The White Collar Crime Centre

OPENING UP CIVIL RECOVERY TO INDIVIDUALS

A Whistle-Blower Framework for the UK?

The White Collar Crime Centre

A Law Reform Proposal for Discussion

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The problem

The UK has a fraud problem. Whilst some debate the precise cost of fraud to the UK and how to measure it, what is known is that fraud costs the country billions every year. For example, the 2016 Annual Fraud Indicator, published by the University of Portsmouth's Centre for Counter Fraud Studies, estimates that fraud annually costs the UK £193 billion, with private sector fraud accounting for £144 billion and public sector fraud accounting for £37.5 billion. The societal impact of fraud cannot be understated. When investors lose their pension funds, the outcome can be catastrophic, and if the impact of fraud is sufficiently great to undermine the stability of a company, jobs are lost, and further strain is placed on the public exchequer. Resource-strapped enforcement agencies struggle to keep up with the demand for fraud investigations and prosecutions, and ill-gotten pounds likely remain in the hands of unscrupulous actors. Ultimately, the size and scale of fraudulent conduct in the UK is difficult to verify – particularly when un-detection or under-reporting is factored – but it seems safe to say that when it comes to combating fraud in the UK, there is room for improvement. In 2016, statistics released by the Ministry of Justice recorded that there were 8,304 prosecutions for financial crime – a six-year low.

What could be done?

The time is ripe for the UK to boost its anti-fraud toolbox. New investigative measures such as unexplained wealth orders are to be applauded but they are not a fix-all. Additional steps are required. One proposal is to implement a whistle-blower incentivisation scheme to fit within Chapter 2 of Part 5 of the Proceeds of Crime Act 2002 (POCA) which provides for civil recovery of property derived from unlawful conduct through the commencement of High Court proceedings. Such proceedings are currently only open to enforcement authorities such as the National Crime Agency (NCA). However, the initiation of Part 5 proceedings could be made open to private individuals who in turn would be paid a portion of the proceeds from any property successfully recovered.

How would this work?

The present limitations of Chapter 2 of Part 5 might best be illustrated by the following example.

A whistle-blower comes forward with evidence her employer has engaged in large-scale fraud against the government by consistently submitting false invoices and inflating expenses in relation to public-tendered work. The whistle-blower's information is compelling but it is insufficient, on its own, to secure a criminal conviction. The fraudulent conduct has taken place in part overseas and evidence from various jurisdictions must be gathered. As a result, enforcement authorities may be reluctant to pursue Part 5 proceedings in the High Court. The whistle-blower loses her job, and the proceeds of the fraud she has disclosed remain firmly in the hands of her former employer.

This is, of course, an unsatisfactory outcome. But what if Part 5 proceedings were open to private individuals?

The whistle-blower could bring a civil recovery action in the High Court against property held by her employer – either entirely on her own or in collaboration with the private sector or NGO with the resources and skills to assist. As the proceedings would be brought under Part 5, there would be judicial oversight throughout to safeguard against unsubstantiated claims. Following the successful recovery of the ill-gotten property, the whistle-blower would stand to collect a portion of the proceeds and the rest would go to the State.

The potential benefit of such a system is considerable. Enforcement authorities would not have to spend their finite resources initiating the action or risk exposure to costs. The public purse would benefit from the recovered assets, and the proceeds of illicit activity would not remain out of reach. For the whistle-blower, the reasonable portion of proceeds received would provide at least some degree of financial security in return for their willingness to rise above the parapet. Future whistle-blowers would also be incentivised to come forward in similar cases.

What is the status of private individuals under POCA now?

The involvement of private citizens in the enforcement of criminal justice is not alien to the English system. There is already some provision in POCA for the commencement of proceedings by private individuals.

Part 2 sets out the framework for the confiscation of the proceeds of crime after a criminal conviction. At the investigation stage, a restraint order can be obtained in relation to property suspected of being the benefit of crime to prevent dissipation. Notably, both restraint and confiscation proceedings under Part 2 are open to an individual acting in the capacity of a 'private prosecutor'.

There is a long-standing tradition of private prosecutions in the UK. The tradition was enshrined in statute by section 6(1) of the Prosecution of Offences Act 1985 (POA), and prosecutions of this kind have become more common in recent years as traditional enforcement agencies have struggled with budget shortfalls. In *R v Munaf Ahmed Zinga* [2014] EWCA Crim 52, the Court of Appeal confirmed that private prosecutors may initiate and conduct criminal confiscation proceedings under Part 2 even where they have no personal or financial interest in the outcome. The court noted that private prosecutors do not have the power to fully investigate a defendant's finances, but this does not preclude them from otherwise participating in the confiscation proceedings.

Once a private party or public prosecutor has successfully obtained a confiscation order, the proceeds are distributed according to the Home Office's Asset Recovery Incentivisation Scheme (ARIS). The funds initially go to the Home Office, who retain 50 percent. The remainder is then split between the prosecuting authority, investigating authority, and the courts. Private prosecutors do not directly receive a percentage of confiscated proceeds but may apply for costs and compensation orders under POA section 17. The Court of Appeal noted in *Zinga* that the payment of these section 17 compensation orders will generally come from the amount confiscated.

The civil recovery regime in Part 5 operates differently. Currently, Chapter 2 of Part 5 contemplates civil recovery proceedings being brought against a person whom an enforcement authority thinks holds recoverable property, regardless of whether criminal proceedings have taken place. An enforcement agency may apply for an interim property freezing order either before or after starting civil recovery proceedings on the ground that there is a "good arguable case" that the property derives from unlawful conduct.

An application for the civil recovery of property is determined by the High Court. To issue a civil recovery order (CRO), the High Court need only be satisfied that, on the balance of probabilities, the property is recoverable. Since an amendment of POCA by the Crime and Courts Act 2013 (CCA), the property or person can be located anywhere in the world.

Ultimately, property will be recoverable if, on the balance of probabilities, it is obtained through or connected to some "unlawful conduct". As such, a criminal conviction is not required. For the purposes of Part 5 and save for situations involving human rights abuse, the unlawful conduct is subject to a dual criminality test. "Unlawful conduct" is defined as conduct that is a violation of criminal law in the country or territory where it occurred and, if it occurred in the UK, would be an offence. The prosecuting agency is not required to allege the commission of any specific criminal offence so long as the category of crime from which the property is alleged to have resulted is identified.

At present, private individuals may come forward with evidence of unlawful conduct but play no formal role in the proceedings. Applicants able to commence Part 5 proceedings are limited to the NCA, Serious Fraud Office (SFO), Financial Conduct Authority (FCA), HM Revenue and Customs (HMRC), and the Crown Prosecution Service (CPS). Even if a private individual's information proves crucial to the making of the CRO, he will not benefit from the property recovered.

The idea to consider

The implications of expanding the High Court civil recovery regime to private individuals are worth exploring by our lawmakers.

A regime resembling the US *qui tam* system and its ballooning rewards might be unlikely to attract widespread support in the UK. A system of whistle-blower incentives which neatly within the UK's existing legislative frameworks, however, deserves exploration. Fundamentally, it could prove to useful in the fight against fraud in the UK.

Why?

Whistle-blowers who report unlawful activities to the authorities face potential financial, professional, and personal ruin. This concern is particularly salient in light of the recent 'Magnitsky' amendment to POCA, recognising whistle-blowers face serious threats to their safety after reporting human rights abuses by government officials or powerful private individuals.

Providing whistle-blowers with incentives to come forward would assist over-worked enforcement agencies and increase the number of Part 5 proceedings brought. The public purse would benefit from the additional funds recovered. Further, the increased levels of detection would help deter future potential fraudsters. As it stands, public authorities are simply not able to address the scope of the fraud problem. Allowing the private sector to fill in the gaps presents a practicable option as reflected by the interest in public / private partnerships when it comes to the fight against money laundering.

The UK already has a history of providing a measure of incentive to informants. Section 32 of the Inland Revenue Regulation Act 1890, now replaced, provided for the reward of informants in relation to tax evasion matters. The practice continues to be employed in relation to tax matters and more broadly. In 2017, it was revealed that enforcement authorities in the UK have paid out at least £22 million to informants in the last five years. Providing an incentive to people who blow the whistle or provide information is not a foreign concept.

From idea to action

A thoughtful discussion of expanding civil recovery proceedings to include private applicants is called for.

Rather than replicate the US system of rewarding whistle-blowers with potentially obscene sums, a system which fits neatly within the UK's existing legislative framework is possible. Subject to sufficient procedural safeguards and judicial oversight, Part 5 could be amended so that whistle-blowers can participate and in the event of successful recovery, receive reasonable benefit.

For instance –

- Whistle-blowers could be awarded only 5 or 10 percent of the proceeds, rather than the 15 to 30 percent of the US *qui tam* system, and the total amount of the award could be capped at a more modest level.
- An award could be calculated based on the actual risks taken or losses suffered by the whistle-blower. The key to any such a scheme would be to provide adequate incentives for whistle-blowers to come forward under difficult circumstances without allowing those incentives to balloon to a point where they become grotesque or senseless.
- To ward against a flood of dubious private actions, a 'consent to proceed' mechanism could be built in to Part 5 where the applicant is a private individual or case review could take place at an early stage.

Proposals to introduce a whistle-blower incentive scheme in the UK have met with scepticism in the past, partly out of fear that adopting a US-style system could lead to outlandish rewards to private individuals when that money could instead be used to benefit the public. It is time to face the fact, however, that traditional enforcement methods are failing to address the scope of the fraud problem, ultimately leaving much of the proceeds of crime in the hands of criminals. A balanced whistle-blower incentive system which fits within existing legislation would create reasonable incentives to take the risk of reporting unlawful conduct without unduly distorting the balance struck by the current system or supplanting the central role of public enforcement authorities. It is high time to consider adopting such a scheme in the UK.

The White Collar Crime Centre has been established by Bright Line Law to explore the developing engagement between criminal law and corporate misconduct. Directed by Jonathan Fisher QC, Lead Counsel of Bright Line Law, The White Collar Crime Centre operates separately from Bright Line Law's legal practice.