
Response to the Home Office Consultation Paper

**One Step Ahead:
A 21st Century Strategy to Defeat Organised Crime**

August 2004

The Fraud Advisory Panel welcomes the opportunity to respond to the Government White Paper, "One Step Ahead" Cm 6167.

1. Overview

- 1.1 The ultimate aim of organised crime is to make money and to be able to make use of that money while concealing its criminal source. In pursuing that aim, criminal offences which fall within the loose ambit of "financial crime" are commonly committed, including money laundering, corruption, and offences of dishonesty. Many of the predicate offences which are committed by those involved in serious organised crime, who are, by definition, professional criminals on a large scale, are fraud offences in themselves. The issues discussed in the White Paper, and many of its proposals, are therefore directly relevant to the work of the Panel, which exists to examine proposals on financial crime and to make recommendations for the reform of the law and procedures to aid the fight against financial crime.
- 1.2 The White Paper accurately identifies the widespread evil and harm caused to the community at large by organised crime, its association with terrorism and its links with those elements which cause the greatest human misery. We were pleased to see, and completely agree with, the references to the damage caused to the economy and the direct financial harm to individuals caused by organised crime. What is not so clearly recognised in the White Paper are the points of contact between organised criminals and the legitimate banking and other financial systems in this country and elsewhere. Organised criminals are professionals and they need other professionals, in the legitimate world of business and commerce as well as professional people in the law and accountancy, to help them commit offences and realise their profits.
- 1.3 The proposals made in the White Paper come within a year of the passing of the Criminal Justice Act 2003 and within four years of the coming-into-force of the Human Rights Act 1998, both of which have had, and will have, profound effects on the UK criminal justice system. Many of the proposals in the White Paper will, if implemented, go a long way to aid the strategy set out to improve the channels of communication of intelligence in this area of crime, disrupting the activities of crime organisations and assisting the investigation of suspected criminal activities; these are all laudable goals. The Panel would be very cautious about endorsing any proposals, however well-intentioned, which may have the effect of eroding the

safeguards entrenched in law intended to uphold the liberty and rights of the individual under investigation and undergoing the trial process, particularly the right to a fair trial. Equally, the Panel, which is committed to supporting the role and encouraging the enhancement in strength of numbers of specialist trained police officers in the areas of intelligence-gathering, disruption and investigation of financial crime of all kinds, would be very reluctant to see any moves which may further weaken these resources.

- 1.4 We note that the Government particularly invites views on the law of conspiracy, the compulsion of witnesses to supply information and the pre-trial and trial process. The Panel's comments on these specific aspects of the White Paper are set out in paragraphs 7 - 10 below.

2. Strategies for the Main Problem Areas (Your paragraph 2.3)

- 2.1 The White Paper refers to a number of strategies currently being worked up in the areas of fraud and notes a lack of integrated strategy in the area of fraud against business. While it is understandable that this Paper does not go into further detail on this aspect of crime, given the context, this is a highly important and economically very significant area. The Panel is heavily engaged in carrying out its own work in this area, including a number of research projects intended to address strategy and tactics to combat this form of crime and welcomes input and, particularly, support from Government to inform its work.

3. Creation of the Serious Organised Crime Agency (SOCA) (Your paragraph 3.1)

- 3.1 It appears to the Panel to be sensible and justifiable as a concept, to bring together the expertise and the resources of the existing National Crime Squad (NCS), the National Criminal Intelligence Service (NCIS), HMCE's investigation and intelligence work on serious drug trafficking and recovering related criminal finance, and the Immigration Service's work on organised immigration crime to increase the effectiveness of efforts in this area. Our concern is the possible blurring of function of SOCA, divided as its proposed purpose appears to be between intelligence gathering and sharing, investigation (and presumably disruption) of suspected organised criminal organisations and individual criminals, and the prosecution of offenders. It is only too apparent that there is a finite resource both in terms of manpower and of funds to supply the existing demands on NCIS, the NCS and law enforcement

agencies more widely. The recent review by KPMG of the work of NCIS in processing suspicious activity reports under the money laundering regulations has highlighted the increasing workload and the concomitant pressure that NCIS is shouldering in this area. The additional loading on these bodies, as well as the development of the role of Special Branch and the creation of the regional intelligence cells (RICs) may be found, in practice, to place an intolerable burden on these agencies which may serve to reduce rather than improve their effectiveness in their existing roles.

3.2 There is a further risk arising from the merging of the functions of the agencies within SOCA. There is a clear imperative for Government to take on board the setting of clear policy in the work of SOCA. Is the policy in running a particular case to be intelligence gathering, disruption, or investigation with a view to prosecution? These considerations must be carefully thought out in advance, and clear guidance must be given to prosecutors to enable them to make proper decisions. In making these decisions, prosecutors need clear parameters and guidelines within which to work. The impact in terms of admissibility of evidence is enormous where lines are blurred. For example, to prosecute cases where the objective was initially disruption can lead to problems since the techniques appropriate to disruption and the gathering of admissible evidence in an investigation with a view to prosecution can be very different. Blurred lines lead to insuperable difficulties with regard to disclosure. These problems have been graphically illustrated in the recent aborted trials prosecuted by HMCE. The difficulties encountered by prosecutors in these cases have been largely caused by problems which arise where policy for running a case has not been clearly delineated at the beginning.

3.3 There is a further concern: that is, the proposed relationship between police and SOCA. It appears that police officers, working out of their home forces will be expected to investigate allegations of serious, organised crime, as they do now, but in association with SOCA. The White Paper does not explain whether they will be supplemented by a cadre of investigatory officers, as opposed to civilian investigators, directly deployed by the new agency. Whether police officers, other than those (NCS/NCIS officers) charged with specifically intelligence-gathering duties will be employed by SOCA, seconded to it or on detached duty is not clear. If it is proposed that SOCA itself will employ police officers to investigate suspected offences, that arrangement should be put on a seconded basis, with direct accountability to the Director-General of SOCA. Police officers who work with the SFO do so on a "detached" basis, with senior officers of their home force, rather than

the Director of the SFO, maintaining responsibility for their pay, rations and discipline and, most importantly, their deployment. This situation has proved to be unsatisfactory in practice. As an example, this system of “dual control” enables senior officers to pull officers off cases at short notice because of exigencies elsewhere within the home force. The Panel would therefore urge Government to take this opportunity, in setting up the new agency, to ensure that direct control of all those, whether police or civilian investigators working for the new agency, to reside with the Director-General.

4. Proposed “Specialist Prosecutors” (Your paragraphs 3.1 and 4.3)

4.1 The Panel welcomes the decision (paragraph 4.3) to separate the cadre of proposed “specialist prosecutors” from the investigators. The Philips principle¹ of independence of prosecutors is enshrined in the working practices of CPS and the SFO, where, although lawyers are closely involved with the course of a criminal investigation and give advice throughout the course of an investigation, the decision to prosecute and associated decisions, such as the granting of immunity to individuals, are taken by those with no involvement in day-to-day investigations. The opportunity to consult and take advice from criminal lawyers during the investigation of organised crime, especially an investigation involving the use of novel and controversial powers, can only be beneficial and is to be welcomed; the “capture” of the individual making the ultimate decision to prosecute, by too close an involvement with the course of the investigation process and contact with those involved in the investigation, will be likely to prejudice his or her prosecutorial independence and must be avoided.

4.2 We understand from sources outside the White Paper, that the intended cadre of “specialist” prosecutors is to be drawn from the CPS. The CPS, already hard pressed, will be further depleted and its own efforts to tackle crime which does not fall within the defined category of serious organised crime will suffer. To train up prosecutors to do this specialised work will inevitably take time and the training involved will distract the “trainers” from their other duties which, presumably, will be mainstream prosecution. It is not clear whether the “specialist prosecutors”, though “answerable directly to the Attorney General” will be part of the CPS or in a separate agency of their own. If the latter, leadership, management and support functions will

¹ The Royal Commission on Criminal Procedure, Cm Sir Cyril Philips, Cmnd.8092

have to be supplied, with the additional drain on existing resources elsewhere in the criminal justice system and further expense (See paragraph 6 below).

5. Data Sharing and the Application of the Data Protection Act (Your paragraph 4.1)

5.1 The issues relating to data sharing that arise in the context of the proposals outlined in the White Paper are made particularly tricky because of the proposed increased involvement of the private sector in the intelligence-gathering exercise. The Panel is concerned that, whilst the Data Protection Act has addressed the issues of law enforcement within the public sector by giving exemptions, the same privileges have not been extended to investigators working in the private sector. Investigators in both sectors are finding it increasingly difficult to work together due to the one-sidedness of data sharing. Where public sector investigators can ask for information from the private sector, this option is not extended to the private sector due to the extremely limited scope available to them. Due to the growing concern of investigators that this may have a detrimental effect on their investigations, the Panel has commissioned a research project (funded by private sector firms) to establish the full extent of the issue.

5.2 It is certainly felt that, for investigations to have a successful outcome, amendments to the Data Protection Act would be necessary to give the private sector investigators similar, if not the same, exemptions allowing retention, sharing and generation of information without breaking the law. Without any changes it is also felt that it would be extremely difficult for investigators in the private sector to carry out investigations in accordance with the law.

6. Strengthening Skills (Your paragraph 4.2)

6.1 It should be recognised that many of the skills necessary to combat organised crime already exist within police fraud squads in local forces. It is a matter of great concern that those skills are being lost to law enforcement as fraud squads are reduced in size and officers are deployed on other duties or leave the Force altogether, disillusioned with the outcomes of successive policing cutbacks in the area of specialist fraud investigation. The Panel urges Government to address this area as a matter of urgency, to stop the haemorrhage from the Force of experienced and trained officers whose skills and experience are central to the efforts needed in this

area as in mainstream fraud. It should be emphasised that even the best skills in the private sector – and the Panel represents a large spectrum of private sector fraud investigative entities and individuals employed by them – cannot replace experienced police officers and are an expensive resource.

6.2 The Serious Fraud Office (SFO) gets barely a mention in this White Paper; yet its staff tackle some of the most complex criminal cases, frequently involving what on any definition is serious organised crime on a daily basis and do so effectively and efficiently. The SFO is geared to tackle the investigation and, most importantly, the prosecution of these cases and is now better resourced than it has been for many years. Prosecution of these enormous and very complex cases is a team effort, involving many hands, all of them with their own particular expertise. The SFO has that experience and expertise in large measure. Many of the cases investigated by SOCA will inevitably involve complex financial crime and it is suggested that consideration should be given, at the very least, to consultation with the SFO before setting up new teams of the specialist prosecutors (and the necessary concomitant support staff) envisaged in the White Paper. Optimally, it should be open to the SFO to consider taking over the prosecution of a suitable case that meets its normal criteria for case acceptance, to avoid duplication of effort and unnecessary deployment of scarce resources.

7. Conspiracy and Participation Offences (Your paragraph 6.1)

7.1 Perhaps the most far-reaching and important changes proposed are set out in this section. The higher conviction rates achieved in other Common Law countries are noted in the White Paper with approbation and some envy. The main barriers within the legal system of England and Wales (Scots law and procedure are not referred to) to achieving comparable results are identified as “areas where the current legal framework appears not to be fit for purpose...” The clear implication is that the law unfairly protects the suspect in an investigation and the defendant at trial. In order to address “modern sophisticated criminality” more effectively, the Paper suggests a number of legal and procedural changes, all of which are designed to lower the evidential burden on the prosecution and, in consequence, to remove from a suspect/defendant many of the protections hitherto enshrined in English law to ensure that the burden on the prosecution, to displace the presumption of “innocent until proved guilty” is discharged only when the Crown has proved the elements of the offence against the defendant to the highest standard of proof.

- 7.2 While successive Governments have lowered the threshold both for the custody of those suspected of serious offences while investigations or other procedures are carried out and, more rarely, for the trial process itself, this has been done only in the context of the most serious crimes, threatening the safety of the State, for offences of and in connection with terrorism. While organised crime in some cases has links with terrorist activity, the vast majority of organised crime is committed for monetary gain and, though extremely large amounts of money are involved, complex audit trails are created and in many cases violence, or the threat of violence is involved, it cannot be said that such extreme measures are justifiable for crimes of an acquisitive nature only, even where violence is involved. It has not been seriously argued that it is necessary to abrogate the protections afforded to the most violent of criminals in other areas of crime, even in those cases which attract the greatest public opprobrium, such as the sex-related murders of children or the killing of police officers.
- 7.3 The aim, to “reach the real ‘Godfather’ figures” behind organised crime groups is a good one; the problem comes where there is insufficient evidence to prove that the “Godfather” has committed a criminal offence, the prosecutor unable to show that he either did an unlawful act or had the necessary guilty intent. To prove a statutory conspiracy, the prosecution must show that the defendant agreed to do an unlawful act. Absent evidence of the agreement, the defendant will be acquitted. It is often impossible to prove that someone close to others who can be proved to be participants in a crime was party to an agreement or, if it is alleged he was a secondary participant, that he did an act in furtherance of that offence. The failed SFO prosecution of the former directors of Wickes² for offences of fraudulent trading and misleading auditors, where the defendants admitted in the proceedings that there was a fraud but that they had no knowledge of it and played no active part in it, demonstrates the difficulty of obtaining sufficient evidence to convict those at the top of an incorporated entity. Still less, is the prospect of obtaining such evidence against shadowy figures heading up organised crime groups. The White Paper rejects the introduction of RICO-style legislation on the basis that RICO itself requires “sufficient evidence to convict on the underlying predicate offence”. To substitute for evidence of a conspiracy, however, a case based on membership of an organised crime group without proof that such an individual actively conspired with others in that group or did

² SFO Annual Report 2002-3 page 35

an act in furtherance of a conspiracy is not to prove conspiracy but a different offence altogether, analogous to membership of a proscribed organisation, as provided by Section 11 of the Terrorism Act 2000. Again, this is a novel offence in English law and its introduction was justified by the egregious threat to national security posed by identified terrorist organisations. The Panel is concerned that the suggestion embodied in the White Paper to introduce a parallel offence for membership of one or other shadowy organised crime group is disproportionate to the mischief alleged and a departure too far from the accepted burden on the prosecution to show both the *actus reus* and the *mens rea* of a crime.

7.4 Evidence of secondary participation on the basis of the hypothesis set out in the White Paper, that is, that the defendant may be aware he is engaging in organised crime but may be unaware of the precise nature of the criminality, will require the prosecution to prove that the defendant knew that he was participating in unlawful conduct, not merely the non-specific concept of “organised crime”. Proof of knowledge may be inferred from conduct, words or from circumstances from which the fact-finders may presume it. For example, to prove D committed an offence of conspiracy with those engaged in smuggling illegal immigrants into the UK, the prosecution would have to prove that D agreed to be a party to such smuggling and knew the elements of what was involved. If G, a don-like Mafioso decided to form an organised crime syndicate, he could invite a number of like-minded individuals to meet together to discuss “organised crime-type” activities. But unless agreement was formed that they would actually carry out an unlawful act, G would escape prosecution.

7.5 The Panel considers that the present state of the law of conspiracy and secondary participation is adequate and should not be extended in the manner suggested in the White Paper.

8. New Powers to Collect Evidence (Your paragraph 6.2)

8.1 The White Paper proposes the introduction and extension of a number of powers which are used in other contexts to assist the effective prosecution of organised criminals. Of these, the powers to require the giving of information and the production of evidence and the power to require answers to questions under compulsion are given sparingly at the moment, for specific purposes, such as to obtain proof of intricate and complex business transactions and clandestine agreements, such as

those investigated by the SFO (Section 2, Criminal Justice Act 1987) and the Office of Fair Trading (Section 193, Enterprise Act 2000). It does appear to the Panel that the investigation of major criminal gang activity involved in much serious organised crime could require and justify the use of such compulsory powers to obtain evidence, on the same basis and with the same restrictions of use as those set out in the Criminal Justice and Enterprise Acts referred to above. The Panel would like to see, in such circumstances, the use of those powers restricted to the investigation of specific offences and to senior members of SOCA and preferably, as under the Criminal Justice Act 1987, the powers restricted to civilian (i.e. non police) members of that Agency.

9. Evidential Use of Intercept Material (Your paragraph 6.2.2)

9.1 The use in evidence of intercept material, is not, in itself objectionable, and indeed, as the White Paper points out, is commonly done in other jurisdictions. The Panel awaits with interest the results of the Government review to examine how it intends to achieve the balance between the use of such material and its understandable concerns that such use must not undermine the confidential activities of the agencies involved which would diminish their effectiveness.

10. Reforming Criminal Trials (Your paragraph 6.3)

- 10.1 The Government is anxious to encourage early pleas of guilty in prosecutions of those involved in serious organised crime, not least, for the avoidance of the huge expense that fought trials of this nature involve. The Panel observes, in this context, that the surest way to achieve an early plea of guilty is to put forward a strong case against a defendant. The suggestion that judges should be able to give an indication of the likely sentence to a defendant who pleads guilty is, however, a sound one and may go some way to encourage early pleas of guilty.
- 10.2 The White Paper echoes remarks made in the past by Government ministers, who have criticised the tactics of defence lawyers abusing the legal system to delay, confuse and in every other respect attempt to throw a prosecution off course. The White Paper does not specifically criticise lawyers for the use of these tactics, but the inference is clear that it is “the best legal advice” to which organised criminals have access which is to blame. This is an unjustified sweeping slur on the legal profession which the Panel cannot support. Where there is a legitimate point to make in the

defence of a client's interests, whether at the pre-trial or the trial stage, a lawyer is duty bound to make it, however infuriating it may be to the prosecution or the investigator. It is a matter for the judge to rule out frivolous or time-wasting applications or submissions. Many judges are incapable or unwilling to show effective management of pre-trial hearings, so as to eliminate possible abuses where they do take place. It is very rare for a judge to penalise the parties, and it should be said, particularly the defence, at the pre-trial stage for failure to meet time limits or to comply with orders made. They are sometimes reluctant to rule against an application by the defence that the prosecution discloses quantities of unused documentary material which is unlikely to assist the defence but whose perusal will delay the commencement of the trial. Trial judges sometimes fail to rule against an application by a defendant for the prosecution to produce witnesses to give oral evidence, whose testimony is uncontroversial and ought to be agreed. Some trial judges allow unfettered and sometimes repetitive cross examination of prosecution witnesses. All these factors prolong the trial process. The Panel urges Government, through the good offices of the Judicial Studies Board to give attention to the training of judges who are likely to hear cases of serious and complex crime to better manage the trial and the pre-trial process.

- 10.3 It is too soon to judge the effectiveness of the provisions of the Criminal Justice Act 2003, which allow for trial by judge alone in cases where there is a danger of jury-tampering. It would be reasonable to assume that jury intimidation and bribery is most likely to occur in cases involving "professional" criminals. Again, trial judges should be encouraged to make full use of the powers granted to them in the 2003 legislation.
- 10.4 Inducing a defendant to plead guilty and to "turn Queen's Evidence" is, as the White Paper observes, something of a rarity nowadays. The encouragement of whistleblowers to come forward in return for immunity from prosecution has never been conspicuously successful and the evidence of an active participant in a crime who has not been prosecuted and is called as a witness for the prosecution is usually viewed with suspicion by the jury who feel, sometimes with justification, that his credibility may have been impugned by the fact of the "deal" he has cut with the prosecution. The Office of Fair Trading has yet to launch a criminal prosecution under Section 188 of the Enterprise Act 2000 so the effectiveness of this tool to secure sufficient evidence to prove the commission of a criminal cartel offence has not yet been tested.