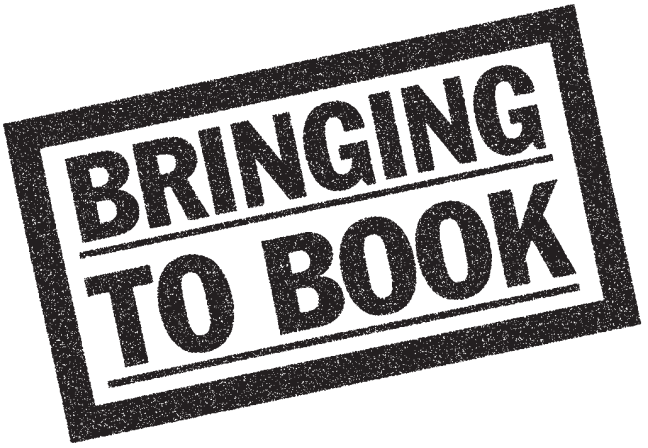
Fraud Advisory Panel



Tackling the crisis in the investigation and prosecution of serious fraud

A Report by the Fraud Advisory Panel

'The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of the evidence laid before us suggests that the public is right.' So said senior judge Lord Roskill in a 1986 report to government.

Twenty years later, the problem remains and has grown alarmingly. The fight against a rising tide of serious fraud is being frustrated by a fragmented use of inadequate resources, onerous obligations on investigators and prosecutors, unmanageably long trials with soaring legal aid bills and – worst of all – the ever-present threat of miscarriages of justice, whether involving the acquittal of the guilty or the conviction of the innocent.

Neither government nor judiciary has stood still since Roskill, and the Government is currently engaged in a major review of the way in which fraud is investigated, prosecuted and tried. But none of the recent measures and proposals will provide a truly effective regime for the investigation and prosecution of serious fraud.

This report is an urgent plea for action from the front line. Its authors are experts from the law, police, forensic accountancy and academia, chaired by Jonathan Fisher QC, under the aegis of the Fraud Advisory Panel, the independent watchdog dedicated to fighting economic crime.

The more detailed report on which this shorter version is based can be found at www.fraudadvisorypanel.org.

Symptoms of Crisis

- Lengthy investigations: in 2002–5 the average time between the Serious Fraud Office (SFO) accepting a case for investigation and transferring it to the Crown Court was just over 33 months.
- Burdensome trials: in 30 cases during 2003–4, the average trial took 67 working days and had an average of six defendants and 114 prosecution witnesses.
- Low conviction rates: just over 66% of defendants were found guilty in all serious fraud cases between 2002 and 2005.
- Soaring costs: in 2003–4 fraud trials consumed nearly £100 million in legal aid alone. The Department of Constitutional Affairs has identified lengthy fraud cases as one of the biggest calls on the legal aid budget.

The most stunning example of a prosecution gone wrong came to public notice in March 2005, when the 'Jubilee Line' corruption and conspiracy to defraud case was abandoned after a 21-month trial at the Old Bailey, at an estimated cost of £60 million.

Underlying Causes

Four structural problems are contributing to the crisis:

1. Inadequate and fragmented investigatory resources
2. Onerous disclosure obligations on investigators and prosecutors
3. Poor trial management
4. Lack of a proper plea-bargaining system.

This Report suggests ways in which these elements can be addressed, in whole or in part, by cost-neutral measures from Government and the judiciary.

Weak and Fragmented Investigatory Resources

It is widely accepted that most investigating and prosecuting authorities suffer from inadequate funding and manpower. The interim report of the Government's Fraud Review, published earlier this year, notes that in 2004 there were only 524 officers left in police fraud squads and economic crime departments. Even the Serious Fraud Office is only equipped to handle 60–70 cases at any one time.

The problem is aggravated by the existence of a large number of organisations (such as the SFO, Crown Prosecution Service, Financial Services Authority, Revenue and Customs Prosecuting Office, the Office of Fair Trading and the DTI) each staffed by too few investigators and prosecutors. The result is that specialist expertise and skills are spread very thin while administrative costs are duplicated.

Hobbling Investigators and Prosecutors

Many of the problems experienced in the investigation and prosecution of serious fraud cases are caused by laws which dictate how an investigation must be conducted.

The Code of Practice under the Criminal Procedure and Investigation Act 1996 (CPIA) requires investigators to pursue all reasonable lines of enquiry, whether or not they establish the guilt or otherwise of the defendant. This compels the investigating authority to widen the scope of an investigation considerably beyond what is necessary to establish the guilt of a suspect.

In order to fulfil this obligation in serious fraud cases, investigators are obliged to seize extremely large volumes of material.

Prosecutors must also disclose all relevant material to defence counsel. This involves their shouldering vast burdens. It is not enough to invite the defence to examine material in the prosecution's possession; everything must be sifted, analysed and listed, tasks that call for extensive funding and trained manpower, both of which are already in short supply.

In 2005 PricewaterhouseCoopers reported that the average prosecution now involves analysis of more than 5,000 e-mails and electronic documents. In some major fraud cases the majority of legal aid costs have gone on meeting disclosure requirements.

The Lord Chief Justice recognises that problems of disclosure 'have the potential to disrupt the entire trial process'. Failure to disclose material, even if inadvertently, can give rise to a legitimate ground of appeal. Impropriety may lead to the quashing of a conviction *even where there has been a guilty plea.*

The obligations on the prosecution to investigate all 'reasonable lines of enquiry' and to disclose on a detailed and documented basis have the effect of dragging out investigations and trials, causing problems for both sides, as witnesses often find difficulty recalling details because of the lapse of time. Some cases have been stopped for this very reason. There is therefore a difficult balance to strike between carrying out a thorough investigation in compliance with statutory obligations and ensuring that the investigation does not become so extended that a prosecution is no longer viable.

Poor Trial Management

One of the most prominent criticisms of fraud trials is of their often astonishing length. Juries have difficulty concentrating and reaching a verdict after hearing so much evidence over such a long period, often with frequent interruptions. Verdicts are more likely to reflect the evidence where trials are properly focused on the most important issues and kept as short as reasonably possible.

- Judges are sometimes assigned to complex fraud cases very late in the day and are usually given too little time before the trial starts to master the issues involved. Both shortcomings make it difficult for them to manage trials efficiently.

- Many Crown Court judges fail to make proper use of preparatory hearings, despite the fact that fraud cases can be successfully 'pruned' to key areas if managed energetically. Few judges have the will to knock the heads of the defence and prosecution together.

- Many judges are unfamiliar and uneasy with computers and unwilling to make full use of them in trial management. Yet IT can speed up the process by making the evidence much more accessible to witnesses, counsel, judge and jury alike.

- Not all judges assigned to try frauds have relevant experience; nor need they have shown an aptitude for trying such cases.

Too frequently, long and complex frauds 'float around' a court centre until a judge with sufficient time and inclination to try the case is found.

Lack of a Plea-bargaining System

There is no provision for pre-trial discussions between the parties in a fraud case where a defendant can make admissions *without* these counting as evidence against him. Indeed, a defendant who pleads guilty to a lesser offence could find that this is used to support the more serious charges. This greatly reduces any incentive to 'come clean' on certain offences, or to give evidence against accomplices.

Breaking the Logjam

Introduce Plea Bargaining

The introduction of pre-charge plea bargaining along lines long followed in the USA could have a dramatic effect upon the investigation and prosecution of serious fraud cases in England and Wales. It would:

- enable the investigating authority to obtain a clear account of the fraud, and the persons responsible for committing it;

- serve to narrow the scope of the investigation and thereby enable the case to be brought to trial more speedily;

- lead to a reduction in the likely length of trial;

- enable the prosecutor to explain the case to the court in an easily comprehensible manner; and

- facilitate the conviction of other participants in the fraud.

Constructive discussions between prosecutors and the defence should be encouraged. If defence counsel were permitted to seek assurances on both sentence and confiscation of assets at the pre-trial stage, defendants would be more willing to plead guilty.

The law should be changed to allow a proposed pre-charge bargain to be brought before a court, so that a clear and binding indication of sentence could be given before a suspect entered into a firm agreement with prosecutors.

In order to safeguard the rights of defendants, no conviction should be permitted solely on the basis of uncorroborated evidence.

Reform Investigation and Disclosure Rules

It is essential to change the provisions of the CPIA Code of Practice. It is essential that an investigating authority has the right to close down an unpromising line of enquiry.

The suspects in a fraud case will often be best placed themselves to identify evidence which will support their pleas. Indeed, it is not uncommon in such cases for a series of different frauds to have taken place within the same company. Relying on investigators to find evidence on the defendant's behalf is unnecessary and distracts them from their fundamental task.

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.

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.

Appoint Specialist Judges

Many members of the judiciary possess financial and commercial expertise and experience. Unfortunately, insufficient numbers of them are chosen to try complex criminal fraud cases in the Crown Court. Consideration should be given by the Lord Chief Justice to assigning experienced commercial and civil judges to try complex fraud cases.

A small cadre of around ten specialist fraud judges should be established (with status similar to those in the specialist mercantile, technology and construction courts) to try the most serious and complex fraud cases. There should be five centres in England and Wales where such judges would sit, all equipped with the latest case IT. Such judges would also be available to deal with non-fraud cases.

Trial management techniques must be taught to all judges who may be called to try complex and lengthy fraud cases. Training should emphasise the strength of character required by a trial judge if he is not to be intimidated by the reputation and skills of leading counsel for the defence. Those trying a particularly long (i.e. in excess of nine to twelve weeks) case should be offered at least a fortnight's reading time beforehand.

Maximising Resources, Safeguarding Standards

The number of authorities involved in the investigation and prosecution of serious fraud should be rationalised, and the money saved by ending unnecessary duplication used to employ more financial investigators.

The Government is interested in so-called 'partnerships' in which the private sector would finance police fraud investigations. But dependence on private funding for law enforcement in this area would send a signal that fraud is not being taken as seriously as other forms of criminal activity. It would also compromise the independence and objectivity of the investigatory authorities and would soon lead to a loss of confidence in their ability to investigate crime impartially.

A more useful, and less dangerous, course would be to encourage the corporate sector to obtain evidence of a quality sufficient for use in the criminal courts. Compulsory training for private financial investigators would be required to ensure that this standard was met; they could then be registered and brought within the scope of CPIA and the Regulation of Investigatory Powers Act 2000 (RIPA).

Three highly significant benefits would flow from the reforms advocated above.

- Public concerns that the law does not deal robustly enough with white-collar fraudsters (particularly for frauds falling within the £100,000 to £1 million bracket) would be addressed.

- Considerable savings would be made through more focused investigations, reduced disclosure of unused material, more guilty pleas and shorter trials. At worst the impact would be cost neutral.

- The interests of justice, and therefore of public confidence in the criminal justice system, would be far better served.

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The Fraud Advisory Panel

The Panel is an independent body of volunteers drawn from the public and private sectors. Its role is to raise awareness of the immense social and economic damage caused by fraud and to develop effective remedies.

A registered charity and a company limited by guarantee, the Panel works to:

- originate proposals to reform the law and public policy on fraud;
- develop proposals to enhance the investigation and prosecution of fraud;
- advise business as a whole on fraud prevention, detection and reporting;
- assist in improving fraud-related education and training in business and the professions, and amongst the general public; and
- establish a more accurate picture of the extent, causes and nature of fraud.

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Registered Charity No. 1108863

May 2006

OTHPLM5378 5/06