EMERGING INSIGHTS

Outsourcing Civil Recovery Litigation to Private Law Firms: A Viable Response?

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EXECUTIVE SUMMARY

This Emerging Insights paper explores the potential benefits and risks of expanding the use of the civil recovery mechanisms in Part 5 of the Proceeds of Crime Act 2002 in the UK, via outsourcing of the litigation phase of proceedings to private law firms in return for a share of the proceeds recovered.

Civil recovery has been under-exploited in the UK in the fight against criminal finances since its inception 20 years ago, largely due to under-resourcing of enforcement agencies. The need to expand the use of these powers has become more urgent in light of the Russia–Ukraine war (given UK-based Russian assets) and the UK’s growing fraud problem. However, the realities of public sector financing in the UK mean that this growth is unlikely to come from public financing, reinvigorating a discussion around the potential role of private law firms.

This paper originally intended to explore the practicalities of a panel system model to harness these resources. However, during the course of the research credible arguments both in favour of and against the adoption of such a model emerged. This paper therefore seeks to summarise the issues to ensure they are considered in a balanced way, rather than taking a firm position.

The argument in favour largely hinges on the view that the scale of the problem will continue to outstrip the resources of the public sector and, on this basis, it is better for victims of these crimes to receive a lower share of the proceeds in compensation, rather than no compensation at all. Furthermore, on a practical level, given the fact that civil litigation expertise lies traditionally in the private rather than public sector, outsourcing may give access to high-quality litigation expertise without a cost to the taxpayer, while at the same time offering a more objective and experienced lens to the viability of the litigation.

A primary argument against the adoption of this model rests on the difficulties of reconciling the commercial drivers of the private sector with the public interest drivers of the public sector – an inherent tension in the model which risks undermining the legitimacy of the system. Furthermore, there is a potential conflict with other areas of policy relating to victim compensation, given that the proportion of eventual proceeds paid to private firms is likely to be substantial. Combined with potential conflicts of interest in client adoption and the issues around transfers of evidence and legal disclosures, it is clear that the adoption of a panel system model is not without risks.

In conclusion, there is a clear consensus that a way must be found to upscale the capacity in UK civil recovery in the face of growing recognition of the scale of criminal proceeds in the UK economy, and that the realities of public finances mean that a viable alternative must be found.
Whether the adoption of a panel system model of outsourcing is the right solution requires careful consideration of all the issues. The decision may ultimately rest on what is seen as the greater risk – the continuation of the status quo or the adoption of a model with some risks and limitations.

INTRODUCTION

The adage ‘crime shouldn't pay’ is a well-established policy imperative in the fight against organised crime and corruption.¹ According to global policy doctrine,² using a range of judicially overseen mechanisms to confiscate the proceeds of crime – referred to in this paper as ‘asset recovery’³ – reduces criminal incentives and capital, compensates victims, and ‘builds trust in a fair society and rule of law’.⁴

However, despite a widespread global policy consensus that robust asset recovery measures are an essential part of crime reduction strategies,⁵ there continues to be a mismatch between stated political commitments and the reality of the global response, with most global estimates placing asset recovery rates at around 1% of criminal proceeds per annum.⁶

This gap between policy and practice extends to the UK government response, which, despite having a wide range of criminal and civil law tools at its disposal under the Proceeds of Crime Act 2002 (POCA), has failed to achieve its policy objective under the Asset Recovery Action Plan (2019–22) of ‘year-on-year increases in the value of assets denied to and recovered from criminals’.⁷

The limited progress made in expanding asset recovery responses has led to a growing discourse on the need to consider forming partnerships with

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1. For example, the UN Convention on Drug Trafficking 1988 first introduced asset confiscation as a tool against criminality, followed by the UN Convention Against Transnational Organized Crime (2003) and the UN Convention on Corruption (2005).
3. This paper follows the common UK use of the terms. See Home Office, ‘Asset Recovery Action Plan’, July 2019. Other terminology is used globally, including, commonly, ‘asset confiscation’.
the private sector to increase capacity.\textsuperscript{8} This debate has received a new urgency in the wake of the Russian invasion of Ukraine, which has shone a spotlight on the scale of alleged corruption proceeds invested in the UK,\textsuperscript{9} and the exponential growth of fraud during the coronavirus pandemic.\textsuperscript{10} These events have served to highlight both the limited resourcing of asset recovery in the UK and the limitations of the current tools when faced with multi-jurisdictional crimes. They have also raised the question of whether co-opting the resources of private law firms – in return for a share of the proceeds – may be a means of bolstering asset recovery levels.\textsuperscript{11}

This debate is gaining traction, in particular in relation to the use of the civil non-conviction-based asset recovery route set out in Part 5 of POCA,\textsuperscript{12} the process by which proceedings are taken against the asset and not the individual in the civil courts (known in the UK as ‘civil recovery’) without the need for an underlying criminal conviction.\textsuperscript{13} This is an area of activity which the author has previously noted as suffering from long-term under-resourcing.\textsuperscript{14}

Despite the growing debate on this issue, there is, however, limited literature examining both the practicalities and policy implications of seeking to formally partner with private law firms on Part 5 POCA civil recovery litigation. This paper therefore seeks to explore what a model for expanding the use


\textsuperscript{12} POCA, Section 240-288.

\textsuperscript{13} Commonly referred to in global literature as ‘non-conviction-based asset forfeiture’ or ‘civil forfeiture’, this process referred to ‘in rem’ proceedings against the asset, and not the individual, in civil proceedings at the lower civil standard of proof. In the UK, this is a ‘balance of probabilities’ rather than the criminal standard of ‘beyond reasonable doubt’.

\textsuperscript{14} Helena Wood, ‘Reaching the Unreachable: Attacking the Assets of Serious Organised Criminality in the UK in the Absence of a Conviction’, RUSI Occasional Papers (June 2019).
of Part 5 POCA civil recovery using private law firm litigation expertise and capacity might look like in practice, to discuss how viable this model is from a practical perspective and to examine the potential policy implications of such an approach.

The paper first explores the context in which Part 5 POCA civil recovery has operated in the UK to date to evidence the policy case for expanding use of the powers, before setting out a potential model for co-opting the civil litigation resources of private sector law firms into these cases. It then explores the practical and policy arguments for and against this model before summarising the key tensions in decision-making surrounding this potential policy response.

**METHODOLOGY, RESEARCH LIMITATIONS AND FOCUS**

This paper is based on a review of existing literature (including academic papers, journal articles and government strategies from 2012–21) and semi-structured interviews with 12 experts in the field of civil recovery from the public, private and third sectors between January 2022 and April 2022. The initial research phase (January–February 2022) focused mainly on the practical workings of the model, while the subsequent phase (March–April 2022) explored the relative merits and risks.

Interviewees were selected based on their professional expertise in the field of civil recovery, experience of commercial and/or civil litigation, or previous research conducted on civil recovery. To achieve balance and objectivity, interviewees included both those who are currently active and those no longer actively undertaking paid work in the field.

In terms of research limitations, civil recovery is an under-researched field with a limited amount of academic literature from which to draw. Furthermore, there has been very limited partnering with private law firms on the litigation aspects of civil recovery, both in the UK and globally, meaning there is a lack of practical global best practice on this topic.

This research was originally intended to focus purely on exploring the practical considerations of partnering with private law firms in this field. However, it identified some highly polarised views on the merits of such an approach from a policy perspective. As a result, research aims were refocused to contributing to a growing area of public debate by setting out, in agnostic terms, the key fault lines in the discussion. This paper therefore seeks to support informed policymaking rather than make firm recommendations.

In conducting research, the author focused solely on the potential of partnerships between the public sector and private law firms in relation to proceedings initiated under Part 5 of POCA. As a result, this paper does not seek to address the potential for wholly private civil proceedings undertaken
by UK law firms on behalf of victims, a topic which deserves its own separate consideration as a policy response.

Acknowledging the fact that 12 participants is not a large enough sample from which to draw representative and generalisable conclusions, this paper provides an indicative guide to the breadth of the debate, rather than reflecting the views of the sector as a whole.

UNDERSTANDING THE CONTEXT

Civil recovery allows for the confiscation of assets in the absence of a criminal conviction, with action being taken through the civil courts against the property and not the person at the lower civil standard of proof (known in the UK as ‘the balance of probabilities’). Despite some academic debate on the positioning of civil law tools as a response to a criminal justice problem,\(^\text{15}\) at least in the international intergovernmental policy discourse,\(^\text{16}\) civil recovery tools are increasingly being positioned as a necessary response to an increasingly globalised criminal finances landscape, where assets are frequently sequestered outside the jurisdiction in which the crime was committed, leading to difficulties in the gathering of evidence to meet the criminal threshold.\(^\text{17}\)

Civil recovery was originally introduced in the UK under POCA to tackle what was viewed as ‘unlawful gains currently beyond the reach of the law as they are held by individuals who protect themselves from prosecution through complex money laundering schemes, bribery and intimidation’.\(^\text{18}\) Despite initial challenges in the courts, these powers have been deemed compliant with human rights obligations and are an established part of the criminal finances landscape in the UK.

However, as the author has previously highlighted,\(^\text{19}\) these tools have been under-exploited in the UK. This is partly due to resourcing constraints, as well as the difficulties in gathering evidence to even the lower civil standard of proof in complex multi-jurisdictional cases. In particular, attempts to use civil recovery against assets obtained through grand corruption have had

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16. For example, the international standard-setter for anti-money laundering and counterterrorist financing, the Financial Action Taskforce (FATF).
limited success,\textsuperscript{20} including following the introduction of unexplained wealth orders (UWOs) in 2017;\textsuperscript{21} a much-vaunted civil recovery investigative tool designed to overcome the evidential burdens on enforcement authorities, but which has faced significant challenges in the courts.\textsuperscript{22}

By way of illustration, the UK government’s 2021 Asset Recovery Statistical Bulletin demonstrates that civil recovery has continued to represent a limited proportion of total asset recovery receipts at between 3\% and 6\% in the period 2016–2021.\textsuperscript{23} This is despite government commitments in its Asset Recovery Action Plan to expand the use of civil recovery as part of its response to criminal finances in the UK.\textsuperscript{24}

\begin{thebibliography}{99}
\bibitem{21} Tom Mayne and John Heathershaw, ‘Criminality Not Withstanding: The Use of Unexplained Wealth Orders in Anti-Corruption Cases’, Anti-Corruption Evidence Research Programme, Exeter University, March 2022.
\bibitem{22} See National Crime Agency v Baker and Others [2020] EWHC 822 (Admin).
\bibitem{23} Home Office, ‘Asset Recovery Statistical Bulletin: Financial Years Ending 2016 to 2021’, official statistics, 9 September 2021. The higher-range figure relates to the financial year 2020/21. During this time, a single £10-million settlement was reached, which may account for the 42\% jump in receipts in this year as compared to the previous year. See Jamie Grierson, ‘Businessman to Hand Over £10m Following “Unexplained Wealth Order”’, \textit{The Guardian}, 7 October 2020. Furthermore, while the 2021 Statistical Bulletin notes a ‘wider shift to the use of civil powers’, this shift seems to be predominantly towards the use of administrative forfeiture tools, such as cash seizures and account forfeiture orders.
\end{thebibliography}
Figure 1: Asset Recovery Statistics 2016–21


Much of the failure to expand the use of asset recovery in the UK lies in longstanding under-investment in enforcement agencies, as well as a specific failure to expand the capacity in UK civil recovery to respond to the increased complexity of cases being pursued via this route. Capacity issues have been particularly acute in relation to civil recovery in both the National Crime Agency (NCA) and Crown Prosecution Service (CPS); the main bodies currently actively using civil recovery as part of their approach. This will be exacerbated by constraints on public financing following the coronavirus pandemic.

All interviewees agreed that civil recovery has been under-exploited in the UK and the expansion of its use, particularly in relation to the proceeds of economic crimes such as high-volume fraud and grand corruption, is a necessary response to the growth of these crime types over the past decade and the difficulties in securing criminal convictions in these types of cases due to their multi-jurisdictional nature. All interviewees agreed that the expansion of civil recovery would be best achieved by proper public sector resourcing of the enforcement agencies. However, it was generally

27. Author interview with civil recovery practitioner, March 2022.
acknowledged by UK-based interviewees that substantial increases in public sector capacity were unlikely in light of the most recent drive to reduce public sector staffing levels. Thus, the substantial gap between the government's desired policy outcome of expanding the use of civil recovery and the ability of existing public sector resources to deliver this is likely to continue for the medium term at least.

The reality of the resourcing environment has led to a growing debate, both in the private sector and parliamentary circles, on the potential benefits and risks of harnessing the resources and expertise of private sector law firms with experience in civil and commercial litigation to bridge the gap between stated policy goals and the reality of public sector finances.

A POTENTIAL MODEL FOR PRIVATE SECTOR ENGAGEMENT IN CIVIL RECOVERY

Although the debate surrounding the engagement of private law firms in Part 5 POCA civil recovery is not new, to date there has been limited discussion of what such a model might look like in practice and whether there are any legal, practical or policy barriers to its adoption. This paper seeks to contribute to closing this gap in the literature by setting out a potential model and discussing its strengths and pitfalls from both a practical and policy perspective.

It should be noted that, from a purely legal perspective, no barriers to the adoption of the below model were found. However, a key finding was the extent to which the debate on this issue is highly polarised between those strongly in favour and those intractably against, with each side demonstrating a clear evidence base for their position. Given the evident merits of both viewpoints, this paper examines them equally to allow for proper consideration of the issues.

THE FORMAT FOR ENGAGEMENT: A PANEL SYSTEM

During the initial phase of the research, the author sought to explore the fundamental basis of how private law firm support to Part 5 POCA civil recovery might work in practice, in order to inform the viability of the proposal from an informed standpoint. Based on initial research interviews

30. Author meeting with parliamentary officials, June 2022.
and follow-up validation, a suggested model for engaging private sector resources emerged. This is set out below and forms the basis of subsequent discussion in the paper on the merits and pitfalls of such an approach.

All interviewees favouring private law firm engagement in civil recovery agreed that such an approach should be based on a ‘panel system’, akin to that used to appoint enforcement receivers in POCA cases and the appointment of lawyers in other areas of government litigation. Under a panel system model, the Government Legal Department would establish an open tendering system via an online portal, setting out the skills, rates, and terms and conditions for applicants wishing to tender for services. Successful applicants would be added to an approved panel and individual lawyers within firms would be vetted via established government security vetting channels.

Appointment to the panel would not guarantee access to work, but would rather allow a vetted set of firms to tender for individual cases (as per the model for enforcement receivers) as and when they are identified. A number of interviewees agreed that it would be best practice for the panel to be backed by a code of conduct and conflict of interest policy, which panel law firms would need to demonstrate adherence to in order to retain their place on the panel.

TYPES OF CASE ASSISTANCE AND RENUMERATION

The majority of private sector interviewees agreed that the types of assistance to be tendered under this model should be scalable by individual case need, rather than fixed to one form of engagement. For example, assistance could be curtailed to advisory assistance and discrete litigation support or tendered for full litigation handling.

As regards renumeration, there was a general consensus among private sector interviewees that this should be established on a case-by-case basis, but that constraints on public finances would likely mean that cases could be

financed either partly or wholly on the established ‘contingent fee’ model,\textsuperscript{36} in which a part or all of the payment would be contingent on the successful outcome of the case (for example, with payment made from an agreed percentage of returned proceeds). Interviewees from the commercial litigation sphere also suggested that litigation funding arrangements – also known as third-party funding, where a private funder agrees to fund litigation costs in return for a share of the proceeds\textsuperscript{37} – would be a likely component of the funding arrangements.\textsuperscript{38}

**INDIVIDUAL CASE SELECTION AND CASE CONTROL**

On discussing the practicalities of how individual cases would be selected and litigated under such a system, interviewees in favour of the approach suggested tasking and coordination mechanisms in the NCA and CPS would establish a set of transparent criteria of the types of cases which would be suitable for joint public–private case litigation. Such criteria might relate to case complexity, case size and the significance of public interest factors in the outcome of the case.\textsuperscript{39} Potentially suitable cases would then be tendered via the panel system, a suitable firm identified, and scope of services and fee-structure arrangements agreed in advance.

All interviewees – whether for or against adoption of the model – agreed that, if such a model were to be adopted, the strategic decision-making control for cases must remain in the hands of the enforcement authority (rather than the private law firm) to ensure that ultimate case decision-making is made in the public interest (as the legislation requires\textsuperscript{40}), rather than being driven by commercial factors.

This approach equates, in effect, to the ‘outsourcing’ of the day-to-day running of litigation to private law firms, rather than relinquishing public sector control. The analogy used by one interviewee to describe the relationship was the role of private law firms running litigation on behalf of corporate entities, where the general counsel of the corporate entity engages outside counsel to run litigation on the firm’s behalf, but retains


\textsuperscript{37} See Nicholas Marler, ‘The Basics of Litigation Funding’, Dispute Resolution Blog, 23 January 2020, <http://disputeresolutionblog.practicallaw.com/the-basics-of-litigation-funding/>, accessed 24 May 2022. It should be noted that while litigation funding is an established part of UK private civil and commercial litigation, it is yet to be used in the public sphere.

\textsuperscript{38} See the Annex for further information on these forms of legal financing.

\textsuperscript{39} With cases of significant wider public interest being potentially less suitable for this approach.

\textsuperscript{40} POCA Section 2A notes that ‘a relevant authority must exercise its functions under this Act in the way which it considers is best calculated to contribute to the reduction of crime’. 
oversight and strategic control of the decision-making in the corporate institution's interests.

This research established one area of consensus as regards the potential model set out above – namely, that no interviewees could identify any strictly legal barriers to its adoption. However, from this consensus position, views diverged strongly on whether the model was practically workable or in keeping with UK policy objectives. This paper seeks to lay out in full these divergences in perspective to facilitate proper consideration of the merits and pitfalls of such an approach.

THE ARGUMENTS IN FAVOUR

Of interviewees who were in favour of adopting the above model, it was seen not as an optional policy but as a necessity given the longstanding failure to fully exploit civil recovery powers in the UK. This view finds wider support in the UK government’s own policy stance. Notably, its Asset Recovery Action Plan (2019–22) states that ‘the private sector can play a valuable role in asset recovery, adding both expertise and capacity to the public-sector enforcement agencies’. 41

It should also be noted that private sector involvement in Part 5 POCA civil recovery is, in many ways, already well established. For example, as noted above, there is already an established use of enforcement authorities in POCA cases in the UK, and members of the independent legal Bar are routinely engaged to lead the legal advocacy aspects of POCA cases. 42

However, the debate on whether to extend this model to the litigation aspects of civil recovery has only emerged in the past few years as the gap between the intended scale of use of civil recovery in the UK and the reality of delivery has become clearer. 43 Previous research by the author and interviews underpinning this paper have highlighted a number of policy and practical arguments in favour of moving the model from theory into practice.

POLICY ARGUMENTS IN FAVOUR

The first argument relates to the aggregate scale of the problem; interviewees favouring the adoption of the above model noted that the volume of cases will always outstrip the capacity of the public sector. The first phase of interviews shed light on the view that the area in greatest need of private sector capacity consisted of cases involving the proceeds of

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42. For more information, see Bar Council, ‘About the Bar’, <https://www.barcouncil.org.uk/about/about-the-bar.html>, accessed 29 April 2022.
43. RUSI closed roundtable of litigation funding experts, legal practitioners, law enforcement and policymakers, 2018.
economic crimes, particularly grand corruption and volume fraud, where the response gap is greatest. According to this view, these cases tend to be more complex than, say, the proceeds of drug trafficking. They also involve complex offshore structures, and would therefore benefit from additional, specialist private sector legal resources and commercial litigation expertise.

The second argument relates to the size of certain individual cases; those favouring adoption of the model note that there are cases which are simply too complex and expansive for current public sector resources to handle alone, meaning that certain categories of criminal remain beyond the reach of the law in practice. This argument finds some sympathy in the government's own Asset Recovery Action Plan, which concedes that there are categories of large-scale, complex cases which cannot currently be pursued by the public sector due to resource constraints. Those interviewees favouring the model note that outsourcing some of the day-to-day aspects of litigation in these cases may allow enforcement authorities to take a more strategic role in a greater number of cases.

As regards renumeration for these services, it should be noted that the idea of paying private law firms under the proposed contingent fee model is not without controversy due to the resultant lower returns to either victims of crime or the public purse. However, those interviewees favouring the approach make the compelling argument that returning a lower proportion of proceeds is more desirable from a policy perspective than the current status quo of these assets remaining in the hands of criminals.

In summary, the policy arguments in favour of adoption of the model hinge on the unpalatability of certain types of criminality being out of scope of the civil recovery regime because of the limitations of public sector Part 5 POCA civil recovery resourcing.

PRACTICAL ARGUMENTS IN FAVOUR

Beyond these policy drivers, interviewees highlighted a number of practical advantages (at least in theory) of adopting the model, including access to specialist civil litigation expertise and increased objectivity on the viability of litigation.

Taking these in order, a number of interviewees favouring the model noted that the majority of civil litigation expertise in the UK resides within private law firms, rather than in the public sector, given the predominant focus of

44. The UK government’s definition of economic crime in its Economic Crime Plan (2019–22) is ‘a broad category of activity involving money, finance or assets, the purpose of which is to unlawfully obtain a profit or advantage for the perpetrator or cause loss to others’. See HM Government, ‘Economic Crime Plan 2019–22’, July 2019, p. 10.
45. Author interviews with subject-matter experts, January–March 2022.
public policy on criminal, rather than civil, law outcomes. As the author has previously noted, the salary differentials between public sector and private legal practice have resulted in challenges in attracting and retaining civil litigation expertise within the former. Accepting this fact and outsourcing certain aspects of the litigation, rather than competing on an uneven financial playing field for resources, will result, some interviewees argued, in better access to highly skilled civil litigation expertise.

Furthermore, some interviewees noted that in other areas of public sector litigation it is established common practice for the government to outsource its litigation to the private sector, rather than attempt to lead such litigation in house. This allows litigation capacity to be brought in on an ‘as and when needed’ basis, rather than having to operate on the basis of existing capacity.

In addition, from a tactical case-handling perspective, some interviewees noted that co-opting outside expertise may have the benefit of bringing a more objective lens to decision-making in litigation. Those operating at arm’s length may be better positioned to offer a more objective view on the viability of litigation success, without being influenced by the policy drivers behind case adoption.

This viewpoint finds some support in the case of NCA v Baker, an unsuccessful use of the Part 5 POCA civil recovery UWOs tool, which resulted in a large costs order falling on the NCA. In the view of some interviewees, this case may have benefited from outside perspectives on its viability given some of its apparently evident weaknesses. While it is important to note that Part 5 POCA civil recovery is driven by public interest factors, rather than commercial considerations, there is an instinctive merit in blending the two perspectives to ensure unviable and costly litigation is avoided.

THE ARGUMENTS AGAINST

While not disregarding the strength of the arguments in favour, it is important to note that these are not universally held views, with a number of interviewees identifying equally compelling arguments against the adoption of the model, which are set out below.

POLICY ARGUMENTS AGAINST

First, three interviewees noted the difficulties of reconciling public interest factors and commercial decision-making. Whereas public sector enforcement authorities are legally required by POCA to ‘exercise [its] functions under this Act in the way which it considers is best calculated to

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47. Wood, ‘Reaching the Unreachable’, p. 17.
Contribute to the reduction of crime, private law firms’ decision-making is largely driven by costs and profit. These interviewees noted that reconciling these two competing drivers would be, at best, challenging and may render whole categories of cases out of the model’s scope. However, where these tensions come to the fore publicly, the adoption of this model may, at worst, undermine the legitimacy of the regime in the eyes of the public.

Second, particularly as regards the use of the model in relation to cases with identifiable victims, such as those involving fraud proceeds, two interviewees felt the payment of private law firms from any proceeds (in effect reducing compensation for victims) was unreconcilable with public policy regarding the treatment of victims. Some interviewees felt that this approach may not be acceptable to victims’ groups and could appear as an admission that the public sector has relinquished its responsibilities to them.

Regarding use of the model in relation to the proceeds of grand corruption, one interviewee noted that the model may not be compatible with the UK’s obligations under the terms of its ratification of the UN Convention on Counter Corruption (UNCAC), which obligates signatories to return proceeds to source countries. However, it should be noted that UNCAC does allow for the deduction of ‘reasonable expenses’.

Third, two interviewees highlighted the potential risk of conflicts of interest between law firms litigating civil recovery claims linked to grand corruption when such firms have, in the past, had business dealings with individuals linked, at least in the public discourse, to alleged corruption or regimes of dubious character. Furthermore, one interviewee noted the risk that some private law firms may, whether consciously or otherwise, in such instances, benefit from ‘reputation washing’ by adopting cases under this model, where such firms have previously been publicly criticised for representing clients with alleged links to wealth of dubious origin.

PRACTICAL ARGUMENTS AGAINST

A limited number of interviewees also noted a number of potential practical barriers to the adoption of the model, including: case adoption criteria; cost-burden sharing of pre-claim investigation costs; and transfer of evidence and disclosure risks.

50. POCA, Section 2A.
51. Author interviews with civil recovery experts, February and March 2022.
53. Author interview with public sector civil recovery expert, March 2022.
54. The UNCAC allows for the deducting of ‘reasonable expenses’ prior to asset return. However, it is unclear whether the payment of potentially high private law firm fees would be considered ‘reasonable expenses’.
55. Those who counter this view note that this issue could be handled by a clear conflict of interest policy underpinning the panel system.
56. Author interview with public sector civil recovery expert, March 2022.
First, some interviewees felt that under a model based wholly or partially on contingent fee agreements or litigation funding, private law firms and litigation funders would be unlikely to accept the complex, high-risk cases which those interviewees proposing adoption of the model use, in part, as the basis for their arguments in favour. On the contrary, two interviewees noted that private law firms, operating with commercial and financial gain in mind, would only be likely to adopt the low-risk, high-value cases where the capacity is less needed. It is these cases, it is argued, where the public sector is adequately resourced and better placed to lead litigation themselves. Furthermore, even if cases were partially adopted on a billable day-rate basis, some interviewees viewed it as unlikely that highly remunerated private civil litigators would be willing to work for inevitably low public sector day rates.

Second, some interviewees noted that the litigation phase of civil recovery cases is often the less burdensome aspect, with substantial investigation costs incurred prior to the litigation phase. Involving private law firms in the pre-claim phase would be, according to these interviewees, impractical, as they would be unable by law to access the coercive investigation powers available under POCA. Nor would they, in multi-jurisdictional cases, be able to gather overseas evidence via formalised mutual legal assistance channels which require a state-led process. In essence, therefore, formulating a fee agreement that fairly reflects the burden of work undertaken by the public sector would be difficult.

Third, some interviewees raised the risks surrounding transfer of evidence to the private sector under the model, particularly the difficulties in sharing evidence which ultimately derives from sensitive intelligence sources. Although these arguments were countered by others who noted that the vetting of law firm staff and secure communications channels may overcome this hurdle, it was conceded by some proponents that duty of care and security issues may take certain cases out of scope of the model.

Finally, one interviewee highlighted the potential difficulties inherent in managing complex legal disclosure requirements between public and private

57. With invoicing on a time-accrued basis.
58. Author interviews with NGO civil recovery specialist and public sector civil recovery expert, February and March 2022.
59. In the main, POCA Part 8 investigative tools.
61. Although it should be acknowledged that those who counter this view noted that under litigation financing agreements it is often standard practice for litigation funders to reimburse initial investigation costs as part of the terms of engagement.
62. Such as covert human intelligence sources, intercept and suspicious activity reporting.
sector actors, particularly in relation to economic crime cases, which often involve expansive datasets. With the success of cases often pivoting on the adherence to (or not) of disclosure rules, as well as recent high-profile failures in disclosure resulting in miscarriages of justice in private prosecutions, this is an issue requiring careful consideration if such a model is adopted.

CONCLUSION

This paper identifies compelling arguments on both sides of the debate in relation to the adoption of a panel system model for private law firm engagement in Part 5 POCA civil recovery. In considering a future policy position on this issue, both sides should be given due consideration.

On the one hand, those favouring the adoption of the model provided a persuasive case based on increased capacity at no cost to the taxpayer, access to high-quality litigation expertise and increased objectivity in case decision-making. When confronted by the theoretical barriers set out to the adoption of the model, advocates noted that a number of the policy and practical challenges could be overcome by the adoption of clear case selection criteria, codes of conduct and conflict of interest policies, transparent fee structures and rigorous adherence to the principle that ultimate control and decision-making over the direction of litigation rests with the enforcement authority.

When viewed solely from the perspective of the policy objective of increasing asset recovery receipts, these arguments are compelling. However, counterarguments emphasise tensions within the broader policy context; in particular, with victim compensation policy and the difficulties of reconciling the profit motive with the public interest. At a practical level, it is clear that issues of disclosure and evidence transfer would require careful consideration in terms of case selection and considered oversight in practice. This is not withstanding the political optics of an approach in which a proportion of proceeds recovered – and perhaps a significant one – is paid away to private law firms rather than returned to victims or the public purse.

Given the polarisation in the debate, it is easy to lose sight of consensus points which unite both sides. All interviewees felt strongly that increasing asset recovery rates in the UK was necessary and urgent, and that greater exploitation of Part 5 POCA civil recovery was an important and viable route to achieving this, best achieved by increasing capacity and capability within the public sector.

However, the gap between policy and practice is resolved, be that through public or private resources, it is clear that maintaining the current position is an increasingly untenable political proposition. The growing realisation of the scale of corruption proceeds sequestered in the UK and failure to find criminal justice solutions to the fraud problem mean that calls to find a sustainable solution to the UK’s civil recovery capacity issues will only continue to increase.

Ultimately, whether the adoption of private law firm capacity as part of the response to the capacity gap in Part 5 POCA civil recovery is the solution is a policy and not a legal decision and one which may rest on what is seen as the greater public policy risk – adopting a model with inherent risks and limitations or allowing criminals to retain the proceeds of their crimes.

ABOUT THE AUTHOR

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ANNEX: DEFINITIONS

The below table sets out the definitions of terms used in the paper, including, where the UK term is distinct to the UK jurisdiction, a list of synonymous terms used to describe the same activity in international discourse and in other jurisdictions.

**Table 1: Terms and Definitions**

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<tr>
<th>UK Term</th>
<th>Definition</th>
<th>Synonymous Terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset recovery</td>
<td>The process of recovering the proceeds of crime via judicially overseen criminal and civil proceedings.</td>
<td>Asset confiscation, asset forfeiture</td>
</tr>
<tr>
<td>Civil recovery</td>
<td>A subset of asset recovery, civil recovery is the process of recovering the proceeds of crime, in the absence of a criminal conviction for the predicate crime, via civil proceedings. These proceedings are taken against the asset (in rem) rather than the person (in persona).</td>
<td>Non-conviction-based asset forfeiture, civil forfeiture, civil confiscation</td>
</tr>
<tr>
<td>Administrative asset recovery – forfeiture order</td>
<td>Administrative asset recovery is the forfeiture of fiat cash, cash in bank accounts or other high-value property seized during law enforcement investigations and forfeited without recourse to litigation. In the UK, this is achieved via a forfeiture order.</td>
<td>N/A</td>
</tr>
<tr>
<td>Criminal confiscation/confiscation order</td>
<td>Criminal confiscation is the forfeiting of the proceeds of crime following conviction, achieved in the UK via a confiscation order.</td>
<td>N/A</td>
</tr>
<tr>
<td>Commercial litigation</td>
<td>Commercial litigation is litigation involving a corporate body, often in relation to contractual or business disputes.</td>
<td>N/A</td>
</tr>
<tr>
<td>Civil litigation</td>
<td>Civil litigation is the process of resolving a private legal conflict in the civil courts via two or more entities.</td>
<td>N/A</td>
</tr>
<tr>
<td>Litigation funding</td>
<td>Litigation funding is where a party with no prior link to the litigation agrees to finance it in return for payment of a proportion of the returns if the litigation is successful.</td>
<td>Third-party funding, litigation financing</td>
</tr>
<tr>
<td>Contingent fee arrangement</td>
<td>Under a contingent fee arrangement, a lawyer is paid at the end of litigation from a proportion of the money the client received if they win or settle their case.</td>
<td>No win, no fee</td>
</tr>
</tbody>
</table>

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