet within civil society about the lack of progress. And they were very ready to adopt any new legislation which would give them something to announce in the press and something to appease that civil society group. So I think it very much means that the implementation in the UK,
which we'll go on to discuss in the way that's kind of borne out in practice, needs to be seen in the context of this being not a government initiated legislative change but something which was pushed for at frustration in civil society and kind of wider media and government disquiet about the state of affairs in the UK.

Q I understand from what you've just said that a strong concern was grand corruption in the UK. And maybe, Mr. Moiseienko, you could address this. But the concern about grand corruption of course is not seen just in the UK but it's been addressed by the UN Convention Against Corruption. I'm wondering if you can speak to the impact of that convention on the development of unexplained wealth orders before we come back to the UK situation specifically?

A (AM) Yes. So there's been some thinking happening at the international level as to how unexplained wealth should be addressed in particular in the context of public officials because some would argue that if you're a public official then there is a strong societal interest in knowing where your wealth comes from and there is therefore a premium on your ability
as a public official to explain the wealth that
you possess. And the UN Convention Against
Corruption contains two provisions that are
relevant to this issue. The first one is
article 20 of the convention that requires state
parties to consider criminalizing what the
convention calls illicit enrichment. It's
important to underscore that the provision is
not mandatory. It's one of the provisions along
the lines of states should consider
criminalizing but there is no obligation to do
so. Illicit enrichment in effect refers to a
discrepancy between the wealth of a public
official and the proportion of that wealth that
they can demonstrate has been lawfully
purchased. And there are countries around the
world that have criminalized that as a separate
self-standing crime. That, as you can imagine,
is intensely controversial because of the impact
on the presumption of innocence and the
incompatibility of that provision with
constitutional and human rights guarantees in a
number of countries.

I should perhaps mention that a similar
provision, in fact almost an identical
provision, is contained in the Inter-American Convention Against Corruption, and to the best of my knowledge, Canada has entered a reservation in relation to that provision based on its incompatibility with the presumption of innocence.

The second provision of relevance in the UN Convention Against Corruption is article 31 paragraph 8, which deals with confiscation. And just a moment, if I may, so that I can cite the exact wording of the provision.

"State parties may consider the possibility of requiring that an offender demonstrate the lawful origin of ... alleged proceeds of crime or other property liable to confiscation, to the extent such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings."

So in other words, the person in question might be required to demonstrate the lawfulness of the manner in which they acquired property, and that provision does not specify whether it deals with criminal confiscation following a conviction or
with civil confiscation or civil forfeiture as well, but the technical guide published by the UN Office on Drugs and Crime says that this is the only provision in the convention that deals with civil forfeiture as well. So regardless of the precise legal import of these provisions -- and I should emphasize again that they're not mandatory anyway -- it demonstrates two strands of thinking at the international level in relation to tackling unexplained wealth. One is taking a criminal law approach and treating having unexplained wealth as a criminal offence. And the other less far-reaching approach is to say it might not be a criminal offence, but if you have unexplained wealth countries might choose to confiscate it.

Q And just for reference, that article 31-8 of the UN convention against corruption, that part that you just cited is found at page 10 of your report.

I understand you've spoken a bit in your paper about the stolen asset recovery initiative, and we heard a little bit about that yesterday. I'm wondering if you can tell the Commissioner a little bit about what that
international initiative is.

A (AM) So Stolen Assets Recovery Initiative is a joint initiative by the World Bank and UN Office on Drugs and Crime. And as the name suggests, they focus on facilitating the recovery of stolen assets, specifically assets diverted through corruption. I'm not intimately familiar with the mandate of this initiative, but from my general knowledge I understand them to be both publishing reports on legislation and regulator requirements that countries might wish to implement or practices that they might wish to adopt in order to facilitate the return of assets and also they maintain the publicly accessible database of corruption-related asset recovery cases. So one can search that database and find links to, for example, indictments or court judgments in cases that are relevant to the initiatives mandate.

Q And just to provide another definition to ground this discussion as we move forward, we'll speak occasionally about grand corruption and can you just give us a quick definition of what grand corruption is understood to be.

A (AM) There is no universally accepted
definition, but broadly people understand it, from my experience, to refer to corruption that is perpetrated at high levels of government and therefore corruption that is not likely to be investigated or prosecuted in the country that it happens because the people involved in that held so much sway over the operation of government and law enforcement machinery in their country.

Other terms that are often used to denote grand corruption include kleptocracy or simply large-scale or endemic corruption. Although I suppose seem people would say that each of those different terms has its own semantic nuances.

Q Ms. Wood, returning to the UK context in particular, I'm wondering if you can ground us a bit by describing the UK's history, pre-unexplained wealth order, with non-criminal based confiscation.

A (HW) So yes, the UK introduced its non-conviction based asset forfeiture regime with the POCA 2002, so that's the Proceeds of Crime Act 2002, and it came into force in 2003. The original agency which had sole power to use the new civil powers of forfeiture was the
Assets Recovery Agency, which has since been disbanded. But this is a kind of basic civil confiscation regime which reduces the burden of proof on the authorities trying to kind of go against these assets. As other regimes it's an in remember process, and it, you know, doesn't remove -- it wasn't any sort of a reverse burden. There wasn't any attempt to follow the Irish model in adopting the UK's model. It very much went for reducing the balance of probabilities and there was initially no reverse burden. And this was kind of debated at great length at that time, but it was thought to be contrary to the UK's traditions at that time. So they preferred to go for, you know, the burden remaining on the enforcement authority, which at the time was the assets recovery agency to prove the case, albeit to the lower standard of proof in the civil courts.

The Assets Recovery Agency had a slightly checkered history. It had been set up with a slightly difficult mandate to be self-funding within five years, which had perhaps failed to anticipate the level of challenge to the law in the courts and the level of litigation that it
would face, and indeed the cost burden that
would incur. So it very much missed its
self-funding targets by quite a wide margin.
And this led the UK system to become somewhat of
a political football. So the UK's
non-conviction based asset forfeiture regime
became mired in controversy, which ultimately
led to the disbandment of the Assets Recovery
Agency in around 2008 and then the kind of
disbursement of those powers to a wider
constituency of agencies in the UK, including
what was the Serious Organized Crime Agency, my
former employer, and then others including our
Crown Prosecution Service and what was the
Revenue and Customs Prosecution Office. Again,
now disbanded, sadly. So it's been a history
that we have to understand when we come to see
where the unexplained wealth order fits in and
some of the perhaps perceived challenges that's
faced.

Ultimately if we look at non-conviction
based asset forfeiture in the UK it's never
really achieved the scale that was intended. So
while the powers were expanded out to other
agencies other than now what is the National
Crime Agency, was the Serious Organized Crime Agency, those powers were expanded out to the Crown Prosecution Service, our main prosecution agency in the UK. However, they've never picked up those powers. They've never chosen to work with them. They're also expanded to the Serious Fraud Office who views them intermittently, but they've never been expanded to the kind of scale that was perhaps anticipated at the disbandment of the Assets Recovery Agency over 10 years ago. A number of reasons for that, but I think it goes back to that legacy of the assets recovery agency becoming somewhat of a political football due to this failure to meet its self-funding target and some of the challenges the Assets Recovery Agency faced in its high court litigation and ultimately leading to these huge kind of costs it was facing and kind of running way over budget.

So I think that kind of legacy in context around non-conviction based asset forfeiture kind of becomes more important, I guess, as we go into the discussion to understand that this is perhaps something that kind of mirrored the way the system had been deployed in our near
neighbour, the Republic of Ireland, where the powers are largely uncontroversial and in fact very much in public consciousness, very much politically supported on both sides of the benches in Ireland. It's been a much more controversial and checkered history with the use of non-conviction based asset forfeiture in the UK.

Q The use of the forfeiture powers is seen to carry some political risk in the UK by those entities that have the statutory power to use them but might hesitate to?

A (HW) Absolutely. And this was compounded shortly after the Serious Organized Crime Agency took over those powers, and indeed the staffing contingent of the Assets Recovery Agency. So it almost picked up the agency and put it within what was the Serious Organized Crime Agency.

They had a quite a high-profile case around kind of the turn of the 2010, so I think it was around 2011, 2012, the NCA SOCA v. Perry was a very high-profile failure by the agency to win that case. And to give you a bit of context on this particular case which continues to cast a shadow of over the UK's non-conviction based
asset forfeiture regime, Mr. Perry was a convicted fraudster in Israel. He'd served his term but had chosen to reside in London. In this case, what was the Serious Organized Crime Agency, sought to tackle his assets both in the UK and in Israel. And it was a highly litigious case in which the points of law were challenged around international reach of the powers which ultimately led to an extension of the Proceeds of Crime Act under the Crime and Courts Act 2013 to look at that international jurisdiction piece. However, ultimately the Serious Organized Crime Agency were unsuccessful in their case and then faced a potential litigation around costs incurred by Mr. Perry around loss of earnings to the tune of 220 million pounds. Obviously not an insignificant sum. To put that in context, that was half of the Serious Organized Crime Agency's budget at that time. Now, perhaps gratuitously for my former employer, Mr. Perry died during those proceedings, and this case was subsequently settled by his children at a much lower level. We don't actually know the level they settled to, but I believe it's in the low millions
rather than the hundreds of millions. But I think that case was very high profile and it got a lot of media coverage. It certainly caused huge ripples across government and across prosecutorial agencies in the UK. And I think, again, along with this context of ARA being somewhat of a political football and the Perry case, again this has cast somewhat of a risk of a shadow over the use of the powers by others.

Q: And do you think that the failure of the Assets Recovery Agency was due principally to exaggerated expectations at its outset, or errors in implementations, implementation of the powers that it had or maybe a combination?

A: It would be difficult to -- it would be very difficult to place the blame in one area. These were very new powers that had only been adopted by a minority of jurisdictions at that time -- Ireland being one that we've mentioned -- but at that time there were only a handful of jurisdictions that had non-conviction based asset forfeiture regimes. So this was really, really untested water.

And one of the failures that I could point to is perhaps the lack of anticipation of quite
how challenged these powers would be in the high
courts and not giving cost comfort to the agency
around those powers.

One of the failures one might point to is
around this slightly naive setting of a
self-funding target by the then heads of the
agency, which was ultimately doomed to failure,
and again, it goes back to that point of not
anticipating the litigious nature of those
powers. People were perhaps always going to
challenge them in the court because they could
and they were so new and so novel. So that
perhaps led to the downfall of the agency in
that way.

I think if they had have anticipated some of
the costs they would have faced and sought
comfort around that, that may have kind of saved
them the death knell of being disbanded as they
were. But ultimately -- and I think personally
I see some of the successes. They did establish
some really important case law at the time,
which has been an ongoing legacy for those using
the power today. They established new kind of
competencies around managing assets. They
managed some really challenging assets that have
never been managed in the UK before, from race horses to very complex businesses, just some quite weird and wonderful areas. They did establish a lot of competence for others in the UK. I think the only criticism I really have is around a slight naivety around this kind of self-funding. The other thing I perhaps point to finally is around the model that was established for the Assets Recovery Agency. They were unable to initiate their own cases at the time. They were entirely relying on referrals from other law enforcement agencies, which limited the kind of cases they could take on. And often they were handed cases that perhaps law enforcement didn't want to deal with within their own law enforcement agencies which were perhaps of a lower level than were anticipated. But certainly the profile of cases now that can be self-generated by the National Crime Agencies are hugely different from what we saw back in the start of the induction of the powers where you were seeing quite low-level mortgage frauds, low-level drug dealing, and not the kind of powers for which the powers were initially established
Q I want to return to that, but first I want to
touch on the issue of unrealistic expectation
and the relationship to the acceptance of risk.
You don't look at South Africa in this piece
that you've written for us, but in the other
piece that I mentioned, the "Reaching the
Unreachable" paper, which we have in one of our
overview reports, you suggest that one of the
reasons that the South African non-criminal --
non-conviction based forfeiture regime was
successful was an attitude at the outset that
there would be risk and specifically litigation
risk and an acceptance of that at an
institutional and a government level. Can you
tell us a bit about that.

A (HW) Yes. Absolutely. I think the South
African system was set up with a much greater
appetite for risk and a much greater
expectation. Actually, one of the clear
outcomes in the early years would be to
establish case law. That was not the case
for ARA. I don't think they'd really
anticipated that. It certainly wasn't one of
their kind of strategic objectives. It was very
much seen as take the risk, take the cases that
are more difficult because only by doing so can
you establish the requisite case law on which
the rest of the organization we founded.
Another thing I'd point to in the South African
regime is a really clear mandate for their
agency and that mandate was around tackling
serious and organized crime. And although the
legislative intent around the Proceeds of Crime
Act was again around tackling so-called Mr. Bigs
and tackling those people deemed untouchable by
the criminal law, the mandate of ARA wasn't
quite so defined around organized crime or those
higher level targets which one ultimately ended
up dealing with, some much lower level cases,
and I think that was -- perhaps, you know, with
hindsight, benefit of hindsight, it was
perhaps -- it would have been better to really
focus the agency around that kind of top tier of
criminality.

Q Returning to the second point that you made
about one of the weaknesses of the Assets
Recovery Agency was that it was entirely
dependent on referrals. Is it the case that the
non-conviction based forfeiture powers are now
available to law enforcement agencies that
conduct their own investigations?

A (HW) So yeah, I'll kind of explain two of the nuances. Absolutely the main user, so the primary user of the powers to date has been the National Crime Agency, previously Serious Organized Crime Agency, and they have adopted the hybrid model named the Roskill model in the UK. So this is where lawyers and investigators sit together and kind of joint work those cases. And the same can be said for the serious fraud office. Again, they have this Roskill model where they have joint prosecutorial and investigators sitting together working those cases together. And they can very much now -- very different model, they can self-generate their own cases. They can start a case on a criminal track and take it off on the civil route. So it's a much stronger model, and they can almost look at their suite of targets and pick those which are suitable for civil recovery investigation.

The nuance I should explain in the UK around wider use of the powers, the Crown Prosecution Service has access to the powers. However, unlike the NCA and unlike the SFO, it doesn't
have its own cadre of investigators.

So it would be, were it to adopt the powers, be reliant on policing to provide that investigative input. And so far that's been a slight barrier to the greater adoption. Because it's not quite clear how the funding model would work. I know there are moves within the UK system to put in place a Roskill-esque model for policing and prosecutors, but ultimately I think the rub will come around funding, as always, in the public sector, particularly in these straightened times, you know, who pays for what and who carries the risk. Ultimately that risk, that cost risk we carry by the Crown Prosecution Service in the UK, which is, I can say, chronically underfunded and has been for some time. Yeah, so just a slight nuance to be aware of in the UK system. The ability to kind of push that out across a broader law enforcement. Law enforcement don't actually have access to the powers. It's actually the prosecutorial authorities that sit separately to them.

Q Okay. And can the non-conviction based forfeiture proceeding, can it proceed at the same time as a criminal process, a criminal
investigation and criminal charges?

A (HW) I wouldn't be qualified to comment on that. I'm a nonlawyer, unfortunately. I would say it would be very unusual for it to do so. It's usually the case that either tack is taken, but I'm afraid I wouldn't be qualified to comment on that, on a point of law.

Q Mr. Moiseienko, are you able to address that?

A (AM) No, I'm afraid not, this question.

Q Just returning to some fundamentals of the UK system. What are the types of assets that are susceptible to forfeiture and what I mean specifically by that, in British Columbia we have a system of civil asset forfeiture that allows our civil forfeiture authority to target assets that are alleged to be either proceeds of crime or assets that are alleged to have been instruments of crime. What types of assets are susceptible to forfeiture in the UK system under the Proceeds of Crime Act? Sorry, Ms. Wood, you are muted.

A (HW) Sorry, yes, it's the theme of 2020. Yes, we have -- this is wholly -- our own civil forfeiture is purely proceeds of crime. We have separate legislation dealing with
instrumentalities, which I'm no expert on that particular field, but primarily under our customs laws and kind of other aspects of our Criminal Code. Not under the proceeds of crime. It's purely for the proceeds of crime.

Q And moving back to the kind of the factual and the political environment that preceded the amending of the Proceeds of Crime Act to add to the unexplained wealth order powers, can you just go back to that context and explain what it was that was the catalyst for amending the act to add these powers.

A (HW) So yes, I think I'll point primarily to growing voice within civil society. The UK's got a very active civil society contingent. Some organizations you'll be familiar with from Canada, such as Transparency International. The UK chapter is very, very active. And others like Global Witness, Spotlight on Corruption and other corruption bodies. There'd been a growing disquiet generally about growing evidence of grand corruption wealth landing primarily in London but also in the wider UK, particularly real estate market and growing kind of levels of investigative journalistic material coming out
about London as a kind of centre for the
proceeds of crime or money laundering and
criminality more generally. And I think that
led to this groundswell of disquiet. I'd also
add in, it's not linked specifically to the
proceeds of crime, but the Skripal poisonings
and the Salisbury poisoning, which you may be
aware of in the UK where -- I should say alleged
Russian poisoning of their former colleagues
from the FSRB had led to a groundswell of
concern generally about the Russian influence in
the UK. So within that context, that included
the levels of Russian wealth landing
specifically in London and the southeast of
England. So there have been this broad context
and broad political pressure on the UK
government to be seen to be doing something
about this level of wealth.

Q You've spoken about the impetus for unexplained
wealth orders being grand corruption. Was the
impetus for the Proceeds of Crime Act 2002, was
it aimed at a different type of problem?

A I'd say very much so. So if we look back to the
then Blair government and his delivery unit
based -- he wrote up the kind of basic blueprint
for our Proceeds of Crime Act. It was more
disquiet about the kind of senior criminal
figures which were kind of quite high profile
in -- particularly again in London, and there
was a growing disquiet about their very visible
wealth which seemed to be reasonably untouchable
by the kind of criminal confiscation powers that
were in place at the time. So very different
drivers, I'd say.

Q And just to put a time frame on the unexplained
wealth orders amendments, when were they
introduced and when did they come into force?

A (HW) So I'll hand to my colleague about the
kind of passage through parliament; he is much
more familiar. But they were introduced with
the Criminal Finances Act 2017.

(AM) Yes, that's correct. They were introduced
in 2016 as part of the criminal finances bill
that then became the Criminal Finances Act 2017.
And to cycle back to the point that was being
discussed about the role of civil society. I
think the first mention in publicly available
documents of the idea of introducing unexplained
wealth orders in the UK was in the paper
published by Transparency International UK in
2015 that was based on the results of the considerations of the UK's framework by a task force that had been convened by Transparency International to study specifically the challenges of confiscating and repatriating the proceeds of grand corruption. Unexplained wealth orders were one of the areas that the report paid attention to. It drew significantly on the Booz Allen Hamilton report prepared by the firm for the US Justice Department in 2012 that you have already referred to. But the task force made certain suggestions as to how the powers might be adjusted in order to better fit the UK context and avoid some of the adverse human rights and civil liberties implications. And effectively that shape of the proposal was so influential that it made its way into the criminal finances bill that was announced by the then security minister in parliament and then those provisions made their way into the final text of the act with relatively few changes along the way.

And you mentioned that the first concept of the unexplained wealth orders, including some modifications to other international models to
address human rights civil liberties concerns.

What were those modifications?

(A) So basically the starting point for the consideration by the task force of what an unexplained wealth order is was the report by Booz Allen Hamilton that drew significantly on the Australian and Irish experience. That was really the focus of the report. So that's the material that the task force was working with and I've touched upon some of the main features of both the Australian and the Irish model.

But the main change that was made by the task force was to convert unexplained wealth orders in the Australian iteration into an information gathering tool to say what we're going to do when we find unexplained wealth and when the respondent is either a politically exposed person or suspected of involvement in serious and organized crime, what they're going to do then is not to ask the person to prove their wealth is legitimate in origin but to require them to provide information that we can then use. And this idea of repurposing unexplained wealth orders as an information gathering investigative tool is to the best of
my knowledge something that has emerged from the work that was done by the task force and this is the model that the UK has subsequently adopted in its law.

Q I understand that concerns were raised in both houses of parliament when the amendments were tabled. Can you tell us a little bit about what the principal concerns expressed about the shape of the unexplained wealth order tools were?

A (AM) So interestingly, these were not concerns around civil liberties. So it seems that the work of the task force has been tremendously successful in that, and the form of this information gathering investigative UWO did not raise the fears that one might have expected it to raise.

The concerns were mostly about some of the provisions in the act in terms of its application. So one of those was the question of when the reverse burden of proof kicks in, so what should be the trigger for a person to be required to prove that they have legitimately acquired property.

The way that the current legislation is framed states that if you get an unexplained
wealth order served against you and you as
respondent fail to comply, then that's when the
property in question is deemed to be
recoverable. In other words, it's treated as
though it were proceeds of crime for the purpose
of civil recovery. And the act in its final
iteration states that purported compliance is
not to be treated a non-compliance. That might
seem to be a relatively nuanced technical point,
but some of the members of parliament both in
the House of Commons and in the House of Lords
were worried that this wording of the provision
means that effectively you as a respondent can
provide a spurious explanation that is patently
wrong, but because on some level you would be
complying with the requirements of the order, or
at least you would be purporting to comply, then
the reverse burden of proof, this sanction for
not complying with the order would not really
kick in. That was one of the considerations in
parliament.

The second area of concern is something
that Helena has foreshadowed in relation to the
costs that would be born by enforcement
agencies. And clearly that follows from the
overall UK's law enforcement experience with
civil forfeiture and the sense that if you
target sophisticated wealthy people, be they
overseas politicians or organized crime figures,
they're likely to push back, and you might be
embroiled in long and costly litigation.

A proposal was made to cap the costs
incurred by enforcement agencies when applying
for an unexplained wealth order and litigating
its issuance, but that was rejected by the
government on the grounds that the ordinary
principle in civil litigation is loser pays and
there was no reason in the view of the
government as expressed in parliamentary debates
to depart from that principle in that particular
instance.

And, finally, another point that was raised
but not probably discussed in the amount of
detail that one might have expected it to be
covered in was the issue of what to do with the
proceeds of crime that are recovered as a result
of any unexplained wealth orders. And
especially in the context of international
corruption, there is the longstanding debate
about what to do with the proceeds of corruption
that have come from one country but have been invested and seized in another country. So you have the proceeds of corruption from elsewhere invested in the UK and the UK law enforcement agencies confiscated those proceeds. Do you share with the country of origin and to what extent do you share; how much does that depend, for instance, on the involvement of the country of origin in the investigation? And that issue was floated during parliamentary debates but not discussed in any great depth, and I understand that the current position in relation to unexplained wealth orders is the same as in relation to civil forfeiture more broadly, which is that the money is basically shared between the home office, 50 percent goes to them, and then the remaining 50 is shared between the investigating agency, the prosecuting agency and the courts. And then it's up to the government to decide if it wants to repatriate any of its share to the country of origin, if any.

Q So you've explained how the last issue is dealt with in practice. Returning to the first two issues, the issue of what is it -- what does it mean to purport to comply and at what point is a
person understood to have complied with an
unexplained wealth order and the issue of costs.

How have those concerns borne out in practice?

A (AM) So the first issue remains terra incognita,
I would say, at this stage. This is because to
date we have only seen one successful challenge
against an unexplained wealth order and that
related -- so that was a challenge against the
issuance of an unexplained wealth order in the
first place. In the case of NCA v. Baker and
others, the respondents who were served with the
UWO went to court and said look, different
conditions for the issuance of the order had
never been satisfied, therefore we should not
have received it. And they did not really get
to the point of discussing what compliance or
purported compliance means because they actually
never purported to comply with the unexplained
wealth order in the first case. And that really
is the current state of discussion surrounding
what purport to comply means in this context.

There were some discussions in parliament
and there are some commentary pieces written by
petitioners who would say that presumably there
is some degree of good faith engagement that you
have to show with the actual requirements in the order, so for instance, you cannot give a blank piece of paper or you cannot answer something that is silly and clearly has no relevance at all to the issues that you are being inquired about. But beyond that, there is really little to no guidance on that.

In relation to cost capping, once again, the best case that we have as an illustration of how that might play out is NCA v. Baker, and that has been reported in the press that currently I think as of the latest news items that I had seen about this case, the issue was under consideration by the courts, but the NCA expected to be hit with a very significant cost order in the millions of pounds and of course one might expect that to lead to at least reconsideration of whether the people who argued for some sort of cost capping during parliamentary discussions were on the right side of that debate. Because one would think that if you have a cost order that potentially derails any appetite to undertake UWO-related investigations in the future or seek the issuance of those orders in the future, then
either the order is not really workable or you have to somehow adjust the conditions in which that order is supposed to be issued, namely you have to address the question of costs in order to make UWOs attractive. But I think all of that should be somewhat qualified by the fact that after NCA v. Baker as you have seen in the report, there's also been a case where the application of unexplained wealth orders has yielded much more success for the NCA. So even though the there remain challenges around costs, it is clear that they do not play out in the same way in all cases where the orders are issued and it's still possible to rely on unexplained wealth orders with some degree of success.

Q And we'll look shortly at a couple of those cases where there has been successful use of the unexplained wealth order, but before we get into that, I wanted to look at the unexplained wealth order itself and I'm going to ask you to give a bit of explanation of how it functions in practice. And perhaps the best way to do this is to actually bring up the Proceeds of Crime Act.
Madam Registrar, I think we have this at tab 6. We have an excerpt of the Proceeds of Crime Act 2002 starting at section 362a, I believe, which is in part 8, investigations. This is just an excerpt from the act.

Mr. Moiseienko, feel free to ask Madam Registrar to scroll up or down as needed, but I think it's helpful to have the actual language in front of us as you walk us through what exactly the unexplained wealth order is, and how it functions.

A (AM) Yes, thank you. So this is the part of the Proceeds of Crime Act that was inserted by the Criminal Finances Act 2017 that sets out what an unexplained wealth order is, what its effect is, how it can be issued and what the effects of non-compliance or even lying in response to an unexplained wealth order are.

So here if we look at subsection (3) that sets out what the respondent might be required to explain if an unexplained wealth order is issued against them. And you can see that the provisions are quite broad in their scope, so the respondent might be requested to set out the nature and the extent of their interest in the
property and importantly explain how they had obtained that property in the first place.

So this is really the substance of what an unexplained wealth order is in the UK and what it requires the respondent to do.

Q And -- just to stop you there. I understand that there's quite a bit of leeway on the part of the authority applying for the order to specify exactly what information is required by way of a response; is that right?

A (AM) Yes, correct. Yes, and you can see -- you can see point D here in relation to setting out such other information in connection with the property as may be specified, so definitely the list provided in this subsection is not exhaustive.

If we scroll down to 362B, please. Thank you. This is the section that sets out the requirements for an unexplained wealth order to be made. And as I mentioned, this is the issue that has acquired particular importance in some of the litigation, in particular NCA v. Baker, the case of the National Crime Agency lost.

If we look at subsection 2, then we see some of the basic requirements in relation to
who the respondent is and what property may
become subject to an unexplained wealth order.
The respondent has to hold the property and the
raw provisions elsewhere in this part of the
Proceeds of Crime Act that specify that trustees
can be deemed to hold the property even though
they're not the beneficial owners of the
property. So the holding requirement is
interpreted quite broadly.

Then there is also a requirement that the
property must be valued at more than
50,000 pounds. I recall that during the initial
discussions of the Criminal Finances Act, that
threshold stood at 100,000 pounds, and that was
lowered. Presumably as a means to ensure that
the assets of organized crime groups of -- I
would not say relatively insignificant, but of
lower value than the kinds of assets that you
would associate with, for instance, the proceeds
of grand corruption can nonetheless be captured
by the operation of UWOs.

Q And if I could ask you just returning back to
something that you mentioned at the beginning
about different forms of unexplained wealth
orders. This form of unexplained wealth order
contemplates identifying a particular -- a
specific piece of property, is that right,
rather than one's general wealth?

A (AM) Yes, correct.

Q Thank you?

A (AM) Yes. And in fact in NCA v. Baker, the
cause for all the troubles that were encountered
by the NCA was that they had specific property
in mind, but they were not actually sure who is
the legal owner of that property. So the whole
process in that case was driven by the
identification of property that they thought
might be owned by someone with connections to
organized crime or someone who was a politically
exposed person, but they were not quite sure and
therefore they had to serve the unexplained
wealth orders against trustees and corporations
that held that property on behalf of the
ultimate beneficiary. And then it turned out
that the ultimate beneficiary was not exactly
the person whom the NCA had expected that person
to be. But I digress.

Perhaps if we move on to -- if we just look
at subsection 3. The High Court must be
satisfied that there are reasonable grounds for
suspecting that the lawfully obtained income of
the respondent would have been insufficient to
obtain the property. And this is a very low
standard indeed. It's not even suspect -- so
it's not even belief; it's reasonable grounds to
suspect. So not very difficult for a law
enforcement agency to satisfy, one would
imagine. And therefore the provisions that are
of particular importance are the provisions that
follow, which specify in subsection 4 that the
respondent to an unexplained wealth order has to
be one of the two categories of people. Either
the respondent has to be a politically exposed
person or there are reasonable grounds for
suspecting involvement in serious crime. And
there are further provisions in the act that
make it clear that when this provision talks
about -- when 4(A) talks about a politically
exposed person what is really meant is
politically exposed person from outside the
European economic area. That was touched upon
during the parliamentary debates and the
explanation for that limitation was that
cooperation with European economic area nations,
so the EU and several other countries in Europe,
is relatively well established and smooth, and therefore it does not raise the same concerns as politically exposed people from some other more far-flung jurisdictions.

Then if we move on to 362C. Thank you. In subsection 2, what we see is the real sanction for non-compliance with the unexplained wealth order. Subsection (1) details what non-compliance is, and it says that if the respondent fails without reasonable excuse to comply with the requirements imposed by an unexplained wealth order then the sanction envisaged in subsection (2) kicks in, and that is that the property is to be presumed to be recoverable property for the purposes of part 5, Proceeds of Crime Act. And that is the civil forfeiture legal framework that Helena has been referring to. So in other words, the property that you have not explained, if you have not responded to an unexplained wealth order in relation to property, that property is deemed to be effect of the proceeds of crime.

Q And just in terms of process, is it presumed to be recoverable and is it then confiscated or is it then subject to a further process?
A (AM) It is then subject to further civil forfeiture process, and it is a rebuttable presumptive, so it would be possible in further civil forfeiture process to bring further evidence that shows that the property is not in fact the proceeds of crime. But the presumption is triggered by non-compliance with the unexplained wealth order.

And one issue that some commentators have pointed to is that this really is the crux of what makes unexplained wealth orders unusual in the UK in that in effect you have the sanction for non-compliance with the court order, which is to say your property, the property in question, is deemed to be recoverable, so normal sanctions for non-compliance with a court order would include things like fines or potentially imprisonment or contempt of court. They would not typically be of this rather esoteric nature, because you have an information gathering order that requires you to provide information and then if you fail to provide that information the sanction is that the property in relation to which the order has been issued is deemed recoverable. So that really goes to show the
Finally, if we can, please, scroll down to section 362E. There is also an offence created by this part of the act of providing false or misleading in a material particular information in response to a requirement imposed by an unexplained wealth order. As you can see in subsection (2), this offence can lead to imprisonment. But of course one of the practical challenges in the operation of the unexplained wealth order regime is that the reason for issuing an unexplained wealth order in the first place is presumably that the law enforcement agency does not have a whole lot of information that would enable it to bring civil or criminal proceedings involving that property or the person concerned. So to show that a person has provided false information and to show that beyond reasonable doubt to a criminal standard, arguably you would need to have more information about that person's state of affairs and the property in question than you have certainly at the point when you make the
application for an unexplained wealth order.

Although maybe then in the life of an
investigation you acquire more information and
stand the prospects of prosecuting someone for
this offence become more realistic. But that
clearly is an important safeguard in principle
for the integrity of the scheme, in that if you
provide false information and lie, you are
liable to criminal prosecution.

I would say that's it in terms of the brief
overview of how the system operates. One other
point I should make, that if we perhaps scroll
back to the beginning of the excerpt, so you can
just stay here. If we go to subsection 7 of
this article, then you can see the list of
enforcement authorities. And as Helena, I
think, has mentioned, so far the National Crime
Agency is the only agency that has actually
applied for an unexplained wealth order, but
theoretically there is a possibility for other
agencies to do the same.

Q Thank you, Madam Registrar.

I think -- Mr. Moiseienko, can we take this
down now?

A (AM) Yes. Thank you.
And to round it out, what is the process if a respondent provides a response as required by the unexplained wealth order? What then happens?

Then the order would no longer be in effect. So the -- I believe the NCA or another enforcement authority that has applied for the order would deem with order to be fulfilled. I'm not sure exactly what form that takes in practice, but the respondent would be deemed compliant. And then most importantly, the information that the enforcement authority has obtained can be used in further civil forfeiture proceedings against the respondent.

There is, however, a limitation in the act in that subject to several limited exceptions such as perjury, this information cannot be used in criminal proceedings against that person. That was done in order to comply with the rules surrounding the privilege against self-incrimination. And a point of note, in that context might be that in one of the cases involving a woman called Hajiyeva, she claimed that the issuance of an unexplained wealth order against her was illegal because it infringed
against English law rules on spousal privilege
and that the information could be used against
not her but against her husband. And the judge
in that case deemed that that is self-evident
from the operation of unexplained wealth orders
and because there is no exception there for any
sort of spousal privilege rules; it is to be
taken that the parliament expected the law to
operate in that way. So basically the
information that you provide can be used against
your relatives, including your spouses in
criminal proceedings.

A  (HW) It's worth very briefly touching on one
again slightly limiting or perhaps controversial
area of the law as well. Once the response to
the unexplained wealth order has been received,
the enforcement authority, if it has an interim
freezing order on the property in place, has
60 days to respond setting out what its next
course of action is, whether that would be to
embark on a full part 5 investigation or whether
to take forward proceedings of another nature.
We're going to discuss some of the limitations
and strengths of the power of course, but that
60-day limit particularly when looking at
gathering evidence across borders is one area where authorities using the power of sorts to kind of push back and perhaps seek further future amendments to the law.

Q I think I'd like to move on, if it's convenient to the practical UK experience with unexplained wealth orders. In your paper you touch on four particular instances where unexplained wealth orders have been issued. Actually, before I do that, I'm sorry, I did have one question about the -- we touched on the use of the information that's provided. The information that's provided in response to an unexplained wealth order, is that information which at the -- what happens to it at the point of being offered? Is it offered in a publicly filed document? Does it -- is it information that becomes available to anyone with access to court records? What is its status?

A (AM) I believe it is provided to the enforcement authority in question.

Q And does it later become public if there's further litigation?

A (AM) It may become -- I believe it may become public to the extent that it is referred to and
relied on in litigation, in that litigation involving unexplained wealth orders is public. So the initial application for the order to be issued is made ex parte, so the respondent is not there. The public is not admitted. But then subsequent litigation does involve public being there. There is no anonymity in relation to against whom the unexplained wealth order was issued, and of course anyone could sit in court and listen to the pleadings of the counsel.

Q And one just further question about the process. Is it -- the initial order, is that made on an -- the initial application, is that made on an ex parte basis?

A (AM) Correct.

Q And in your report you say that it’s often accompanied by an application for an interim freezing order; is that --

A (AM) That’s right.

Q And is that invariably the practice?

A (AM) I believe in all the cases so far that has been the practice.

Q Moving back, then, to the UK’s experience in using the unexplained wealth order. First of all, has there been the power -- the amendment
came into force I believe in 2018, and do you have any idea of how many unexplained wealth orders have been successfully sought since then?

A (HW) So yeah, limited. So just the -- to our knowledge just the four that have been referred to in Anton's paper.

(AM) If I may just add to this. There have been different indicators of what the appetite is in relation to using unexplained wealth orders. So the original impact assessment produced by the home office said that they expected around 20 unexplained wealth orders to be issued per year. Interestingly, the impact assessment also predicted that the costs associated with each unexplained wealth order would roughly be equivalent to the costs of seeking a disclosure order, and as the Baker case demonstrates, that has not been entirely borne out in practice.

But then there have been press reports around more than 100 unexplained wealth orders being potentially considered by the National Crime Agency. There have been reports about unexplained wealth orders being considered by the London Metropolitan Police, although approximately 20 of them, but this is all rumour
and speculation, and as Helena says, these are not official statements by any means, so we only have the definitive information about those four cases and 15 orders in those cases that we cited in the paper and the rest is just rumour.

A (HW) If I can add slightly on to that. I refer back to the issue around the limited appetite in our Crown Prosecution Service and lack of investigative capacity and their wider risk appetite around this particular power. They don't currently have any expertise around civil litigation in the Crown Prosecution Service. It is, as the name suggests, a criminal prosecution service. So at the moment they just don't have the expertise to pick up these powers at scale. Although there have been huge political appetite for these powers to be used at speed and scale, that was matched by the capacity and capability available in the system to do so.

Q Mr. Moiseienko, can you tell us a little bit about two cases where there has been success on the part of National Crime Agency in seeking unexplained wealth orders that -- two cases you mention in your report are one that you've alluded to, Ms. Hajiyeva, and another one was a
case of Mr. Hussain. If you could tell us about those.

A (AM) These are both, as you indicated, cases where the National Crime Agency has been successful, albeit in different ways so far.

So in the Hajiyeva case, that was the first time that an unexplained wealth order was issued in the UK. The order related to properties owned by an Azerbaijani citizen and the wife of a former high-ranking public official from Azerbaijan who headed a state-owned bank in that country. Her husband had been convicted of a crime in his home country, that is Azerbaijan, but she had property in London that became the subject of the unexplained wealth order.

She challenged the issuance of the unexplained wealth order both in the high court and then later in the court of appeal, and she failed in both those instances on a variety of grounds. That is to say, different grounds for appeal were offered and rejected by the court of appeal.

One of those that might be of some interest is the argument that her husband was not in fact a politically exposed person because although he
was chairing a state-owned bank that was essentially commercial activity and the bank happened to be owned by the state doesn't make him a state official and the court of appeal rejected that argument and deemed him to be a politically exposed person and therefore as someone who is affiliated to that politically exposed person is someone who's their spouse, this woman herself could be a legitimate respondent to an unexplained wealth order.

We --

Q I'll just -- I had a question, you reminded me I had a question that I meant to ask before which is does the Proceeds of Crime Act 2002 define a politically exposed person?

A (AM) Yes, I believe so. So the section on unexplained wealth orders specifically does contain a definition of who a politically exposed person is. I don't have that provision in front of me at the moment, but I believe that it refers to the criteria from the European Union's money laundering directives and clarifies that the PEP definition only applies to non-EEA PEPs, as I have discussed already.

Q Thank you.
And we don't know what has eventuated from this situation so far, so we don't know if any assets have been seized to date. So presumably that case is still ongoing. But of course the success for the NCA was the fact that an unexplained wealth order was sought, it was contested, and the challenge was successfully resisted in the high court and the court of appeal.

The other case that involves another success for the National Crime Agency which happens to be the most recent unexplained wealth order case that we're aware of involves a man called Mansoor Mahmood Hussein, who according to the NCA has been described as involved in money laundering in the north of England.

In May 2019 the NCA sought and obtained an unexplained wealth order in relation to a number of his properties. He then contested the issuance of the order, failed in court. The judge went through different grounds that the respondent relied on to argue that the UWO should not have been issued. The judge disagreed with him, and therefore subsequently the respondent decided that it was worth
settling with the National Crime Agency and in August 2019, so only several months after the UWO had been issued to begin with, a settlement was reached whereby he surrendered almost 10 million pounds in property to the National Crime Agency. And that is a significant success partly because of the amount involved and partly because it happened to arrive on the heels of NCA v. Baker, the case that we have referred to many times already today and the case that was a high-profile loss for the NCA. So that was followed by this instance of success.

Q You say in your paper that the -- Mr. Hussein -- we don't need to go there, but it's page 16, just for the reference -- Mr. Hussein, according to the NCA, submitted a very lengthy response to the unexplained wealth order, and that had some impact on the eventual settlement. Can you tell us what you know about that. And I appreciate it's from public reports from the NCA itself.

A (AM) Correct. We only know what is there in the NCA press release and it's a quote that the statement inadvertently gave NCA investigators clues to make a bigger case against him. And it's interesting to think about what that might
entail because as we discussed, this information would not be used in criminal proceedings against him. It would only be used in civil forfeiture proceedings against him or potentially in criminal proceedings against someone else whom he implicated or provided information in relation to. But for whatever reasons he decided that it was worth to settle on the terms that the settlement eventually took place rather than risk that information that he provided being used in whatever way the NCA envisaged to use it, whether it's to confiscate or seek confiscation of more property or perhaps go after other members of the organization that he was involved with. We simply don't know.

Q And just a clarification. Mr. Hussein was not suspected of grand corruption. He was a local organized crime -- suspected local organized crime figure?

A (AM) Correct. Yes. He was suspected of being a professional money launderer for a range of organized criminals in the Leeds area in the, I think, north of England, unless my knowledge of geography fails me.

Q And you mentioned very briefly an unexplained
Helena Wood (for the commission)  
Anton Moiseienko (for the commission)  
Exam by Ms. Patel

wealth order issued against [REDACTED]. Can you
tell us -- the mention in your paper is very
brief, so I'm assuming you know very little
about it, but can you tell us what is known
about this particular order?

A (AM) Yes. This is based on public reporting,
which as you indicate is sparse in this
instance. We know that an unexplained wealth
order has been issued in relation to properties
owned by a woman called [REDACTED], and some
reporting indicates that she has been suspected
of ties with Irish -- northern Irish
paramilitary groups involved in cigarette
smuggling, which arguably makes this case of
some public interest, but as you say, we know
very little about it except the fact that an
unexplained wealth order has been issued.

Q And finally returning to the NCA v. Baker, a
case that you've already touched on, can you --
my understanding is that this is an instance
where the NCA ran into difficulty with the
drafting of the Proceeds of Crime Act itself and
how the unexplained wealth order is formulated.
Can you tell us about why there was a failure in
this case, what exactly happened.
A (AM) Yes. That's right. So it might be helpful to begin with a bit of context about the investigation.

The NCA obtained several unexplained wealth orders in relation to three properties in the UK. The NCA suspected that these properties had been purchased by a man who at one point was a public official in Kazakhstan, and he was also allegedly involved in serious and organized crime in Kazakhstan.

By the time that the NCA applied for unexplained wealth orders, that man was already dead. He died in, I believe -- well, it doesn't matter when, but he died in an Austrian prison awaiting extradition to Kazakhstan to stand trial for the crimes that he allegedly committed. So the NCA issued or applied for unexplained wealth orders to be issued in relation to those properties and the respondents in those cases as I've indicated were a professional trustee and several companies that were the formal legal owners of that -- of those properties. Those respondents provided information to the NCA after they received an unexplained wealth order. The judgment is
silent as to whether the respondents purported
to comply with the unexplained wealth order or
perhaps they simply sent a letter to the NCA
saying, we're not even pretending to comply with
the order, but here is additional information
that you might find useful that will show why
the unexplained wealth order should never have
been issued in the first place. And that
information supplied to the NCA indicated that
the actual owners of the property were two
family members of that man who had died. One of
them is a politically exposed person from
Kazakhstan in her own right. She happens to be
the daughter of the former late president of
Kazakhstan. Her name is Dariga Nazarbayeva, so
she is the person that most people, I believe,
would associate with this case because she was
really the face of the litigation, so to speak.
She is the most high-profile person involved.
And one of the properties was owned by their
son, so her son and the son of the man who had
died in Austria who the NCA thought had
purchased the property in the first place. And
information was provided to the NCA to the
effect that the woman in question was
independently wealthy, she received very little
money from her husband, who was allegedly
involved in serious organized crime, and she and
her son had purchased the property out of the
proceeds of their legitimate business activities
and using their family wealth.

So that was the story that was offered to
the NCA, and the judge in the High Court
Ms. Justice Lang made extensive reliance and
referred often to this explanation that was
provided by the owners of the property.

However, there were also legal questions
involved that really it seems from the judgment
determined the outcome. And that is the fact
that the legislative scheme is drafted in such a
way that the requirements for an unexplained
wealth order to be issued only really makes
sense if you have in mind the beneficial owner
of the property. So, for instance, if I am a
criminal or a politically exposed person and I
held property in the UK through a series of
intermediaries such as professional trustees,
the Proceeds of Crime Act says that you can seek
an unexplained wealth order in relation to the
trustee. There is a special provision that
enables that because the trustee is thought to hold property, and therefore is a permissible respondent. However, then you bump into all the other requirements for an unexplained wealth order to be issued because the trustee is not himself a politically exposed person. He is not involved in serious and organized crime.

Another requirement that was particularly problematic in this context is that for an unexplained wealth order to be issued as we have discussed there has to be a discrepancy between the overall wealth of the person and their lawful income. So when the NCA faced the judge, the judge asked well, okay, what are we talking about here; where is the discrepancy between the wealth of the professional trustee and the lawful source of income? And of course that's when the whole scheme entirely breaks down and you have to engage in a lot of gymnastics to make sense of it because of the way in which the provisions of the act are drafted, and there was a lot of clever lawyering involved. For example, the NCA made the argument that perhaps the professional trustee was involved in laundering the proceeds of crimes and therefore
he himself was to be treated as someone who's engaged in serious and organized crime, and the judge would have none of that. So at the end of the day the decision was that unexplained wealth orders should not have been issued in the first place in that instance. And perhaps surprisingly for some, the court of appeal denied the mission to appeal and therefore that is currently the latest statement in case law in relation to how the provisions on unexplained wealth orders should be applied to professional trustees or other intermediaries.

Q So for jurisdictions who are looking perhaps to draft their own unexplained wealth orders, perhaps a caution about thinking about those relationships between the holders of property and the beneficial owners and what exactly the legislation requires to be shown and of whom it requires information?

A (AM) Yes, correct. It would seem that there was simply a breakdown in the fabric of the legislative scheme and with more foresight of those issues, it should be possible to remedy it in a relatively straightforward way, I would imagine.
Ms. Wood, were you going to add to that?

Yes, the judgment is a very long and detailed judgment, which I encourage you to read should you have the time. But the other facts that Justice Lang picked up on were some of the failures in the investigations. So as Anton referred to, the respondents provided a whole raft of information explaining in part the wealth, and there were issues in there that could have been, you know, lines of inquiry that could have been followed by the investigators which could have potentially have been counselled, but for one reason or another, which we are not aware of, those lines of inquiry were not followed. Particularly around the issues of who ultimately held the property, where the actual wealth came from the, and the status of that property. So there were some criticisms in the judgment around the actual investigation. And then kind of learning, I guess, for others considering analogous powers would be that, you know, a UWO isn't a shortcut for a comprehensive and wide-reaching investigation into the underlying property. It shouldn't be seen as a full reverse onus power. They should have been
kind of armed for those facts and should have been seen to respond. So whilst I wouldn't see this case as a failure of the ultimate legislation overall, you know, the facts need to turn on this particular case, I would say. However, I think it's a cautionary tale on the need to not see the UWO as a shortcut as to a kind of more fulsome investigation.

Q We're going to look at non-UK examples of unexplained wealth orders, but before we do that -- and of course we'll have the opportunity to compare them, but before we do that, can we wrap up the discussion -- I'd like to wrap up the discussion of the unexplained wealth order in the UK by asking for your conclusions as to its strengths, its weaknesses and its effectiveness in achieving what was its goal in the first instance of fighting grand corruption. And perhaps Ms. Wood, I'll start with you?

A (HW) I think it's tempting with the recent Baker case to kind of see this as a failure of legislation. In many ways I would disagree. I mean, what we learned from the Baker case is UWO is quite a useful tool to get behind some of these hugely complex ownership structures that
have become such a feature particularly in grand corruption cases increasingly and kind of more mainstream organized crime. Although the case in and of itself has failed and will have cost implications for the NCA, we're learned a lot more about the ownership structure behind those properties and no doubt the NCA will be using that information in the future to some end, I would hope. So I wouldn't see the Baker case as a failure.

I think they shouldn't be seen as a volume tool in investigations in the UK. That's absolutely not the intention parliament had when adopting them. They were only ever to be seen as a tool not of last report, but of limited application. So if we look at the code of practice that sits behind the law, there's a statutory code of practice that must be adhered to by those using the powers and this absolutely says being cognizant of the really intrusive nature of the UWO, the other powers should and must be considered before reaching the UWO stage. So this should be seen in that context. They're not a bullying tool. They're a tool that should only be used where it's absolutely
necessary and when no other investigative power
can get at the information you're looking at.
And arguably the Baker case, although it was
flawed and there have been some controversy of
the investigation which will cast a shadow over
the use of the powers in the future, arguably it
shows the power of the UWO to get behind complex
ownership structures.

Secondly, I turn to the point of the
Mansoor Hussein case, and we repeatedly as an
institute have referred to the serious organized
crime limb of the UWO as having the most
potential. We always would have expected that
the PEP limb, those targets that were being
sought and the UWO legislation would be those
that would have the most complex ownership
structures that would have the legal might to
fight against what are, you know, under resourced
state law enforcement agencies and that would
have the most stake in terms of their reputation
and the veneer of respectability under which
they operate. But the serious organized crime
limb, those targets are less likely to use
complex structures, they're less likely to need
a veneer of respectability as they operate and
are less likely to want to reveal the kind of
greater expense of their criminal empire, as
happened in the Mansoor Hussein case. When he
tried to recover those tracks, he wasn't able to
do so and in fact tripped himself up and
revealed the extent of his full criminal empire.
So I think for me the real strength of the UWO,
the PEP case, it always is going to run up
against the limitations that all of other
investigative tools meet when they reach these
PEP targets that operate across multiple
jurisdictions with huge legal prowess and
complexity behind them. I think its strength in
time will be in this serious organized crime
limb, and that we're seeing the evidence of that
through the Mansoor Hussein case, so I would
expect that bit to be a kind of pivot towards
using them all. Although that was not the kind
of genesis of the powers, I would say they're
pivoted towards the more organized crime side.

In terms of their limitation as Anton has
referred to repeatedly, there are various
hurdles put in place before you can reach this
reverse onus and even then while you do so
you're still able to rebut those presumptions
kind of when we revert to the part 5 investigation. On a personal level I'd say it's quite right that those protections are afforded. This is a really -- some might say this standard non-conviction based asset forfeiture regime kind of butts up against human rights provisions enough, so this should absolutely perhaps should be those protections, and that's absolutely what's behind implementing a power that didn't go for this full reverse onus or illicit wealth provisions Anton's correctly referred to. But again, it's going to end up in the case that as with all the other investigative tools it will be problematic in those cases where it's perhaps most needed and that is in these grand corruption cases or the kind of global laundromat cases that operate behind these complex and shady structures. So it will have limitations, but I don't think the Baker case should be seen as a failure. I think we should perhaps say that if we want to protect human rights, then obviously the powers are going to have those limitations and you have to find some balance between protecting property rights and enabling enforcement agencies to tackle illicit
wealth. Whether that balance is right is perhaps to be told in the longer term. This is quite a new power in the UK, I would say. But again, I point to that case as well. There is perhaps in implementing powers, however they are conceived under unexplained wealth orders perhaps a conception that you -- they're a shortcut to a kind of shorter, a less litigious process for regaining illicit wealth, and that's absolutely been proven untrue in the case of the UK variant of the unexplained wealth order. You know, there's still a need to have a really wide reaching and stringent investigation into the underlying wealth if you are to counter some of the legal might that you will face if you are tackling these hugely powerful and well-resourced individuals. The limit would be definitely this inference in the mind of the investigator that there is a shortcut, they absolutely are not when you look at the UK example.

Q Mr. Moiseienko, do you have anything to add to the assessment of the effectiveness of the UK power?

A (AM) I would echo that it is definitely not a
shortcut. I think I would also inject slightly
more scepticism of the assessment. I hope
Helena will forgive me for that. But the way
that I would approach thinking about their
effectiveness is looking at it from three
different angles. One is are unexplained wealth
order a good way of seizing criminal property.
So this is where the discussion around the
reverse burden of proof and all of that really
centres. Are we thinking about unexplained
wealth order as a means of tackling criminal
wealth. And if so, then why do you have to take
such long and winding route to the actual
reversal of the burden of proof. And I don't
want to foreshadow too much by way of discussion
what other countries are doing, but if you come
to the conclusion that in some cases it is okay
to reverse the burden of proof, for example when
there's an overwhelming public interest in
making sure that public officials can account
for their wealth, or perhaps there are other
safeguards in place. For instance, you have to
justify your belief that someone is involved in
serious and organized crime and you provide
evidence to court of that. Then maybe that is
enough of a triggering event in order to have
the reversed burden of proof. It's not entirely
clear why the UK has chosen such a difficult and
complicated approach to that. And I think that
might be in the end one of the reasons why
unexplained wealth orders will not lead to
significant confiscations of criminal wealth.
Although we don't know. I don't think the jury
is still out. The second the information
gathering aspect of unexplained wealth orders,
because that's really what they say on the tin
they do. And as Helena has underscored, the
statutory guidance is very unambiguous about
unexplained wealth orders being an information
gathering tool. And there I think it's just
very difficult to assess the effectiveness of
them. How do you assess the amount and quality
of information that is gathered. Do you try to
assess them by relevance to the success of civil
forfeiture cases that might follow the issuance
of an unexplained wealth order? I think that's
another area where we simply don't have the
answer yet. And I would be -- if I were a
jurisdiction coming at it with a blank slate, I
would ask myself well, is it actually a good
idea to have a new information gathering tool
that would only be used in 20 cases per year?
Because if we are talking about an information
gathering tool would it not be good to have a
tool that is more broadly applicable, and if so
and what is the information gathering problem
that we're trying to solve here and maybe we
could better address it by tweaking our
disclosure regime in some other elements. I
think that's the information gathering aspect of
UWOs. And finally the most speculative aspect
of their effectiveness or the lack thereof is
the news reports in some media to the effect
that there are people from countries around the
world who are now reconsidering their
investments of dirty money in London and there
are clients from certain high-risk jurisdictions
coming to their lawyers in London and asking
well, are you sure I'm not going to be hit with
an unexplained wealth order? Sort of the
overall deterrent effect of the legislation and
the power that it has had in terms of conjuring
up this image of a country that is tackling
illicit wealth seriously, and it might well be
that that is a significant benefit of having
unexplained wealth order provisions. Because ultimately everyone is playing a bit of a PR game as well, and it's important to demonstrate political resolve, and maybe unexplained wealth orders do have this symbolic effect, but it's virtually impossible to estimate. So this is the kind of consideration that a policy maker might bear in mind, but if you go back and try to assess how much of an impact you've made, I would imagine that's practically impossible.

Q: Thank you. Mr. Commissioner -- oh, I'm sorry, Ms. Wood, did you have something?

A: (HW) It was just one point, if I may. Just to come back on Anton's very well-made point about the UWO as an information gathering tool, which is absolutely what it is, and the legislation is very clear on that and the code of practice behind it. But when we speak to investigators, they're often of the view that the disclosure order also imparts aids of our Proceeds of Crime Act which allows you to make a written notice of the need to provide documentary evidence or return to an interview or give up further information to the investigation. That was extended as well into the criminal finances to
non-conviction based asset forfeiture
investigations, and in their view that's a much more impactful information gathering tool.

So I think UWO should be seen as part of that suite and often the disclosure order is the preferred tool. Although it has had less media attention, in terms of investigatory impacts the people we talk to say that's been the biggest game changer.

The second point, again leading on Anton's point about deterrent effect, we also -- again it's difficult to prove in any sort of empirical sense, but we hear that in the kind of more standard mainstream part 5 civil investigations, there's been a greater willingness to engage in non-order based information giving based on the fact that people do not want to be faced with a UWO given the level of media scrutiny on the respondents in those cases. So information is being more willingly put forward now in the non-UWO part 5 cases because the respondents in those cases do not wish to have the media spotlight shone on them. So although it's very difficult to measure the real and true impact of a kind of reportive level from investigators
that having the threat of a UWO is actually extremely useful, even if it's not deployed to any scale.

Q Thank you.

MS. PATEL: Mr. Commissioner, this would probably be a good time for us to take a short break.

THE COMMISSIONER: Sorry. Thank you, Ms. Patel, we will take 15 minutes then.

THE REGISTRAR: This hearing an adjourned for a 15-minute recess until 11:36 a.m.

(WITNESSES STOOD DOWN)

(PROCEEDINGS ADJOURNED AT 11:22 A.M.)

(PROCEEDINGS RECONVENED AT 11:35 A.M.)

HELENA WOOD, a witness for the commission, recalled.

ANTON MOISEIENKO, a witness for the commission, recalled.

THE REGISTRAR: The hearing is resumed, Mr. Commissioner.

THE COMMISSIONER: Thank you, Madam Registrar. Yes, Ms. Patel.

MS. PATEL: Thank you, Mr. Commissioner.

EXAMINATION BY MS. PATEL (continuing):
Moving on from the UK context, your report addresses principally the Proceeds of Crime Act of Ireland and the Proceeds of Crime Act of Australia as well as various state and territorial pieces of legislation that have some form of unexplained wealth order, and I think unless there's anything -- your report does mention very briefly, for example, Italy and Georgia. Unless there's anything specific in those nations' legislation that you would like to touch on, I'd ask Mr. Moiseienko, if you could take us to the Irish situation.

And by way of prefacing that, perhaps it's worth saying that the legislative schemes in countries like Italy and Georgia are similar to the Irish experience in that there is a reversed burden of proof and there is some sort of situation or something that a law enforcement agency has to prove in order to trigger that reversal, and the reversal is predicated on something more than simply a discrepancy in the wealth of people concerned. So, for instance, in Georgia the person concerned has to be a public official and has to have been accused of a number or one of a number
of crimes. But as you say, the Irish example is worth focusing on in greater detail. Partly because as Helena has briefly alluded to earlier, the Irish experience is often held out as an example of best practice internationally. Partly that is probably a function of factors other than legislation, but there is certainly a perception that the legislation is part of that.

So the respective piece of legislation in Ireland is the Proceeds of Crime Act 1996. And what it enables the Criminal Assets Bureau to do is to gain an interlocutory order if there are reasonable grounds to believe that certain property constitutes the proceeds of crime, and once that interlocutory order is granted the burden is then on the respondent to prove on the -- to prove to the civil standard that the property does not in fact constitute the proceeds of crime.

What is important to mention is that, first of all, I should correct something that I said earlier, which is that I referred to the wrong standard. I said that it was the reasonable ground to suspect, and I've probably been affected by the UK experience which uses this
term. Actually, in Ireland the proper wording is reasonable grounds for belief that certain property, and specific property has to be identified, constitutes the proceeds of crime.

So you can see that this system, this legislative scheme is relatively straightforward in comparison to the one in use in the UK in that there is a defined criterion, a defined threshold that the Criminal Assets Bureau has a satisfy, then the burden reverses to the respondent and then the proceedings take place. And probably one thing I would note in relation to the Irish experience is that very often when you read commentary on that -- and I should be upfront about the fact that our report is based on what we saw in publicly available information regarding the Irish experience -- publicly available sources tend to highlight the fact that the Criminal Assets Bureau is highly resourced, while reputed in the local communities, and also importantly it brings together people of varying backgrounds and areas of expertise, including financial investigation. And so arguably all of those contextual factors are important, at least as important to
understanding the success of the Irish scheme as the actual legislation in place.

And finally, a point of terminology when we started, I made the point of listing different kinds of provisions that people might deem to constitute unexplained wealth orders. I expect that some people of a kind of purist persuasion would say that I'm entirely wrong to refer to Ireland in this context because Ireland does not have unexplained wealth provisions, because as we've discussed, the trigger for the reversal of the burden proof is not the discrepancy in wealth per se, but as we touched upon in the beginning, that really is a matter of terminology rather than substance.

Q And, again, the Irish provision that you just walked us through, it addresses specific pieces of property?

A (AM) Sorry, could you clarify that.

Q The authority, I suppose it would be the Criminal Assets Bureau, goes into court not making allegations about somebody's wealth at large like you've just said, but they've identified a specific piece of property?

A (AM) Yes, that is absolutely correct.
And I -- Ms. Wood, I know that you have written -- you mention the Criminal Assets Bureau in the other paper of yours that we've mentioned today, the "Reaching the Unreachable."
And I wonder if you have anything to add on the perceived effectiveness of the Irish system and whether it is due to a superior or an effective -- not superior but an effective legislative scheme or is it in the operations of the Criminal Assets Bureau itself?

I think it would be a mix of those. I mean, primarily one of the strengths that really backs up the Irish system is just the groundswell of kind of cross party political public support for their action. And that could be seen in the kind of background and context in which their non-conviction based forfeiture system was implemented in the first place, being on the back of a very high-profile murder of a journalist in Ireland by serious and organized criminals which led to a level of public opprobrium that meant that political action against the issue was perhaps inevitable, and on the back of that, they were one of the first jurisdictions to implement such provisions.
And I mention that because I think it's protected the Criminal Assets Bureau. That kind of level of political and public support has protected them through, you know, various levels of public austerity over the past 10 years that we've seen globally. That budget has been protected, and I think that's a really key factor when we compare it perhaps to the UK system more broadly. The UK system has broadly been under resourced and it's left it open to challenge by high-profile cases where the UK system has been outgunned legally in resourced terms. The same can't be said in Ireland where they have a much better resource system that's predicated on this kind of groundswell of public support for what they do. If you walk down the street in, say, Dublin and mention CAB, people will know who you're talking about and they'll know what civil asset forfeiture is. You walk down the street in London, and you would get a reasonably blank look about civil forfeiture, so it's a really different cultural context.

Whilst the legislation is in one part useful, I wouldn't say the reverse onus provisions are key to the success over there.
Though they can be useful in certain instances,
I wouldn't say they're key to success. In fact
the modelling of the Irish system is in some way
limited because they have this very strict
provision in their reverse owner scheme, which
means you have to wait seven years before
forfeiting the asset if it's not explained,
which is quite a long term particularly if the
CAB are forced to manage the asset, if it's not
a kind of piece of real estate. That's quite a
long arm, seven years, so they have got quite a
rigid measure, again, to protect people's human
rights, which is absolutely right and proper.
But actually their reverse onus scheme could be
seen as fairly being rigid in places.

So if I can summarize that, I would say
actually the success of the CAB is primarily
more down to that operating model and the kind
of level of public support and resourcing more
than it is down to simply the fact that they
have a reverse onus provision in their
legislation, in my personal view. But I know
you're hearing more from others who are more
closer to that system tomorrow.

Q Yes, we are. It's still useful for us to hear
the comparison, though, from somebody sitting inside another system. One thing you mentioned was the protected budget and I'm wondering if you can comment on the need -- the AR -- the Assets Recovery Agency was supposed to be self-funded, and my understanding is there's no such expectation of the Criminal Assets Bureau. Can you comment on what impact that has on its ability to be effective?

A (HW) Absolutely. The whole discussion in Ireland isn't around whether POCA pays for POCA, which has become a bit of a term in the UK. It's whether taking it where the asset has a wider community benefit. So in their kind of adoption model of cases, they don't simply look at whether it's, say, a commercially viable principle, if you look at it, say, as a normal civil litigation case, which is the way the commercial litigator would look at it. They look at in terms of the wider community impact.

So, for example, if it was to cost a million pounds to take away a million-pound property, then within the Irish system that would be absolutely fair. That's not to say those principles don't apply in Britain, but I think
going back to the legacy that the UK system operates under due to the legacy of the Assets Recovery Agency, there is still this notion that the impact of asset recovery should be measured in financial terms rather than in the more difficult to measure community impacts or dismantling of criminal schemes terms. I think that the UK continues to labour under that position that POCA should pay for POCA when absolutely that's not the legislative intention of any of these provisions across the world. It's to impact on criminality and not to be in any way commercially viable.

Q And I don't mean to cut short the discussion of Ireland, Mr. Moiseienko, if you had anything that you thought was important to add to the discussion, but if not I was going to ask you to move to a description of the Australian, the national and then the state and territorial schemes?

A (AM) Yes. Nothing to add on Ireland. So happy to move on to Australia.

Australia is an interesting example in terms of how simple its regime looks. It's worth noting that unexplained wealth orders were first
adopted in Australia in 2010. I believe New South Wales was the first state to do so. And then shortly thereafter unexplained wealth orders were also adopted at the commonwealth level. So they're now part of the Proceeds of Crime Act 2002 in Australia. And currently seven out of nine Australian states and territories have unexplained wealth orders in place. Although as we might discuss, it does not seem that they're always being vigorously used.

In terms of what the legislative scheme looks like in broad terms, as I have alluded to if we look at the commonwealth level as an example, a law enforcement agency would apply to a court for what is known as a preliminary unexplained wealth order, and that would be predicated on the disparity between the overall wealth of the person and their lawful income. Then the person in question would be required to appear before the court at a hearing and provide explanation as to how a property was purchased.

And then if the court is not satisfied that all of the property comes from legitimate sources, then the court is authorized to make
the unexplained wealth order. In Australian parlance, the unexplained wealth order basically stands for the confiscation order that is the culmination of those proceedings. And the unexplained wealth order can be made in relation to the difference between the person's overall property and the part of the property that has been proven to come from lawful sources, provided that that difference is more than $100,000.

So that is really the scheme of the commonwealth level. It's important to note that its operation is limited to offences that are recognized under the law of the commonwealth. So basically what you have to prove as a respondent is that your property does not derive from any of the offences recognized under the law of the commonwealth as opposed to the laws of states and territories. And given the inertia that has apparently existed in some states and territories -- or maybe inertia is not a kind word, but really the lack of resourcing and other factors that have constrained the application of unexplained wealth orders, given all of that in recent years
there has been a shift towards giving greater powers to law enforcement agencies at the federal or commonwealth level and empowering them to also confiscate property that has been obtained in breach of the laws of states and territories, not only federal law. And that I think is now possible since 2018, when the cooperative scheme was created with a view to facilitate on this application of unexplained wealth order by the Australian Federal Police and federal agencies.

So that's broadly the scheme at the commonwealth level.

Q If I could just draw out a couple of points from what you've said. One of the key points from the commonwealth scheme, I understand, in comparison to the Irish scheme, the Irish scheme requires that the Criminal Assets Bureau come -- I assume it's the Criminal Assets Bureau come to court and show that there are reasonable grounds for belief that a particular piece of property constitutes the proceeds of crime. And then they get an order to freeze. In Australia there's no requirement at the commonwealth level with respect to this unexplained wealth order to
show a suspicion that -- or grounds for belief that a particular piece of property is a proceeds of crime or indeed that one's wealth in general is the proceeds of crime. But rather the preliminary test is met by showing there's reasonable grounds for suspicion that a person's total wealth exceeds the wealth of their -- exceeds the value of their wealth that was lawful acquired?

A    (AM) Yes.

Q    Okay. And then in fact there is no requirement at any point for -- I mean, I suppose that the commonwealth could prove, it could endeavour to show that a person's wealth was unlawfully acquired, but it has no obligation to do so. Rather the onus is on the respondent to show the negative, to show that it was not unlawfully acquired?

A    (AM) Yes, correct. I should perhaps qualify "unlawfully" by reiterating the point that I just made about you as a respondent having to prove that your property does not originate in a list of offences under the laws of the commonwealth.

Q    Or for an indictable offence?
A (AM) That's right.

Q And you mentioned the national cooperative scheme. Can you tell us a little bit more about that and just in brief, appreciating we will have evidence from Australia later this week. So I won't put that burden on you.

A (AM) Yes, yes, when we've got a good international cohort. But the genesis of that scheme lies in, I think, three factors. The first is that there has been so far limited uptake of unexplained wealth orders at the federal level. So if you look at annual reports published by the Australian Federal Police, for example, they only refer to a very small number of cases. You could count them on the fingers of one hand where unexplained wealth orders have been sought. And I think the latest state of affairs is that currently no investigations are being pursued with unexplained wealth orders. So you've got the relative paucity of practice at the commonwealth level, and then you also have two reviews that were launched into the operation of unexplained wealth orders in two states and territories, and one of them being Western Australia and the other being Tasmania.
And both of those reviews have shown a mixed record of implementation of unexplained wealth orders, and by "mixed record" I mean that it's impossible to discount their utility in principle. It seems as though they might be useful but equally they're not being applied often in practice.

And so across the board in Australia, there seems to be this sense that unexplained wealth orders could be useful but something is currently missing in how they're being applied. And one solution that had been discussed for some time and has culminated in its actual establishment in 2018 is the national cooperative scheme whereby the Australian Federal Police would be empowered to apply for unexplained wealth orders and they would not be constrained by the limitation of the list of offences to those under the laws of the commonwealth. So even if property originates in offences against the laws of states and territories that take this part in the scheme, then the powers would be there to seize that property. Though to my understanding is that not all states and territories are willing to
take part in the scheme and that will obviously constrain its effectiveness overall.

Q We don’t need to go into this in detail, given the -- that we will be hearing evidence on Australia and the state and territorial schemes later this week, but are there any particular details of a state or a territorial scheme with respect to unexplained wealth orders that you think should be highlighted for the commission?

A (AM) I think there are small differences. And you can find them in the report. I mean, it’s really words like "reasonable suspicion," different standards that are used to kind of, you know, trigger the reversal in the burden of proof.

So, for example, in New South Wales, Queensland and Victoria, you do need to show reasonable suspicion that a person has been engaged in serious crime, and that of course is something that is closer in its mindset and in its approach to the model followed in the UK than the commonwealth level legislation. So there are slight distinctions in how different states and territorial schemes operate. But from the research that we have done, I do not
feel that any of them has been tremendously consequential or definitive in terms of the effectiveness of the overall regime. I think subject to what you hear from the much better informed Australian experts, it seems as though Australia is much less often presented internationally as an example of best practice in this area than, for instance, Ireland. And going back to my earlier point, that must refer -- that must be due not to weaknesses in legislation but to other contextual factors.

Q Indeed they look on the face of them to be extraordinarily powerful legislative provisions.

A (AM) Yes, exactly. Very easy to apply. It would seem extraordinarily powerful. Specifically adopted it might be worth saying with a view to combatting organized crime, so it would seem from what I've read that corruption was much less of a concern in Australia, and yet it just does not seem to be used to a significant extent.

Q Ms. Wood, do you have anything to add to the consideration of the various Australian schemes?

A (HW) Nothing further from me.

Q I'd like to move on back to the reasons that we
are here, and I'd like to ask for your thoughts based on your review of the legislation in the UK, in Ireland and Australia, and your knowledge generally of these kinds of schemes and of non-conviction based forfeiture what British Columbia should keep in mind if it considers drafting some kind of unexplained wealth order for its own civil forfeiture authorities. And maybe base that -- your thoughts around what are the kind of legislative considerations that will have to be borne in mind and what are the operational considerations that will have to be borne in mind and perhaps I'll start with Ms. Wood.

A (HW) Yes. Let's start with the operational considerations. You know, based on the experience not just of UWOs but the kind of wider non-conviction based scheme in the UK. I think the cases were operating reasonably well after the initial establishment by the case law that we've referred to by the Assets Recovery Agency. But as I've previously referred to, the kind of targets of those orders were primarily kind of lower to mid-tier criminality and certainly not into the grand corruption realm.
As, you know, there's been kind of a political and media push towards using the powers as they were originally intended against kind of top tier organized criminal targets and the kind of grand corruption targets that we have referred to that led to the kind of groundswell of support for the implementation of UWOs. We've seen a considerable outgunning of the political -- sorry, the legal might available to government when faced with kind of multiple benches of QCs, sort of top tier of lawyers in the UK. So I think the big lesson for anyone is, you know, you have to have an equality of arms when you're going against these top targets.

So at the moment the UK has a cadre of civil litigation expertise within its ranks, but arguably, given the kind of pay disparity between public sector pay and some of the bigger private legal firms to which the respondents to these orders have recourse, they've been considerably outgunned. And that's not to undermine the expertise of former colleagues in National Crime Agencies. There's certainly some great talent there. However, to attract the
right pool of talent and expertise, you really
do have to at some level match the pay the kind
of civil litigators are being offered in the
private sector. I think that for me that's --
more the primary problem in the UK for me at the
moment is capacity. Yes, you know, it's been an
under resourced area, but it's also capability
and the struggle to attract significant kind of
commercial civil litigation expertise to come
into what is a kind of quasi-criminal sphere has
been really, really difficult and secondly
retaining that expertise, given, you know,
burgeoning property prices in London in the
southeast meaning the kind of public sector pay
isn't matching that kind of scale. So there's
been a sort of hemorrhaging of expertise due to
those pay disparities. Not an easy circle to
square, I admit, but I think that's something
that's really key to me.

In terms of the legislation, as Anton's
referred to, some of the debates in parliament
didn't centre so much on the human rights
aspects of this, but there was certainly in the
framing of the law consideration, a full reverse
onus provision wasn't something the UK had
appetite for, nor would it fit with the kind of legal traditions in the UK. So I guess it depends on that legal appetite. It's a really -- as you already know, there's significant controversy around the use of civil confiscation powers without unexplained wealth orders being brought in and it's finding that correct balance between empowering investigators with tools at their disposal while not running roughshod over people's property rights. I think building in enough kind of weight to allow people to vent themselves is key, but finding the balance between those two areas is really difficult, and whether the UK's found the right balance, I think will only come out in time as the powers are tested to their full potential. I don't think we've seen them yet. Certainly early examples suggest that these powers are going to face as much if not more litigation than the underlying civil litigation scheme faced when the assets recovery was set up. I think finding that balance is really key. And I think that goes down to political and cultural appetite within the Canadian legal tradition.

Q Mr. Moiseienko?
A (AM) I think that in terms of approaching the design of a legislative scheme I would start with a very simple question of are we okay with the idea of a reverse burden of proof in civil forfeiture proceedings, because if the answer is no then the rest of the discussion falls by the wayside. You cannot have any sort of unexplained wealth order provisions. If the answer is yes, we're okay with that in certain circumstances, then the issue becomes well, what are those circumstances. And that can be approached in a variety of ways. You could think about the characteristics of the respondent, so for instance, you've got the Italian example where people suspected of affiliation to a Mafia type group are treated differently and there the reverse burden of proof is possible. You've got the Georgian example where the focus is on public officials. You've got the UK example which combines the two approaches and enables UWOs to be issued in respect of either non-EA PEPs or people involved in serious and organized crime. You can have requirements around the standard that the law enforcement agency has to satisfy, whether it is
something like reasonable grounds to suspect, reasonable ground to believe or even anything higher than that. It really depends on sort of what options you've got in your country. And then it's also possible to play around with parameters such as what is the value of property in respect of which the UWO can be sought. Does the court have a discretion or should the court issue an order automatically if certain requirements are satisfied?

So there are different pieces of the puzzle, and I think that if you line them up in the right configuration, provided that there is no overarching constitutional human rights objection to the principle of the reversal of the burden of proof in civil forfeiture, then it's possible to come up with a scheme that is relatively permissive, such as in Australia, or exceedingly complicated -- or not exceedingly, but definitely quite complicated like in the UK. And where you fall on that spectrum will really depend on, as Helena says, your appetite and the legal tradition and the sense of what is appropriate and what is not appropriate. So I would imagine that's -- that's it in broad
terms.

One other issue I would mention is if you do approach unexplained wealth orders as an information gathering tool, like the UK approach has been, then it strikes me as necessary to consider that in the context of other information gathering tools, so how do our disclosure orders work, what other means do we have of getting information about property that we might want to confiscate and how exactly would some sort of unexplained wealth order, for example, like the one used in the UK, how would that be helpful in that endeavour. I think I'll stop here.

Q If I could layer on to the question by asking how does your assessment -- what is useful to a jurisdiction change if the principal target, the principal political issue, the facts that are being addressed by civil forfeiture aren't grand corruption but are rather organized crime? How does that change the assessment for the jurisdiction, say that's the situation here. Not saying that it is. But hypothetically does that change the assessment of what is the best approach?
(HW) Should I start there or Anton? Yeah. So my personal perspective, and certainly I think we've touched on this today in the Mansoor Hussein case, the UK system I personally think will be most effective in the cases against organized crime, and I think it's well designed for this, although it was not the intention initially behind initiating this legislation. But where the reverse onus is triggered by the lack of response to a request for information, I would suppose that an organized crime target would be more willing to be non-compliant with an order and walk away, particularly looking at the example of Mansoor Hussein where he actually implicated himself further by the fact of responding and may have simply have had a smaller order had he have not responded at all to the UWO, the UWO revealing a greater pool of wealth that became part of the wider part 5 case. And I would suppose that those targets will be less likely, if they're domestically based targets, to use the complex trust and shell company structures that we've become familiar with in terms of politically exposed targets. I guess it depends on the design. I
would think the UK system is well designed to target those individuals who are less likely and less willing to be able to explain away their wealth. As compared to a politically exposed person who has been structuring their wealth all along to give a veneer of respectability in a way that a serious organized crime target doesn't always have in the back of their mind when they are seeking to move that wealth.

Q Mr. Moiseienko, do you have any thoughts on that?

A (AM) I would think that if you have a very permissive approach, for example if you can issue a UWO in respect of virtually anyone, then it doesn't really matter whether you have in mind PEPs or serious and organized crime figures because the tool that you have is so powerful and can be applied, well, to anyone. If on the other hand you have to limit its application and tailor its application in a much more focused way, for instance if you have to impose certain requirements on the law enforcement agency, then it might make sense, for instance, to require them to demonstrate reasonable belief that someone is involved in list your -- wish lists
of different kinds of organized crime that you
are particularly interested in. I think that
would be the difference in approach. Because if
the application of UWOs is intended to be
narrowly focused on organized crime figures,
then the legislation can be framed with that in
mind and presumably some of the civil liberties
concerns and human rights concerns would be less
acute just because the legislation is quite
narrowly targeted to certain specific cases.

One practical point that might be worth
recalling is that in the UK in light of the
possible application of UWOs against organized
crime figures the property threshold was lowered
from 100,000 pounds to 50,000 pounds, so it's
also one of the things to bear in mind. What
sort of property do you intend to be seizing and
how often do you intend for the tool to be
applied? Do you want it to be applied once a
year against a mansion of $10 million worth or
is it going to be a much more consistent
application against a wide array of lower valued
targets? That would probably really impact on
the way in which you frame the legislation to
begin with.
MS. PATEL: Unless either of you has anything -- any final thoughts to add on advice for British Columbia, I'm going to move forward and my friends have some questions that they would like to put to you.

Mr. Commissioner, those are my questions for these witnesses.

THE COMMISSIONER: Thank you, Ms. Patel.

I think Ms. Hughes on behalf of the province has some questions and has been allocated 10 minutes.

MS. HUGHES: Yes, thank you, Mr. Commissioner. I don't intend to use the entire 10 minutes.

EXAMINATION BY MS. HUGHES:

Q I have but one question for the panelists, and it's specific to the report that you've provided. And perhaps I don't need to have the report brought up. I can ask my question and if necessary we can go there. In the report when discussing why in the UK an unidentified wealth order, we have the two criteria. There's the politically exposed persons and then serious organized crime. The politically exposed persons is limited to those from non-EA countries, and the comment in the report is that
this is because the premise -- the premise underlying that is that obtaining information about possible wrongdoing from an EEA country is unlikely to pose significant difficulty. And I'm just wondering if the panelists could provide some additional information on what mechanisms are in place that make it unlikely to be difficult to get information from other EEA countries.

A (AM) Sorry, Helena go ahead.

(HW) No. You go ahead first.

(A) Okay. Thank you. Basically that refers to various report sorts of corporation within the framework of the European Union ranging from Europol to Eurojust to -- I'm not an expert in European criminal law, and interestingly there is now a branch of European criminal law, the criminal law of the European Union, but there are special rules on the enforcement of requests for evidence and in effect for matters of both legislation and practice and the degree of integration, as long as the UK was an EU member, there was a sense that this is an entirely different kettle of fish compared to cooperating with non-EU member countries. And EA is
basically EU member countries plus a couple of other European countries that once again have relatively strong and well-established corporation with the UK.

One of the obvious questions is how that might change now that the UK is no longer a European union member and that has been, as you might imagine, a subject of heated and active discussion, and I think the broad sense on both sides, both in the UK and in the EU is that there will continue to be a significant extent of law enforcement and security corporation because no one wants to lose access to the information and corporation and expertise from the other party, so in practice one might expect that to some extent even though the UK is out, the rationale for this particular provision broadly stands and survives Brexit.

MS. HUGHES: Thank you, Mr. Commissioner -- unless Ms. Wood has anything to add, that is my question for this panel. Thank you.

THE COMMISSIONER: Thank you, Ms. Hughes.

Ms. Magonet.

MS. MAGONET: Thank you. Sorry.

THE COMMISSIONER: Just to situate you for the
EXAMINATION BY MS. MAGONET:

Q Can you all hear me well, Ms. Wood and Mr. Moiseienko? Excellent.

I'd like to start with just a few questions about your report, Ms. Wood, in the "Reaching the Unreachable" paper you wrote.

If Madam Registrar could please call that up. That's in the overview report of legislation and jurisdictions outside of Canada at appendix C. Thank you, Madam Registrar.

If you could please go to -- sorry, my version is different. I know it's page 950 of the very large overview report. But let me see what page it is -- sorry, page 951. I believe it is page -- it's appearing as page 2, but that can't be right. Oh. It's page 2 after the introduction. Sorry about that. If you can keep scrolling down. Yes, it will be the next page. Brilliant.

So, Ms. Wood, on this page you refer to a research report by Colin Atkinson, Simon
Mackenzie and Yale Hamilton Smith about the effectiveness of asset focused interventions against organized crime. And you refer to it I think once or twice in this paper. Would you agree those researches found that it's actually unclear that asset forfeiture approaches reduce organized crime?

A (HW) I'd give it a slightly different nuance. I'd say there's a lack of empirical evidence and my memory, appreciating that this is information I read almost sort of two years ago now, but my memory of what was written there was around -- it's very difficult to prove the impact, given some of the impacts are not quantitative in nature. It's very difficult to prove deterrent effects, for example, in the -- proving a negative is extremely difficult. So I wouldn't disagree with you, but I'd say it's a slightly different nuance. They kind of challenge the very fact there's an ability to measure in any sort of true empirical way the real impact of asset-focused interventions. However, as I refer to in the report, there is a -- I mean, the policy basis across the globe is a more morale imperative for ensuring that crime
doesn't pay.

Q Thank you. But you would agree they found at least at this point there's not empirical evidence that enables us to say that these -- despite maybe the moral imperative or their popularity there isn't empirical evidence establishing their effectiveness?

A I would definitely say there are considerable research gaps in this field. It's a massively underresearched field both in the UK and globally, and there's only a handful of researchers, some of whom are giving evidence before this committee, so I would prefer to -- Dr. Colin King, who is giving evidence tomorrow, is one of the experts. I believe you also have taken evidence from Jeffrey Simser. Again it's a very small pool of research, and it's a vastly under researched area when compared to other areas of their fight against kind of illicit finance, including money laundering and terrorist finance. So I would definitely agree it's an under researched area that would be value in a greater evidence base for the interventions.

Q Thank you. In this paper -- and we don't have
to go to the page unless you would find it helpful, but you also talk about the incentivization scheme for civil forfeiture in the UK, and would you agree that you conclude that it's problematic because it can lead authorities to prioritize cases based on potential revenue rather than community impact and harm reduction?

A (HW) I would absolutely agree with that. So the UK is currently undergoing a review of its incentivization scheme, and my public response to that has said that I think we should scrap all incentivization. Personally I think it skews priorities, and we've see that most acutely in the United States where their own civil forfeiture regime has been subject to a considerable level of public criticism because it has been subject to skewed incentives where law enforcement have even been able to keep the actual assets to use themselves. So I do agree that incentivization is hugely problematic. And, again, it goes back to my point of the UK scheme has been mired in this kind of POCA pays for POCA rather than looking at the real impacts of the legislation. It shouldn't be -- in my
view it should not be judged in financial terms; it should be based on its other merits which are kind of removing kind of criminal -- criminals from the environments, so removing those incentives for others to enter crime, disrupting criminality, removing criminal capital, all those other things. I am -- my personal view is that incentivization can skew priorities and I'm definitely a proponent of scrapping the UK's incentivization scheme.

Q Thank you. I now just have some questions of effectiveness of UWOs more generally. Madam Registrar, you can take that document down. Thank you.

Are you aware of any empirical research showing that the UWO regime in the UK is reducing money laundering?

A (HW) I would personally say -- again I refer to it being a vastly under resourced area -- under researched area, forgive me. And I think it's too early to make any judgment on the actual impact to the UK scheme. It's very young. It's yet to establish it's kind of full base of case law. And even if there were to be research undertaken I don't think you could make that
specific link between a few individual cases and
a kind of aggregate reduction in money
laundering. I'll refer to other areas. My
colleague Anton referred to there will be
without a doubt a deterrent effect that the UWO
has. I would personally say it would be near
impossible and almost folly to try and measure
that in empirical terms, but it's undoubtedly
the case that it does and will have a deterrent
effect.

Q And earlier when you provided evidence about the
fact that individuals may be more willing to
voluntarily disclose information to avoid the
media attention that a UWO would attract, was
that anecdotal evidence just from speaking with
people working in this field?

A Absolutely, yeah. Purely anecdotal. There's no
kind of -- again, it's quite a young power.
There's no kind of wholesome research been
conducted on that. It's absolutely just
anecdotal evidence we received on that.

Q Okay. Thank you. I now have some questions
about the report that both of you prepared along
with Mr. Keatinge for the Cullen Commission. I
don't think we need to pull it up, though,
unless -- I think that they're more general
questions. Just as a first point, the UWO
regime in the UK, in order for the state to be
able to seek a UWO there's no need to show a
nexus between the property sought and the
alleged criminality; is that correct?

A (HW) That's correct. As I understand it.

(AM) Yes, same here.

Q Earlier you both explained that the politically
exposed person route of obtaining a UWO only
applies to individuals outside the European
economic area. Would you agree that this has a
potential discriminatory impact by only
targeting individuals from certain countries?

A (AM) I haven't looked into this question in
detail, so I would not be able to dismiss the
concern out of hand or confirm it. I think the
way to look at it, and my understanding of how,
for example, the European Court on Human Rights
would look at it is to first identify a
disparity in treatment, and there is clearly a
disparity in treatment, but then look at whether
it is justified, and that really is the crux of
the matter because arguably the UK has other
ways of dealing with misconduct of politically
exposed persons within the UK than the
application of unexplained wealth orders and
there are more investigative means at the UK's
disposal. And then the reason why politically
exposed persons from other EU countries -- well,
at the time the UK was obviously still a
member -- other EU countries are not covered is
something that we have discussed already. So
there's also a rationale for that.

Q Thank you. In your report you discuss that the
effect of a UWO may prompt a regulated entity to
drop business relations with the respondents
regardless of the merits of the order, which is
problematic from a human rights standpoint, you
write. Can you elaborate on the types of human
rights concerns that this may raise.

A (AM) So to give you a bit of context, this is
based on a report published by ACAMS, the
Association of Certified Anti-Money Laundering
Specialists, who look specifically at the impact
of unexplained wealth orders on the regulated
financial sector and how compliance officers
working there might approach doing business with
someone who has faced an unexplained wealth
order. In terms of human rights concerns, I
would not be prepared to couch that in any legal terms or refer to any particular problem under the UK Human Rights Act, but I think from a broad human rights civil liberties how do we treat others perspective, if you have not been convicted of a crime and if you have been subject to a mere investigatory measure but that measure has been widely publicized and led to significant impact on your life and the quality of your life, even though ultimately there might have been no there there, right, so there might have been no reason for that and perhaps the investigatory measure, the unexplained wealth order simply resulted in you providing more information and the investigation never having happened. Even if -- notwithstanding all of that you still feel negative consequences on your private and professional life as a result of being subject to that measure, the unexplained wealth order, that is clearly problematic. And I think that's a general concern in relation to how financial institutions might occasionally treat high-risk customers in a way that would not necessarily enable them to carry on normal life and, you
know, sometimes that is quite difficult to reconcile with the idea that you should only face significant negative consequences if you've been convicted of wrongdoing by a court. (HW) Yeah, I definitely wouldn't think this confines itself to unexplained wealth orders. We know that production orders and other investigative tools under the Proceeds of Crime Act can often act as a trigger for so-called de-risking by banks and that’s driven by the more heavy-handed approach to anti-money laundering regulation generally. It’s kind of a problematic feature of the wider anti-money laundering regime in its totality rather than very specific to UWO. I think it’s important to recognize that it’s an issue that requires wider consideration, and indeed colleagues in the Royal United Services Institute are researching just that at the moment, looking at the impact of financial crime measures on financial inclusion. So do what you have with that report, but I think it shouldn’t be confined to unexplained wealth orders. Though I would say they have received disproportionate attention in the UK media, perhaps given they’ve been couched
as kind of mafia laws, but yes, just to give you
that wider context.

Q Thank you. You would agree that the type of
information that the state can seek using a UWO
in the UK may be extremely personal information?

A (AM) I think it depends on what you mean by
extremely personal. But certainly, you know,
this is not information that you would give to
someone you don't know or even a friend. It is
information about people's financial affairs.

Q Thank you. And you would agree that the
constitutionality of the UK's UWO regime has not
yet been assessed by the courts?

A (AM) Well, the courts have upheld the issuance
of UWOs. There have been a human rights
based -- well, not human rights based arguments
per se. But as I mentioned in one of the cases
the issue of spousal privilege came into play,
which is quite close to a human rights issue in
its nature.

In terms of constitutionality, I think the
UK operates -- and I'm by no means an expert on
the UK's constitutional law, but given that
there is no written constitution, basically an
act of parliament is the law of the land, and
under the Human Rights Act, the court, the High Court, could make a declaration of incompatibility if anything that parliament adopts is contrary to the Human Rights Act, which implements the European Convention on Human Rights. In that instance the act would still in force, but a declaration of incompatibility ideally would prompt parliament to reconsider the legislation.

So I don't think that we can really speak in the UK context about challenging the constitutionality of unexplained wealth orders in the same way as you would in some other countries.

Q Sorry, that was my mistake. I shouldn't have used the word "constitutionality." What I meant to ask about was that the compliance of the UWO regime in the UK with the Human Rights Act implementing the European Convention of Human Rights, that hasn't been tested yet specifically?

A (AM) I don't know. I'm not sure if human rights, if arguments based on the Human Rights Act have been raised. If that's correct and they haven't been raised it could be because
they were deemed hopeless by litigants or it
could be that the issue will crop up in the
future. But I think as I hope we made clear
during the presentation, the compliance of the
overall civil forfeiture regime has been -- the
overall civil forfeiture regime is human rights
compliant in the UK as per judgments by UK
courts and the European court on human rights.
And the way that the unexplained wealth orders
are implemented in the UK is very heavily
steered towards human rights compliance, given
how difficult it is for you to get to a point
where the reverse burden of proof provisions get
into effect, so it's not immediately obvious to
me where that challenge would come from, but
I'll defer to Helena. I think she wanted to
jump in.

(HW) I think there's also a point in the report
where we point to the fact that reverse onus
provisions have been tested through the European
Court of Human Rights and have been deemed
compliant. So whilst this isn't a strict
reverse onus, in fact if anything it's much more
protective of human rights, we might say, and
that's absolutely the way it was intended to be
drafted. But a more strict and perhaps, depending on your viewpoint, a more severe reverse onus provision has been deemed compliant by the European Court of Human Rights, so that it's not specific to the UK. So I would opine, and it's clearly opining, that lawyers acting for respondents have judged a challenge on human rights grounds to be unmerited and not a good use of litigants' money.

Q Thank you. I think I'm just about out of time, so I'll just ask one last question. Is it correct to say that in your report you conclude that there's no international consensus on the desirability of UWOs from a human rights perspective?

A (AM) I would say there is no international consensus in their desirability, period. And part of that is the fact that different countries have a different understanding of what unexplained wealth orders are, so I did not get the sense that there is any fundamental basic human rights objection to unexplained wealth orders that all countries would subscribe to. That's certainly not the case and that as we discussed there are different ways in which you
could design your unexplained wealth order legislation and the degree of intrusiveness, which really depend on that. It's very difficult to speak of unexplained wealth orders in the abstract given the different manifestation that one might come across in different countries.

Q Do you want to add anything, Ms. Wood?

A (HW) It's only a more general point and definitely not a point of law, but I think it's that balance between the kind of human rights of the kind of victims of grand corruption which need to be perhaps balanced against the rights of the individual, and as we've seen I'm referred repeatedly to the complex corporate structures behind which this illicit wealth is hidden globally being such a now commonplace feature that it comes to a point where the criminal law is impotent and even -- we've got to a point where even the civil standard of proof is proven no match for these complex global structures. So I think when we're talking about these provisions in the context of human rights, it's, you know, whose human rights are we talking about. Is it the countries who
have been robbed of the kind of schooling roads
health provisions by kleptocrats, or is it the
human rights of a single individual? And I
think finding the right balance between those
two concepts of human rights is a really
important part of the discussion.

MS. MAGONET: Thank you both.

Those are my questions, Mr. Commissioner.

THE COMMISSIONER: Thank you, Ms. Magonet. And now
Mr. Rauch-Davis on behalf of Transparency
International, who has been allocated
15 minutes.

MR. RAUCH-DAVIS: Thank you, Mr. Commissioner.

EXAMINATION BY MR. RAUCH-DAVIS:

Q Mr. Moiseienko, I take it from your evidence
this morning that the UWO orders are used as a
tool in information gathering, investigation and
destruction of money laundering. Is that a fair
characterization?

A (AM) Yes, correct.

Q And you went through the Baker case in some
detail in your evidence this morning about how
the EWOs only are really effective if you have
in mind or have information on the beneficial
ownership of the corporations or complex trusts?
So my question to you is doesn't the UK's corporate beneficial ownership registry assist in that type of information gathering or that type of investigation?

I think it would if one is interested in the affairs of a UK registered company, but then of course regardless of whether the UK has or does not have a publicly accessible beneficial ownership register, which it does happen to have, that information would be available to UK law enforcement agencies anyway. So the challenge here is that we're talking about companies or other legal entities incorporated or based elsewhere in the world and the Baker case in particular involved several Panamanian foundations, and that poses a challenge in terms of investigating who owns -- who is the ultimate beneficial owner of the property, what do you know about them, and then building your case based on that information. That is very difficult because that information might not be forthcoming and you would be trying to piece together what you learned from different sources about an exceedingly complex corporate
Q I guess part of the problem there is the voracity of the information coming from these international companies to the registry itself. Would you agree with that?

A (AM) I would. Yes. And maybe I'll give the floor to Helena. She's been meaning to jump in.

Q Oh, yes --

A (HW) I'll just give you a bit of wider context on beneficial ownership of the UK, if it's of interest.

So there is currently a bill due to be introduced to the UK parliament, though we don't yet have a date for that, which you may be aware of from your colleagues in the UK, which will require corporate -- overseas corporate owners of real property in the UK to name their beneficial owner. And that is due to come forward hopefully in the next session. There's been quite a push to bring that onto the legislative books.

Q And the expectation, I take it, Ms. Wood, you would agree that the expectation is that that type of regime would work in tandem with the UWO regime to create an overall more effective civil
forfeiture regime; is that correct?

A (HW) I think the intention behind the registration of overseas ownership is slightly separate. It's kind of dealing with a problem of kind of the opaqueness of who is putting assets into the UK economy. That said, I think it will be a really helpful investigative source of all kind of forms of illicit wealth entering the UK. And again, I refer back to that deterrent effect. It may deter those who have hidden behind overseas corporate structures in purchasing high net worth properties, particularly in London.

Q Wouldn't it assist in the investigation and the discretion to implement these types of proceedings, UWO proceedings or any civil forfeiture proceedings?

A (HW) In my personal view it might negate the need for a UWO in some circumstances because sometimes the need for a UWO is there where there's no other way to get at that information and that's often the case in these complex ownership structures. So where a beneficial ownership register of overseas owned properties is in place, that information should be there,
whether -- I go to your point on voracity. It relies on the ability to verify that data and sanction those who provide false data to account. So it will be one measure, but the proof will be in whether sanctions are put against those who provide false information and how well the registry is policed.

What we know from the current corporate transparent and open register the UK has is transparency is not the only answer and there's a particular problem with lack of verification of data in the UK, which is currently under scrutiny and should be legislated for shortly.

And the Hussein matter that's referenced in the RUSI report, Mr. Hussein, I take it, hid most of his assets through complex shell corporation structures and things like that. Isn't that right?

(HW) I'll defer to my colleague as well on this one. But to my knowledge they were UK-based companies through which he held his property rather than overseas complex shell structures. He was, one might opine, a slightly less sophisticated criminal.

Mr. Moiseienko, was that your understanding as
A (AM) To be honest, I don't know. I'm not sure. I need to go back to the judgment to check if it makes any comments on that.

Q Thank you. Ms. Wood, I guess the final topic of questions I have are just on the economics of the UWO regime, and you gave evidence this morning that it was slightly naive, I think, of the previous regime of setting a self-funding target and that it was doomed to fail because of the litigious nature of some its opponents or some of its -- the people who are against such a regime. Could you expand on that? Was that not anticipated prior to setting the budget and this type of thought?

A (HW) Yeah, I don't think the authorities had really done their due diligence on how -- on the litigation they should be expecting and perhaps a naivety that people would perhaps walk away from their assets. But as we've learned through the course of the regime people are very, very keen to hang on to their illicit wealth. Perhaps prison, whilst prison can be seen as an occupational hazard people really don't want to let go of their property. So I think that has
been a slight naivety on the part of the authorities, yes.

So my understanding was that evidence was for the prior regime to the UWOs; right? I see your nodding your head.

(HW) That's correct, yes. So that was the original operation. That was the ethics recovery agency where we had a sole agency in the UK who was able to initiate civil proceedings under part 5 of the Proceeds of Crime Act. Since then that agency has been disbanded and the power spread across the range of agencies who are able to kind of self-generate kind of arguably higher quality cases.

Do you share the same sentiment on the current regime, or is there the same type of target on the current UWO regime?

(HW) No, it was absolutely a point, kind of a learning from our experience that financial targets and incentives in place. In POCA we used to have a very kind of target-driven approach to the Proceeds of Crime Acts. Whether that was under part 5 under the criminal confiscation regime or cash forfeiture, it was
very driven by targets, and that has led to widespread problems both in the criminal confiscations and civil. So we've ended up with a huge legacy on the criminal side, for example, of unenforceable orders; we have a value-based rather than asset-based criminal regime in the UK. So those financial targets were done away with, and I refer back to that point that the system should be judged on its impact against criminality rather than it being a kind of cost centre or income generator.

Q I guess so instead of purely assessing its impacts on the tangible revenue it produces, the focus is trying to shift or is shifting towards the less discernible financial benefits associated with all anti-money laundering effects; is that fair?

A (HW) Yes. But again I refer back to one of my previous answers. It's a hugely under researched area. And I certainly think there'll be value globally, not just parochial in the UK, and better understanding in articulating the benefits of asset recovery. Intuitively we know that it will have an impact. Intuitively we know that criminals don't want to give up that
Helena Wood (for the commission)
Anton Moiseienko (for the commission)
Exam by Mr. Rauch-Davis

1 wealth, and it will provide a disincentive to
2 further reengage in crime. But there's just a
3 fundamental global lack of an empirical research
4 basis for that, so I would encourage more
5 research in this area to prove their kind of
6 case or not around the utility of asset recovery
7 in general.
8
9 Q Thank you. Those are my questions.
10
11 Unless, Mr. Moiseienko, do you have anything
12 to add on that final question?
13
14 A (AM) Yeah. I think I would only add that it's
15 exceedingly difficult to estimate the impact of
16 any legislative regulatory or other intervention
17 on the overall scale of money laundering because
18 it's so difficult to measure money laundering in
19 the first place. So if we're talking about
20 effectiveness in those terms I think it's
21 probably a dead end, to be honest, so I would
22 imagine that any research into this subject
23 would really involve trying to understand the
24 experiences of organized criminals and how they
25 approach, you know, what keeps them up at night;
26 right? It's probably much more of a sort of
27 ethnographic research that one would have to
28 undertake. Because whenever you operate with,
you know, billions or trillions that are
allegedly laundered around the world every year,
it's never possible to quantify that. And even
in any given country on a smaller scale. And
then it's never possible to attribute any change
in the status quo to the effect of any
particular intervention. It might just be
haphazard and happenstance. So just a couple of
cautionsary words about the difficulties of doing
that kind of research.

Q  I take you point, Mr. Moiseienko, that there are
difficulties in the research, but there is
research to the effect of eliminating these
types of proceeds of crime in a local economy
will have benefits in terms of increased market
confidence, benefits to small businesses and
other legitimately run businesses. That type of
research is out there, isn't it?

A  (AM) Yes. I mean, there's no doubt in the fact
that it's good to take away the proceeds of
crime, but it's just that there are different
strands of research that are happening in this
domain, and some of them have proven more
difficult. Others are probably more promising.
That was the point I was making.
MR. RAUCH-DAVIS: Thank you. Those are my questions.

THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

Ms. Magonet, did you have anything arising?

MS. MAGONET: No, Mr. Commissioner. Thank you.

THE COMMISSIONER: Ms. Hughes?

MS. HUGHES: No, Mr. Commissioner. Nothing arising.

THE COMMISSIONER: Ms. Patel?

MS. PATEL: Nothing arising. Thank you, Mr. Commissioner.

THE COMMISSIONER: Thank you, Ms. Wood and Mr. Moiseienko. We're very appreciative of your engagement with the commission and the insights and understanding you've provided to us in an area of considerable interest. So you're now excused from further testimony. Thank you.

(WITNESSES EXCUSED)

THE COMMISSIONER: I think we'll adjourn now until tomorrow morning at 9:30.

MS. PATEL: Yes, Mr. Commissioner.

THE COMMISSIONER: Thank you.

THE REGISTRAR: The hearing is now adjourned until December 16th, 2020 at 9:30 a.m.

(PROCEEDINGS ADJOURNED AT 12:47 P.M. TO DECEMBER 16, 2020)