



WORKING PARTY PAPERS

**The Legal Relationship Between
the Serious Fraud Office and the Police**

written by

Chris Dickson, Joint Disciplinary Scheme

Peter Hyatt, Mazars Neville Russell

John Knox, Criminal Cases Review Commission

Stephen Low, Levy Gee

David Roberts, Roberts Croston Associates

Introduction

This paper examines the legal relationship between the Serious Fraud Office and the police. It is no part of its purpose to advise upon whether this legal relationship should be changed or whether it should remain the same in the future. It does suggest how change might be effected.

The Authors

The paper has been written by Peter Hyatt, a partner on the forensic side of Mazars Neville Russell and a former Assistant Director of the Serious Fraud Office; John Knox, a member of the Criminal Cases Review Commission and a former Deputy Director of the Serious Fraud Office; Stephen Low, a senior manager at Levy Gee and a former senior accountant with the Serious Fraud Office; David Roberts, of Roberts Croston Associates, Accountants, a former officer of the DTI and an accountant secondee at FIG; and Chris Dickson of the Joint Disciplinary Scheme, also formerly of the Serious Fraud Office. Efforts to include a serving police officer in the group ultimately failed; but this was not through any lack of interest on the part of the officer or force concerned.

Background

For at least 200 years, the principal persons charged with the investigation of crime have been the police. The police remain the principal investigators of all crime, including serious fraud. As far as we can ascertain, the genesis of direct accountancy involvement in fraud cases arose from the requirement that liquidators report frauds discovered in the course of winding up companies to the Director of Public Prosecutions ("DPP"). This requirement first appeared in the Companies Acts and is now to be found in Section 218 of the Insolvency Act 1986.

A working party set up by the Attorney General in 1978 to review the arrangements for the investigation and prosecution of fraud was followed by a small working group to examine the working party's proposals. Concern was expressed about the ineffectiveness of the current arrangements, particularly as they concerned auditors, by amongst others Lord Benson GBE, a leading chartered accountant.

The working group's conclusions were sufficiently positive to lead to a pilot scheme in which two major fraud cases were investigated by an ad hoc group drawn from the DTI, the DPP's Office and the Metropolitan Police. History does not relate what the modus operandi of this ad hoc group actually was - did, for example, anybody other than police officers actually take part in the active side of the investigations (as opposed to analysing evidence obtained by police officers)? As far as we have been able to ascertain the DTI officers did not use DTI investigation powers to obtain documents or to interview witnesses or suspects.

The pilot scheme was, in any event, rated a success, and the Fraud Investigation Group ("FIG") - a part of the DPP's Office and the forerunner of the Serious Fraud Office - was brought into existence at the beginning of 1985. It was located in premises belonging to the DPP; but whilst police reported cases to FIG, police officers did not work from these premises. Initially, three accountants were based there (two from the Insolvency Service, with CIB experience, and one from another Government Department). Whilst these accountants spent part of their time helping with the vetting of fraud complaints from liquidators, they also gave advice and provided accounting help with the actual investigations. Anecdotal evidence which we have obtained suggests that in some cases, accountants actually accompanied police on search operations and on visits to banks and other financial institutions. Lawyers, because of their prosecuting functions,

took no part in investigations.

The DTI accountants attached to FIG did not exercise DTI investigative powers. Apparently the Controller of FIG was told that if it became clear that an investigation under Section 447 of the Companies Act 1985 was called for, the DTI would co-operate fully. In that short period of FIG's life before the Serious Fraud Office came into existence, this situation did not arise. In any event the exercise of Section 447 powers is always a matter for the Secretary of State, and officers exercising these powers act only under the Secretary of State's direction. It is certainly arguable that once another investigative body has embarked on a criminal investigation, it is inappropriate for a separate investigation to be mounted by the Secretary of State for the same purpose.

The Roskill Committee

A Committee under Lord Roskill (one of its members was Lord Benson) had been set up some time before FIG was officially created, and charged with considering ways in which the conduct of criminal proceedings in fraud cases could be improved. This Committee reported when FIG had been in existence for less than a year.

As a result of its recommendations, the Serious Fraud Office was set up, coming into existence on 6 April 1988. It is, perhaps, no more than a curiosity that just at the time when the Crown Prosecution Service was getting on its feet, representing as it did a conscious decision to separate the investigation and prosecution functions, the Serious Fraud Office, equally consciously, combined them again.

The Serious Fraud Office

The Serious Fraud Office was constituted by Section 1 of the Criminal Justice Act 1987 ("the 1987 Act"). The same section gives its Director power to investigate any suspected offence which appears to the Director "on reasonable grounds to involve serious or complex fraud" (Section 1(3)). Section 1(4) empowers the Director, if the Director thinks fit, to conduct any such investigation "in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it".

The Director is given extensive powers of investigation by Section 2 of the 1987 Act. In relation to these powers, those who exercise them can be divided into two groups. The first group consists of members of the Serious Fraud Office, to whom the Director can devolve the exercise of these powers in accordance with the normal administrative arrangements for Government.

The second group, defined in Section 2(11) of the 1987 Act, consists of "any competent investigator (other than a constable) who is not a member of the Serious Fraud Office". The Director may authorise any such person to exercise the powers for the purposes of a specific investigation (i.e. the Director may not grant such a person a general authority).

The specific exclusion of police officers arises from their constitutional position. Police officers are not civil servants but rather officers under the Crown who are subject to the command control and discipline of their own Chief Officers. It is worth noting that the exercise of most police powers is controlled by the courts, to whom police officers must apply for such documents as arrest and search warrants, and production orders. The Director of the Serious Fraud Office, on the other hand, is responsible for the exercise of the investigative powers created by Section 2, through the Attorney General, to Parliament. Whilst that is effective in the case of persons employed by the Serious Fraud Office, or contracted to do particular investigations, all of whom are subject to the Director's direction, it would not be effective for police officers who, even though working in conjunction with the Serious Fraud Office, are not subject to such direction. The Director would, without the proviso in Section 2(11), be potentially liable for the exercise of these investigative

powers by persons over whom the Director had no control.

Consequences of Section 2(11)

There is no doubt that the result achieved by Section 2 of the 1987 Act is quite different from that envisaged by the Roskill Committee. The Committee recommended that powers analogous to those in Section 447 of the Companies Act 1985 be conferred upon the police. A practical consequence of the position arrived at by section 2 is that in Serious Fraud Office cases, police officers are excluded as a matter of law from conducting interviews with key witnesses (and occasionally potential defendants) where these are conducted under the Director's investigative powers. Whilst acknowledging the legal framework which has given rise to this situation, it is still difficult to defend the practical consequences of an arrangement which prevents highly skilled and experienced investigators from taking part in such important interviews.

Another consequence of the present constitutional structure has been the lack of a single chain of command: supervision of police officers working at the Serious Fraud Office has remained a matter for senior police officers rather than for the Director.

A third consequence is that the Director does not control all the resources for investigating cases, whilst nevertheless being legally responsible for the investigations.

Two possible approaches

If it were thought desirable to change this position, one possible solution would be to delete the words "other than a constable" in Section 2(11). As explained at paragraph 13 supra, however, the need for those exercising Section 2 powers to be accountable (through the Director and the Attorney General) to Parliament makes this impractical on its own; and it would not on its own address the chain of command or control of resources problems. This idea is considered again at paragraph 27 infra as part of a different solution.

A second approach would be to create a legal structure whereby police officers could be detached from their home forces and attached to the Serious Fraud Office, becoming "members of the Serious Fraud Office" during the period of their attachment.

The legal provisions relating to service outside a police officer's home force are now contained in Section 97 of the Police Act 1996. Section 97(1) defines the "relevant service" which can be undertaken, and this does not, as currently enacted, include service as a member of the Serious Fraud Office. Section 97 provides for both operational service (eg service overseas) and non-operational service (eg temporary service as an advisor to the Secretary of State). It would be necessary, therefore, to add an additional paragraph to subsection 1 to include in the definition of "relevant service" the following: "service as a member of the Serious Fraud Office". Section 97(9) would also require amendment so as to make the Director of the Serious Fraud Office liable for the torts of such police officers in the same way that the Director is liable for the torts of existing members of the Serious Fraud Office. Thereafter the relationship between the attached police officer, his home force and the Director would be a matter of contract.

One advantage of proceeding in this way would be that, whilst the small amendments to Section 97 set out in paragraph 19 would be required, there would be no need to amend the 1987 Act (because police officers attached to the Serious Fraud Office would exercise their powers as members of the Serious Fraud Office (ie as part of the first group) rather than as non-members authorised under Section 2(11) - the second group). The implications of doing so would have to be explained to Parliament.

Police officers so attached would retain their statutory powers as constables (see Section 97(8) of

the Police Act 1996). This would mean that whilst engaged in matters not involving the exercise of police powers (at least 90% of their time), attached police officers could act under the direction of the Director. Only in circumstances in which it was necessary for them to exercise police powers would they revert to the command and control of their own Chief Officers.

Attached police officers, as members of the Serious Fraud Office, would be part of a single command structure, in which they would play a full and influential rôle. There would be flexibility within the Office's investigative structure (attached police officers would not have to limit their work to cases from their own force area). The process of team building would benefit from the fact that attached officers were not excluded from any area into which civilian investigators could go (particularly in the exercise of Section 2 powers).

If, after the changes in the law outlined above, such attachments were to be undertaken, the desirability of attached police officers also exercising police powers (particularly those of search and arrest) on a routine basis would be a matter for resolution by Chief Officers after discussions with the Director. We have not given detailed consideration to the legal implications of officers exercising both rôles simultaneously. There would be obvious dangers, in terms of admissibility of the evidence, if a confession were first made to an attached police officer under Section 2 (when it would not now be admissible under any circumstances); and then immediately afterwards to the same attached police officer purporting to conduct a voluntary interview under the PACE Code (when, prima facie, it would be admissible as part of the prosecution case). Such dangers are well understood by existing members of the Serious Fraud Office who could find themselves in the same position.

There would be other matters to resolve. One would be how the cost of attached officers should be met. If one assumes that the combined budgets of the police and the Serious Fraud Office are unlikely to be increased, an alternative would be a "top slicing" levy on police budgets (which is how, as we understand it, Home Office attachments are funded). This would cause great problems for the police, who not only suffer annual cuts in their budgets, but also have real difficulties in maintaining discrete fraud squads in certain parts of the country. Top slicing operates in a fairly rough and ready fashion - some forces would clearly gain by attaching officers over and above the amount of their levy, whilst others would lose by not attaching any officers whilst still paying the levy. Having said that, a system of winners and losers would be more likely to persuade police forces actively to encourage good officers to compete for Serious Fraud Office attachments. We have assumed that whilst attached police officers would continue to receive the police salaries and allowances to which they were entitled (whilst following Serious Fraud Office arrangements for Travel and Subsistence), actual payment would be made by the Serious Fraud Office.

One argument against attaching police officers to the Serious Fraud Office is that the temporary removal from County forces of their best fraud-trained officers might mean that less fraud was investigated locally. On the other hand, local fraud squads working on Serious Fraud Office cases already devote considerable time to them; and if the National Crime Squad were in the future to take on serious fraud, a similar consequence would occur which would have to be met by recruitment and training of further suitable local officers. The benefit to local fraud squads of officers returning after attachments would be considerable.

Finally, there might be a lack of flexibility if police officers were attached to the Serious Fraud Office for fixed periods. Inevitably the incidence of fraud rises and falls, and no doubt regrettably, this does not take account of the manpower strength at the Serious Fraud Office! But this is a personnel problem which every organisation faces; and there is no evidence that those at the Serious Fraud Office are other than very fully occupied. All law enforcement agencies (Customs and Excise, Inland Revenue and the DTI, as well as the police) have to manage the staff levels of their organisations within the parameters of the work to be done.

Most current Serious Fraud Office cases need some work to be done by locally based police officers. At present, police forces do this work willingly, but there must be a question as to whether

this would continue. The experience of the Serious Fraud Office has been that police forces invariably go out of their way to help whenever they can; and the type of local help which is normally requested - arrests, searches, intelligence - does not normally impose a long term burden. Indeed the greatest problem for police forces (particularly County forces) who are involved in Serious Fraud Office cases under the present arrangements is the burden of the long term commitment (investigations often last for two years, sometimes even longer). It is just this burden which a system of attachments would remove. As against that, after paying to staff up a police contingent at the Serious Fraud Office, there may be resistance amongst police forces to providing further help at their own expense.

A Third Approach

A different solution would be to give the Serious Fraud Office powers similar to those exercised by the Criminal Cases Review Commission and the Police Complaints Authority. Both of these bodies can require a Chief Officer to appoint investigating officers (see, for example, Section 19 of the Criminal Appeal Act 1995), and can take "any steps they consider appropriate for supervising the undertaking of inquiries by an investigating officer" (Section 20(4)). This is a very wide authority, exercised in practice by terms of reference and regular conferences; but there is no reason in law why control should not be as great or little as the circumstances require. The practical arrangements, if similar powers were given to the Serious Fraud Office, would not be very different from those in Serious Fraud Office cases at present.

If powers of this sort replaced the present arrangements for the Serious Fraud Office to investigate in conjunction with the police (Section 1(4) of the 1987 Act), the Director would be able to control police resources on investigations based on an existing model. Such control might enable Parliament to remove the bar on constables exercising Section 2 powers which is contained in Section 2(11) of the 1987 Act.

The model of the Criminal Cases Review Commission and the Police Complaints Authority is not exactly suitable for the Serious Fraud Office since the outcome of an investigation under Section 19 is reported to the supervising body. Moreover the Criminal Appeal Act 1995 envisages appointment on occasion from outside the immediate force, such appointments being made where there are suspicions of failure or malpractice by that immediate force. These are not the circumstances of Serious Fraud Office investigations. However the essence of "civilian" supervision of officers working within a local force structure is appropriate to the needs of the Serious Fraud Office. The Serious Fraud Office would be able to add central expertise by use of a few ex-police officers as required and as at present, but very far from central exercise of the total investigation function.

Conclusions

Whether or not any of the legal changes outlined above should be made is not within our remit. Personal relationships between police officers and the Serious Fraud Office are good, and at an official level, the Serious Fraud Office and the Association of Chief Police Officers have entered into a Memorandum of Understanding to provide a framework for joint investigations. The need and wish of the two parties for further change, together with the question of how it should be paid for, are likely to be the principal influences on Parliament.