
Improving the Investigation and Prosecution of Serious Fraud

Special Project Group

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Part 1: Introduction

1. Acting independently of the Fraud Review initiated by the Government on 27 October 2005,¹ the Fraud Advisory Panel established a Special Project Group (SPG) in September 2005 to produce recommendations on improving the focus of criminal investigations and prosecutions in serious fraud cases.
2. The members of the SPG were drawn from the private and public sectors and included leading lawyers with significant prosecution and defence experience, a senior forensic accountant, a former senior police officer specialising in fraud and a leading professor of criminal law (see Appendix A). On occasions during its deliberations the Group has been assisted by contributions from a senior Circuit Judge and from those currently working with the Serious Fraud Office and the Office of Fair Trading (OFT), as well as from lawyers with experience of overseas criminal systems, notably the United States and Germany. The Group wishes to express an enormous degree of gratitude to all those who have assisted with its work (see Appendix B).
3. Although there is no legal definition of serious and complex fraud (the SFO customarily uses a financial limit of £1 million), there is a general perception that the process for the investigation and prosecution of serious fraud is working poorly. The average time between the SFO's accepting a case for investigation and transferring the case to the Crown Court during the last three years has been nearly three years. In the year 2002–3 the average time was 27.4 months,² increasing to 41.6 months in the year 2003–4³ and reducing to 30.5 months during 2004–5.⁴ During the same period the conviction rate has been falling. In 2002–3 the SFO achieved a 68% conviction rate. This reduced to 67% in 2003–4 and to 64% in 2004–5. What is more, these cases have become extremely expensive to try. In July 2005 the Government estimated that over 50% of Crown Court legal aid expenditure was accounted for by 1% of cases, and that this disproportionate expenditure was even more marked for the very few most expensive cases.⁵ Those cases are invariably serious fraud cases. The Government went on to say that in the top 30 cases during 2003–4, the average trial length was 67 working days; the average number of prosecution witnesses was 114; the average number of defendants was six; and the average legal aid cost was £2.6 million per case.⁶ One of the most egregious examples of a disastrous fraud prosecution occurred in March 2005

¹ http://www.lso.gov.uk/pressreleases/fraud_review_and_s43.doc.

² http://www.sfo.gov.uk/publications/2002_2003/section_04.asp#04.

³ http://www.sfo.gov.uk/publications/2003_2004/section03.asp#03.

⁴ http://www.sfo.gov.uk/publications/2004_2005/sectionthree_04.asp.

⁵ *A Fairer Deal for Legal Aid*, July 2005, Cm 6591, para 5.4, <http://www.dca.gov.uk/laid/laidfullpaper.pdf>.

⁶ *Ibid*, para 5.5.

when the Jubilee Line corruption and conspiracy to defraud case against six defendants was abandoned after a 21-month trial at the Old Bailey. The estimated costs of the case have been put at £60 million.⁷

4. Perhaps the most depressing and debilitating aspect of the contemporary problems experienced in the investigation and prosecution of serious fraud is that it was exactly 20 years ago that Lord Roskill published his seminal *Fraud Trials Committee Report*⁸ ('Roskill'), it having been recognised a generation ago that, to quote from the opening section of Roskill:

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 (Summary, paragraph 1).

5. Lord Roskill believed that radical change was necessary. In relation to the investigation process, he suggested the creation of a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud, with an independent monitoring body, to be called the Fraud Commission, which should be responsible for studying and advising from year to year on the efficiency with which fraud cases are conducted. Roskill also recommended the abolition of trial by jury in complex fraud cases, and a raft of procedural reforms such as the nomination of the trial judge at an early stage, effective pre-trial reviews, an obligation on the defence to make disclosure, and substantial revision of the rules of evidence.⁹ All but two of these recommendations have been implemented. Roskill foreshadowed the establishment of the Serious Fraud Office in 1987, and there have been many changes to the rules of criminal procedure and evidence since that time. That said, two major recommendations – the establishment of an independent Fraud Commission and the abolition of trial by jury in the most complex cases – have not come to pass.
6. There has been no shortage of reports and studies suggesting improvements to the prosecution process in serious fraud cases since Roskill. In December 1992 the Lord Chancellor's Department, together with the Home Office and the Legal Secretariat to the Law Officers, published a Consultation Paper on Long Criminal Trials. Just over three years later, on 10 January 1996, the Audit Faculty of the Institute of Chartered

⁷ see <http://news.bbc.co.uk/1/hi/england/london/4373461.stm> and <http://www.guardian.co.uk/crime/article/0,2763,1444584,00.html>.

⁸ HMSO, 1986.

⁹ See the Summary, paras 6 to 12.

Accountants in England & Wales (ICAEW) published *Taking Fraud Seriously*, which included a call to Government to establish an independent Fraud Commission. Two years later, in February 1998, the Home Office revisited the issue of trial by jury in a Consultation Document entitled *Juries in Serious Fraud Trials*, and this was followed by a review of pre-trial procedures in serious fraud cases undertaken by the Lord Chancellor's Department in 1999. In October 2001 Lord Justice Auld published his *Review of the Criminal Courts*, which included some significant recommendations on the trial process, and there have also been reports examining the substantive law of fraud, such as the Law Commission's Report on Fraud (No 276) published in July 2002, which followed the Law Commission's Consultation Paper No 155 entitled *Fraud and Deception*, published in 1999.

7. The Fraud Advisory Panel was established in 1998 through an initiative of the ICAEW when it appreciated that the Government was not going to establish an independent Fraud Commission. The Panel works to encourage a truly multidisciplinary perspective on fraud, and it has published a number of papers calling for changes in the approach to the investigation and prosecution of fraud. In 1998 it published a paper examining the relationship between the SFO and the police¹⁰ and a response to the proposals by Government relating to the procedure for trying fraud cases.¹¹ In October 1999 the Panel published a response to the Law Commission's proposals;¹² in January 2002 a response to Lord Justice Auld's proposals;¹³ and in August 2004 a response to the proposed Fraud Bill¹⁴ (before Parliament at the time of writing).
8. In recent times, the Government and the courts have introduced a number of measures which have yet to impact on the investigation and prosecution of serious fraud cases. A new Consolidated Criminal Practice Direction and Protocols have been established to improve the way in which fraud cases are managed in the courts, and this was accompanied on 22 March 2005 by a special protocol issued by the Lord Chief Justice on the control and management of heavy fraud and other complex cases.¹⁵ In April 2005 the Attorney General issued revised guidelines to prosecutors on disclosure,¹⁶ following the decision of the House of Lords in *R v H and C*¹⁷ in February 2004. Furthermore, the Government has established a statutory framework in section 43 of

¹⁰<http://www.fraudadvisorypanel.org/newsite/PDFs/publications/Relationship%20of%20SFOPolice.pdf>.

¹¹<http://www.fraudadvisorypanel.org/newsite/PDFs/publications/Procedural%20Reform%20in%20Cases%20of%200Serious%20Fraud.pdf>.

¹² <http://www.fraudadvisorypanel.org/newsite/PDFs/submissions/FraudDeception.pdf>.

¹³<http://www.fraudadvisorypanel.org/newsite/PDFs/submissions/Response%20to%20Auld%20Report.pdf>.

¹⁴<http://www.fraudadvisorypanel.org/newsite/PDFs/submissions/FAP%20Response%20to%20Fraud%20Law%20Reform%20Aug04.pdf>.

¹⁵ http://www.dca.gov.uk/criminal/procrules_fin/contents/pd_protocol/pd_protocol.htm.

¹⁶ <http://www.lso.gov.uk/pdf/disclosure.doc>.

¹⁷ [2004] UKHL 3; <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040205/hc-1.htm>.

the Criminal Justice Act 2003 for the trial of fraud cases by a judge sitting without a jury.¹⁸ The provision can operate only where the judge is satisfied that the length or complexity of the trial is likely to make it so burdensome upon the jury that the interests of justice require trial by judge alone, and the Lord Chief Justice gives his approval. Implementation awaits affirmative resolutions from both Houses of Parliament. Though these new measures are interesting and might prove helpful, the SPG does not believe that they are adequate to address the fundamental problems which arise in the investigation and prosecution of serious fraud in our international and highly technological age.

9. On 22 March 2006 the Fraud Review published an interim report.¹⁹ Emerging findings in the Interim Report include:

- the benefits of establishing a national fraud strategy for the whole economy, the better to coordinate work carried out across a number of government departments and agencies and the private sector;
- the possibility of giving a single body the responsibility for overseeing the strategy;
- improving the reporting and recording of economic crime, potentially through a National Fraud Reporting Centre, so that a better estimate for the scale of fraud can be gained – a study by Association of Chief Police Officers (ACPO) into this area has been commissioned;
- greater police resources may need to be devoted to fraud investigations, either through a National Fraud Squad or a National Lead Force or Regional Fraud Squads;
- the possibility of more civilian fraud investigators, and more partnerships in which police, public and private sectors collaborate to investigate and finance the investigation of fraud;
- ongoing work on the effective management of trials in general should lead to shorter and more focused fraud trials; but further measures specific to fraud trials, such as simplifying the disclosure procedure and specialised fraud courts, merit consideration by the review;
- the popular perception that fraud is dealt with relatively leniently by courts needs examining, and whether any corrective action is necessary;

¹⁸ <http://www.opsi.gov.uk/acts/acts2003/30044--h.htm>.

¹⁹ http://www.lslo.gov.uk/pdf/Interim_Fraud_Report_03_06.pdf.

- whether the potential scope for further data sharing and data matching could yield anti-fraud benefits.
10. In the White Paper *A Fairer Deal for Legal Aid* the Government indicated that it was considering the introduction of other measures to assist the management of the disclosure process in serious fraud cases. These measures involve:
- the appointment of a prosecution disclosure specialist to look at disclosure issues in large and complex cases;
 - greater early joint working between police and the Crown Prosecution Service (CPS) in potentially long and complex cases to assist in the management of disclosure;
 - providing disclosed material electronically, whenever possible.
11. The SPG believes that neither the new measures announced by the Government and the courts in 2005, nor the proposals contained in the interim report produced by the Government's Fraud Review, nor the White Paper *A Fairer Deal for Legal Aid* will deliver an effective regime for the investigation and prosecution of serious fraud. The SPG considers that more imaginative and radical solutions are required, and it hopes that the recommendations set out in this report will assist the Government in its deliberations. However, whether or not the standards of fairness are assessed by reference to Article 6 of the European Convention of Human Rights²⁰ or the more ancient formulation in Chapter 40 of Magna Carta²¹, it is trite to observe that every miscarriage of justice, whether it involves the acquittal of the guilty or the conviction of the innocent, grotesquely undermines the rule of law. In putting forward imaginative and radical proposals to solve the problems engendered by the investigation and prosecution of serious fraud, this overriding principle must always remain the paramount concern.

²⁰ 'In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law ... Everyone charged with a criminal offence has the following minimum rights ... (b) to have adequate time and the facilities for the preparation of his defence'.

²¹ 'To no one will we sell, to no one will we deny or delay, right or justice'.

Part 2: Identifying the problems in practice

12. Before developing possible solutions, the SPG has been concerned to accurately identify the current problems in the investigation and prosecution of serious fraud cases.
13. Broadly speaking, based upon the collective experience of the SPG and information supplied to the SPG by external sources, the problems involved in investigating and prosecuting serious fraud cases can be grouped into six categories:
 - the fragmentation of resources;
 - the difficulties experienced in focusing the investigation;
 - the large volume of seized material;
 - the length of the investigation;
 - lengthy trials; and
 - lack of support for the judiciary.

At their most serious, problems in any one of these areas at the investigative stage can lead to the failure of a prosecution. They are difficulties which arise to some degree in almost all investigations of large scale fraud cases.

Fragmentation of resources

14. It is widely accepted that most investigating and prosecuting authorities suffer from inadequate funding and manpower. There are many bodies responsible for the investigation and/or prosecution of frauds— for example, the SFO, the CPS, the Revenue and Customs Prosecuting Office (RCPO), the Department of Trade and Industry (DTI) and the Financial Services Authority (FSA) – but, it is thought, too few investigators to assist in what are frequently mammoth investigations and lengthy and detailed exercises in marshalling information for a prosecution. In fact, although the SFO is the one body that exists purely for the investigation and prosecution of large and complex frauds, it deals with only a small number of frauds. The CPS prosecutes a significant proportion of the total number of fraud cases, yet as a body its focus is not on this area, but rather on prosecuting generally. The remaining prosecuting authorities, such as the DTI and FSA, have more limited resources than either the SFO or the CPS. Indeed, it is common for other authorities to begin an investigation into a suspected fraud only to find that it is serious or complex, so that responsibility will fall

on the SFO. This system gives rise to further delays and can, for example, interfere with the later prosecution by the SFO where the original prosecuting authority has elicited confessions under compulsory powers, which cannot then be used at trial.

15. The Fraud Advisory Panel noted in its annual review for 2003–4²² that the Commissioner of Police for the City of London had commented that police forces had been distancing themselves from fraud investigations for years. There were 869 mainstream fraud investigators in 1995, compared with around 600 some nine years later.

Lack of focus

16. In order to avoid an over-lengthy investigation, investigators need to focus the investigation at the earliest stage possible. Experience suggests that in prosecutions of large-scale frauds, juries are more likely to convict defendants who appear early on the indictment, rather than those who have less involvement and appear towards the end of the indictment. It is therefore important that the investigation is, at some stage, focused on those individuals who can be said to be at the centre of the fraudulent conduct. However, the nature of fraudulent conduct is such that at the early stages of an investigation investigators may be unaware of the true scale of the fraud; should investigators focus early on in order to shorten the investigation, at the risk of later finding out that someone eliminated from the investigation was a central figure in the execution of the fraud?
17. The same issues arise when decisions have to be made at an early stage as to what charges to bring against identified defendants. Overloaded indictments are to be discouraged, and hence so is the overcharging of defendants. Both lead to unnecessarily lengthy and potentially complicated trials, where the true criminality could be encompassed more simply. Again, such decisions are difficult to make at the very early stages of an investigation into what is suspected to be a large-scale fraud, and focusing the investigation consequently becomes difficult.
18. The courts' powers to confiscate the proceeds of criminal conduct create a further difficulty for those responsible for determining the scope of the investigation, as there is now an obligation on prosecuting authorities to investigate a defendant's assets with a view to confiscation after conviction. It may be cheaper and more efficient to do this as the initial investigation into the defendant's conduct progresses, but this may lead to a longer investigation. The difficulties in this area mirror a wider tension: namely that the

²² <http://www.fraudadvisorypanel.org/newsite/PDFs/annualreports/Annual%20Report%202004.pdf>.

prosecuting authorities are expected to assume ever wider responsibilities, whilst heeding calls for swifter and more focused investigations.

Large volume of seized material

19. Investigators dealing with a suspected fraud are, like any other investigator, required by the Criminal Procedure and Investigations Act 1996 (CPIA) to investigate all reasonable lines of enquiry, whether they point towards or away from the defendant. In order to fulfil this obligation in serious fraud cases, investigators seize an extremely large volume of material, including paperwork and, increasingly, computers, which themselves may contain a large volume of potentially relevant electronic material. Indeed, in 2005 PricewaterhouseCoopers, whose findings were published in the *Financial Times*, concluded 'the average fraud case now requires analysis of more than 5000 emails and electronic documents'. This material must be considered and scheduled in order to comply later with disclosure obligations. These tasks call for resources and manpower, which are frequently lacking in the investigating and prosecuting authorities.
20. The recently updated Attorney General's Guidelines on disclosure (see paragraph 8 above) recognise that there may be cases where the volume of material seized is such that the prosecution may only be able to review it by a 'dip-sampling' method (for example, by using software search tools), and then providing a detailed description on the schedule of unused material to allow the defence to appreciate the nature of the material. However, this does not resolve the problem of *how* to disclose large amounts of unused material to the defence where it falls to be disclosed. There are practical and costs implications involved in copying and serving reams of paper to the defence, and increasingly there are problems in extracting and copying computer records for disclosure.
21. In some cases papers are scanned onto CD-ROM, solving storage and delivery difficulties. In others, the investigating authority has sought to solve its difficulties by handing the defence the 'warehouse key'. The recent Attorney General's Guidelines and the Lord Chief Justice's Protocol make it clear that giving the defence the warehouse key is not compliance with disclosure obligations, and prosecuting authorities must refrain from doing so.
22. It is clear from a consideration of various cases concluded in recent times that the large volume of material seized during an investigation into a large-scale fraud can inhibit effective scheduling and eventually the disclosure process. There have been a number

of prosecutions by HM Revenue & Customs (HMRC) (then Customs & Excise (HMCE); now the RCPO) stayed for abuse of process because of failures in the disclosure process.²³ Undoubtedly in these cases the investigating authority was in possession of a vast amount of material, but failures in the early stages in the investigation properly to manage the material seized led eventually to the failure of the prosecution. Consider, for example, the problems which occurred in the Operation Venison case brought by HMCE in relation to alleged VAT fraud.²⁴

Length of the investigation

23. As already noted, the average time between the start of an investigation by the SFO and transfer proceedings is just under three years. As an example of a particularly extensive investigation, in the SFO investigation into the Robinsons legal aid fraud three years and eight months elapsed between the start of the investigation and transfer, and a further two years and two months elapsed before the start of the trial, no doubt because the investigation necessarily involved the examination of a massive quantity of legal aid forms which were central to the fraud.²⁵
24. Almost by definition, serious fraud cases require a large-scale investigation to bring defendants to trial, and any such investigation will inevitably be long and comprehensive. It is axiomatic that the longer it takes to bring a matter to court, the more open the prosecution witnesses become to challenges to their recollection of events. In the most extreme cases, this can lead to an abuse of process argument by the defence, which if successful will end the prosecution. Delay causes prejudice to both sides. It is not only the prosecution witnesses who may have difficulty recalling details; asking a defendant to recall details of business transactions years before may lead to inherent unfairness.
25. There is therefore a difficult balance to strike between carrying out a thorough investigation in compliance with the statutory obligations under the CPIA and ensuring that the investigation does not become so extended that a prosecution is no longer viable. The investigation must be in proportion to the seriousness of the allegations, but it is often difficult at the start of an investigation to understand the extent of the fraud and identify the key parties involved.

²³ See, for example, the collapse of the money laundering prosecution by HMCE at Blackfriars Crown Court involving Prosser, Chandler and Henderson in November 2003: <http://www.guardian.co.uk/crime/article/0,2763,1079703,00.html>.

²⁴ Gavin Macfarlane: Tax Journal (2005) No. 804, pp. 19–20; Jason Collins and Ben Cooper: Tax Journal (2005) No. 796, pp. 9–11.

²⁵ http://www.sfo.gov.uk/news/prout/pr_328.asp?seltxt=.

26. Other delays which frequently occur in investigations of complex frauds may be beyond the control of the investigating authority. Delays arise from the resolution of issues of legal privilege, and the difficulties in accessing and retrieving material stored on computer. Many frauds are not confined within the borders of the United Kingdom, and the prosecuting authority needs to approach foreign jurisdictions for assistance. Letters of request must be prepared, and obtaining a response can take time. There may be a need for investigations abroad. All of these factors can add considerably to the time needed to fully investigate a suspected fraud.

Lengthy trials

27. Currently, one of the most prominent criticisms of lengthy trials is that they result in higher than average costs. It is generally accepted that the length of trials can be reduced by stringent judicial case management from an early stage in the case, together with proactive case management by the prosecution and between the parties prior to trial.
28. There is anecdotal talk that in the Jubilee Line fraud case the prosecution could have severed the indictment and thereby shortened the trial. In both the Robinsons legal aid fraud²⁶ and the *Pound* case²⁷ anecdotal evidence suggests that the trials could have been markedly shorter, but for the prosecution's insistence on calling all available evidence and the defence's probing of large volumes of unused material. In the *Pound* case the trial judge refused to allow the case to proceed on the wide-ranging indictment prepared by the prosecution, but nonetheless the trial continued in relation to the entirety of a 13-year period during which the defendant was alleged to have been involved in fraudulent conduct. The defence referred to vast quantities of material in order to try to establish all the work Mr Pound had performed over those 13 years, to seek to justify his allegedly inflated fees. This alone took weeks of court time.
29. As well as the costs implications of lengthy trials, it has frequently been argued that juries have difficulty concentrating and reaching a verdict after hearing so much evidence over such a long period, often with frequent interruptions, and that the verdict is more likely to fairly reflect the evidence where trials are properly focused on the most important issues and defendants and kept as short as possible. Experience suggests that where a jury is put in charge of a number of defendants, some of whom can be described as 'tail-enders' in the alleged fraud, they will be more likely to convict those

²⁶ See para 23 and fn 25 above.

²⁷ http://www.sfo.gov.uk/news/prout/pr_310.asp?id=310.

higher on the indictment. Both prosecution and defence undoubtedly suffer prejudice where a trial is poorly managed and becomes unnecessarily lengthy as a result.

30. In order to avoid long trials, in recent years the Court of Appeal has urged prosecutors to sever parts of a case into a series of trials²⁸. Prosecutors argue that severance dilutes the strength of the prosecution case because it does not permit the totality of the criminality to be shown. Conversely, on occasions where he perceives that it helps his case, the defendant may nonetheless wish to show the overall picture, in which case the purpose sought to be achieved by severance is thwarted.

Lack of support for the judiciary

31. It is clear from the tenor of the Lord Chief Justice's Protocol that in order to participate fully in a long and complex fraud trial, the judge must have a full and detailed understanding of the issues involved. This will mean the judge having read and considered the papers in advance of the pre-trial hearings, and not only in advance of the trial itself. It is commonly accepted that judges are rarely given the time required to read into large complex cases, particularly during the early stages of the case. They are therefore unable to take from the very start the proactive approach to case management that is encouraged in the Protocol and, indeed, in the Criminal Procedure Rules.
32. Full use of preparatory hearings is not being made by many Crown Court judges. Insistence on adherence to time limits for the service of documents and reports, and the service of full defence case statements is rare. Many fraud cases could be successfully 'pruned' to key areas of contested issues if managed energetically by the trial judge. Unfortunately very few have the will or are prepared to take the initiative to knock the heads of the defence and prosecution together to try to agree areas of least contention and those which are peripheral to the main issues. Experience suggests that there are many Crown Court judges who do not relish determining issues relating to legal professional privilege and confiscation.
33. With the increasing weight of documentary and computer-held evidence led in most big fraud cases, the use of IT in fraud trial courts has now become standard. Many judges, appointed some years ago from the senior ranks of the Bar, are unfamiliar and uneasy with computers and unwilling to make full use of their capability in trial management. Use of scanning and of techniques such as LiveNote can speed up the trial process and make the evidence much more accessible to witnesses, counsel, the judge and the

²⁸ See *Kellard* [1995] 2 Cr App R 134.

jury alike. Because of expense, courts are not routinely equipped with IT facilities, and many judges do not request that they be supplied by the Court Service for use in a fraud case.

34. Further criticism from legal practitioners has centred on the fact that not all judges assigned to try frauds have experience in practice in the area, nor need they have expressed an interest in or shown an aptitude for trying such cases. We understand that 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, adding to the inherent delay in bringing these cases to trial.
35. Delays in assigning a trial judge influence the management of the case and will have a consequent impact on the eventual length of the trial. For example, if it is accepted that a large case must be managed effectively from the early stages, including enforcing time limits for service of documents and of defence case statements and ensuring the indictment is not overloaded, then a judge ought to be assigned from the commencement of the prosecution, so as to have sufficient opportunity to read into the case. It may even be that optimum efficiency requires judicial involvement from the investigative stage.

Part 3: The existing legal framework

36. The SPG believes that many of the contemporary problems experienced in the investigation and prosecution of serious fraud cases have been precipitated by the existing legal framework, which in large measure dictates to the investigating authorities the way in which an investigation has to be conducted.

CPIA obligation to pursue all reasonable lines of enquiry

37. The Code of Practice under Part II of the CPIA at paragraph 3.5 states that: 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances.'
38. There is no doubt that the content of this directive compels the investigating authority to widen the scope of the investigation beyond what is necessary to establish the guilt of a suspect in a given case.
39. For example, it is clear by reference to the obligation on the prosecution to pursue all reasonable lines of enquiry even where these point away from the suspect that there will be instances where an investigator will have to take steps to obtain material from third parties, even if the material does not advance the prosecution case.
40. Perhaps because the extent of the obligation depends so closely on the nature and circumstances of each particular case, the appellate courts do not appear to have taken an opportunity to propose any general principles. Those Court of Appeal judgments that do touch upon the extent of the duty generally involve abuse of process arguments mounted on the basis of a failure to seize and/or disclose CCTV evidence. See, for example, *R (on the application of Ebrahim) v Feltham Magistrates' Court and another (Mouat v DPP)*²⁹ and *R v Sahdev*³⁰. Other than to repeat the mantra that the duty to investigate must be proportionate to the seriousness of the issues being investigated,³¹ no point of general principle is enunciated, and it is made clear that each case will depend on its own facts.
41. The SPG has been supplied with a transcript of the Judge's ruling in the Powerscreen case,³² which was stopped at Bristol Crown Court in 2004. The main defendant,

²⁹ [2001] 1 All ER 831.

³⁰ [2002] EWCA Crim 1064.

³¹ [2002] EWCA Crim 1064 at para 17.

³² http://www.sfo.gov.uk/publications/2004_2005/sectionfour_02.asp.

Cosgrove, successfully applied to stay the proceedings for abuse of process on the ground that the SFO had failed in its duty to seize and retain documentary evidence. The documents were notes and diaries kept by Cosgrove which he said contained notes of instructions he had given concerning allegedly false adjustments made to some company accounts. The company office at which the notes and diaries were maintained was not searched by the SFO during the investigation; the SFO had taken the view that as the defendant was cooperating, it had no power to apply for a warrant. Cosgrove claimed that the SFO had failed to pursue all reasonable lines of enquiry. Rejecting the SFO submission that the duty incumbent upon the investigating authority did not extend to a duty to seize and preserve material of which the authority had knowledge, the judge held that the duty was wider. 'The failure to seize and retain material from those offices was a serious failing which breached the duty imposed on the Crown'.

Disclosure of unused material

42. The foreword to the Attorney General's revised guidelines of disclosure make clear that fairness requires that full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence. Fair disclosure is part of a fair trial, but this does not mean that the defence are entitled to blanket disclosure of unused material. Whilst prosecutors are under an obligation to disclose all material meeting the test, they can only assess the material in light of the information available to them. The obligation is a continuing one³³ and needs to be reviewed frequently as a case proceeds and further information comes to light. Material ought not to be viewed in isolation, as several items taken together could have the effect of undermining the prosecution case or of assisting the defence. Guidance issued by the CPS envisages situations where prosecutors will have regard to material which may exist in linked investigations or prosecutions. The Attorney General's guidelines state that when considering the test for disclosure, prosecutors should have regard to, for example, the use to which material might be put in cross-examination, or its capacity to assist in an application to stay proceedings or exclude evidence.
43. A failure to disclose material can give rise to a legitimate ground of appeal.³⁴ In *R v Alibhai*³⁵ the Court of Appeal stated that in many cases it will suffice to show that the

³³ Section 7A CPIA 1996.

³⁴ See, for example, *R v Stephen Craven* [2001] 2 Cr App R 12, in which the failure to disclose the presence of a fingerprint belonging to a person other than the appellant on the glass used to inflict the fatal injury was held to be a defect in the trial, but the Court of Appeal decided that it was inconsistent with the use of the glass as the murder weapon and from examining all the other evidence the failure to disclose the presence of the fingerprint did not render the conviction unsafe.

failure to disclose was such that it may be reasonable to suppose that it might have affected the outcome of the trial. Non-disclosure may lead to the quashing of a conviction even where there has been a guilty plea.³⁶

44. The obligations on prosecutors to disclose material has been the subject of extensive litigation, reaching the European Court of Human Rights (ECHR) on several occasions. In *Edwards v United Kingdom*³⁷ the ECHR found that there had been no breach of Article 6(1). Material impacting on the veracity of the police officers' evidence as to admissions made by the defendant had been withheld at trial, but the ECHR found that any defects were remedied as far as Article 6 rights were concerned by the subsequent procedure in the Court of Appeal. However, the ECHR did consider it to be a requirement of a fair trial that the prosecuting authority should disclose *all* material *for or against* the accused to the defence.³⁸
45. More recently, judgments of the ECHR in *Jasper v United Kingdom*³⁹ and *Fitt v The United Kingdom*⁴⁰ have repeated this test. In those cases the ECHR examined the procedure for withholding material on grounds of public interest immunity (PII). It was accepted that the entitlement to disclosure of relevant evidence is not absolute, but that only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Any difficulties caused to the defence must be sufficiently counterbalanced by judicial procedures. In both cases the ECHR found that the judicial scrutiny of the material was sufficient and there was no breach of Article 6 as a result of the withholding of public interest immunity (PII) material by the prosecution.

The views of the House of Lords: The case of *H and C*

46. In *R v H and C*⁴¹ the House of Lords concluded that the appointment of special counsel to assist in cases involving complex issues surrounding disclosure of material purported to be subject to public interest immunity should be decided on a case by case basis. Special counsel⁴² should be appointed where it is shown to be in the interests of justice,

³⁵ [2004] 5 Archbold News 1.

³⁶ *R v Smith* [2004] EWCA Crim 2212, where it was held that the material could have had a causative impact on a tenable abuse of process argument.

³⁷ (1992) 15 EHRR 417.

³⁸ Page 31, para 36.

³⁹ (2000) 30 EHRR 441.

⁴⁰ (2000) 30 EHRR 480.

⁴¹ [2004] UKHL 3.

⁴² Special counsel are barristers instructed to independently review the material. For a review of the growth in the use of special counsel, see paras 40 and 41 of the Grand Chamber of the European Court of Human Rights judgment in *Edward and Lewis v United Kingdom* [2003] ECHR 381.

and no other course could adequately meet the overriding requirement of fairness to the defendant.

47. The House also reviewed the general disclosure obligations of the prosecution. It was made clear that in every case the starting point for disclosure will be whether the material under scrutiny might undermine the prosecution or assist the case for the defence. The 'golden rule' is that material meeting this test must be disclosed in full.⁴³
48. The approach to be adopted by the prosecution when public interest immunity arises in relation to otherwise disclosable material was set out, and it was said that the prosecution should only seek a judicial ruling on disclosability of material in 'truly borderline cases'⁴⁴. A set of seven questions was enunciated to assist judges asked to decide on matters of PII.
49. The clarification of what the defence can expect to be disclosed, and what the prosecution are – and importantly are not – under an obligation to disclose, or to consider when thinking of non-disclosure on PII grounds should assist in the management of large-scale cases at the investigation and pre-trial stage and in avoiding frequent applications from the defence on the basis of insufficient disclosure.

Case management: The Lord Chief Justice's Protocol and its impact

50. There is no doubt that the Lord Chief Justice's Protocol on the Control and Management of Heavy Fraud and other Complex Cases (the Protocol) seeks to readdress the issue of unused material which a prosecuting authority is obliged to disclose. The Protocol addresses the investigation of fraud, case management, disclosure, and the trial itself. The aim of the Protocol is to ensure that those trials of heavy frauds, or other complex trials estimated to run for eight weeks or more, are brought under the control of an assigned judge at an early stage to ensure proactive case management. The parties are to be ready to define the issues at an early stage and to agree common ground and admissions wherever appropriate. In order to ensure that trials do not become cumbersome and lengthy, the Protocol encourages the use of interim case management hearings, electronic presentation of evidence, and jury management: for example the use of written directions. The new obligations on all

⁴³ At para 14.

⁴⁴ At para 35.

those involved in criminal proceedings imposed by the Criminal Procedure Rules (CPR) support this approach and, of course, are binding on the parties.⁴⁵

51. At the Crown Court at Southwark current proposals are that a form be completed at the Magistrates' Court stage where a case involves fraud or money laundering allegations and is estimated to last six weeks or more. The form sets out a number of directions, including that the prosecution must serve a case summary and core bundle within 42 days, and be in a position to open the case briefly before the court if necessary. Among other requirements, all parties are to agree an agenda for the first hearing in the Crown Court, to include draft orders it is proposed the court should make. It is envisaged that the prosecution will be responsible for taking minutes of the hearing and circulating them among the parties.
52. The Protocol represents what is perhaps the culmination of an increasing desire to ensure that an assigned trial judge takes full control of case management from an early stage in the proceedings in order to avoid over-lengthy trials, which produce unsatisfactory results for all parties. The Court of Appeal expressed such a desire in *R v Jisl*⁴⁶ and it is to be expected that judges will now take a more robust approach to, for example, generalised requests for disclosure from the defence and failure by the parties to define the issues at an early stage. Indeed, the Protocol recognises that problems of disclosure 'have the potential to disrupt the entire trial process'.
53. When considered with the clear guidance from the House of Lords in *H and C* (see above), the Protocol should have the effect of limiting disclosure to that which is truly relevant, avoiding the time and cost of both the prosecution and defence trawling through large swathes of unused material. The defence is urged to serve proper case statements, and the prosecution is warned that 'it is almost always undesirable to give the "warehouse key" to the defence'.
54. The Protocol suggests that the judge should set a timetable for dealing with disclosure at the outset, and should fix a date by which all defence applications for disclosure should be made. The defence are to be ready to make a list of specific requests, and to offer justification for each request for disclosure. The early definition of the issues should also assist the consideration of PII, as there is a danger that a judge asked to rule *ex parte* on PII (or indeed special counsel instructed to assist) will be unable fully to appreciate the potential relevance of the material to the defence.

⁴⁵ See, for example, *R v K and others* [2006] EWCA 724, in which the Court of Appeal held that counsel and trial judges should be familiar with the 'Protocol for the Control and Management of Unused Material', and further recognised the obligations of the CPR.

⁴⁶ [2004] EWCA Crim 696.

55. That said, the obligations to undertake all reasonable lines of enquiry and to make disclosure of material which assists the defence remains a burdensome requirement for the prosecuting authorities to discharge.

Pre-trial discussions between the parties

56. Unlike the situation pertaining in the civil sphere, there is no provision for pre-trial 'without prejudice' approaches between the parties involved in a criminal trial. Indeed, in a case where a defendant pleads guilty to a lesser offence encompassed within a more serious offence on the indictment for which he is being tried, circumstances may arise in which the defendant's guilty plea to the lesser offence can be used by the prosecution as evidence against him to establish that he committed the more serious offence – see *R v Hazeltine*.⁴⁷
57. Similarly the prosecution is likely to rely on any inconsistencies between a version of events suggested at the pre-trial stage by a defendant, and one offered in evidence during the trial. This use of inconsistencies is clearly envisaged in the provisions allowing for a jury to draw adverse inferences from the departure by a defendant at trial from the account put forward in a defence case statement.⁴⁸
58. Sections 76 and 78 of the Police and Criminal Evidence Act 1984 may allow a defendant who has made admissions at the pre-trial stage to seek to have those admissions excluded from the evidence at trial. Whether or not such admissions will be excluded is a matter for the trial judge, and as such not sufficiently certain to be relied upon at the pre-trial phase.
59. The Inland Revenue's 'Hansard' procedure amounts in essence to an informal approach from prosecution to defence at the pre-charge stage. The procedure encourages a potential defendant to confess all to the Inland Revenue and offer to repay anything owed in return for the possibility that criminal proceedings will not be instituted at all. However, section 105 of the Taxes Management Act 1970 envisages that statements made at these interviews may be admissible in certain circumstances.
60. In *R v Gill and Gill*⁴⁹ lies told by the defendants in a Hansard interview were held by the Court of Appeal to have been properly admitted in evidence to show their dishonesty in concealing accounts. However, the Court of Appeal noted that this is different from the admission of a confession by a defendant during such an interview. The House of

⁴⁷ [1967] 2 QB 857, per Salmon LJ.

⁴⁸ See s. 11(1)(d) of the CPIA 1996 (to be amended by s. 39 of the Criminal Justice Act 2003 when it comes into force).

⁴⁹ [2003] EWCA Crim 2256.

Lords judgment in *R v Allen*⁵⁰ acknowledges that there is probably a strong argument that the Crown should not be permitted to rely on evidence of an admission made after the inducement of a Hansard interview. What is clear is that there is little certainty for a potential defendant who admits to wrongdoing that criminal proceedings will not be instituted and admissions used against him in evidence. This lack of certainty is a disincentive for any potential defendant to approach and assist the prosecution at an early stage, and therefore probably depends on a defendant personally indicating a desire to plead guilty before any progress can be made.

Serious Organised Crime and Police Act 2005

61. Sections 71 to 74 of the Serious Organised Crime and Police Act 2005 (SOCPA) provide for a new scheme for the use of evidence given by those involved in the commission of offences. Broadly, the regime allows a prosecutor to give immunity from prosecution and/or to give an undertaking not to use certain evidence in criminal proceedings. Some undertakings would remain in force only so long as the individual concerned carried through the agreement and provided the information offered at the time the undertaking was given.
62. Section 73 of SOCPA provides a statutory regime for the reduction in sentence offered to defendants who provide the prosecuting authorities with assistance. The defendant will enter into a written agreement with the prosecutor as to the assistance to be offered, and in the event that the defendant is given a reduced sentence, but later knowingly fails to provide information as agreed, section 74 gives the courts power to review and impose a greater sentence.
63. This statutory regime represents a departure from previous practice, which involved at best the informal reduction of a sentence for assistance already given. The fact that a prosecutor can give an undertaking not to use evidence in criminal proceedings offers some protection to defendants willing to offer assistance from an early stage but concerned about the use to which their information will be put. It will also give greater certainty for those defendants who can expect a reduced sentence for their assistance.
64. These provisions are clearly aimed at encouraging a greater number of defendants to offer assistance to the prosecution during the investigation and at the pre-trial phase. Whether the evidence they provide will be sufficiently reliable for a jury to convict, or whether this will necessitate a return to the more frequent giving of accomplice directions by trial judges, remains to be seen.

⁵⁰ [2001] UKHL 45 at para 35.

Use of accomplice evidence

65. Section 32(1) of the Criminal Justice and Public Order Act 1994 (CJPOA) abrogated the requirement on a judge to direct a jury that it is dangerous to convict on the uncorroborated evidence of an accomplice. Prior to the enactment of this section accomplice warnings were obligatory: that is, where the prosecution case rested on the testimony of a witness who had 'turned Queen's Evidence', the jury were directed to look for other evidence that was capable of corroborating that account.
66. Since section 32(1) took away this requirement, whether or not to give any direction as to corroboration is a matter for the judge's discretion, based on the content and manner of witnesses' evidence and the circumstances of the case as a whole. Some guidance was given to judges by the Court of Appeal in *R v Makanjuola* and *R v E*,⁵¹ in which it was suggested that in some cases it might be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. There ought, however, to be some evidential basis for suggesting that the witness's evidence may be unreliable, over and above the mere suggestion of this in cross-examination. However, the Court of Appeal made it clear that the terms and strength of the warning are matters for the individual judge, and in particular the full corroboration direction previously given is no longer necessary. Indeed, the court disapproved of any attempt to 're-impose the straitjacket of the old corroboration rules'.
67. The matter has come before the Court of Appeal on a number of occasions since the decision in *Makanjuola*, and in the majority of cases the guidance has been affirmed with little alteration. See, for example, *R v Muncaster*,⁵² in which the Court of Appeal interpreted the guidance in *Makanjuola* as 'applying generally to all cases where a witness may be suspect because he falls into a certain category',⁵³ where what the judge says is 'not a technical direction of law but merely an observation of common sense'⁵⁴ the extent and detail are for the individual judge to decide. In *R v Cairns and others*⁵⁵ the first appellant's husband, having pleaded guilty to his part in the conspiracy, had given evidence for the Crown, and it was suggested by the second and third appellants that he was a witness unworthy of belief. The Court of Appeal found that there was no requirement of law that a witness needed to be wholly believable, but that where such a witness's evidence could be called into doubt there would need to be special directions to the jury.

⁵¹ [1995] 2 Cr App R 469.

⁵² [1999] Crim L R 409.

⁵³ *Ibid.*, at page 410.

⁵⁴ *Ibid.*

⁵⁵ [2002] EWCA Crim 2838.

68. In Scotland, the rule requiring corroborative evidence remains, subject to statutory exceptions. The oral testimony of one witness, however credible, is not full proof of any ground of action or defence (in the civil or criminal sphere) and thus if the only evidence in support of a case is the uncorroborated testimony of one witness, the judge must direct the jury that there is not sufficient proof in law. The requirement of corroboration applies to all facts that are essential to the case; in essence, this means all facts necessary to proving the elements of an offence, e.g. identification of the defendant. Corroboration may be derived from a second witness's testimony, but may also derive from other evidence in the case.

The core issue in serious fraud cases

69. The meaning of the word 'defraud' was considered in 1960 by the House of Lords in *DPP v Welham*.⁵⁶ According to Lord Radcliffe 'to defraud' could mean to cheat someone, to practise a fraud on someone, and to deprive someone of something belonging to him by deceit.⁵⁷
70. Perhaps the widest fraud offence is that of conspiracy to defraud; however, there are many offences which are used to prosecute those suspected of committing fraud: for example false accounting, or obtaining by deception. The element that all these offences and all of Lord Radcliffe's definitions of 'defraud' have in common is dishonesty. The classic definition derived from *DPP v Welham* is that 'to defraud' or to act 'fraudulently' is dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that you have no right to do so.⁵⁸
71. Common law conspiracy to defraud covers an agreement by two or more persons to dishonestly deprive another of something which belongs to that person, or to which he would or might be entitled, or to injure some proprietary rights of another. It potentially covers a wide range of fraudulent conduct, but in every case the prosecution must prove dishonesty. Similarly false accounting, an offence contrary to section 17 of the Theft Act 1968, requires that a defendant act dishonestly, with a view to gain for himself or another or with intent to cause loss to another. A further example is the offence of fraudulent trading contrary to section 458 of the Companies Act 1985. Whilst the definition of the offence does not specifically refer to dishonesty, there must be an intent to defraud or fraudulent purpose, which indirectly involves proof of dishonesty in line with the definition set out above.

⁵⁶ [1961] AC 103.

⁵⁷ At p214.

⁵⁸ Although dishonesty was never actually mentioned by the House of Lords in *Welham*.

72. The Fraud Bill presently before Parliament seeks to simplify the law by abolishing many of the myriad Theft Act deception offences and defining three new major fraud offences (as well as a number of other linked offences). Each of the proposed new offences retains the element of dishonesty.⁵⁹ There is also a new offence of obtaining services dishonestly.

Proving dishonesty

73. 'Dishonesty' is not defined by statute. On the contrary, section 2 of the Theft Act 1968 defines what is to be understood to be *not* dishonest:

2.— 'Dishonestly'.

(1) A person's appropriation of property belonging to another is not to be regarded as dishonest –

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

74. Defendants in large-scale frauds often do not dispute that they have done the acts alleged, but say that whatever part they played, they were acting honestly. The *Ghosh* test⁶⁰ then comes into play, involving two stages for the jury in considering dishonesty: first, was what the defendant did or agreed to do dishonest by the ordinary standards of reasonable and honest people; and secondly, must the defendant have realised that it would be regarded as dishonest by those standards?
75. One of the principal difficulties for prosecutors of fraud offences is proving these elements of dishonesty – that the conduct of the defendant was objectively dishonest, and that the defendant must have realised that it was. In the absence of an admission by the defendant, this can often be proved only by the use of circumstantial evidence: that is, by asking the jury to infer from a number of strands of evidence – for example,

⁵⁹ Fraud Bill, ss. 2 to 4.

⁶⁰ From *R v Ghosh* [1982] 75 Cr App R 154.

of the surrounding circumstances – that the defendant was acting dishonestly when he did the acts alleged.

76. The classic warning about the use of circumstantial evidence comes from the speech of Lord Normand in *R v Teper*⁶¹ – ‘Circumstantial evidence may sometimes be evidence, but it must always be narrowly examined, if only because evidence of this kind may be manufactured to cast suspicion on another.’
77. Notwithstanding such warnings, for a recent example of the Court of Appeal accepting that a conviction may be based to a large extent on circumstantial evidence, see *R v Dove and others*.⁶² The Court of Appeal found that the case being based on circumstantial evidence was not necessarily a weakness for the prosecution, as there were a number of strands of evidence which collectively gave rise to a powerful case against the defendants.

⁶¹ [1952] AC 480, at 489.

⁶² [2005] EWCA Crim 1982.

Part 4: Comparative systems

78. Having identified the main problems in the investigation and prosecution of serious fraud cases in England and Wales, the SPG received assistance on the operation of comparative systems in the United States and Germany. Although there is always the temptation to conclude that the 'grass is always greener', there are occasions when lessons can be learnt from the experience of foreign jurisdictions. The SPG was interested to discover whether one of those occasions might be in the field of the investigation and prosecution of serious fraud.

United States of America (USA)

79. In the USA the primary investigation of any offence is aimed at compiling a case to put before the Grand Jury, the tribunal responsible for deciding whether there is sufficient evidence to proceed to trial, to show reasonable cause that a crime has been committed. At this stage witnesses are interviewed, records gathered, and entities subpoenaed: for example, telephone companies and financial institutions. The Grand Jury is entitled to ask questions of witnesses and of the prosecutor. Once all the evidence is presented to the Grand Jury, it is for them to vote on whether the proposed defendant should be indicted. In New York State, immunity from prosecution for any crime relating to the subject matter of the testimony is automatically granted to any witness who appears before the Grand Jury.
80. Plea bargaining may take place either before or after the Grand Jury procedure. The bargain involves the defendant admitting responsibility for the crime, and often showing willingness to cooperate with the prosecution. In return the prosecutor may ask the judge to impose a more lenient sentence, or merely drop some charges. A judge is not necessarily bound by a plea bargain, but in practice bargains are followed. The majority of cases in the USA are concluded in this way prior to trial. The impact on large-scale fraud investigations will include a far shorter investigation, since the defendant pleading guilty will usually provide the prosecution with information.
81. Plea bargaining can involve an approach from the prosecutor to the defence, or an approach from the defence to the prosecution. In the latter case it is usual for a defendant to attend at the prosecutor's office in company with his lawyer. The prosecution can give a signed agreement, known as a 'Queen for a Day' (QFD), confirming that the prosecution will not use against that defendant any statement made by him. It prevents the prosecution from relying on the defendant's statements at trial except where the defendant gives testimony inconsistent with the information provided

at this stage. In essence a QFD allows a defendant to provide information at a very early stage in an attempt to secure a plea bargain agreement, but without prejudicing his ability to fight the case at a later stage.

82. As a general rule there is no obligation on the prosecution to disclose anything prior to charge (which includes an indictment put before a Grand Jury). A suspect may even be asked to testify before a Grand Jury and no obligation to disclose will arise, although in this scenario the prosecutor is obliged to warn the individual that they are a suspect.
83. Post-charge, Rule 16 of the Federal Rules of Criminal Procedure requires the prosecutor, promptly and upon the request of the defendant, to disclose oral statements made by the defendant pre- or post-arrest in response to interrogation by a person the defendant knew was a government agent and which the government intends to use at trial; relevant written or recorded statements made by the defendant; the defendant's criminal record; all exhibits that are to be used at trial, are material to the preparation of the defence, or were obtained originally from the defendant; reports of examinations and tests; and a summary of any expert evidence on which the government is to rely. Rule 16 specifically provides that where the defendant is an organisation, the government must identify persons who it says were legally able to bind the defendant regarding the subject matter of their statements, or were personally involved in the alleged criminal conduct and legally able to bind the defendant by that conduct because of that person's position. There is no deadline for Rule 16 disclosure, but there is a clear continuing duty to disclose material falling into the above categories.
84. Once a defendant requests and receives disclosure under Rule 16, he comes under a duty to disclose any documents or objects (i.e. defence exhibits), reports of any examinations or tests and a written summary of any expert witness testimony. Statements made to a defendant and/or his lawyer by any witness, including a government witness, are not disclosable.
85. The court has the power to regulate disclosure, and may conduct ex parte hearings to review material. If a party fails to comply with its Rule 16 disclosure obligations, a court may order discovery of the material, or prohibit that party from introducing the undisclosed evidence. The court is empowered to make any order that is just in the circumstances.
86. Further obligations to disclose will arise where a defendant seeks to challenge the admissibility of any evidence. Where a defendant does so, and an oral hearing takes place, the prosecutor must disclose the relevant statements of witnesses called at such a hearing. The rules in fact only require disclosure of the statements once the witness

has given evidence, but in practice these are usually disclosed prior to the hearing. Rule 12 gives the government discretion to disclose at or soon after arraignment notification of the intention to use specified evidence at trial, to give the defendant the opportunity to object to its use. The defendant can request that such material be disclosed as ought to be disclosed under Rule 16 for the same purpose.

87. Where a case proceeds to trial, there is in fact no obligation on a prosecutor to disclose statements of witnesses to be relied upon until those witnesses have given oral evidence. Again, in practice such statements are usually disclosed by prosecutors prior to trial. Where, for example, a prosecutor is concerned for a witness's safety and considers that disclosure of the statement should be delayed, it is common for the prosecutor to apply for a 'protective order' ex parte. This procedure would seem to equate roughly to PII applications in England and Wales.
88. Prosecutors are further obliged by established case law to disclose any material that tends to impact on the credibility of a prospective witness: for example, previous criminal record, prior inconsistent statements, or promises of leniency. Similarly, case law establishes that prosecutors should at the same time disclose any material in the hands of the government that tends to exculpate the defendant. The timing of such disclosure is not fixed, but in practice seems to take place at around the time the prosecution discloses the statements of the witnesses on whom it intends to rely.

Germany

89. The German legal system is inquisitorial in nature, and consequently the German approach to disclosure is markedly different from the system in England and Wales.
90. The inquiring judge exercises control over the proceedings from the outset, having wide powers of investigation, including, for example, the power to summons persons to give evidence or to direct the police to conduct further investigations. An indictment is prepared early on and read by the judge, and proceedings will be opened only where the judge believes there is sufficient evidence to conduct a trial. The court is responsible for determining the order of evidence, and will always begin by questioning the accused person.
91. Disclosure can be raised fairly informally at any point during this process and discussed between the judge and the parties. The police are required to keep files of evidence, but are not required to provide anything similar to a schedule of unused material to the defence. However, the prosecuting authority is required to provide to the court and the

defence any material that is exculpatory. The prosecutor is obliged by the German criminal code to secure such evidence if its loss is threatened.

92. If before the start of proceedings the defence has not received any evidence files from the prosecuting authority, it is entitled under the German code to inspect the files available to the court and to inspect evidence seized. Interviews conducted with the suspect and expert opinions must not be withheld from the defence. Either the Public Prosecutor or the presiding judge may decide whether to allow defence access to files. If the Public Prosecutor refuses access, and the suspect is remanded in custody, then this decision is subject to judicial review.
93. Defence representatives are permitted to apply for further evidence or access to further evidence during the trial. Both the defence and prosecution can seek to direct the court in its investigatory duties, and thus the procedure goes further than that provided in England for the defence to seek further disclosure under section 8 of the CPIA. However, it seems that in practice it may be hard for the defence to influence the direction of a police investigation, particularly where its aim is to seek exculpatory material only.
94. Disclosure in the German system is an ongoing process and is more fluid and informal than the process adopted in England. As in England, it is governed ultimately by the fair trial provisions of Article 6 of the European Convention on Human Rights.

The investigation of cartels as a comparative model

95. The OFT has the ability to grant partial or total immunity from the penalties that might otherwise be imposed in respect of cartels. Directors of a company granted 'leniency' in this manner will also benefit, as competition disqualification orders are not sought against them.
96. Total immunity is available to the first member of the cartel to come forward with relevant information. Immunity is automatic if the information is provided before the OFT has begun an investigation and the OFT does not already have sufficient evidence to establish that the cartel exists. Once the OFT begins an investigation, the grant of total immunity becomes discretionary. There is also provision for partial immunity, ordinarily resulting in a discount on penalty of up to 50%, for example where the entity comes forward at a later stage with information, or has been involved in coercing other parties to the cartel.
97. Immunity depends upon full and continuing cooperation, and the company must cease its involvement in the cartel. Where full immunity is granted, the OFT will issue 'no

action' letters pursuant to section 190(4) of the Enterprise Act 2002 (EA) to individuals employed by the company, and to its directors. These letters give the recipients immunity from prosecution under the EA (except in the circumstances specified in the letter). Where an individual or company approaches the OFT to offer such information, they will be interviewed. Information provided in these interviews will not be used against them, except where a 'no action' letter is not issued and false or misleading information has been knowingly or recklessly provided, or where a 'no action' letter is otherwise revoked (e.g. where that person ceases to comply with the conditions for immunity). A 'no action' letter will be issued where there is a likelihood of prosecution and the interviewee confirms they will comply with the conditions for the issuing of a 'no action' letter.

98. Where this happens it has the obvious advantage of providing the OFT with substantial evidence against other companies involved in the cartel, arising from a comparatively limited investigation. However, it is thought unlikely that such evidence would be accepted as sufficient without some corroboration, and in practice this is what has occurred.
99. This model is used widely in the USA, where it is known as granting 'amnesty' to the company offering the information. It is believed to be one of the most effective tools for investigating and proving cartels. When it is considered that the majority of US cases are resolved at the pre-trial stage by way of a plea bargain, adducing the uncorroborated testimony of an entity which has been granted amnesty in practice arises rarely and therefore causes few problems.

Part 5: Identifying possible solutions

Pre-charge plea bargaining

100. In paragraph 6.14 of the Fraud Review's Interim Report it is noted that current plea-bargaining arrangements in England and Wales do not seem to achieve significant savings in time or costs, nor to provide effective arrangements for securing prosecution evidence, compared with the approach in the USA.
101. For its part, the SPG welcomes the ability of the SFO and other prosecuting authorities to use the new powers conferred by sections 71 to 75 of SOCPA, and further, the SPG believes that there is much to commend a procedure for pre-charge bargaining along the lines of the process in the USA. The SPG considers that a legal framework needs to be established in England and Wales for serious fraud cases which would provide an improved incentive to those involved in cases who are willing to cooperate with the investigating authorities at a pre-charge stage. The law needs to provide a statutory framework which, following a request from a suspect in an investigation, requires the investigating authority to give an early statement and early disclosure of the nature of the investigation and the perception of the suspect's role in the fraud. The framework needs to make provision for contacts between the prosecuting authority and representatives of the defence at a very early stage in the investigation, so that the defence can tender a 'pre-offer statement' which would include proposals for confiscation of the proceeds of criminal conduct and for victim compensation, where this is an issue. If defence counsel were permitted to seek assurances at the pre-trial stage in relation to sentence and confiscation even without an indication from the defendant that he is willing to plead guilty, advice given at a very early stage might be more readily heeded by those defendants who are initially unwilling to consider assisting the prosecution in this way.
102. For pre-charge plea bargaining to be efficacious, the legal framework must address two further issues. First, it is essential for clear provision to be made for defence legal costs to be covered, albeit arising at a very early stage in the investigation and indeed, by definition, pre-charge. The framework should make provision for defence legal advice to be taken at the highest level, given the importance of the outcome of pre-charge bargaining for the person concerned. Secondly, it is essential for the legal framework to establish a conduit by which a proposed pre-charge bargain can be brought before the sentencing court, so that a clear and binding indication of sentence can be given before

a suspect enters into a pre-charge plea bargain; it is probable that only a significant reduction in sentence would act as a sufficient incentive in such cases.

103. It is thought that addressing confiscation at this early stage might encourage more defendants to offer assistance. The current regime involves an assessment of a defendant's 'benefit', which often will amount to far more than the actual profit realised from the criminal activity by an individual. In defining the extent of any confiscation at this stage, recalcitrant defendants concerned by the prospective loss of, for example, the matrimonial home might be more willing to assist the prosecution if a guarantee were given that only the defendant's realised profit will eventually be seized.
104. The SPG perceives that the introduction of pre-charge plea bargaining 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 nature of a fraud and the persons responsible for committing it. It would serve to narrow the scope of the investigation and thereby enable criminal proceedings to be brought to trial more speedily. It would lead to a reduction in the likely length of trial. A 'pre-offer statement' would enable the prosecutor to explain the case to the court in an easily comprehensible manner, and the testimony given by the accomplice would facilitate the conviction of other participants in the fraud. It is axiomatic to record that all dealings between the investigating authority and the accomplice would be transparent, at least in so far as the other participants in the fraud were concerned.

Evidential value of accomplice evidence

105. Whilst the SPG supports the enhanced use of informant evidence whether obtained at the pre-charge or post-charge stage, care must always be exercised when deploying this evidence to establish the guilt of other alleged participants in the fraud.
106. Mindful of the risks of injustice in a case where accomplice evidence is placed before the court, the SPG calls for the abolition of section 32(1) of the CJPOA and the establishment of a requirement for an accomplice warning to be given as a matter of course in all serious fraud cases where a witness is given an immunity from prosecution. The new provisions in sections 71 to 74 of SOCPA have heralded a significant change of emphasis in the workings of the criminal justice system, by placing enhanced reliance on informant and accomplice evidence. The proposals for change put forward by the SPG would take these provisions a step further. In these circumstances, in order to safeguard against the risks of injustice where an accomplice gives evidence motivated by a wish to improve his own position, having obtained either

immunity or a reduced charge or sentence in consideration for his endeavours, it is essential that the fact-finding tribunal remains alive at all times to the possibility that the accomplice evidence is by definition self-serving and may be less than truthful. A requirement to establish corroboration for his testimony would provide a suitable counterbalance to the risk of injustice. A court should not be permitted as a matter of law to convict a defendant on the basis of uncorroborated evidence from an accomplice in these circumstances.

Focusing the investigation

107. The SPG does not believe that the problems regarding the ability to focus an investigation and the consequent disclosure of large volumes of unused material will be solved until there is change in the provisions of the CPIA Code of Practice. With the issue of dishonesty such a central one in a serious fraud case, we do not believe that it is necessary for such an extensive investigation to be undertaken. If wasting valuable resources is to be avoided, it is essential for an investigating authority to have the ability to close down an unpromising line of enquiry.
108. The SPG believes the obligation upon the investigating authority to pursue all reasonable lines of enquiry to be wholly unrealistic in the circumstances of a serious fraud case. Unlike many other types of case, in a serious fraud case the suspects in the investigation will often be best placed to identify lines of enquiry and documents which advance their case, and reliance on the investigating authority to undertake this task on their behalf serves only to distract from the fundamental task at hand. It is not uncommon in serious fraud cases for a series of different frauds to have taken place within the same company. In these circumstances, as a matter of general principle the SPG believes that it would be fair and just to permit an investigating authority to select a confined and discrete area for investigation. That said, it is important that a suspect or defendant should not be without redress where, for example, there is other material extraneous to the area chosen for investigation known to the prosecution which would advance his defence at trial.
109. The SPG believes that the solution to this issue lies in earlier judicial involvement which would enable the investigating authority to seek approval from a Crown Court judge to confine its investigation to certain areas. Where an investigating authority seeks such approval, it would be open to a suspect or defendant to apply to the court for an order requiring the investigating authority to explore a line of enquiry or to obtain and/or disclose unused material where it was able to establish to the court's satisfaction that this course of action was necessary for the suspect or defendant to advance his

defence. The SPG appreciates that this solution would involve the judiciary in an enhanced role in the investigation process. However, it is right to point out that the judiciary are already involved to some extent when determining applications for search and seizure warrants under the Police and Criminal Evidence Act 1984. Early judicial involvement should also limit the opportunity for allegations of failure by the prosecuting authority to take full account of the views of victims of fraudulent conduct when focusing the investigation.

A presumption of dishonesty

110. It has been suggested that one possible way of shortening a trial in terms of proof by the prosecution of dishonesty is to establish a presumption in favour of the prosecution, which would provide that a defendant is presumed to be dishonest in circumstances where he has received monies without lawful authority, unless he proves otherwise. This could operate in a similar way to the presumption under section 2 of the Prevention of Corruption Act 1916, which creates a statutory presumption in cases brought under either the Prevention of Corruption Act 1906 or the Public Bodies and Corrupt Practices Act 1889 to the effect that where it is proved that any money, gift or other consideration has been paid or given to or received by a person in the employment of the Crown, the Government or a public body, by or from a person, including via an agent, holding or seeking to obtain a contract from the Crown or any government department or public body, the payment shall be deemed to have been paid or given and received corruptly. Once the presumption is raised, the onus of proof lies on the defendant to disprove it on the balance of probabilities.
111. Having considered the matter carefully, the SPG believes that it is neither necessary nor appropriate to introduce such a presumption into the law of dishonesty.

The Assets Recovery Agency – an enlarged role

112. The ability of the investigating authority to focus upon a particular area of criminality for the purposes of bringing a serious fraud case swiftly to trial should not derogate from the wider ability of the Assets Recovery Agency (ARA) to pursue confiscation of criminal assets produced by other fraudulent conduct which is not the subject of prosecution.
113. In order to introduce these solutions, changes would be required to the CPIA, and also to permit ARA to pursue civil recovery of criminal assets in a case where prosecution is possible but not economically viable. At present, this possibility is precluded because

Government criminal justice policy requires a prosecution to be brought in all cases where prosecution for the offence is possible.⁶³ For our part, we see no reason in principle which should prevent the ARA in an appropriate case from commencing civil recovery proceedings for the larger part of fraudulent conduct uncovered in an investigation, where no more than a narrow part of the conduct has been the subject of criminal prosecution.

Unused material

114. With regard to disclosure of unused material, the SPG sees considerable force in an amendment to the CPIA legislation which would broadly follow the approach taken by the authorities in the United States of America. The prosecuting authority would present the judge with a schedule of unused material and seek his approval that there is no reason to suppose that the material is relevant to the issues likely to arise in the case. Any further requests for disclosure of unused material, either held by the investigating authority or in the hands of a third party, should be made the subject of a specific application, and the onus should be placed on the defence to satisfy the court that there is good reason for disclosure to be made. Again, the defence is much better placed than the prosecuting authority to know whether or not certain classes or items of unused material are relevant. There is no reason why the burden of proof should not be shifted to the defence in this instance when the matters are within the defendant's knowledge. There are a number of instances where Parliament has shifted the burden of proof to a defendant, in circumstances where it has taken into account the ease or difficulty for the respective parties of discharging the burden of proof in the particular case.⁶⁴ Where the application by the defendant relates to unused material held by a third party, in assessing the merits of the application the judge could take into account the fact that the defendant will not know the location of the material in these files. We have considered compatibility with the European Convention on Human Rights and do not foresee a problem.

Increased judicial involvement

115. In addition, the SPG considers that in terms of pre-trial procedures there is greater scope for the courts to require increased defence disclosure, and for the jury to be made aware not only of inconsistencies between the defence case statement and

⁶³ <http://www.assetsrecovery.gov.uk/downloads/SOSrevisedguidanceFeb2005.pdf>.

⁶⁴ See *Hunt* [1987] AC 352.

evidence at trial, but also of non-compliance by the defendant with a requirement to make full disclosure.

116. The court ought to have the ability to pass sentence following conviction for associated criminality which could become the subject of a contested hearing if the facts are disputed by the defendant. The hearing would be conducted in accordance with the principles laid down in *R v Newton*.⁶⁵ The judge would determine the factual issues after hearing evidence from the prosecution and the defence. He would direct himself in accordance with the normal criminal standard of proof and apply the trial rules of evidence when considering admissibility of relevant material.⁶⁶

Case management training for solicitors

117. There is a need for both prosecuting and defence solicitors alike to receive case management skills training. Experience demonstrates that inefficient case management by the prosecution or the defence lengthens the proceedings.⁶⁷
118. Prosecuting lawyers need special training in the management skills required for the handling of serious fraud cases, if they are to avoid the problems arising from poor case management.
119. At the present time defence solicitors do not need to demonstrate case management skills to obtain a franchise to undertake serious fraud cases. Since management is so important in cases involving serious fraud, the SPG considers that this qualification should be mandatory. The Legal Services Commission ought to be required to provide courses to teach the skills required for the efficient management of a serious fraud case. As a result of the additional demands involved in the management of a serious fraud case, an appropriate uplift should be included in the legal costs paid to defence solicitors.
120. The SPG notes that it is not possible to limit to a small number those defence solicitors who are properly equipped to undertake serious fraud cases. Mindful of the number of defendants often charged in serious fraud cases and the number of companies involved in such cases, a sizeable panel of defence solicitors is needed to facilitate separate representation where required.
121. On occasions where the prosecution or the defence fail to demonstrate competence in the management of a serious fraud case, we believe that the courts should be more

⁶⁵ [1983] 77 Cr App R 13.

⁶⁶ For further information on the nature of a 'Newton hearing', see Archbold 2006 at para 5-74.

⁶⁷ The role of the trial judge is considered in the next section, below.

robust in the application of their powers to make a wasted costs order against the lawyers concerned. The jurisdiction can be exercised under section 19A of the Prosecution of Offenders Act 1995 when a legal or other representative conducting litigation acts in an improper, unreasonable or negligent manner.

Specialist judges

122. Similarly, judicial experience is inevitably trial focused, having been conditioned by an advocacy and not a management career. Many judges have little or no experience of the investigation and preparation of a case from the perspective of the prosecution or the defence.
123. The most complex cases involving fraud involve the dual expertise in commercial and financial matters and trial management technique. Many members of the Bar, the solicitors' profession and 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, as opposed to civil cases in the High Court. Trial management techniques can be taught and, if the case management Protocol is to be translated into practice, must be taught to all judges who may be called on to try complex and lengthy criminal cases. One factor which is insufficiently emphasised is the strength of character necessary on the part of the trial judge, faced with formidable experience and ability on the part of senior silks brought in by the defence in some of the bigger and more high-profile trials. In those cases, it is apparent that a few Crown Court judges are intimidated by the force of arms on the defence side and do not intervene or manage the process in as vigorous a manner as they would if faced by more junior or less experienced counsel.
124. Consideration should be given by the Lord Chief Justice to assigning experienced commercial and civil judges from the Chancery and Queen's Bench Divisions to try complex fraud cases. The Judicial Studies Board should institute appropriate trial management courses, based on Woolf Protocol principles, for all Crown Court judges with fraud 'tickets'. The SPG believes that it is in the public interest for greater transparency to be afforded to the question of how fraud 'tickets' are allocated. For example, the criteria for allocation and the mechanics of the appointment process ought to be made known. Judges trying a particularly long (i.e. in excess of nine to twelve weeks) case should be offered at least two weeks' reading time in advance of the trial and the services of a judicial assistant.

125. The SPG recommends the establishment of a small cadre of (say) ten specialist fraud judges with status similar to that of the specialist mercantile judges⁶⁸ and specialist technology and construction judges.⁶⁹ These judges would try the most serious and complex fraud cases. There should be five centres throughout England and Wales at which these judges would sit. The courts should be fully equipped with the latest case info-technology used in fraud trials. Of course such a panel of judges would not be confined to trying fraud alone, and when available would be able to deal with non-fraud cases.
126. The SPG notes that as well as implementing a more specialised system of appointment for judges trying fraud cases, the overall efficacy of the Crown Court in dealing with trials of serious frauds could be enhanced by the introduction of appropriate powers for a Crown Court judge to sit in such a capacity as to allow him to deal with the wider financial implications of a fraud: for example, to ensure restitution to victims and to ensure proper regulatory and deterrent sanctions such as professional disqualifications, which at present are not dealt with at the sentencing stage.

Public–private sector collaboration

127. The SPG is cautious regarding the indication in the Interim Report that the Fraud Review wishes to explore the prospect of more partnerships in which police, public and private sectors collaborate to investigate and finance the investigation of fraud. Whilst collaboration between prosecuting authorities and regulatory bodies may lead to greater efficiency, the SPG believes that the provision of a police investigation service is a function of Government and not of the private sector. Although mindful of the reduction in the number of mainstream investigators to which reference has already been made,⁷⁰ the SPG does not believe that it is the role of a corporate victim to financially support a police investigation into the circumstances of criminal conduct which has taken place. Attempts by Government to encourage a corporate victim to financially support a police investigation devalue the importance to be attached to the investigation of serious fraud and set this species of crime apart from other forms of criminal conduct in respect of which the resources of the State are fully deployed. In short, it would send the wrong signal from Government, to the effect that corporate fraud is not being taken as seriously as other forms of criminal activity.

⁶⁸ For the job description of a mercantile judge, see <http://www.dca.gov.uk/judicial/appointments/sca/scmjnecguide.htm#anna>.

⁶⁹ For the job description of a technology and construction judge, see <http://www.dca.gov.uk/judicial/appointments/scjsalf06/scjsalf06appguide.htm#A>.

⁷⁰ See Part 2, para 15 above.

128. In this regard, the SPG is mindful of the adverse comments made by the Court of Appeal in *Hounsham, Mayes, Blake*,⁷¹ a case in which three insurance companies had made sums available to a police force to assist in the investigation of a case involving the theft of cars which were used in staged road traffic collisions and were the subject of inflated claims made to the insurance companies in question. As Gage LJ noted:⁷²

The prosecution now accept that the police were acting ultra vires their powers when they accepted financial contributions towards the expense of the investigation from three insurance companies. In our judgment, soliciting by the police of funds from potential victims of fraud, or any other crime, quite apart from being ultra vires police powers, is a practice which is fraught with danger. It may compromise the essential independence and objectivity of the police when carrying out a criminal investigation. It might lead to police officers being selective as to which crimes to investigate and which not to investigate. It might lead to victims persuading a police investigating team to act partially. It might also lead to investigating officers carrying out a more thorough preparation of the evidence in a case of a 'paying' victim; or a less careful preparation of the evidence in the case of a non-contributing victim. In short, it is a practice which, in our judgment, would soon lead to a loss of confidence in a police force's ability to investigate crime objectively and impartially.

129. Notwithstanding, the SPG believes that there is a way in which the private sector can collaborate significantly with the public sector, to their mutual advantage. Instead of funding police investigations, we do not see any objection to the corporate sector being encouraged by Government to undertake its own investigations, which would focus not only on the asset recovery by action in the civil courts but also on the obtaining of evidence which could facilitate the prosecution of those who committed the fraud in the criminal courts. The evidence obtained in the private investigation could be passed to the police, who would review the material for further action and possible prosecution.

130. To some extent this practice occurs already, but there are often problems. Evidence obtained by private investigators may not be in a form which can be used in evidence in a criminal court, and as a result the police have to retake the relevant witness statements. The provenance of critical financial documents is sometimes not adequately tracked, and documents not considered to be critical to the investigation are

⁷¹ [2005] EWCA Crim 1366.

⁷² Judgment, para 31.

misaid. Also, the integrity of computers used by the fraudulent perpetrators may not have been preserved. Worse still, experience suggests that there are occasions when private investigators (some, not all) obtain evidence in a manner which would prevent the evidence from being adduced in a civil or criminal court.

131. These difficulties could be overcome if a system for the regulation of private sector investigation companies was established, with compulsory training for financial investigators working in the private sector. Once private investigation companies were properly regulated, suitably qualified private investigators could be brought within the provisions of the CPIA and the Regulation of Investigatory Powers Act 2000 (RIPA). A system could also be established to enable private investigation companies to obtain guidance from the police on the conduct of an investigation. The SPG would support the notion of increased private–public sector collaboration if it proceeded along these lines.

Maximising resources

132. The SPG unhesitatingly supports any proposal from Government which is directed at the maximisation of resources available for the investigation and prosecution of serious fraud. The SPG believes that the number of authorities involved in the investigation and prosecution of serious fraud needs to be rationalised. Various estimates of the number of bodies with responsibility for investigating and prosecuting fraud vary; it is thought that there are well over 50 such bodies. The multiplicity of investigating and prosecuting bodies dilutes specialist expertise and skills, and is a chronic waste of money. Multiplicity of different authorities leads to fragmentation of resources and unnecessary competition.
133. Expense saved by unnecessary duplication of investigating and prosecuting bodies should be utilised to employ more financial investigators, who would be available to investigate a case for the purposes of trial as well as confiscation.
134. Much greater use of a 'lead force' should be made amongst the police authorities, replicating throughout England and Wales the situation in London, where City of London Police have become the 'lead force' for the investigation and prosecution of fraud in the South East.⁷³ The SPG believes that it is essential for the lead forces to be properly funded, with adequate investigative and forensic resources. The lead forces must be afforded access to top-quality specialist legal advice where necessary, and

⁷³ <http://www.cityoflondon.police.uk/economic-crime/economic-crime.html>;
<http://news.bbc.co.uk/1/hi/business/4485743.stm>; <http://www.uk-fraud.info/forum.html>.

there is a role for the SFO or the specialist fraud investigation unit of the CPS to play in this regard. Again, it is vital that additional funding is made available to support this resource.

135. Public opinion tends towards the view that the criminal justice system does not deal robustly enough with white-collar fraudsters. This is particularly so with regard to frauds falling within the £100,000 to £1 million bracket. The expected increase in efficiency in prosecuting medium to high level frauds resulting from these proposed changes ought to go some way in dispelling this perception.
136. There is also scope for maximising resources in the case of defence solicitors. The Legal Services Commission should address the duplication of resources which occurs when more than one defence team undertake similar work in a case where no conflict of interest between defendants arises in relation to that work. For example, where the work involves checking an analysis or schedule of evidence prepared by the prosecution, it is inexcusable for the checking exercise to be duplicated by different firms of solicitors acting for different defendants.

Part 6: Cost

137. The SPG is not in a position to assess the cost implications of the solutions it puts forward. However, mindful of the considerable savings which would be made through more focused investigations, reduced disclosure of unused material, more guilty pleas and shorter trials, cost savings are quite possible. At worst, the SPG would expect the package of measures to be cost neutral.

Appendix A: Professional biographies of the SPG

Jonathan Fisher QC (Special Project Group Chairman) is a barrister based at 18 Red Lion Court, London, specialising in financial crime and regulatory cases, in particular those involving tax, money laundering and confiscation. He is listed as a leading silk in the Legal 500 *Who's Who in the Law* for 2005. Jonathan has recently been involved in leading confiscation cases such as *Simpson*, *Stannard*, and *HMRC v Hill*, and he was a member of the Assets Recovery Agency Steering Group for the first three years of its operation. Prior to taking silk, Jonathan was Standing Counsel (Criminal) to the Inland Revenue at the Central Criminal Court and London Crown Courts. Co-author of *The Law of Investor Protection* (Sweet & Maxwell), Jonathan holds visiting academic appointments at the London School of Economics and the Cass Business School, and he is a legal panel member of the Accountancy Investigation and Disciplinary Board. Jonathan has been an active member of the Fraud Advisory Panel since its inception in 1998.

Robin Booth is a partner at BCL Burton Copeland, a London firm specialising in business crime and financial regulation. He has extensive experience, as both prosecutor and defence lawyer, of the investigation and prosecution of serious financial and other crime; before returning to private practice in 1999, he was Head of the Fraud Division at the Crown Prosecution Service. Robin now specialises in fraud, corruption and money laundering cases both in the UK and abroad. He also advises individuals, companies and foreign governments on money laundering and corruption. He is the General Editor of Sweet & Maxwell's *Anti-Money Laundering Guide* and chairs the Money Laundering Task Force of the Law Society.

Ken Farrow is Head of Group Financial Crime Unit at Lloyds TSB. Prior to joining Lloyds TSB, Ken served as a City of London Police detective for over 30 years in a wide variety of CID and Fraud Squad roles. Between 1992 and 1994 he was seconded to the Serious Fraud Office and later became the head of the 140-strong City of London Police Economic Crime Department. During this period he also chaired the ACPO National Working Group on Fraud.

Will Kenyon is a Chartered Accountant and a partner in PricewaterhouseCoopers' Forensic Services group, specialising in the detection, investigation and prevention of fraud and other financial and business impropriety in a wide range of organisations, both private and public sector.

Originally an auditor, Will has worked in the field of forensic accounting for the past 14 years. His extensive experience encompasses assignments in a wide variety of sectors and situations, including misappropriation of assets by employees, management fraud and breach of trust, procurement fraud, corruption, accounting manipulation, loan fraud, misuse

of client monies, and many others. In addition, Will has been involved in investigations and recovery actions in relation to some of the most significant insolvency cases of the last decade. Will has considerable experience of working in and leading cross-border teams on major international assignments. Will is also a director and trustee of the Fraud Advisory Panel.

David Ormerod is Professor of Criminal Law at the University of Leeds and a Door Tenant in the Chambers of David Etherington QC, 18 Red Lion Court. He is the Cases Editor for the *Criminal Law Review* and Editorial Advisor, *Blackstone's Criminal Practice*; he serves on the Editorial Board of the *International Journal of Evidence & Proof* and the *Covert Policing Review*. He lectures regularly to the profession and to the judiciary. David is the author of numerous journal articles and editor of *Smith and Hogan, Criminal Law* (11th edition, 2005) and *Smith and Hogan Cases and Materials on Criminal Law* (9th edition, 2005). He is also the co-author of *Bailey Harris and Jones on Civil Liberties* (5th edition, 2001), and *Modern English Legal System* (4th edition, 2002).

Rosalind Wright is the Chairman of the Fraud Advisory Panel, the independent fraud watchdog founded and supported by the Institute of Chartered Accountants in England and Wales. She is also a non-executive director of the Office of Fair Trading and the Department of Trade and Industry and a member of the Supervisory Committee of OLAF, the European Anti-Fraud Office. She is a barrister and a Master of the Bench of Middle Temple and has also been called to the Bar of Northern Ireland. She was made a Companion of the Order of the Bath in the New Year Honours in 2001.

Rosalind was formerly the Director of the Serious Fraud Office, from 1997 to April 2003. She was previously general counsel and an executive director for ten years at the Securities and Futures Authority, one of the principal City financial services regulators. Prior to taking up that appointment, she was an Assistant Director of Public Prosecutions at the DPP's Department, where she worked for 18 years, after five years in practice at the Bar.

Appendix B: Those who have assisted the SPG

Thanks are due to Emma Gargitter for her assistance in undertaking research for this report, and to Simon Pearce for producing the executive summary.

Thanks are also due to the following individuals and organisations that have been consulted during the drafting of the report:

- Felicity Banks, Head of Business Law, Institute of Chartered Accountants in England and Wales
- Robert Goldspink, Managing Partner, Morgan Lewis
- Vicky O’Keeffe, Head of Policy, Serious Fraud Office
- James Kellock, Deputy Director, Serious Fraud Office
- Charles Kuhn, Senior Crown Prosecutor, Crown Prosecution Service
- David Levy, Head of Fraud Prosecution Service, Crown Prosecution Service
- His Honour Judge Geoffrey Rivlin QC, Southwark Crown Court
- Robert Wardle, Director, Serious Fraud Office
- DCS Steve Wilmott, Head of Economic Crime Department, City of London Police
- Members of the Investigation, Prosecution and Law Reform Working Group, Fraud Advisory Panel.

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