Written evidence from the Bar Council

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.

Summary

The criminal justice system is under-resourced both in the investigation and prosecution of all criminal offences; fraud is no different. The Bar Council has repeatedly advocated for sufficient and sustainable investment. In our response to the Committee's call for evidence we have set out examples of specific areas in the system in which the manifestation of under-funding is most acute. However financial investment is not the only pressing issue. For example, an overhaul of the approach to corporate prosecutions is overdue and the burgeoning growth of private prosecutions needs to be addressed. Our response addresses the following:

- An outline of the particular features of fraud in the criminal justice system
- Delay (and under-funding) – particularly in respect of
    - the procedure of 'release under investigation',
    - disclosure, and
    - listing
- Private Prosecutions
- Expert Evidence
- Prosecutions of Corporations

Overview

1. 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.
2. 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 is reasonably capable of assisting the defence case or undermining that of the prosecution) and the Criminal Procedure Rules 2021 (which, broadly, provide the framework within which the preparation for, and conduct of, all criminal trials are conducted) – but their practical application varies significantly.
3. The vast majority of fraud cases are investigated by the police or Her 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.

4. 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.

5. 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 limbs of the Full Code Test are not met.[1]

6. 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 CPS Serious Fraud Division and the SFO. These are often with multiple defendants, intended or actual losses which run into millions of pounds, and with 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.

7. It is important, therefore, that the Committee considers the full range of fraud cases brought before the courts, and not just the larger cases: they all provide evidence of a justice system buckling under the burden of well-documented and chronic under-funding.

8. 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.

9. 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.

10. 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,

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

- there is an increase in private prosecutions brought by corporations for fraud (alongside, or in preference to, civil actions) and
- since the onset of the pandemic, fraud trials of medium-significant length are routinely delayed due to the backlog.

11. The Bar Council welcomes the Committee's investigation and the opportunity it gives 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. The Committee may well be concerned with the question of how difficult the public finds it to persuade the authorities to investigate a complaint of fraud at all. Fraud victims are generally directed to report complaints to Action Fraud. In the last year for which figures are available over 906,944 fraud and cybercrime reports were made to Action Fraud. Of these, only 71,865 were referred to the police for further investigation. From this number only 6,881 reports led to a prosecution, warning or other "judicial outcome". It is not for us to express a view on whether this is an adequate response by the State to an ever-growing problem.
12. Below are some of the areas relevant to those cases which do reach the courts, which the Committee may want to explore further:

Delay (and under-funding)

13. 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 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.
14. 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).
15. 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 submitted 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 problems with the statutory disclosure regime under the CPIA are well-known and 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. The use of inappropriately trained personnel to deal with disclosure has meant that the rigour that ought to be applied is not, with the consequential impacts felt later, which again may add to delay and ultimately injustice. Frequently the courts 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.

c. 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 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

        1. the size of the task at hand;

        2. the lack of expertise in those conducting the disclosure review

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

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

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.

d. Listing: It is hopefully now accepted by all stakeholders, that an unacceptable backlog predated the pandemic. As a result of limiting the use of the court estate, on grounds of cost, successive Governments allowed the development of a backlog of trials that exceeded 30,000 prior to the court lockdown in February 2020. Whilst some laudable efforts have been made subsequently to reduce it, they are insufficient. Fraud trials, which are invariably longer than trials for other offences, and for which defendants are usually on bail (and so custody time limits – which act as a cut-off for pre-trial remand in custody – do not apply), have a low priority for listing. The onset of the pandemic further exacerbated the position and, whilst it may be understandable (given the impact of delays on cases which are given precedence), the current approach to the listing of fraud cases cannot be allowed to continue. This additional delay has a marked adverse effect on those waiting to be tried, complainants, witnesses, and the confidence of the public that the 'system' takes fraud seriously. It is our experience that trials with time estimates running into several months, which have had fixed trial dates, are routinely being taken 'out of the list' with no consultation and little notice. A solution at hand is the expanded use of Nightingale Courts to include and accommodate fraud trials (an enclosed dock is usually not required). This would undoubtedly have an immediate impact on what has become a subgroup of cases languishing and waiting to be tried. Delay must be avoided. It is further suggested that in fraud cases, the early assignment of the trial judge should become routine; s/he would be 'invested' in the case and be in a position properly to manage pre-trial litigation and preparation. There are few dedicated fraud court centres and judges do not have to be approved or 'ticketed' to try frauds (in contrast to other serious crime). 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. Such types of specialist court centres may need also to be considered out of London, given not only the pressure on the court estate but the anticipated increase nationally in fraud crime.

Private Prosecutions

16. 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*, 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.

17. 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.
18. 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.
19. 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. 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.

Expert Evidence

20. 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.
21. 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 and underlines 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.

Prosecutions of Corporations

22. The future of corporate prosecutions is currently being considered by the Law Commission and it is a contentious topic, to which the Bar Council will formally respond in due course. The law which determines the evidential basis on which a company can be prosecuted is not settled and arguably is no longer fit for purpose in the light of the modern structure of corporate governance. Put shortly, the issue is how can a company 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.

23. 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). They 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.

24. 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.

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