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**Response to the Home Office Consultation Paper**

**New Powers Against Organised and Financial Crime**

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October 2006

## 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 Government Green Paper “New Powers Against Organised and Financial Crime” Cm 6875.
- 1.5 This response has been prepared on behalf of the Fraud Advisory Panel by a subgroup comprising of members from the Investigation, Prosecution and Law Reform Working Group.

## 2. DATA-SHARING

### **Information Sharing Within and Between Sectors (Your Question 1)**

#### *Information Sharing Within the Public Sector*

- 2.1 The public have a right to expect the state to afford a reasonable level of protection from crime, including fraud and financial crime.
- 2.2 The Fraud Advisory Panel agrees with the general principle that the responsible and proportionate sharing of data held by public bodies in order to detect, investigate and prosecute fraud is a legitimate objective. We believe that the private sector also

has an important role to play in combating fraud and increased data sharing between the public and private sectors is an effective way of doing so, subject to the requirement that such sharing is carried out in a manner which is compatible with the Data Protection Act 1998 and with appropriate safeguards to protect an individual's personal information, and other sensitive information held by the private sector, from misuse or abuse.

- 2.3 The Panel believes that a more consistent approach to fraud prevention across the public sector will result in a more effective response to fraud and financial crime and significant long-term cost savings. The potential for savings has already been demonstrated by the Audit Commission's National Fraud Initiative (NFI) which cost £1 million and saved £111 million in 2004/05<sup>1</sup>.

#### *Information Sharing Between the Public and Private Sectors*

- 2.4 The debate about data sharing between public and private sectors is in its infancy (see 'Government Fraud Review' and 'Information Sharing Vision Statement' DCA 47/06). We take the view that the appropriate way forward at this stage is to engage in the debate in general terms and that discussion of specific proposals should be left until the Government has published detailed consultation documents.
- 2.5 Questions relating to the type of information shared (factual vs. suspicions), issues of accessibility, accountability, transparency and mechanisms for information exchange must be adequately addressed and safeguards implemented before any data-sharing between the public and private sectors commences on a formalised and large-scale basis.
- 2.6 The Panel believes that there are benefits to be gained from sharing data on reported frauds between the public and private sectors. These have already been demonstrated by the pilot exercise with CIFAS – the UK's Fraud Prevention Service ("CIFAS")<sup>2</sup> and this could be extended to include other organisations.
- 2.7 There are also likely to be benefits in preventing and detecting fraud, particularly identity fraud, in sharing information on deceased persons.

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<sup>1</sup> Government Fraud Review. *Fraud Review: Final Report*. July 2006. Also see Audit Commission. *National Fraud Initiative 2004/05*. May 2006

<sup>2</sup> Home Office. *New Powers Against Organised and Financial Crime*. July 2006.

- 2.8 Recent research commissioned by the Panel recommended that information relating to deceased persons should be made available to appropriate persons or bodies, subject to adequate safeguards<sup>3</sup>.

*Safeguarding Information / Appropriate Vehicle for Data-sharing*

- 2.9 There is a risk that information that is not properly dealt with could contribute to the incidence of identity fraud or other forms of fraud and financial crime. Therefore it is important that clear rules of engagement and proper safeguards and controls are put in place if greater sharing of data is to occur between the private and public sectors.
- 2.10 The flow of this information between the private and public sectors must be strictly controlled. It is unlikely that the public will find it acceptable for private sector organisations to have access to records held by public sector bodies.
- 2.11 However such information could conceivably be channelled through an organisation in a similar way to the Criminal Records Bureau or the National Fraud Reporting Centre currently being proposed by the Government Fraud Review<sup>4</sup>. As a public sector body, this agency could perform checks on high risk individuals on behalf of public and private sector organisations and provide results within a certain level of tolerance (rather than disclose actual personal details for the individual) in much a similar way to the current Suspicious Activity Reports (SARs) regime.
- 2.12 Regardless of delivery mechanism robust safeguards must be introduced to ensure that only the information relevant to a particular enquiry is released and that this is to an individual authorised to receive it. The accuracy of the data which is shared is also vital; inaccurate data leads to inaccurate conclusions and potentially serious consequences to innocent parties. Safeguards must ensure data accuracy, perhaps through the use of rigorous audits prior to sharing.
- 2.13 CIFAS could be used as a vehicle for data-sharing between the public and private sectors at least initially, pending the final outcome of the fraud review process.

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<sup>3</sup> Fraud Advisory Panel. *Perceptions on the Impact of Data Protection Legislation on the Successful Private Sector Investigation of Fraud: A preliminary study*. March 2006.

<sup>4</sup> Government Fraud Review. *Fraud Review: Final report*. July 2006.

- 2.14 There is some concern that current security systems may not be robust enough to ensure that data is adequately protected from misuse or abuse through hacking, ransom-ware, theft of databases etc. Therefore existing systems must be reviewed with a view to additional security mechanisms being established to minimise exposure to these types of risks.
- 2.15 There are also important caveats about protecting the rights of the individual in giving informed consent, and the potential marginalisation of certain sectors of society, particularly those who refuse to consent to the sharing of their information between the public and private sector. Furthermore, the private sector exposes itself to potential liability when sharing data, therefore a clear legal framework must be established in order to give the private sector a basis upon which to share data.
- 2.16 We believe that guidance should be issued by the Information Commissioner in order to assist both the public and private sector on the acceptable scope of data sharing.

#### **Scope of the National Fraud Initiative (Your Question 2)**

- 2.17 The Panel agrees that the scope of the Audit Commission's NFI should be expanded and placed on a statutory footing in order to increase its capacity to detect fraud within the public sector.

#### **Suspicious Activity Reports (Your Question 3)**

- 2.18 The Panel agrees that the Serious Organised Crime Agency (SOCA) should match SARs received from the regulated sector against a range of appropriate public sector databases, particularly HMRC and DWP but also DVLA, Identity and Passport Service and local authorities, subject to appropriate safeguards to protect the identity of the person and organisation submitting the report. This information should not be disclosed in any dissemination to other public sector bodies.

#### **Data Matching/Mining to Identify Suspicious Profiles (Your Question 4)**

- 2.19 Data-mining of public and private sector databases to detect and prevent criminal activity is clearly a more contentious activity than the sharing of information.

- 2.20 The Panel recommends that more analysis work is undertaken to identify priority areas for data-mining and the appropriate parameters for such exercises, noting that any such exercises must be targeted and proportionate to the harm it is seeking to prevent and the level of effort required by law enforcement to act.

### **3. THE CRIMINAL LAW (Your Questions 5 - 6)**

- 3.1 The Panel has no comments to make on the proposals to restrict clause 2 of the Law Commission's draft Bill or to extend liability to those who indirectly encourage or assist a person.

### **4. ORGANISED CRIME PREVENTION ORDERS (Your Questions 7 - 9)**

- 4.1 The Green Paper proposes the introduction of civil Serious Crime Prevention Orders to impose binding conditions to prevent individuals or organisations from facilitating serious crime. These might include restrictions on financial dealings or the amount of cash an individual may carry, or require an individual to divest ownership of certain possessions.
- 4.2 Research into the success of Anti-Social Behaviour Orders (ASBOs) in deterring and preventing anti-social behaviour suggests that Serious Crime Prevention Orders may only have limited effectiveness in deterring and preventing fraud. For example over one-third (36%) of individuals who received an ASBO in July to September 2000 had breached their order within a year<sup>5</sup>.
- 4.3 However there may be a role for Serious Crime Prevention Orders to limit movement of individuals (perhaps in conjunction with tagging in specific circumstances), or the movement of funds.
- 4.4 Therefore the Panel recommends that a pilot study of Serious Crime Prevention Orders be undertaken to define what they are, how they are to be served, and how they will be enforced in order to determine the potential effectiveness of such

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<sup>5</sup> Campbell, Siobhan. *A Review of Anti-Social Behaviour Orders: Home Office Research Study 236*. (January 2002).

preventative orders in disrupting criminal activity and identify any increased costs to law enforcement in monitoring compliance.

- 4.5 The Panel has no comments to make on whether the prosecution should be required specifically to draw the court's attention to relevant facts about the impact of potential orders upon the interests of third parties.

## **5. PROCEEDS OF CRIME**

### **Proposed New Measures (Your Question 10)**

#### *Measures to Merge Confiscation and Enforcement Hearings*

- 5.1 There appear to be obvious benefits from merging confiscation and enforcement hearings as follows:
- a) Having one hearing ought to reduce the time and costs of both the prosecuting authorities and the courts; and
  - b) There is less scope for inconsistent findings of fact between the two stages.
- 5.2 However, while merging confiscation and enforcement hearings may remove the sometimes lengthy litigation as to what are the Defendant's assets that follows a confiscation hearing, the confiscation hearing itself may become far more complicated and lengthy.
- 5.3 In addition, bringing forward the time for when challenges are to be made by third parties as to the ownership of assets may result in challenges that would not otherwise be made by those third parties. For example, under the present system a Defendant can pay the amount of the compensation order without the need for enforcement and without the need to hear third party challenges in respect of particular assets.
- 5.4 On balance it is probably better for the two to be merged. Under the present system there may be serious challenges as to the ownership of assets at both the confiscation hearing and enforcement hearing stages to enable third parties to have

what amounts to “two bites of the cherry”. Therefore it will probably be more efficient for all issues to be disposed of at a single hearing.

#### *Contracting Out Enforcement of Confiscation Orders*

- 5.5 There is a great deal of expertise gained over a number of years by certain civil law practitioners specialising in asset recovery. In more complex cases, for example those involving trust assets, assets in foreign jurisdictions and piercing of the corporate veil, that expertise may be invaluable in making the difference between successfully enforcing a confiscation order and failing to do so.
- 5.6 The expertise gained by civil practitioners also extends to the freezing of assets at an early stage, without notice to a Defendant. Therefore the involvement of experienced civil practitioners with expertise in asset recovery at all stages of the process could be of invaluable assistance.
- 5.7 Expertise also exists in the private sector in various aspects of confiscation and enforcement such as investigators, forensic experts and accountants that could assist in the confiscation and enforcement process.
- 5.8 If used properly such expertise could make recovery more efficient and “free up” resources of the prosecuting authorities to deal with more cases.
- 5.9 The obvious potential drawback is the cost. Experienced civil law practitioners are not cheap. A major criterion in outsourcing government work is often who will undertake the job for the lowest sum. In specialist asset tracing cases, this can be a false economy. Experienced civil law practitioners are successful in the private sector because they consistently achieve better results than others who may be cheaper to retain; it makes commercial sense to use them.
- 5.10 The Panel believes that what needs to be achieved is proper overall and demonstrable control over the work that is outsourced. The prosecuting authorities need to continually consider the costs/benefit ratio in the same way as a client in the private sector will carefully scrutinise the way in which his or her money is spent by their enforcement team. As in the private sector, those who deliver value for money will be the ones who ultimately receive a greater number of instructions, minimising the amount of outsourcing that does not achieve value for money.

- 5.11 Where costs are justified we believe that they should be borne by the confiscated assets.

*Extending Certain Search and Seizure Powers to All Financial Investigators*

- 5.12 We favour extending powers in order to give financial investigators the tools to do the task given to them but this must be subject to rigorous safeguards against abuse.
- 5.13 The extension of search and seizure powers may be of great benefit. They are powerful weapons in the fight against criminals, who might otherwise destroy or conceal evidence.
- 5.14 However, the extension of search and seizure powers is not a matter that should be taken lightly. It is a draconian power and the rights of the potentially innocent respondents must be properly safeguarded.
- 5.15 In civil proceedings the courts have over the years developed safeguards for the respondents, many of which, but not all, are reflected in the process of obtaining and executing a search and seizure warrant. If the powers of search and seizure are to be extended, then it may be best to incorporate more of the safeguards of civil search orders.
- 5.16 In addition, safeguards should also include provision for Legal Aid to be available to individuals, against whom these powers are exercised, including those investigations where Legal Aid has not previously been available. Consideration should also be given to the extension of the Legal Aid Representation Order to cover enforcement proceedings.

**Money Laundering (Your Question 11)**

- 5.17 The Panel congratulates the Serious Organised Crime Agency (SOCA) for the recent improvements made to the response times to consent requests made in SARs.

5.18 It is difficult to achieve a balance between maintaining existing benefits to law enforcement and enabling suspension of transactions or activity with a client without causing suspicion. Possible areas for consideration are:

- a) The lower the value of the asset in question, the less the benefit may be to the enforcement authorities of delaying the transaction whilst steps are taken to seize and restrain the assets or by the disruption to the criminal activity. It may therefore be that a de minimis approach to suspending the transaction be adopted (ie. that it need not be suspended if lower than a particular sum, say, £10,000).
- b) The enforcement authorities should perhaps be required to prioritise those suspicious transaction reports (to decide whether to give clearance for the transaction) where they are informed by the reporting party that suspension of the transaction for seven days will give rise to suspicion, subject to appropriate safeguards to prevent delays in processing reports.