

RESPONSE TO THIRTEENTH PROGRAMME OF LAW REFORM PUBLISHED 14 JULY 2016

The Fraud Advisory Panel welcomes the opportunity to comment on the *Thirteenth Programme of Law Reform*, published by the Law Commission on 14 July 2016, a copy of which is available from this [link](#).

This response of 31 October 2016 has been prepared on behalf of the Fraud Advisory Panel by the board of trustee directors.

We are happy to discuss any aspect of our comments and to take part in all further consultations on the issues we've highlighted in our response.

Contents	Paragraphs
Introduction	1
Responses to specific questions	2 – 61
A. Banks' duties to customers	2 – 35
B. Criminal Procedure and Investigation Act 1996	36 – 61

The Fraud Advisory Panel (the 'Panel') is an anti-fraud charity and membership organisation.

Established in 1998 the Panel is an independent voice of the fraud-fighting community. We lead the drive to improve fraud awareness, understanding and resilience and are committed to ensuring that everyone has the knowledge, skills and resources they need to protect themselves and their families, friends and colleagues against fraud.

The Panel provides leadership and practical support to almost 300 corporate and individual members drawn from the public, private and voluntary sectors and many different professions. All are united by a common concern about fraud and a shared determination to do something about it.

Copyright © Fraud Advisory Panel 2016
All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and Fraud Advisory Panel reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact info@fraudadvisorypanel.org

www.fraudadvisorypanel.org

INTRODUCTION

1. We support the project identified by the Law Commission on banks' duties to customers. In addition, we also believe that urgent consideration should be given to the Criminal Procedure and Investigation Act 1996 (CPIA) and code of practice.

RESPONSES TO SPECIFIC QUESTIONS

A. BANKS' DUTIES TO CUSTOMERS

Q1: In general terms what is the problem that requires reform?

2. We believe that in certain circumstances banks fail in their duties to pay due regard to the interests of their personal and business customers and to treat them fairly, particularly when those customers have been the victims of non-credit card related banking fraud (such as bank transfer fraud, mandate fraud and payment diversion fraud).
3. It is our view that banks do not deploy the same level of advanced technology and due diligence to protect customer's current and savings accounts from fraud as they apply to plastic card and other accounts where the bank is at risk of suffering a loss. This may be because there is no legal obligation for them to do so, and results in customers bearing a greater risk of loss than the banks themselves.
4. More specifically we are concerned that:
 - 4.1. Banks do not do enough to provide their customers with greater certainty that the stated beneficiary of an intended payment corresponds with the name of the account holder (i.e. is the genuine beneficiary) before a customer authorises a payment. According to research carried out by Payments UK more than 55% of customers incorrectly believe that banks check the recipient's name when an electronic payment is sent.¹ However banks check the account number and sort code in a payment instruction and not the account holder's name. This means that even slight alterations to an account name can go undetected.
 - 4.2. When a customer unwittingly makes a payment to an account operated by a fraudster and bearing a different name, banks will decline to disclose the name (or company name) of the suspected fraudster that would enable the customer to identify the perpetrator(s) and therefore detect fraud and protect themselves from further victimisation. Instead the victim is compelled, immediately in the aftermath of suffering loss, to instigate court proceedings to gain access to this information by seeking a court order to direct the recipient bank to disclose the information needed for a thorough investigation, thus compounding their loss and causing delay in achieving redress.
5. Both these circumstances are unhelpful in the fight against fraud and financial crime. Financial institutions and customers have a shared role and responsibility to prevent these types of crimes.
6. Finally, we are also concerned that when banks do reimburse customers for failures it seems to mean that no further action is taken, thus perpetuating future risk and potentially skewing the crime statistics as many of these cases go unreported to the authorities.

¹ Payments UK (2016), *Payments Made in Error?* available from this [link](#).

Q2: Can you give an example of what happens in practice?

7. A fraudster opens a bank account using either fake or genuine documents and is given an account in their name with an account number and sort code. The fraudster deceives a victim to purchase goods, services or investments and to make an electronic payment to their bank account but showing a name that is different to that which corresponds with the account number and sort code.
8. The victim is reassured that the transaction is legitimate because the payment is made to a UK bank account and falsely believes that the bank has checked the account holder. The victim transfers a large sum of money (usually c.£50,000 and not within the normal behaviour associated with the customer's account) from his/her bank account to the fraudsters.
9. The fraud is discovered either by the victim when they realise they have been deceived or by a bank that identifies suspicious activity on the fraudsters account that received the money. The customer confirms they have been deceived into sending money and asks their bank to return the money and provide details of the fraudster and the account to which money was sent.
10. The victim's bank may be able to confirm with the recipient's bank that the bank account was used for fraud and that the money it contained has been withdrawn and cannot be recovered. The bank declines to provide the victim with any details about the fraudster or the account without a court order and advises them to report the matter to Action Fraud.
11. The victim does not have the resources to obtain a court order but reports the fraud to Action Fraud. However, because there are no lines of enquiry to follow such as the names and addresses of suspects, the case is not investigated by the police.
12. The customer has lost £50,000 and the bank has not (or is not permitted to) give them information about the fraudster that could be used to launch their own investigation and take steps to prevent themselves from falling victim to further crime.

Q3: To which area(s) of law does the problem relate?

13. Consumer law, criminal law and regulatory law.

Q4: We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation or journal articles that relate to this problem.

14. Tidal Energy Limited vs. Bank of Scotland 2013 and the Payment Service Regulations 2009 (see Regulation 74).

Q5: Can you give us information about how the problem is approached in other legal systems?

15. On 06 September 2016 the United States Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued an advisory to US financial institutions warning of an increase in the number of email compromise scams designed to defraud financial institutions and their customers. The advisory note is available from this [link](#).
16. It stated that careful review and verification of customers' transaction instructions and their circumstances was needed to detect and stop these scams and highlighted a number of red flags. These included instances whereby 'e-mailed transaction instructions direct payment to a known beneficiary; however, the beneficiary's account information is different from what was previously used' (see page 6).

Q6: Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

17. Throughout the UK.

Q7: What do you think needs to be done to solve the problem?

18. A regulatory requirement should be introduced on UK banks to:

18.1. perform checks to ensure that the beneficiary of an intended payment is the genuine intended beneficiary before a customer authorises a payment; and

18.2. introduce monitoring systems to protect the personal and business accounts of customers along the lines of those used to verify credit card payments (such as algorithms and fuzzy-matching that identify anomalies).

19. In addition, consideration should also be given to amending data protection legislation to permit banks to share information with fraud victims in certain specified circumstances when a payment has been made to a fraudster's account to enable prompt investigation to be undertaken.

Q8: What is the scale of the problem?

20. According to latest crime statistics released by the Office for National Statistics there were 5.6m fraud and computer misuse offences in the past year. The most common types of fraud experienced were bank and credit account fraud.²

21. Figures released by Financial Fraud Action UK (FFA UK), which represents the UK payments industry on financial crime issues, indicate that financial fraud increased by a quarter to £399.5m in the first half of 2016. Online banking fraud, including cases in which customers were duped into making fraudulent money transfers, increased by 64% to £133.5m.³

22. Individuals who fall prey to investment-based frauds suffer some of the highest losses. These can run into millions of pounds for a single victim. Yet investment fraudsters are almost entirely dependent upon the banking system to facilitate their crime because it enables them to open bank accounts to accept payments from victims.

23. Mandate fraud (also known as creditor fraud, payment diversion fraud and supplier takeover fraud) can cause single transaction losses in the low hundreds of pounds to reported cases in excess of £5m.

24. According to recent research by Which? three in five people don't realise that they have no consumer protection from their bank if they are scammed into making a bank transfer, and one in ten either knew someone that had or had themselves made a bank transfer payment to a fraudster's account.⁴

Q9: What would be the benefits of reform? In particular, can you identify any economic benefits (costs of the problem that would be saved by reform) or other benefits (such as societal or environmental benefits)?

² Office for National Statistics (2016), *Statistical Bulletin: Crime in England and Wales: year ended June 2016*, available from this [link](#). (See chapter 11 on 'what's happening to trends in fraud?').

³ Financial Fraud Action UK (2016), *Fraud the Facts 2016*, available from this [link](#).

⁴ Which? (2016), *Which? makes super-complaint: banks must protect those tricked into a bank transfer*, available from this [link](#).

25. Possible benefits of reform include deterring more criminals from using the UK banking system to facilitate fraud and therefore protect more UK bank customers against the risk of victimisation.
26. An example of what banks can do to address this problem is evidenced in the results of a pilot scheme undertaken by Royal Bank of Scotland / NatWest in Scotland.
27. NatWest uses technology to monitor unusual transactions on customer's accounts. Cases that meet a certain criteria are passed onto an Investment Scams Team to take action to protect customers. Since 2015, this team has proactively contacted customers they have identified as potential victims of investment fraud and have protected them from mistakenly paying out in excess of £8m to suspected fraudsters. It also has a team of Community Protection Managers who work with frontline staff and customers to proactively raise awareness of customer vulnerabilities, local scams and to make sure they are dealt with in the best possible way. This team has protected more than £70m of customer losses since their launch in July 2015.

Q10: If this area of law is reformed, can you identify what the costs of reform might be?

28. We are not in a position to assess the cost implications of reform, though we do expect that banks will bear additional compliance costs.

Q11: Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

29. Anyone with a UK bank account is at risk of being defrauded by organised and determined criminals. People with substantial savings or investments, limited investment experience, and/or are vulnerable, are at risk of losing significant sums of money.

Q12: In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

30. The Law Commission itself has identified banks' duties to customers as an area of law that may require reform, and cited that the Financial Services Consumer Panel has argued that the existing FCA regime 'does not protect customers of financial services as it should'.

Q13: Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

31. No.

Q14: Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

32. In September 2016 consumer watchdog Which? announced that it was making a 'scams super complaint' to the Payment Systems Regulator and alerting the Financial Conduct Authority, calling for banks to better protect customers who are tricked into transferring money to a fraudster.⁵
33. We understand that this problem is also being considered by the Payments Strategy Forum (the 'PSF'), a body established by the Payments Systems Regulator in October 2015. In July 2016 it published a strategy document for consultation which proposes a co-ordinated campaign to give

⁵ Ibid.

consumers and businesses the tools to help reduce the threat of becoming crime victims and further work on data sharing between banks and other agencies to tackle fraud, money laundering and sanctions.⁶ It does not consider the difficulties that customers experience when seeking information from a bank about a fraud to which they have been victim.

34. The PSF strategy is comprehensive and if it is accepted it is envisaged that customers will benefit from far better services and more transaction data including assurance about payees. However these changes to banking infrastructure will take considerable time to implement and unless an interim solution is put in place, customers will continue to be exposed to risks that can and should be mitigated.
35. The outcomes of the Bank of England's review into the real-time gross settlement (RTGS) standards and processes is also likely to be relevant.⁷

B. CRIMINAL PROCEDURE AND INVESTIGATION ACT 1996

Q1: In general terms what is the problem that requires reform?

36. Overall, we believe that the current disclosure regime is not fit for purpose, particularly in cases of serious and complex fraud.
37. Under the Criminal Procedure and Investigation Act 1996 (the 'CPIA') investigators are required to pursue all reasonable lines of enquiry whether or not they establish guilt. This compels investigators to widen their investigation far beyond what is needed to make a case and results in the seizure of large volumes of material, much of which will never be used but must still be considered, documented and disclosed to the defence if the material might assist the defence or undermine the prosecution case.
38. Our concerns remain unchanged since they were first voiced in 2006⁸ and have been highlighted again in our much more recent report, *The Fraud Review: Ten years on*, published in July this year:
 - 38.1. 'In a modern serious and complex fraud case, perhaps involving the activities of a large organisation over several years, the unused evidence can run to millions of individual items. The prosecution resources devoted to investigating the facts are frequently dwarfed by the effort needed to sift, analyse and catalogue a mountain of unused material.
 - 38.2. Disclosure also creates many opportunities for the defence to delay the trial, or even to derail it completely. In serious and complex fraud cases, abuse of process applications by the defence have now become commonplace.
 - 38.3. The disclosure process is so complicated, burdensome and stressful for prosecutors that the risk of a mistake is increased. An accidental failure can be grounds for a conviction to be quashed even when the defendant has pleaded guilty.'⁹

Q2: Can you give an example of what happens in practice?

39. In large and complex fraud cases, the exercise of providing disclosure under the CPIA can require a team of lawyers to work full-time for at least a year. This exercise rarely produces any

⁶ Payments Strategy Forum (2016), *Being responsive to user needs: a draft strategy for consultation*, available from this [link](#).

⁷ Bank of England (2016), *RTGS strategy review*, available from this [link](#).

⁸ Fraud Advisory Panel (2006), *Improving the Investigation and Prosecution of Serious Fraud*, available from this [link](#).
Fraud Advisory Panel (2006), *Bringing to Book: Tackling the crisis in the investigation and prosecution of serious fraud*, available from this [link](#).

⁹ Fraud Advisory Panel (2016), *The Fraud Review: Ten Years On*, available from this [link](#). (See page 19).

documents of real significance for the defence, such that it might assist their case or undermine the prosecution. The cost, in pure manpower terms, is often more than £250,000.

Q3: To which area(s) of law does the problem relate?

40. The criminal law. It can also affect the civil claims by the victims causing delay in access to material by the investigators, both criminal and civil whilst the lawyers review the documents.

Q4: We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation or journal articles that relate to this problem.

41. The main legislation is the Criminal Procedure and Investigation Act 1996 and codes of practice.

42. In addition, the Criminal Procedure Rules 2012, the Attorney General's guidelines on disclosure for investigators, prosecutors and defence practitioners (December 2013) incorporating the Supplementary Guidelines on Digital Material 201 and the Judicial Protocol for the Disclosure of Unused Material in Criminal Cases.

Q5: Can you give us information about how the problem is approached in other legal systems?

43. We highlighted the US and German approach in our special report *Improving the Investigation and Prosecution of Fraud*.

Q6: Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

44. The problem occurs in England and Wales in complex fraud cases. We do not comment here on Scotland and Northern Ireland.

Q7: What do you think needs to be done to solve the problem?

45. It is essential that an investigating authority has the right to close down an unpromising line of enquiry.

46. The suspects in a fraud case will often be best placed to identify evidence which will support their pleas. Relying on investigators to find evidence on the defendant's behalf, and decide whether it is relevant, is unsatisfactory and distracts them from their fundamental task.

47. An investigating authority should be permitted to select a confined and discrete area for investigation, subject to approval from a Crown Court judge. A suspect or defendant should in turn be given the right to apply for an order requiring the investigating authority to explore a line of enquiry, or to obtain and/or disclose unused material.

48. The prosecuting authority would also present the judge with a schedule of unused material and seek a ruling on whether it is relevant to the issues likely to arise in the case. It should be for the defence to satisfy the court that further disclosure should be made. It is much better placed than the prosecuting authority to know whether any unused material is relevant.

49. We believe that significant benefit could be derived from amending the CPIA legislation to broadly follow the approach taken by the authorities in the USA in relation to the disclosure of unused material (see page 37 of our 2006 report).

Q8: What is the scale of the problem?

50. One key problem in serious and complex fraud cases is the volume of material collected during investigations, most of it in electronic format.
51. According to recent figures released by the Serious Fraud Office 95% of material is now electronic with some 40-50 million evidential documents fed into their eDiscovery platform annually.¹⁰
52. As stated above, the cost implications of conducting full-scale disclosure exercises on this volume of material are very onerous on investigators and prosecuting authorities.
53. Also, as stated above, a significant number of fraud trials fail due to perceived disclosure failures which are, in truth, of no real unfairness to the defence.

Q9: What would be the benefits of reform? In particular, can you identify any economic benefits (costs of the problem that would be saved by reform) or other benefits (such as societal or environmental benefits)?

54. We believe that reform of the disclosure regime is likely to result in significant future benefits and cost savings to the criminal justice system including more focussed investigations, faster trials, and increased public confidence.
55. In addition, the risk that cases are not investigated because of perceived costs and risks of the disclosure process would be removed.

Q10: If this area of law is reformed, can you identify what the costs of reform might be?

56. We are not in a position to assess the cost implications of reform. However, mindful of the considerable savings that could be made through reduced disclosure of unused material we would expect reform to be, at worst, cost neutral, and there is a real prospect of reducing the cost of fraud trials.

Q11: Does the problem affect certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

57. No.

Q12: In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

58. The Law Commission is the most appropriate body to undertake this work given its remit to review and recommend reform where needed in order to make the law fair, modern, simple and cost effective.

Q13: Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

59. In addition to our reports previously mentioned above, we also voiced our concerns about the CPIA in our response to the Government's *Fraud Review* consultation in late 2006.¹¹

¹⁰ Serious Fraud Office (2016). *Annual Report and Accounts 2015-16*. Available from this [link](#). (See page 1).

¹¹ Fraud Advisory Panel (2006), *Response to the Government's consultation paper: fraud review: final report*, available from this [link](#). (See pages 17 – 20).

60. The Government's response to the fraud review consultation noted that its recommendation to review CPIA disclosure guidance was 'generally welcomed' and proposed the establishment of a working group in 2008 to do this.¹²

Q14: Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation of this issue, and why you think the Law Commission should also look into the problem.

61. In March 2016 JUSTICE, the all-party law reform and human rights organisation, published a report on *Complex and Lengthy Criminal Trials*. It identified many of the same problems associated with the process of disclosure under the CPIA and recommended a number of changes to the current regime.¹³

¹² Fraud Review (2007), *Fighting Fraud Together: Response to the Consultation*.

¹³ Justice (2016), *Complex and lengthy criminal trials*, available from this [link](#).