



Response to the Sentencing Advisory Panel Consultation Paper

Sentencing for Fraud Offences

December 2007

1. INTRODUCTION

- 1.1 The Fraud Advisory Panel (the “Panel”) is an independent body of volunteers drawn from the public and private sectors. The Panel’s role is to raise awareness of the immense social and economic damage that is caused by fraud and to help both the public and private sectors, and the public at large, to fight back.
- 1.2 Members of the Panel include representatives from the law and accountancy professions, industry associations, financial institutions, government agencies, law enforcement, regulatory authorities and academia. The Panel works to encourage a truly multi-disciplinary perspective on fraud.
- 1.3 The Panel was established in 1998 through a public-spirited initiative by the Institute of Chartered Accountants in England and Wales. Today, it is a registered charity and company limited by guarantee. The Panel is funded by subscription, donation and sponsorship.
- 1.4 The Fraud Advisory Panel welcomes the opportunity to respond to the Sentencing Advisory Panel's consultation paper on sentencing for fraud offences.
- 1.5 This response has been prepared on behalf of the Fraud Advisory Panel by Jonathan Fisher QC at 23 Essex Street.

2. GENERAL REMARKS

- 2.1 The Fraud Advisory Panel broadly welcomes the tenor of the Sentencing Advisory Council’s Consultation Paper, “Sentencing For Fraud Offences”.
- 2.2 A wider context. In so far as the Panel has reservations about the approach adopted by the Sentencing Advisory Council, these focus on the perceived artificiality of considering sentencing policy in a vacuum, since the wider issues of asset confiscation, victim compensation and the discount resulting from a plea bargain ought to be taken into account. In this regard, the Panel is concerned that the Consultation Paper’s recommendations are not sufficiently “victim centric”.
- 2.3 Confiscation. The Panel considers that the imposition of confiscation orders are a powerful penalty for those who commit fraud offences. Experience in practice

suggests that fraud offenders fear the imposition of a confiscation order to the same extent as they fear the imposition of a custodial sentence. Against this background, the Panel believes that it is of paramount importance for the Government to ensure that confiscation orders are strictly and effectively enforced.

- 2.4 Compensation. It is axiomatic to record that victims can be compensated in respect of their losses from the proceeds of a confiscation order.
- 2.5 Plea bargaining. The Panel believes that sentencing policy cannot be divorced from the issue of plea bargaining and the importance of encouraging guilty pleas in serious and complex fraud cases.
- 2.6 The Panel perceives that there is a tension between the offering of significant incentives to defendants to plead guilty and the need for transparency in so far as the public is concerned.
- 2.7 Sentencing bands. In determining the custodial bands for sentencing in fraud cases, the Panel believes that it would be mistaken to place too great an emphasis on the financial loss caused by the fraud at the expense of the effect on the victims.
- 2.8 In particular, the Panel is keen to ensure that longer custodial sentences should be imposed on those who target vulnerable victims. A sentencing Court ought to consider carefully the number and type of vulnerable victims targeted in a fraud case, with full weight accorded to the social as well as the economic impact of the fraud on the victim.
- 2.9 Where there has been a degree of sophisticated professional planning in the commission of fraud, this too should influence a sentencing Court more extensively than the extent of financial loss which has been caused.
- 2.10 Specifically, the Panel expresses a degree of concern in relation to the “nature of harm” aspects of the Consultation Paper’s sentencing bands¹, especially as the category described as “high value (including sentimental value) of property to the victim” is potentially ambiguous. To clarify this phrase, the Panel recommends the category should be described as “relative high value ... property”, so that the sentencing Court is clear that the assessment of property value (including sentimental value) is *relative* to the victim in the case.

¹ Consultation question 8, Attachment 1, page 2.

2.11 Additional factors to be taken into account. Whilst the more sophisticated articulation of sentencing bands is to be applauded, the Panel is concerned that there are three factors which have not been fully reflected in the development of these sentencing bands. In particular, the Panel points to –

- a) the degree of pre-determined professional planning in the commission of a fraud;
- b) the treatment of recidivists who commit fraud;
- c) the use of electronic technology in the commission of fraud.

2.12 The Panel notes that the imposition of extended sentences of imprisonment in fraud cases will not have any significant impact in terms of deterrence upon those who are tempted to commit fraud when a multitude of problems in the investigation and prosecution of fraud cases remains extant.

3. CONSULTATION QUESTIONS

3.1 In response to the questions set out in the Consultation Paper, the Panel respectfully responds as follows:

3.2 **Do you have any comments to make about the change in the proportion of offenders by gender, identified in paragraph 20?** (Your Question 1)

3.3 No comment.

3.4 **Do you agree with the approaches adopted in Mills and Kefford? If not, why not?** (Your Question 2)

3.5 This issue is addressed above.

3.6 **In what circumstances, if any, should a court consider imposing a fine alongside a custodial sentence for a fraud offence?** (Your Question 3)

- 3.7 The Panel believes that there is no reason in principle why a fine should not be considered alongside a custodial sentence, confiscation and compensation orders.
- 3.8 **Do you agree with the Panel's conclusions about the effect of ancillary orders on sentence?** (Your Question 4)
- 3.9 No comment.
- 3.10 **Is using a dead person's identity to commit a fraud more or less serious than using a living person's identity, or is the level of seriousness the same? Why?** (Your Question 5)
- 3.11 The Panel considers that using a dead person's identity is indicative of an extensive degree of sophistication in the commission of the offence which increases the level of the offender's culpability.
- 3.12 **Do you agree that an offender who submits an entirely fraudulent claim is more culpable than an offender who fraudulently exaggerates a genuine claim by the same amount, or is the level of culpability the same? Why?** (Your Question 6)
- 3.13 This is addressed above.
- 3.14 **Are there any aggravating or mitigating factors that you feel should not be included in the list in Annex C? Are you aware of any other aggravating or mitigating factors which should be included in that list? Why?** (Your Question 7)
- 3.15 A mitigating factor which could be included is the poor state of the offender's health.
- 3.16 **Do you agree with the proposed starting points and ranges for confidence tricks?** (Your Question 8)
- 3.17 The Panel broadly agrees with the starting points and ranges.
- 3.18 **Do you agree with the proposed starting points and ranges for e-fraud and possessing, making or supplying articles for use in frauds?** (Your Question 9)

- 3.19 The Panel disagrees with the low sentences proposed for making/supplying/possessing articles for use in frauds. The Panel considers that where there is an abuse of a fiduciary relationship, a position of trust or of public position, this ought to be considered as a significant aggravating feature in the case.
- 3.20 **Are you aware of any reasons for the significant drop in the number of convictions for excise duty evasion?** (Your Question 10)
- 3.21 No comment.
- 3.22 **Do you agree with the Panel's approach of providing a single guideline to cover fraud against HM Revenue and Customs, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud?** (Your Question 11)
- 3.23 The Panel disagrees with the approach of providing a single guideline and supports the element of judicial discretion in sentencing.
- 3.24 **Do you agree with the proposed starting points and ranges for fraud against HM Revenue and Customs, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud?** (Your Question 12)
- 3.25 The Panel disagrees with the proposed starting points and ranges for fraud as the Panel would welcome the judiciary retaining some flexibility to take into account the variety of circumstances in these cases. The Panel considers it to be artificial to constrain sentencing in these type of cases by placing them into one of five bands.
- 3.26 **Issues relating to the diversity of offenders have been discussed throughout this paper where they arise. More broadly, the Panel is interested to hear your views regarding whether any of its proposals are likely to impact disproportionately on some offenders by reason of their gender, age, disability, race or ethnic group.** (Your Question 13)
- 3.27 No comment.