Home Affairs Committee
Inquiry into Fraud
Bar Council written evidence

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

1. The Bar Council through its membership, has direct experience and expertise in the prosecution of fraud cases both in the Crown Court and Magistrates' Court. It is to that aspect of the terms of reference of the Call for Evidence to which this submission is directed.
2. Most frauds of significance are tried in the Crown Court. All the offences in the Fraud Act 2006 are 'either way' offences; that is, those which can be heard in either the Magistrates' or the Crown Court – the latter at the direction of the Magistrates' Court or the election of the defendant. The Bar Council therefore focusses its submissions on cases in the Crown Court.
3. The context of the Select Committee's Inquiry is the Fraud Strategy published by the Home Office in May 2023, a key component of which was the appointment of Anthony Browne MP as the Anti-Fraud Champion with whom the Bar Council has already engaged. It is of note that his remit relates to fraud committed against individuals and not specifically fraud committed against the State. The terms of reference of this Inquiry are not expressly so limited. Fraud against the State perhaps highlights the diversity of the cases prosecuted – from highly complex and technical marketed tax avoidance schemes devised and operated by professionally qualified promoters and advisers, to a single defendant failing to disclose a material change in their personal circumstances which affects their monthly Universal Credit payment. As set out below, many of problems which beset the successful prosecution of fraud in the Crown Court are common to all types of fraud, as are many of the potential solutions. As far as practitioners and the courts are concerned, there is no distinction to be drawn between economic crime (sometimes seen as incorporating fraud against the State) and fraud; such is artificial and unhelpful. It is hoped that the Committee's Inquiry will encompass the full range of fraud cases, both large and small: they all provide evidence of a justice system buckling under the burden of well-documented and chronic under-funding.

Overview

4. Investigations and prosecutions for fraud in the criminal justice system take many forms and, more than any other category of 'mainstream' offences in the criminal code, are undertaken by a variety of public and private agencies.

5. Each case is subject to the same fundamental statutory, regulatory and procedural rules – such as the Code for Crown Prosecutors (which is widely used to determine whether a case is sufficiently evidentially robust to bring to charge, and whether a charge is in the public interest), the Criminal Procedure and Investigations Act 1996 ('CPIA', which governs the prosecution's duty of disclosure to the defence of material which might reasonably be considered capable of assisting the defence case or undermining that of the prosecution) and the Criminal Procedure Rules 2020 (as amended) (which, broadly, provide the framework within which the preparation for, and conduct of, all criminal trials are conducted) – but their practical application varies significantly.

6. The vast majority of fraud cases are investigated by the police or His Majesty's Revenue and Customs and are charged and prosecuted by the Crown Prosecution Service ('CPS'). Each body has separate and defined statutory functions (particularly in respect of disclosure), although there is considerable collaboration.

7. Other fraud cases are brought by bodies which, critically, both investigate and prosecute. For prosecutors from the private sector, it is resources and economies of scale, rather than principle or learned experience, which often dictate that structure.

8. Non-CPS prosecutions can be divided between statutory bodies such as the Serious Fraud Office ('SFO'), the Financial Conduct Authority, local authorities, and private organisations such as welfare charities, trade bodies, private corporations, and individuals. Whilst the Director of Public Prosecutions ('DPP' – the head of the CPS) has the statutory power to 'take over' prosecutions launched by any other body, it is a power which is rarely exercised in fraud cases. The DPP has indicated that the CPS will take over and discontinue a case if, on review of the papers, the evidential sufficiency or public interest limbs of the Full Code Test are not met.[1]

9. Fraud itself encompasses a wide variety of offences and offending. The evidential components of cases are also varied and differ as to complexity of material and input requiring expertise over a range of subjects. The larger, longer, more resource-intensive and more high-profile cases tend to be prosecuted by the Serious Economic Organised Crime and International Directorate of the CPS and the SFO. These often involve multiple defendants, intended or actual losses which run into millions of pounds, and vast disclosure exercises. However, many fraud cases (and numerically, no doubt the far greater number) involve victims who are neither sophisticated investors nor the Public Revenue; rather ordinary citizens who, for example, have had their personal financial data stolen and misused, or have been targeted by predatory criminals who rely on the financial naivety of their victims.

[1] https://www.cps.gov.uk/legal-guidance/private-prosecutions#_Toc23510728.

10. Most cases are brought against individual defendants as opposed to limited companies; although there is no legal bar to prosecuting the latter, there are significant evidential hurdles and some uncertainty as to the legal principles to be applied (addressed further below). The majority of fraud trials of any complexity or length (not necessarily judged by the value of any financial loss) are dealt with in the Crown Court by a jury, aside from low value State benefit frauds which are generally heard in the Magistrates' Court.

11. The following appear inescapable conclusions from the experience of practitioners:

    - the prevalence of fraud in society generally is inexorably increasing, and in particular cyber-fraud (see paragraph 14 below)
    - there is an increase in private prosecutions brought by corporations for fraud (alongside, or in preference to, civil actions) and
    - since the pandemic, fraud trials of medium-significant length are routinely delayed due to being deemed of lower priority or urgency than other cases within the backlog.

12. The Committee's Inquiry provides the opportunity to highlight the specific pressures faced in the management of fraud cases. We should say that our experience of fraud in the criminal justice system typically arises once a decision to prosecute has been taken in respect of smaller cases, and somewhat earlier in larger cases where we may be instructed to advise after an investigation has been formally adopted by the relevant body and before charge. Other respondents will be better placed to comment on the prevalence of, and reason for, the apparent failure of the State to investigate allegations of fraud more generally, as highlighted in the Call for Evidence.

13. The following are specific areas which the Bar Council suggests the Committee addresses, with the aim of achieving successful prosecutions which can more swiftly be brought to a resolution, to the benefit of individual victims, the State, and the wider public. A successful prosecution is one which results in the just conviction of the defendant after a fair trial. It is one of the overriding objectives of the criminal justice system that the guilty are convicted and the innocent acquitted.

(i) Delay (and under-funding)

14. A fundamental issue which is a blight on the entire criminal justice system is the lack of State resources directed to the investigation and prosecution of crime. This issue is a real and critical danger to the effective control of fraud, given the increased level of sophistication applied to criminal operations where avoidance of detection is furthered by the digital age. Cybercrime is without question an area where investment is needed to tackle this "growth" area. Whilst it is appreciated that such is not specifically the focus of the Committee's remit in this call for evidence, the strangulation of resources in this area constitutes a threat to the continued viability of an effective criminal justice system and provides the backdrop to any meaningful discussion about improvements to any of its constituent parts.

15. It is (and must be) acknowledged that the investigation and prosecution of complex fraud cases takes time, and some delay is inevitable. A lack of resources is not the only

cause of delay. However, under-funding is a significant contributory factor to delay which pervades the entire course of a fraud case, from initial investigation to charge, through to pre-trial litigation and the listing and conduct of trials, to the jury verdict and ultimate sentence on conviction (including confiscation of the proceeds of crime).

16. In particular:

    a. 'Release Under Investigation' ('RUI'):

    A consequence of replacing police bail with a procedure of RUI has resulted in a lack of impetus in many fraud investigations. Time precious investigations become necessarily damaged and the absence of any judicial oversight of extended delays means that scarce police resources will be deployed to other enquiries perceived as more urgent, thus providing a distraction from the central and critical issues in an investigation. It is not unusual in larger cases for delays of over 5, and up to 10 years, before charge. Witnesses in fraud cases may be elderly or vulnerable, having been scammed out of significant savings or their pension (even if the ultimate loser is a financial institution). The adverse effect on witnesses and suspects of delays in an investigation or prosecution is obvious. The Bar Council highlighted these issues in a detailed response to the Home Office consultation paper on 'Police Powers: Pre-Charge Bail' in May 2020[2].

    b. Disclosure:

    The same underlying principles apply to every fraud case, whatever its size. The burden is on the investigators to undertake the disclosure exercise, (rightly so, since it is they who have, or have access to, the material) and the cause of the common and repeated failings of the prosecution properly to exercise their duties of disclosure are often case specific. The principles to be applied under the CPIA are clear; the problems which arise often relate to the investigating/prosecuting bodies failing properly to identify what the issues are in a case, and to ensure defensible, resilient decisions about which material to obtain and what review is made. There is no centralised disclosure training programme across the disparate criminal investigation agencies and the standard of the available training is variable. As a result, there is often a lack of rigour in the application of the statutory regime, which impacts on timely and appropriate disclosure of material being made. This in turn may add to delay and ultimately injustice. Regrettably, it is still the case that some judges fail to enforce sensible limits on disclosure and to apply the rules of the disclosure regime, which are drafted in favour of achieving trials which are both fair and not unduly or impossibly burdensome on legitimate prosecutions.

    Disclosure management from an early point in the proceedings is necessary so as to provide shape to the investigation and maintain an overview of case progress. The reality is that much time in fraud is expended on reviewing and collating material which ultimately is only of marginal, if any, relevance to the

[2] https://www.barcouncil.org.uk/resource/bar-council-consultation-response---police-powers-pre-charge-bail.html

trial issues, but necessarily has to be reviewed as it cannot simply be ignored. Disclosure should be directed at the real issues, and as such there is scope for greater mandatory involvement from the defence (who will know what those issues are) and supervision from the court. Both the prosecuting authorities and defence need to be engaged in the process at an early stage. For example, the provision of realistic search terms for electronic media and engagement with the prosecution's Disclosure Management Document is a must. One issue which needs to be grasped and understood in clear terms is that proper disclosure requests made do not cause delay. These are not tactics designed to avoid a defendant facing his/her trial. This is a myth, which needs firmly dispelling; disclosure is an essential component of a fair trial.

i. Experience has demonstrated that systemic and human error often (but not always) occurs in the disclosure process because of a number of issues including:

    a. the size of the task at hand;

    b. the lack of expertise in those conducting the disclosure review;

    c. the lack of focus which leads to the unnecessary collation and review of marginal material and

ii. Failing to anticipate and manage such issues is contrary to the interests of the justice and protection of the public, and will add to delay, and impede ultimately the execution of justice, thus defeating the object of the exercise.

On 12 October 2023, the Home Office announced the launch of an independent review into disclosure and fraud offences, chaired by Jonathan Fisher KC. This is an issue of particular interest to the Bar, and we look forward to engaging with it.

c. <u>Listing</u>:

Listing is the process by which individual court centres determine the date on which cases are heard, whether for trial, guilty plea and sentence, or other interlocutory hearings. Listing is overseen by the judiciary, not the Ministry of Justice. It is administered by List Officers at individual Crown Court centres. A backlog of c.30,000 cases predated the court lockdown caused by the pandemic. It currently stands at 64,709 (as of 28.9.23). Whilst some laudable efforts have been made to reduce it, they are insufficient. In the drive to reduce the backlog, fraud trials have a low priority for listing, for the following reasons:

- They take longer than most other trials, their duration being estimated in advance by reference to weeks (or even months) rather than days. Therefore, for the length of one fraud trial of say three weeks duration, the same courtroom could accommodate three or four shorter trials, with the backlog being reduced accordingly.

- Most defendants in fraud cases are on bail. In contrast, in other cases where defendants are remanded in custody pending their trial, however serious the offence, there is a statutory obligation on the court to start their trial within a specified period once it has been 'sent' to the Crown Court, subject only to limited criteria justifying an extension (this period is known as the 'custody time limit').
- Most fraud cases are document based, and so do not rely on 'eyewitnesses' or the contemporaneous recollection of events.
- The voices of victims of fraud are less likely to be heard and acted upon in response to complaints about delay.

It is our experience that trials with time estimates running into weeks and months, which have had fixed trial dates, are routinely being taken 'out of the list' with no consultation and little notice.

The use of Nightingale Courts should be expanded to accommodate fraud trials. These courts are not located within the existing court estate and, accordingly, rarely have secure docks to house the defendant. In a fraud case, where the defendant is on bail (as they most often are), a secure dock is not required. Indeed, in long cases (i) the attendance of defendants themselves is routinely excused where the evidence on a particular day does not concern them and (ii) the court has the power to direct that the defendant may sit with their legal team rather than in a dock. This proposal would enable courtrooms with secure docks to be used only for cases which require them.

(ii) Judicial Case Ownership

17. A frequent problem encountered in fraud cases is that (i) a trial judge is not appointed until shortly before the start of the trial and (ii) the judge appointed may have no experience, training, or expertise in fraud cases.

18. Fraud cases of significant length are legally and factually complex. They inevitably have a large volume of documentation which the parties will have spent months (or maybe years) assimilating and preparing. There are frequently interlocutory hearings, relating for example to disclosure and the admissibility of evidence, which require judicial rulings. The hearings often last half a day or longer; the rulings have significant consequences for the scope and conduct of the trial. All too often, the Listing Officer will allot a judge to deal with such a hearing the night before, when they are able to identify a judge, any judge, who has a 'gap' in his or her court diary. That judge will have had no reading-in time and will not (unless by chance) be the judge who conducts the trial. Unfortunately, that can mean that the judge either simply adjourns the hearing or makes rulings which would be improved by having greater knowledge of the case. In large cases, there are often several such interlocutory hearings. It is our experience that it is not uncommon for each successive hearing to be conducted by a different judge; continuity and consistency are essential. On occasions these are ordered to take place as 'preparatory hearings', which are bespoke statutory hearings, rulings from which can be appealed by either party to the Court of Appeal (Criminal

Division). It is clearly in the interests of justice that the judge at first instance 'gets it right'.

19. Murder and serious sex cases can only be tried by 'ticketed' judges, that is judges who have specifically been approved to try them on account of their experience, training and expertise. No such system applies to serious fraud cases. Our experience is that it is a widely held, but false, assumption that serious fraud does not require a specialist judge. There are few dedicated fraud court centres. The court complex which is planned for Fleet Street in London will hopefully be used to complement Southwark Crown Court in having the required expertise and facilities to accommodate fraud cases.

20. It is our view that:

    a. Cases of serious fraud should be allotted a nominated trial judge as from the Plea and Trial Preparation Hearing. The default listing position should be that every hearing of substance is dealt with by the nominated trial judge.

    b. The judges who try serious fraud cases should be 'ticketed'. The nominated trial judge should be a ticketed judge. The default listing position should be that any hearing of substance, if it cannot be heard by the nominated trial judge, should be heard by a 'ticketed' judge.

(iii) Private Prosecutions

21. Private prosecutions are undertaken, usually, by a corporate complainant, who will pay for the investigation of an offence (often in-house), and its subsequent prosecution by one of a number of organisations set up for that very purpose. This may be, in part, a direct result of the reluctance of the police/CPS to investigate or prosecute fraud, and the consequent frustrations suffered by victims. These private prosecutions are not regulated *per se* but are expected to adhere to by the Code for Crown Prosecutors (albeit there is no statutory requirement that the Code is adopted) and the provisions of the CPIA. Any crime prosecuted by the State must clearly be in the public interest, a test regularly applied and understood by the CPS.

22. In private prosecutions, there is frequently a tension between the wider public interest and the private interest of the prosecutor, who is almost inevitably the complainant and therefore is not independent and has a vested interest in a conviction. Whilst that must be an accepted consequence of allowing private prosecutions, it does require enhanced oversight (and potentially formal regulation) and vigilance, to ensure that the power is not abused, and that the investigation is conducted fairly. For example, there is obvious scope for deliberate or unintentional abuse of the disclosure process and/or the application of the Code for Crown Prosecutors. An egregious example of how things can go wrong, and the consequences for individuals when they do, is the scandal of the prosecutions brought by the Post Office against sub-postmasters/postmistresses based on the flawed Horizon software programme. There is also a tension between private and the public interest in private prosecutions: corporations may use the criminal justice system as a substitute for civil litigation (and, via the compensation and confiscation regimes, a more cost-effective route to

achieving financial recompense), or as a means to enhance their prospects of a successful judgment or a generous settlement in their favour.

23. A small, but important safeguard, would be to enact a requirement that all private prosecutors inform the defendant of their right to request the DPP to take over the prosecution.

24. Whilst private prosecutions may benefit the State by taking on the resource-heavy burden of investigating and prosecuting fraud, this advantage is tempered by their power to apply to the court, whether or not the prosecution results in a conviction, for the costs which were incurred in bringing the prosecution (albeit investigative costs do not come within this power). The court in turn has limited grounds on which to refuse or interfere with the quantum of the claim, which will be based on the private fees charged by the lawyers, which invariably are far higher than the fees which the State pay its prosecuting lawyers. Such cases may also take up much valuable court time.

(iv) Expert Evidence

25. Increasingly, the prosecution (and often the defence in response) rely on expert evidence relating to the relevant, say, financial product or banking practice which is the subject matter of the case. This involves the calling of a witness who is supposed to have the necessary expertise and experience to give an opinion to assist the jury. The calling of expert evidence is common across the range of criminal trials and the reliance on it by either party should be closely monitored by the court in accordance with the Criminal Procedure Rules, where the rules as to the responsibilities of expert witnesses are clear.

26. The conduct of such experts in two recent high profile fraud trials, called into question the reliability and credibility of such evidence. In one, the expert did not possess the qualifications he claimed and, in the other, he did not possess the knowledge he claimed, and in the course of giving evidence sought out the opinion of others who did have the necessary expertise. These cases exposed the paucity of the regulation of financial experts in criminal cases. Fortunately, the assiduous preparation by the legal teams revealed this conduct, thereby underlining the importance of preparation in trials by appropriately qualified individuals. There is no doubt that in complex fraud trials the jury will need unbiased assistance as to the detail of evidence which will be beyond their experience and understanding. There is often though difficulty in finding a suitably qualified and experienced expert in a highly specialised field who is genuinely independent of the individuals and institutions who feature in the evidence.

(v) Prosecutions of Corporations

27. The future of corporate prosecutions is currently being considered by the Law Commission; it is a contentious topic, to which the Bar Council will formally respond in due course. The work of the Law Commission has to an extent been overtaken by the Economic Crime and Corporate Transparency Bill which is currently going through its Final Stages in Parliament. The refence in the title of the Bill to 'Economic Crime' encompasses all forms of fraud committed by a company. The Bar Council

broadly welcomes the proposals in Clauses 195-197 of the Bill which address the issue of how a company can be guilty of an offence which requires a mental element (or *mens rea*); in fraud the central jury issue is most often whether the prosecution can prove dishonesty. Traditionally the approach adopted by prosecutors is to identify the 'directing mind' of the company – usually a director – who makes the decisions as to the actions taken by the company, which constitute the conduct element of the offence (or actus reus). S/he is said to be acting 'as the company' and it is his/her dishonesty which is attributed to the company. Identifying that person may be straightforward where the company, say a family firm, has one director and one shareholder. However, the management of large companies in the modern world is more diffuse – the decision-making process is undertaken by committee and rarely do any directors actually make the final decisions, or, if they do, it is difficult to identify them. The written constitution of the company may dictate who in law can bind the company, but those persons may in practice not be the decision makers in respect of the relevant actus reus. There is uncertainty about how to apply the "directing mind" principle to corporations governed by executive committees and a heterogeneous board including non-execs. One of the problems arises between those cases where knowledge of several people can be amalgamated (e.g. corporate manslaughter and some regulatory offences) and those where knowledge or intent must be derived from a single identifiable individual who embodies the corporate, e.g. human trafficking. In fraud cases the issue of a corporation's dishonesty is difficult, especially in the case of a large corporate and even more when it is a multi-national.

28. The response of the Home Office in the Bill, in respect of certain scheduled fraud offences, is to fix liability of the company on a senior manager who acts within his/her actual or apparent authority on behalf of the company (or limited liability partnership). It is anticipated that the Committee's Call for Evidence will come too soon to meaningfully consider the effect which this new legal test will have on the prosecution of fraud.

29. If the appropriate person can be identified, the prosecutions of large corporations can be highly complicated factually and take several months of court time (so preventing other shorter trials being listed). There is also a burden on individual jurors. On criminal conviction, the only sanction of any substance for a company is a fine and a confiscation order which may remove the proceeds of the crime (that in itself is a time and resource-heavy exercise). There is therefore a suggestion from some that corporations should not be subject to criminal prosecution but rather subject to a self-funding scheme of transparent regulation before a professional tribunal with a wide range of sanctions, including enforced changes to corporate governance. Alternatively, some suggest that there should be wider use of Deferred Prosecution Agreements ('DPAs'); a procedure available to both the CPS and the SFO. Since the enactment of this procedure in the Courts Act 2013, there have only been a dozen DPAs, all initiated by the SFO. A DPA acts as a sword of Damocles over the offending corporation and allows for the disgorgement of profits and enforceable undertakings as to future conduct.

30. The opposing argument is that there should be more, not fewer, corporate prosecutions and that large, wealthy companies should not be able to 'buy' their way

out of a criminal conviction. Their actions can cause real and lasting harm to a significant number of citizens and undermine the public's confidence in the relevant economic sector. They should therefore be liable to the reputational damage, and financial consequences, which flow from a conviction; such is the only effective lever which will bring about lasting change to corporate governance. The criminal law, it is argued, should be amended in a way that will make it easier to prosecute large companies. For example, by introducing an offence of 'failing to prevent fraud', which currently is only available for a limited number of offences in areas such as bribery, tax evasion and health & safety.

31. Clauses 198-206 of the Bill introduce a new offence of 'failure to prevent fraud', which is modelled in part on a similar offence pursuant to Section 7 of the Bribery Act 2010. Again, this Call for Evidence may come too soon to consider the effect which this new offence will have on the prosecution of fraud.

(vi) Evidence Obtained from Overseas

32. As is emphasised in the Government's Fraud Strategy, fraud can easily cross international boundaries in its planning and execution. However, the obtaining of evidence from overseas to deploy at trial is both cumbersome and time consuming. The Crime (International Co-operation) Act 2003 sets out the legal framework for obtaining evidence, which is via the issue of International Letters of Request. The intention appears to have been that this would be largely superseded by the power to apply for streamlined Overseas Production Orders under the Crime (Overseas Production Order) Act 2019. It is not clear to what extent OPOs have been sought or granted, and this is an area that the Committee may want to explore with those who are likely to have been making (or at least considering) such applications.

33. International co-operation in criminal law is being considered as a law reform project in the Law Commission's consultation on projects for inclusion in its 14th Programme of Law Reform. To that end, the Law Commission announced on 7 September 2023 that it has entered into a collaboration with the Criminal Law Reform Now Network (a recognised and established academic research organisation) to produce a scoping study which will consider the issue of Mutual Legal Assistance between States in respect of the obtaining and use of evidence in criminal prosecutions. Its findings are expected to be published in 2024.

34. At this early stage the Bar Council has no specific proposals to make but will actively contribute to the discussion as and when the Law Commission issues its consultation paper.

(vii) Confiscation

35. Depriving a convicted defendant of the benefit of his crime acts self-evidently as a deterrent, an effective punishment and a significant source of revenue to combat fraud. The Law Commission recently published its Final Report into the 'Confiscation of the proceeds of crime after conviction' (Law Com No. 410: 8 November 2022). A summary of the report can be read here.

36. The Law Reform Committee of the Bar Council made extensive submissions to the Law Commission and broadly endorses its conclusions and recommendations, which are of particular relevance to fraud.

The Bar Council
October 2023