

Enhancing law enforcement efforts on asset recovery

We propose an amendment to the Economic Crime and Corporate Transparency Bill that would:

- ***extend the new costs order regime introduced for Unexplained Wealth Orders in the Economic Crime (Transparency and Enforcement) Act 2022 to all economic crime related civil recovery cases.***
(N.B. For the purposes of this amendment, “cases of economic crime” would include offences under Schedule 8 of the Bill.)

Rationale

1. This amendment would:
 - Bring coherence to the fragmented system of costs in civil recovery proceedings;
 - Encourage law enforcement authorities to pursue asset recovery more ambitiously and reasonably;
 - Protect the public purse when enforcement authorities have exercised their powers reasonably and in the public interest, but have been unsuccessful.
2. The current costs regime for civil recovery is fragmented, with different rules applicable in different courts and for different civil recovery tools. Enforcement authorities will rarely have to pay costs when pursuing civil recovery in the magistrates’ court, but are exposed to significant costs in High Court proceedings, where the [general rule](#) is that the unsuccessful party pays the legal costs of the successful party.
3. The high costs that law enforcement agencies face when they bring cases, however reasonable, against deep pocketed suspects currently act as a serious disincentive for law enforcement to pursue ambitious targets, and skew enforcement efforts towards low-hanging fruit and to assets belonging to “*the fled and the dead*” – i.e., targets that cannot contest such cases.

Background

4. Part 5 of the Proceeds of Crime Act 2002 (POCA) enables law enforcement authorities to recover property that was obtained through unlawful conduct without the evidentiary difficulties of securing a criminal conviction. The effective exercise of these powers is essential if the UK is to make good on its stated [commitments](#) to increase levels of asset recovery, and to ensure that the UK can proactively remove assets from criminals.
5. The government’s 2019 [Asset Recovery Action Plan](#) noted that: “*the legal nature of POCA means that general application of costs rules can be dissuasive and not fit for purpose.*” It promised to review the cost regime for both civil and criminal cases.
6. In March 2022 the Economic Crime (Transparency and Enforcement) Act introduced (at [section 52](#)) a new costs order regime for Unexplained Wealth Orders, Interim Freezing Orders, and applications for the appointment of a receiver and for

compensation. The new regime states that a court may not award costs against a law enforcement body in these cases or in appeals, unless that body has acted unreasonably, dishonestly or improperly. This effectively puts on statute the [Perinpanathan](#) principle that has developed in case law for the crown and magistrates' courts, which states that where a public authority is unsuccessful in bringing an application, no order for costs should be made unless the public authority acted unreasonably.

7. The latest reform in the Economic Crime Act 2022 however, has led to piecemeal reform of the costs regime for civil recovery and leaves significant and important civil recovery tools subject to the “loser pays” costs regime.
8. Separately, the Law Commission [has found](#) that there is a similar issue with restraint orders in criminal cases where the current costs regime has a “*disincentive effect*.” It has made proposals for a new rule that each party will bear its own costs where the prosecution can demonstrate to the court that it has brought a restraint application reasonably even if unsuccessful. During the Law Commission’s consultation, the government stated its support for this proposal.
9. Law enforcement bodies [have flagged](#) that they would be keen to have the new costs regime extended across civil recovery under Part 5 of POCA to enable them to increase their risk appetite on such cases. The government is in discussion with law enforcement bodies about helping them to manage the risk of big financial costs where they lose a case. It is our understanding that this proposal includes the Home Office (and ultimately the taxpayer) picking up the cost of such cases, and that it would come with increased oversight by government officials of such cases. In our view this is highly undesirable, not least from the point of view of the operational independence of such bodies.
10. It is far more desirable in our view that the courts act as the arbiter of whether a law enforcement body has acted reasonably, and that the costs regime introduced by the Economic Crime Act 2022 for some Criminal Finances Act tools, or that proposed by the Law Commission for restraint orders, is adopted across civil recovery in Part 5. This would avoid political interference in the operations of law enforcement bodies and protect the public purse.
11. Other arguments put forward by the government against the extension of the costs capping established in the first Economic Crime Act (ECA) include that there is no evidence of the need for reform. Contrary to this position, evidence we have heard from law enforcement bodies suggest that there is a significant case load of potentially high-risk cases in the pipeline which bring significant costs risks. This may relate to civil recovery cases not covered by the ECA, to satellite or “spin-off” litigation from main civil recovery proceedings, or challenges to decisions by the magistrates courts. These include over 60 cases being reviewed by one prosecution authority, and close to £1 billion in assets frozen by an enforcement body.
12. The extension of a new costs regime to all of Part 5 in POCA in cases of economic crime would encourage law enforcement bodies to act ambitiously but also reasonably in bringing civil recovery cases and has the potential to ensure that significantly more stolen assets and proceeds of fraud and corruption can be recovered and returned to victims, and be reinvested back in law enforcement agencies themselves through the Asset Recovery Incentivisation Scheme. This would enable them to enhance their capacities further to increase enforcement outcomes.

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