



Home Office

Updated Report on the government review on introducing costs protections in civil recovery proceedings in the High Court under Part 5 of the Proceeds of Crime Act 2002

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Presented to Parliament pursuant to Section 215 of the Economic Crime and Corporate Transparency Act 2023

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Report on the government review on introducing costs protections in civil recovery proceedings in the High Court under Part 5 of the Proceeds of Crime Act 2002 as required under section 215 of the Economic Crime and Corporate Transparency Act 2023.

Statutory commitment to report on costs orders for proceedings for civil recovery in section 215 of the Economic Crime and Corporate Transparency Act 2023 (c. 56)

1. The Secretary of State must assess whether it would be appropriate to restrict the court's power to order that the costs of proceedings under Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 are payable by an enforcement authority and, if so, how.
2. In carrying out the assessment, the Secretary of State must consult such persons as the Secretary of State considers appropriate.
3. The Secretary of State must publish and lay before Parliament a report on the outcome of the assessment by the end of the period of 12 months beginning with the day on which this Act is passed.
4. In this section "the court" means the High Court in England and Wales.

Background

Civil recovery

Civil recovery describes the broad set of powers available to law enforcement agencies in the UK to take ownership of assets which a civil court is satisfied (on the balance of probabilities) derive from criminal conduct or are intended for use in criminal conduct. These powers include civil recovery in the High Court or Court of Session under the Proceeds of Crime Act 2002 "POCA" (chapter 2 of Part 5) and summary forfeiture in the magistrates' or sheriff's court (chapters 3 to 3F of Part 5). During the passage of the Economic Crime and Corporate Transparency Act 2023, non-government amendments were tabled which sought to introduce costs protection for enforcement authorities in all proceedings for civil recovery in the High Court, under Part 5 of POCA.

Costs in civil recovery proceedings

In relation to the use of powers under POCA, a longstanding concern with the loser pays principle in the Civil Procedure Rules, the general rule that the "losing party" of a case will be ordered to pay the legal costs of the "winning party", is that it exposes law enforcement and prosecuting agencies to the risk of strains on their budgets, particularly in cases against wealthy elites with costly legal representatives.

In civil forfeiture cases before the magistrates' court, a different costs regime applies in England and Wales. This is set out in section 64 of the Magistrates' Court 1980 (c. 43) and the case of *Perinpanathan*: [2010] EWCA Civ 4. The *Perinpanathan* case found that, "in a case where regulatory or disciplinary bodies, or the police, carrying out regulatory functions, have acted reasonably in opposing the grant of relief, or in pursuing a claim, it seems appropriate that there should not be a presumption that they should pay the other party's costs. However, this costs regime does not apply to proceedings in the High Court (or Court of Session).

The Economic Crime (Transparency and Enforcement) Act 2022 amended the Unexplained Wealth Order "UWO" provisions in POCA by introducing 'costs protection' for enforcement agencies, preventing the court from ordering costs against them unless they act unreasonably, improperly or dishonestly. This aimed to encourage the use of the UWO powers by relevant law enforcement teams.

The previous government agreed to a duty to review whether it would be appropriate to restrict the court's power to order the payment of costs by an enforcement authority (also known as "costs protection") in civil recovery proceedings in the High Court in England and Wales. The duty requires the government to publish and lay before Parliament a report within 12 months of Royal Assent.

Costs protection and civil recovery: review and stakeholder engagement

The government ran a targeted engagement exercise seeking views from key stakeholders across law enforcement, the Judiciary, civil society, legal profession, and other government departments on whether it would be appropriate to restrict the court's power to order costs payable by an enforcement authority in civil recovery cases in the High Court.

The Home Office's engagement exercise sought views on the appropriate mechanism for implementing potential changes. Three options on how to proceed were considered including:

1. Changes via primary legislation – this could in some way mirror the changes made for UWOs in POCA by the Economic Crime (Transparency and Enforcement) Act 2022. Alternatively, for example, any changes could follow the approach in section 194(4) of the Economic Crime and Corporate Transparency Act 2023 by requiring the Civil Procedure Rules to be amended in a specific way.
2. Changes via secondary legislation – this option would be to amend the Civil Procedure Rules in order to create a new bespoke regime that would restrict the court's power to order that costs are payable by an enforcement authority in civil asset recovery proceedings pursued under Part 5 of POCA; or would

disapply the general rule that the 'loser pays', either in all such cases or only where the authority is unsuccessful. This option would allow more flexibility in how and when costs protection is applied.

3. Do nothing – this option would mean that the status quo would continue to apply in civil asset recovery proceedings pursued under Part 5 of POCA, as in most other civil cases. Enforcement authorities would therefore still be liable to pay costs in civil recovery cases if they were to lose, subject to the usual application of the Civil Procedure Rules.

In general, consultees were supportive of introducing a form of costs protections for enforcement authorities, noting that expensive litigation is one of the risk factors that enforcement authorities actively consider, which has an impact on their decision to pursue an investigation as their budgets are often limited. However, some consultees highlighted the potential negative impacts of costs protections on access to justice. Some felt that costs protections should also be extended to all of Part 5 of POCA, including the magistrates' court and the Crown Court when considering appeals from the magistrates' court, to ensure consistency across regimes. Some consultees also felt that it was worth considering the value of adding a threshold at which the costs protections for enforcement authorities would apply.

The government has also engaged with the devolved governments in Scotland and Northern Ireland. The devolved governments are not aware of the 'chilling effect' on enforcement agencies in bringing civil recovery cases due to the fear of significant adverse cost rulings. However, both Scotland and Northern Ireland are in favour of possible changes being brought forward through primary legislation as this would provide for more open and transparent scrutiny and afford the opportunity to take a position on the proposals.

Conclusion

The government sees merit in introducing costs protections based on the consultation responses and is making progress to determine whether amendments should be made in law. This will include full assessment of the impact on rights in recognition that civil recovery orders engage the right to peaceful enjoyment of possessions by permanently depriving a person of their property, and that costs restrictions can constitute an interference with the right of access to a court under Article 6 of the European Convention of Human Rights ("ECHR"). The government will also consult Scotland and Northern Ireland, and any changes made will be subject to legislative consent.

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