

Obtaining redress and improving outcomes for the victims of fraud

Research into the professional advice given to victims of fraud trying to recover their money

Civil justice initiative

The Fraud Advisory Panel's civil justice initiative aims to encourage fraud victims (especially individuals and smaller businesses) to make more use of the civil courts in England and Wales when trying to get their money back, especially where a criminal investigation and prosecution is unlikely.

The initiative forms part of the national counter fraud strategy, Fighting Fraud Together, which is a partnership between the UK's public, private and voluntary sectors.

This publication is one of a series examining the current justice landscape and the options available to victims of fraud seeking to obtain redress and recover money.

The Fraud Advisory Panel is a registered charity and membership organisation which acts as the independent voice and leader of the counter-fraud community. It works to raise awareness of fraud and financial crime, and to help individuals and organisations prevent fraud for themselves.

www.fraudadvisorypanel.org

Introduction

In mid-2012 the Fraud Advisory Panel commissioned independent researchers TNS BMRB to explore:

- the professional advice and support given to fraud victims seeking redress, especially those trying to recover money by civil means;
- what differences, if any, there are in the approach adopted towards businesses rather than individuals, and the advice given to each; and
- the level of fraud victims' knowledge and awareness of alternative legal routes to redress and recovery, and how to improve it.

The research included 14 in-depth interviews with professionals in the public and private sectors.

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The experience profiles of the professionals interviewed were as follows:

Public sector

Code	Respondent	Sector
PU1	Generalist adviser who also has expertise in banking and sees clients by appointment on related issues	Citizens Advice Bureau
PU2	Senior trading standards officer	Trading Standards
PU3	Senior manager	Action Fraud
PU4	Senior officer, outputs team	Police
PU5	Detective chief inspector, specialising in fraud	Police
PU6	Sergeant, specialising in fraud	Police
PU7	Adviser	Legal Advice Centre

Private sector

Code	Respondent	Industry sector
PR1	Insolvency partner	Accountant
PR2	Forensic services partner specialising in international fraud, corruption and asset tracing investigations	Accountant
PR3	Partner and head of insolvency and business recovery	Solicitor
PR4	Consultant specialising in liability insurance	Litigation funder
PR5	Director	Accountant
PR6	Partner in law firm specialising in litigation	Solicitor
PR7	Senior partner specialising in fraud cases	Solicitor

Four more in-depth interviews were conducted with smaller businesses who have become victims of fraud. These have been published separately, as case studies, in: *Research into the experiences of smaller business fraud victims in recovering their money (case studies)*.

The research findings outlined broadly support previous research into the needs and experiences of fraud victims of all types.

Main findings

1. Small and medium-sized businesses ('smaller businesses') are more at risk from fraud than larger companies because:

- family-run enterprises rely on higher levels of trust between the participants;
- 'entrepreneurial spirit' can come to take precedence over the need to protect against fraud; and
- they tend not to have done the advanced planning that would enable them to respond promptly and appropriately when a fraud is suspected or detected.

2. Smaller businesses find fraud difficult to identify, prove and pursue as a criminal prosecution. Civil frauds can often be pursued more successfully through breach of contract or trust, for example.

3. From a very early stage in a case professionals feel the need to talk down the victim's chances of recovering their losses, whatever the legal route they choose: criminal, civil, or both. Public professionals in particular (though to a lesser extent those in private practice too) see it as part of their role to manage their clients' expectations of recovery by emphasising the obstacles of cost (civil) and time (civil and criminal). This is especially true where the case is complex, the perpetrator is hard to find, and the assets are difficult to trace.

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4. There is often a need to move quickly to identify the fraudsters and freeze their assets. Obtaining injunctions is very slow and needs to be made faster, perhaps by using specialist judges.

5. There is evidence of a lack of sympathy towards all victims of fraud (especially those of boiler-room scams), but this is particularly noticeable with respect to smaller business victims. The emotional and financial hurt experienced by businesses is commonly thought to be less than for individuals.

6. Professionals acknowledge that the civil justice route is generally beyond the financial means of most smaller businesses and individuals. That said, these victims are often unaware that civil redress ('suing the fraudster') is even possible.

'The expectation of reporting is that in 99% of cases there is no investigation at all because for most of the frauds we don't even know the country the fraudster is in.'
(public professional)

'There is a perception that a business should expect a certain proportion of fraud and perhaps build that into their processes ... there probably isn't the same kind of empathy that ... [there is] ... for an elderly person that's been ripped off.'
(public professional)

'Quite often people are not taken to court because it's not seen as cost-effective. Clients may wish to make reports to criminal justice. The authorities may not take it on because they think it's too difficult.'
(public professional)

'Small businesses – with one, two or three people employed – there isn't the same risk management structure.'
(public professional)

'Even if you get the judgement, [then] you have to pursue enforcement – do you throw more good money after bad?'
(public professional)

'Suing the fraudster' – awareness, knowledge and perceptions of civil recovery among professionals

Public sector

- Both Citizens Advice Bureau (CAB) and Trading Standards admit to a lack of experience in this area as well as a general lack of confidence that civil recovery can be successful.
- Members of national and regional police forces admit that, whilst they are aware of the civil route, they lack a full, practical working knowledge of it. In addition:
 - they may not prioritise fraud because it is not one of their key performance indicators (KPI); and
 - shrinking police budgets have reduced their ability to pursue fraud cases.
- The civil route is thought to be simpler, faster and more likely to succeed because cases need not be proved 'beyond reasonable doubt'. However, there are still barriers, namely: cost, the difficulties of finding a solicitor familiar with fraud investigation, and the administrative burden of registering a claim.
- It is thought that data protection laws are being used to avoid sharing information with victims which might otherwise help them mount civil recovery suits, banks being particularly unhelpful in this respect.

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On balance, public professionals lack knowledge of, and confidence in, the civil justice route for most cases. Civil recovery 'success stories' are few and far between.

Private sector

- Private professionals should be the best informed about fraud and best placed to advise victims on their civil justice options. But here too the research reveals a lack of experience and self-confidence, which even extends to those marketing themselves as fraud experts! Many such 'experts' refused to be interviewed for this research, claiming that their experience is 'minimal'.
- When it comes to helping victims to recover their money, interviewees have more faith in the civil justice route than criminal proceedings. Even under the Proceeds of Crime Act 2002 (POCA) the criminal route continues to be seen as difficult and long-winded.
- Private-sector professionals take a pragmatic view of prospects, recognising that civil recovery is a far from reliable route to success.
- Because the police have a duty to prosecute, there is some indication that they favour the criminal route even when it is not in the best interests of the victim. This can also lead to disappointment when the requirements of criminal justice make evidence unavailable for civil asset recovery proceedings (although there is some acknowledgement that cooperation between the police and solicitors is improving).

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Victim needs – perceptions among professionals

- 1. Diagnosis:** victims seek confirmation that a fraud has indeed taken place and reassurance that something can be done about it.
- 2. Trust:** there is a great need for advisers whom victims feel able to trust to navigate them safely through the litigation process and with whom they can consult at crucial points in the process. This is especially true at the outset of a case, when (it is acknowledged) there are limited public services available to help guide the business victim. If the business cannot afford to retain 'expert' advisers at the early stages, they may find the unearthing of a suspected fraud much more difficult.
- 3. Recovery:** in almost all cases the recovery of losses is considered to be the victim's primary motivation for seeking advice or support.
- 4. Punishment:** the desire to punish the offender and prevent future crimes and victims comes to the fore if the amount of money lost is small and/or the fact of the loss has been accepted by the victim and/or civil recovery was not successful.
- 5. Reputation:** in an attempt to protect their corporate image, larger businesses may be more inclined to avoid taking action.

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'They want their money back ... some of these businesses can't afford these losses.'
(public professional)

'Businesses are run by individuals, so the driving factor tends to be the same, and there is quite a desire for them not wanting [the fraudster] to get away with it ... for revenge, if you like.'
(private professional)

'Sometimes people are defrauded and the fraudster has spent the money, so the next thing you want is punishment.'
(public professional)

General advice and support – what are the professionals providing?

Private and public professionals alike acknowledge that there is a large hole in the fabric of support for smaller businesses and individuals who have lost money to fraud. Civil recovery is usually too expensive (even via a class action case). Most professionals are unaware of any legal aid for fraud cases, and litigation funding is only available for large sums. Private sector professionals will usually spend up to 30 minutes providing free advice to help assess the victim's chances of mounting a successful civil recovery case.

- Specialists tend to have very few smaller businesses or individuals (unless 'high net worth') among their clients because:
 - for them to take a case the loss must usually exceed £100k, or more likely £250k; and
 - an upfront fee, after-the-event insurance or litigation funding (minimum loss would then apply) may also be required.

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- Solicitors' charges vary from 'no win, no fee' to hourly rates of between £150 and £600+.
- 'After the event' insurance was mentioned by one interviewee as a relatively new service, offered where there is a reasonable chance of success. The defendant pays the premium.
- Advice and support tends to be tailored to the type of fraud rather than the type of client.
- Where a professional decides not to take a case, the accompanying advice tends to include some or all of these:
 - *legal representation* – find a solicitor with experience of fraud (though a specific specialist is unlikely to be recommended);
 - *asset recovery* – find an accountant with fraud experience; and
 - report the crime to the police and/or Action Fraud (though there is a general lack of awareness of what Action Fraud is and does).
- Generally, victims are advised to act quickly to identify the fraudster and freeze their assets. But there is concern that the injunction process is too slow and would be better if handled by judges with specialist experience of issuing injunctions in fraud cases.

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The importance of managing expectations

Professionals often say that they see a key part of their role as managing the expectations of victims. In particular, warning them that:

- the police may not investigate unless the fraudster can be identified and located;
- because police do not themselves have the powers to track down a fraudster, they will have to involve others, such as banks, etc.;
- all the money may not be recovered; and
- there will be no damages paid.

'I try and manage expectations – they want their money back, and just because it's happened and you are innocent, doesn't mean that you are going to get your money back ... and I say 50% of the cases can usually be successful.' (public professional)

'People expect that they tell us one day what's happened and the next day they are going to get their money back – that's not how it happens.' (public professional)

'A lot of victims are very disappointed and that's quite difficult to manage expectations ... They think the police can investigate everything – they don't appreciate the resources that are needed [and that even if] the full investigative process takes place they are not necessarily going to get their money back.' (public professional)

First point of contact and the web of referral

- High street public professionals, such as CAB advisers, tend to refer victims to the police by default, rather than recommend a solicitor or accountant.
- Few victims are advised to report their crime to Action Fraud.
- Solicitors may be approached before or after the crime is reported to the police. The contact is likely to have been suggested or recommended by one of the solicitor's other professional business acquaintances, or result from an existing relationship with the victim. It is thought by both public and private professionals that some solicitors may not necessarily have the experience or specialist knowledge to deal with fraud cases adequately, and that there is some evidence of victims changing their solicitor because they suspect incompetence or feel they are being exploited.

Few victims are advised to report their crime to Action Fraud.

- Banks and insurers may be the first to be approached, but mostly by larger organisations.
- Victims may contact the police at any point, but often as soon as they realise a fraud has occurred and usually on the recommendation of a solicitor (to get a crime reference number) or a high street public professional. If the police are contacted later in proceedings, this usually happens after an unsuccessful attempt at civil recovery.

When victims seek help, their choice of a first port of call seems to be decisive in determining the quality of their subsequent experience.

Larger businesses with more established support networks benefit from immediate professional help and guidance. Private professionals can function in this way, as 'trusted advisers', for individuals and smaller businesses, but their effectiveness will depend on the strength of the business relationship and the amount of trust fostered within it. In reality, individuals and smaller businesses seem more likely to be forced to navigate the whole crisis, or at least key parts of it, alone. This may explain the pattern of earlier reporting to the police by these groups; they have nowhere else to go.

Thus, the web of referrals experienced by victims seems random and chaotic. While the police or a solicitor may be approached at some point in the victim's journey, friends and business colleagues are usually the first point of contact, with what can be highly variable results as the detailed case studies reveal.

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'If they go to the police it will hamper them getting the money back because the evidence may disappear, and if the police stamp all over it, or put a restraint on it, then that doesn't help the client.' (private professional)

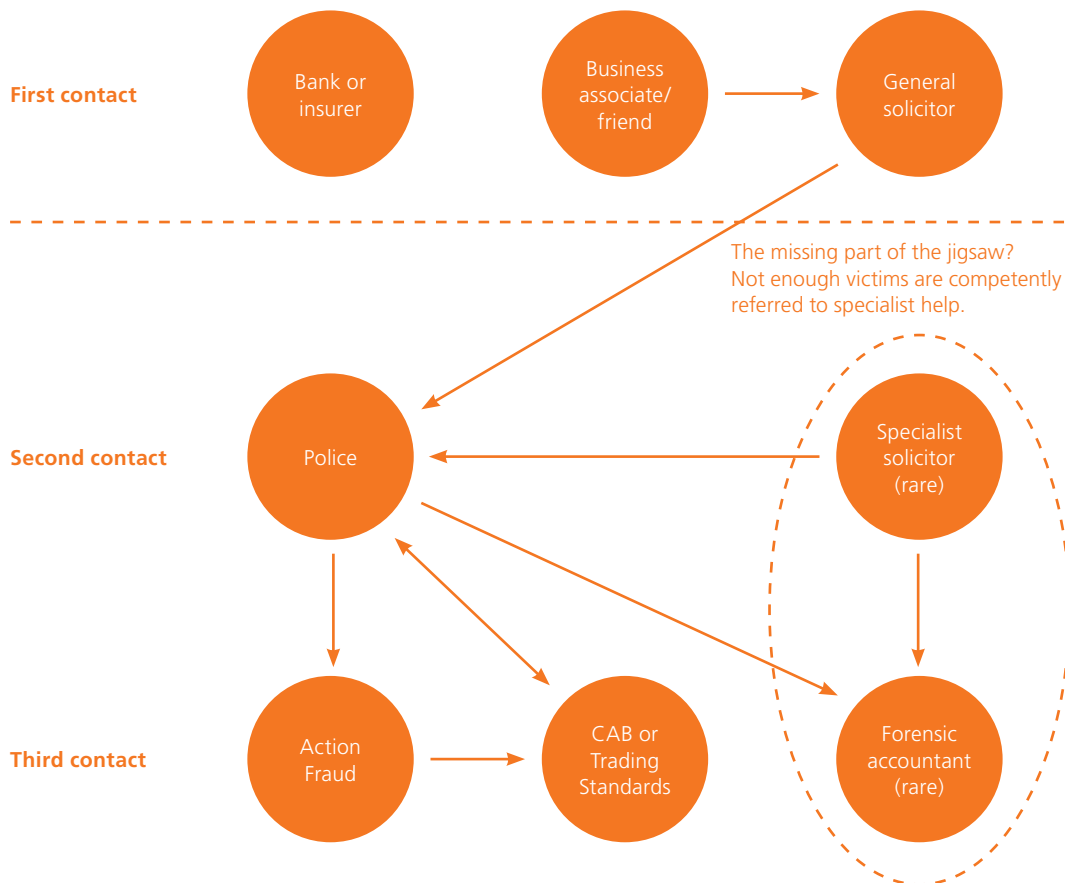
'Not all areas of fraud are investigated, so for a victim, this can be very frustrating. They are told, "thank you for your report", but all instances of fraud may not be investigated. I think, as a victim, it can be frustrating if you don't hear any further information about it.' (public professional)

'It's difficult to decide where to send people, that's why Action Fraud and the NFIB should come in. I think there should be national messages from these organisations.' (public professional)

'You must be able to identify the fraudster ... and establish there is money to recover.' (private professional)

'The way in which assets are held is also important. For example, you may have reasonable intelligence about where the funds are, but you may not have conclusive evidence – something that is very difficult to manage when you are assessing if you could recover particular assets, such as a string of offshore assets.' (private professional)

'Many sole practitioners get out of their depth too quickly, especially as many solicitors don't have much work at the moment [so take on cases which they are not experienced enough to handle].' (private professional)



Case acceptance – decision-making criteria

Case acceptance criteria are narrow and tend to be based on four factors: the complexity of the case, the amount of the financial loss, the evidence available to launch a prosecution or civil action, and the likelihood of success; in other words, the balance between the effort required by the investigating party and the likelihood of success.

Case acceptance criteria are thus based on the goals of the professionals involved. Broadly speaking, this means:

- **Police forces** are interested in taking on a case where a risk to the public can be demonstrated and evidence is available to effect a prosecution. In general, a case will be escalated from the local force to the regional if the loss is more than £2m and the victim comes from the private sector.
- **Private professionals** are interested in exploring commercially-interesting cases in which they would have a reasonable chance of success. They emphasise the need to be able to identify both the fraudster and the existence of money to recover. Unless a client is determined to proceed, private practitioners will generally deem a loss of under £30,000 to be not worth the effort of civil litigation. Some set the bar much higher, in the region of £100,000.
- **Litigation funders** will typically accept a fraud case only if the chance of success is 60% or higher – some offer an initial case diagnosis for £1,500.

Improving civil recovery and the experience of victims – guiding principles

Smaller businesses need independent advice early on to help them understand their chances of success and the full range of options available. Then they need the continuing support of a 'guide' as this stressful and potentially expensive journey unfolds.

1. Victims need honest and independent help, first to diagnose whether a fraud has taken place at all, and then to decide what action to take in the first few days/weeks thereafter.
2. Greater transparency about options and potential costs (time and money) would allow victims to make informed decisions about whether the civil route is right for them.
3. Sources of expert independent help and advice (Action Fraud or Fraud Advisory Panel) should be better signposted, with typical first points of contact (ie, police, CAB, general solicitors, business professionals, etc.) better educated about what the independent experts can offer.
4. More solicitors should be encouraged to develop fraud expertise.
5. Accreditation schemes for individual fraud specialists would make it easier to find properly skilled help and advice.
6. The importance of using forensic accountants during the early stages of a case should be emphasised; 'before you litigate you need to investigate'.
7. Smaller businesses need to be made more aware of fraud insurance.
8. Neutral step-by-step guidance for fraud victims and potential victims – where to go, who to inform, what to do – should be promoted in schools, at company inductions, and when registering a business at Companies House.
9. Obtaining an injunction to freeze assets should be quicker and easier.
10. Proposals for a victim compensation scheme should be looked at again. (Public and private professionals alike have previously rejected this idea because it would require taxpayer funding and might be open to abuse.)

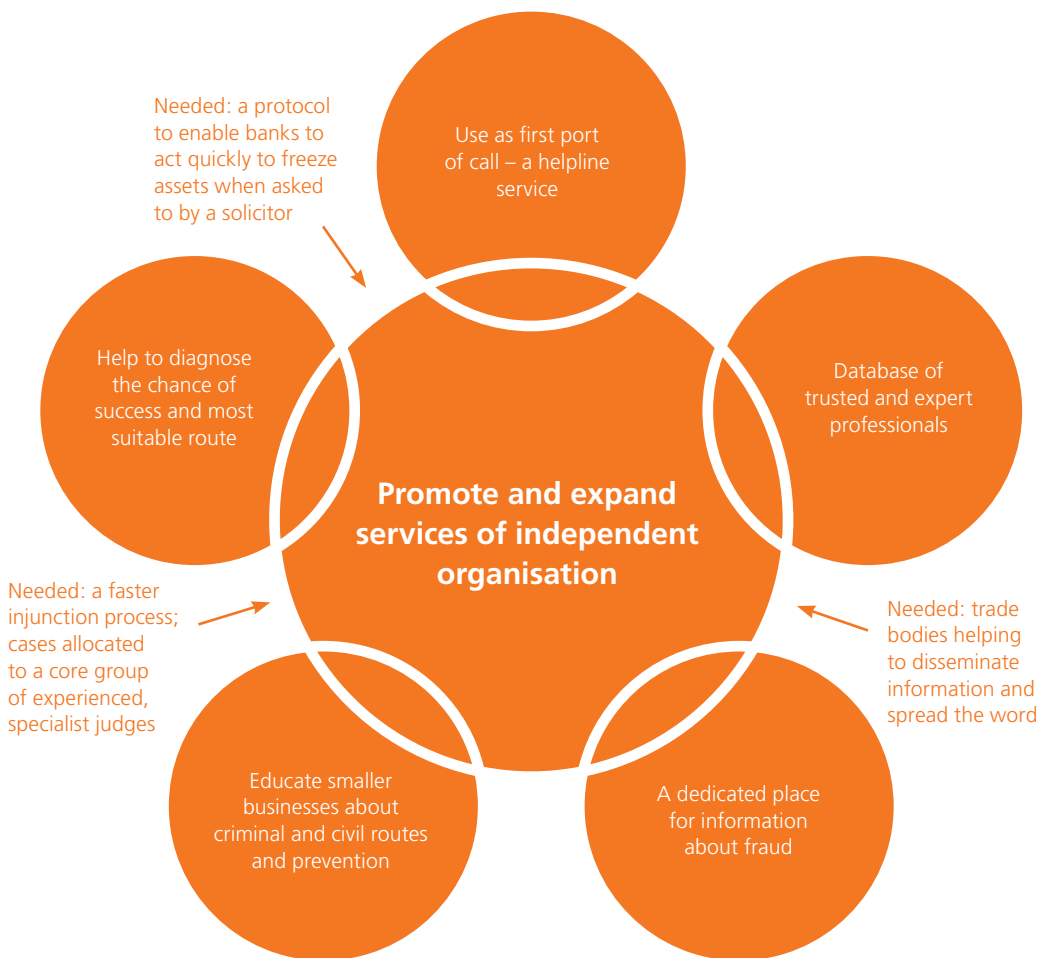
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Victims need honest and independent help.

'I think it would be very difficult for a compensation scheme to exist in the commercial world because there is an expectation, quite rightly so, that people go into business with their eyes open and are aware of the risks they take. Individuals who may not have a professional skill, such as people who may be invested in a particular scheme who find out they have been ripped off, do deserve a compensation scheme, especially if there is some sort of public sector involvement.' (private professional)

'There should be something like ChildLine, where business victims can ring up and have immediate access to impartial advice.' (private professional)

Diagram 1: A call for a dedicated centre to help educate, diagnose and refer victims



Acknowledgements

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