

# FRAUD ADVISORY PANEL

## RESPONSE TO LORD JUSTICE AULD'S REVIEW OF THE CRIMINAL COURTS

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### **1.0 OVERVIEW**

- 1.1 The Fraud Advisory Panel (“the Panel”) warmly welcomes the extensive procedural changes recommended by Lord Justice Auld in his report and foreshadowed by the Panel in its earlier paper on procedural reform in serious fraud cases.
- 1.2 In addition to these reforms, the Panel calls for the system of independent counsel reviewing material in respect of which a claim for legal professional privilege is made to be placed on a statutory footing.
- 1.3 The Panel opposes the recommendation made by Lord Justice Auld to transfer financial and market infringements from the criminal justice process to the regulatory and disciplinary process. The Panel believes that the regulation of the financial markets is not morally neutral and that abandonment of the criminal sanction would send out the wrong message in terms of the importance of financial regulation at the present time.
- 1.4 The Panel also opposes Lord Justice Auld’s recommendation for parallel proceedings combining criminal justice and regulatory processes in fraud and financial misconduct cases because it believes that the maintenance of a profession’s integrity is exclusively a matter for the exercise of a professional body’s discretion and judgment.
- 1.5 Further, the Panel opposes the recommendation made by Lord Justice Auld that jury trial should be abolished in cases of serious or complex fraud, for the following reasons:
  - (i) No compelling case for change has been made out.
  - (ii) Lord Justice Auld is inconsistent in his approach between lengthy and complex trials in non-fraud cases, where abolition of jury trial is not recommended, and lengthy and complex trials in fraud cases, where trial by Judge and lay assessors is

recommended. No justification for the distinction between the two types of case is made out.

- (iii) It is impossible to reach an informed conclusion on the abolition of jury trial until further research is conducted on the performance of juries in long and complex cases. This research should be conducted after the extensive procedural changes recommended by Lord Justice Auld have been introduced.

## **2.0 PROCEDURAL REFORMS IN SERIOUS FRAUD TRIALS**

- 2.1 The Panel submitted proposals for procedural reforms in serious fraud cases in October 1998 in response to the Home Office Consultation Document on Juries in Serious Fraud Trials, published in February 1998.
- 2.2 The Panel is gratified to note Lord Justice Auld's acknowledgement<sup>1</sup> that he has adopted "all or most" of the Panel's proposals in his recommendations for the conduct of jury trials generally.
- 2.3 In particular, the Panel welcomes Lord Justice Auld's proposals that:
  - (i) Adequate time should be given to trial judges to enable them to manage and prepare cases assigned to them, and that they should be given suitable training as well as secretarial, administrative and technological assistance to meet their needs<sup>2</sup>;
  - (ii) There should be introduced, by way of a judicial sentencing guideline, a system of sentencing discounts graduated so that the earlier the tender of plea of guilty the higher the discount for it<sup>3</sup>;
  - (iii) The judge should be entitled formally to indicate the maximum sentence in the event of a plea of guilty at that stage and the possible sentence on conviction following a trial<sup>4</sup>;
  - (iv) More effective use of defence statements should be facilitated by general improvements to the system for preparation for trial, and encouraged through professional conduct rules, training and, in the rare cases where it might be appropriate, discipline,

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<sup>1</sup> Chapter 5, fn 212, p. 204.

<sup>2</sup> Recommendation 71, p. 39 and Recommendation 79, p. 41. See Proposals for Procedural Reform in Cases of Serious Fraud, Fraud Advisory Panel, paras 15.1 and 15.2, published in New Law Journal, [2000] NLJ 398 and 435.

<sup>3</sup> Recommendation 186, p. 53.

<sup>4</sup> Recommendation 187, p. 53.

to inculcate in criminal defence practitioners the propriety of and need for compliance with the requirements<sup>5</sup>.

- 2.4 Indeed, the Panel supports the introduction of all the recommendations put forward by Lord Justice Auld in the section headed “Case Management” in Chapter 10 of the report, headed Case Management<sup>6</sup>, and in the section dealing with trial procedures in cases of trial by jury, set out in Chapter 11 of the report<sup>7</sup>.
- 2.5 The Panel believes that Lord Justice Auld ought to have placed greater emphasis in his report on the more extensive use of admissions, agreed schedules and flow charts in serious fraud cases where there are a large number of documents. Evidence establishing extensive movements of monies, goods and/or invoicing trails can be easily presented in this way. Admissions could also be drafted in relation to the production of documents, chronologies and interviews. The sanction for failure by any party to co-operate ought to be a wasted costs order. The Panel repeats its suggestion that Rules of Court should be introduced to provide a comprehensive statutory framework to this effect<sup>8</sup>.
- 2.6 There are other recommendations put forward by Lord Justice Auld not considered in the Panel’s proposals on procedural reforms, the introduction of which are supported by the Panel.
- 2.7 Amongst these, the Panel welcomes the recommendation that:
- (i) A new statutory scheme for third party disclosure should be established<sup>9</sup>;
  - (ii) A scheme should be introduced for instruction by the court of special independent counsel to represent the interests of the defendant where the court considers prosecution applications in the absence of the defence in respect of the non-disclosure of sensitive material<sup>10</sup>.
  - (iii) Alternate or reserve jurors should be sworn in long cases to meet the contingency of a jury being reduced in number by discharge for illness or any other reason of necessity<sup>11</sup>. There is no reason why this recommendation should not apply equally to long and complex fraud cases tried by jury;

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<sup>5</sup> Recommendation 203, p. 54.

<sup>6</sup> Recommendations 208 to 223; p. 55 to 56.

<sup>7</sup> Recommendations 235 to 250, p. 58 to 60.

<sup>8</sup> See Proposals for Procedural Reform in Cases of Serious Fraud, Fraud Advisory Panel, paras 2.3 to 2.5, published in New Law Journal, [2000] NLJ 398 and 435.

<sup>9</sup> Recommendation 206, p. 55.

<sup>10</sup> Recommendation 207, p. 55.

<sup>11</sup> Recommendation 16, p. 34.

(iv) Section 8 of the Contempt of Court Act 1981 should be amended to permit enquiry by the trial judge and/or the Court of Appeal (Criminal Division) into alleged impropriety by a jury, whether in the course of its deliberations or otherwise<sup>12</sup>.

2.8 Also, the Panel warmly supports the reforms to the law of criminal evidence recommended by Lord Justice Auld in Chapter 11 of the report<sup>13</sup>.

2.9 However, the Panel believes that Lord Justice Auld ought to have placed greater emphasis in his report<sup>14</sup> on the judicial resolution of differences between expert witnesses at the preparatory hearing. The Panel repeats its suggestion that a judge could hear evidence at the preparatory hearing from experts where, for example, the expertise or integrity of an expert is impugned<sup>15</sup>.

### **3.0 LEGAL PROFESSIONAL PRIVILEGE**

3.1 The Panel believes that, in addition to the procedural reforms recommended by Lord Justice Auld, the system of independent counsel reviewing material in respect of which a claim for legal professional privilege has been made should be placed on a statutory footing<sup>16</sup>.

3.2 The recent establishment of a statutory system in The Orders for the Delivery (Procedure) Regulations 2000, implementing procedures where a production notice is served under section 20BA of the Taxes Management Act 1970 as amended, is a useful precedent which should be refined and followed more generally.

3.3 In this regard, the Panel is anxious to ensure that there are adequate procedural safeguards for a suspect / defendant, so as to ensure that where an investigating authority asserts that material does not enjoy legal privilege because it was created in furtherance of a criminal enterprise, the investigating authority ought to be required to provide the suspect / defendant with copies of all the material on which it relies in support of its assertion. Additionally, copies of material supplied by an investigating authority to independent counsel ought to be disclosed to a suspect / defendant, so that he is aware of the allegations being made against him.

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<sup>12</sup> Recommendation 29, p. 35. See Chapter 5 para 97, p. 172, where Lord Justice Auld considers the application of this reform in serious fraud trials, where alternative scenarios are often put to a jury.

<sup>13</sup> Recommendations 254 to 275, p. 61 to 63.

<sup>14</sup> See Recommendations 271 and 272.

<sup>15</sup> See Proposals for Procedural Reform in Cases of Serious Fraud, Fraud Advisory Panel, para 5, published in New Law Journal, [2000] NLJ 398 and 435.

<sup>16</sup> See R v Customs Excise Commrs ex p Popely [1999] STC 1016; R v Chesterfield JJ ex p Bramley [2000] QB 576.

#### **4.0 FINANCIAL AND MARKET INFRINGEMENTS**

- 4.1 The Panel does not support the recommendation made by Lord Justice Auld that once the Financial Services Authority has assumed full responsibility for supervision in the financial services field, consideration should be given to transferring appropriate financial and market infringements from the criminal justice process to its regulatory and disciplinary control<sup>17</sup>.
- 4.2 Whilst it is accepted that there is now a proliferation of financial and market controls supported by criminal sanctions<sup>18</sup>, the Panel believes it is important for these controls to be buttressed by the criminal process, so that condign punishment can be imposed in a small number of “bad” cases when this is appropriate.
- 4.3 Moreover, the Panel urges all agencies responsible for investigating and prosecuting financial crime to exercise their discretion to prosecute in cases where, within existing protocols, they consider criminal proceedings to be in the public interest.
- 4.4 The Panel does not believe that regulation of the financial markets is morally neutral and it is necessary, as Parliament has recognised, to stigmatise such conduct as genuinely criminal. A prohibition combined with a criminal sanction has been the standard form used for regulation of the economy since Tudor times<sup>19</sup>, and abandonment of this approach would send out the wrong message regarding the importance of financial regulation at the present time.
- 4.5 The Panel would not welcome a return to the characterisation of certain financial delinquency as “victimless crimes” and, therefore, not deserving of the stigma and punishment resulting from criminal conviction.

#### **5.0 PARALLEL PROCEEDINGS**

- 5.1 The Panel believes that there are serious objections to Lord Justice Auld’s recommendation for parallel proceedings combining criminal justice and regulatory processes in fraud and financial misconduct cases<sup>20</sup>.
- 5.2 Whilst there is often considerable factual and legal overlap between the issues raised in criminal proceedings and those raised in the regulatory process, the objective of the disciplinary process is quintessentially

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<sup>17</sup> Recommendation 145, p. 49.

<sup>18</sup> Chapter 9, para 50, p. 383.

<sup>19</sup> W. Holdsworth, A History of English Law, iv, 1929, p. 134-9.

<sup>20</sup> Recommendations 146 to 149, p. 49.

different. Sir Thomas Bingham MR (as he then was) articulated the particular considerations to be taken into account by a professional body in Bolton v Law Society [1994] 2 All ER 486 at p. 492b-f in the following terms:

“It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purposes achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is most fundamental of all: to maintain the reputation of a solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession’s most valuable asset is its collective reputation and the confidence which that inspires”.

- 5.3 The Panel believes that the second purpose to which Sir Thomas Bingham MR (as he then was) referred is exclusively a matter for the exercise of a professional body’s discretion and judgement.
- 5.4 In this connection, the Panel notes that members of a professional body’s disciplinary committee are elected by the society’s membership, or appointed by the governing Council, the members of whom will have been elected by the society’s membership<sup>21</sup>.

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<sup>21</sup> viz: General Medical Council - paragraph 1, Schedule 1, Medical Act 1983; General Dental Council, Article 11, Schedule 2, Dentists Act 1984; Royal Pharmaceutical Society, Article 1, Schedule 1, Pharmacy Act 1954; Law Society, section 46(6), Solicitors Act 1974.

- 5.5 Also, the Panel is concerned at the prospect of a criminal court undertaking a broader role in the protection of a particular profession's reputation. The judicial perception of a profession's status and reputation may be different to that held by the profession itself. There is a risk of invidious comparisons being drawn in the criminal courts between the way in which the status and reputation of particular professions are to be regarded.
- 5.6 In any event, the degree of overlap between proceedings in the criminal courts and the regulatory process is not great in practice.
- 5.7 Where a defendant is found guilty by a criminal court, proof of criminal conviction becomes a formality in the regulatory process.
- 5.8 On the other hand, where a defendant is acquitted in a criminal court, it would not be appropriate for the court to proceed to determine whether the defendant's conduct amounts to professional misconduct in breach of his profession's Code of Practice. Different considerations apply, and the presence of lay members or expert assessors to assist the Judge is no adequate substitute for a disciplinary committee, invariably composed of at least two or three members of the profession in question<sup>22</sup>.
- 5.9 Proceedings in disciplinary tribunals are governed by civil and not criminal rules of evidence and procedure. In this connection, the Panel notes the recent decisions of the Court of Appeal in Fleurose v Securities & Futures Authority, 21<sup>st</sup> December 2001, in which it was held<sup>23</sup> that Article 6(2) and (3) of the European Convention of Human Rights does not apply to regulatory proceedings in the Disciplinary Appeal Tribunal of the Securities and Futures Authority.

## 6.0 THE JURY SYSTEM

### A compelling case for change

- 6.1 The Panel agrees with Lord Justice Auld's starting point that any change to the system of trial by jury requires a compelling case<sup>24</sup>. In a later passage in the report, Lord Justice Auld states that he shares the instinct to accept the jury system "unless and until it is found so wanting that we should seek to replace it with some other mode of trial"<sup>25</sup>.

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<sup>22</sup> See fn 21.

<sup>23</sup> The Court of Appeal applied the principles set out by the Court in the earlier decision of Han & Yau v Commissioners of Customs and Excise [2001] EWCA Civ 1048.

<sup>24</sup> Chapter 5, para 2, p. 135.

<sup>25</sup> Chapter 5, para 82, p. 166.

- 6.2 As Lord Justice Auld acknowledges<sup>26</sup>, trial by jury retains its aura in contemporary times, since it involves the community in the administration of justice. In this connection, the Panel notes the observation made by Baroness Kennedy of the Shaws that:

“... jury tradition is not only about the right of the citizen to elect trial but also about the juror’s duty of citizenship. It gives people an important role as jurors – as stakeholders – in the criminal justice system. Seeing the courts in action and participating in that process maintains public trust and confidence in the law”.

There is no evidence to support a compelling case for change

- 6.3 The Runciman Royal Commission in 1993 received no evidence leading it to argue that an alternative method of arriving at a verdict in criminal trials would make the risk of a mistake significantly less<sup>27</sup>.
- 6.4 The Panel repeats its earlier call for research to be conducted to find out how jurors cope with serious fraud cases<sup>28</sup>. Indeed, the Panel does not see how a compelling case for abolition of trial by jury in serious fraud cases can be made out in the absence of such research.
- 6.5 Lord Justice Auld notes<sup>29</sup> that whilst there has been a wealth of well documented research throughout the common law world, the assistance rendered by this research is limited since most of the research has been conducted in the United States of America, which has a different form of jury trial from ours, and it has been of a non-intrusive kind. The Panel does not believe that this research assists in making any determination about how well individual jurors serving on fraud trials understood the evidence.
- 6.6 Statistics published by the Serious Fraud Office suggest that the jury system is functioning perfectly well in serious or complex fraud cases. In the twelve months to July 2001, in prosecutions brought by the Serious Fraud Office, there were 32 defendants who pleaded guilty, 22 defendants who were found guilty by a jury and 7 who were found not guilty<sup>30</sup>.
- 6.7 During the last three years investor fraud cases have constituted between 40% and 45% of the cases prosecuted by the Serious Fraud Office. Financial market manipulation has been the subject of the fraud

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<sup>26</sup> Chapter 5, para 10, p. 139.

<sup>27</sup> Report of the Royal Commission on Criminal Justice, Chapter 1, para 8, quoted by Lord Justice Auld in Chapter 5, para 3, p. 136.

<sup>28</sup> Proposals for Procedural Reform in Cases of Serious Fraud, Fraud Advisory Panel, para 14.1, published in New Law Journal, [2000] NLJ 398 and 435.

<sup>29</sup> Chapter 5, paras 83 to 85, p. 167.

<sup>30</sup> SFO Annual Report 2000/2001, Part 3, Key Facts and Figures.

in no more than 5 prosecutions brought in 1998/1999, 5 in 1999/2000, and 6 in 2000/2001<sup>31</sup>.

- 6.8 As the Panel noted in its response to the Home Office Consultation Document<sup>32</sup>, it ought to be borne in mind that dispensing with the jury in serious fraud trials may not achieve the anticipated savings in court time. Some of the complex issues that would have formed the subject matter of the second Maxwell trial were fully ventilated in a civil case<sup>33</sup> that lasted for many months in 1993 before an experienced High Court judge who gave a 600 page judgment at the end of the case.

#### Inconsistency in approach between fraud and non-fraud

- 6.9 The jury research commissioned by Lord Justice Auld expressly records that it “made no attempt to examine research into complex and lengthy serious fraud trials, or to suggest how they could be improved. Fraud trials are not all complex and complex and/or lengthy trials may be of crimes other than fraud”<sup>34</sup>.
- 6.10 It is axiomatic to record that long trials frequently occur in cases involving allegations of drug-trafficking, multiple instances of violent behaviour, hijacking, illegal immigration, child abuse, and public disorder offences such as affray.
- 6.11 Accordingly, the Panel believes that Lord Justice Auld has adopted an approach in cases of serious fraud which does not sit easily with his procedural recommendations to be applied in non-fraud cases where long trials are involved.

#### Conclusion

- 6.12 Against this background, the Panel remains of the clear view that the case for abolition of juries in serious fraud trials has not been made out by Lord Justice Auld in his Review.
- 6.13 The Panel urges the Government to implement at the earliest opportunity the extensive procedural reforms recommended by Lord Justice Auld before making a decision on the removal of trial by jury in serious or complex fraud cases.
- 6.14 It is only after these procedural reforms have been introduced and their effect monitored can any informed decision be taken on the future of

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<sup>31</sup> See fn 30.

<sup>32</sup> Proposals for Procedural Reform in Cases of Serious Fraud, Fraud Advisory Panel, para 16.2, published in New Law Journal, [2000] NLJ 398 and 435.

<sup>33</sup> Macmillan Inc v Bishopsgate Investment Trust plc, 10<sup>th</sup> December 1993, unreported, Millett J (as he then was). Reference is made to the judgment in an associated case, MGN v Bank of America [1995] 2 All ER 355, by Lindsay J at p. 358b-c.

<sup>34</sup> Derbyshire, What Can We Learn from Published Jury Research, [2001] Cr L R 970 at p. 979.

trial by jury in long and/or complex cases, irrespective of whether an allegation of fraud is involved or not.

#### Acknowledgement

- 6.15 In preparing the Panel's response on the abolition of jury trial in serious or complex fraud cases, the authors gratefully acknowledge the assistance rendered to them by David Corker and David Rowe-Francis in discussion documents<sup>35</sup> circulated amongst members of the Panel in advance of its meeting on the 13<sup>th</sup> December 2001.

16<sup>th</sup> January 2002

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<sup>35</sup> Corker, Trying Fraud Cases Without Juries; Rowe-Francis, Does the Fraud Advisory Panel agree with Lord Justice Auld's recommendation that juries should be abolished for complex or serious fraud trials?