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The Investigation and Prosecution of Serious Fraud in England and Wales

Theresa Amelia Frances Searl

This study sought to examine the principles and practice of investigation and prosecution of serious fraud by criminal justice agencies within the English and Welsh legal system. It commenced with an examination of the literature in relation to the status of fraud within the English legal system together with that in relation to the principles and operation of several of the agencies identified as dealing primarily with fraud.

This identified that the English legal system did not recognise fraud as an offence and that the criminal and civil justice systems dealt with what was popularly accepted as constituting "fraud". To make meaningful analysis of the systems' response to this, the study would have to be confined to a specific type of fraud and to either the civil or criminal the branches of the justice system. Fraud committed by companies or individuals against other companies or individuals, involving large sums of money, and dealt with by the criminal justice system was adopted as the focus of the study.

The main agencies responsible for this type of fraud were identified as being the police, the Crown Prosecution Service; the Serious Fraud Office and the Department of Trade and Industry. Examination of the literature revealed the possible overlap of remit and operation between these and regulatory agencies.

Access was granted to the staff and files of police, CPS and DTI. Approximately three months was spent conducting fieldwork in the offices of each of these agencies; interviewing staff, examining files and attending case conferences.

Examination of these agencies operation revealed common themes that supported a conclusion that fraud was not a high priority within the criminal justice system. The lack of a substantive offence of fraud is discussed and analysis made of the results with a view to possible improvements to the current systems.

CHAPTER ONE

INTRODUCTION

The aim of this chapter is to detail the context within which the study was undertaken. Examination is made of the concept of fraud as it occurs within the Zimbabwean and English legal systems, with particular reference to the criminal justice systems of both countries. Thereafter the development of concept of fraud within the English criminal justice system is considered. Following this is a section on the development of a definition of fraud for the purposes of the study. Determination of this definition enabled the establishment of the parameters of the study, which are detailed in this chapter. Unlike the Zimbabwean context, there is provision within the English justice system for regulatory and criminal justice agencies to deal with fraud. For this reason this chapter briefly examines the concept and operation of regulation in the context of responding to fraud.

Background to the study

The interest in the investigation and prosecution of fraud that led to undertaking this study began whilst I was working as a prosecutor in Zimbabwe, within Harare Magistrates Courts, that was and remains the largest court of first instance in Zimbabwe. At the time I worked within those courts, the complex comprised twelve courts. It was established practice that three courts were set aside for remand only; guilty pleas and road traffic prosecutions. The remaining nine courts were available for general criminal prosecutions, with two courts allocated solely to the prosecution of fraud cases. Unlike the other courts, these two courts had designated prosecutors.

After working in the courts for some months, I was appointed as lead prosecutor in court 9. The cases in that court were predominantly straightforward deceptions that needed little preparation. However it soon became apparent to me that the vast majority of cases set down ('listed') for trial simply did not take place. The reason for this appeared to me to be a lack of interest or understanding on the part of the prosecutors, who frequently had not properly read or understood the police file, and had failed to ensure that the necessary witnesses had been warned to attend court. This situation appeared to be possible due to the arrangement in all the magistrates' courts whereby one prosecutor had responsibility for reading files and either setting the cases down for trial or requiring further police investigation, whilst another prosecuted cases in court.

This situation did not occur in the High Court, where I was posted in 1992. Unlike the magistrates court matters, all police files for the High Court were submitted by officers from a specialist CID fraud squad, not uniformed officers. The Attorney-General's (A-G's) Office had a corresponding specialist group of prosecutors, to which I was appointed. As a result of this system, police officers and prosecutors came to know each other's ways and requirements, working very closely with each other as a matter of routine.

Even with the improvements in officers and lawyers with personal responsibility for investigation and prosecution of fraud, it appeared to me numerous cases were poorly presented and that unacceptable delays in investigation and trial were common place. At this time, the early 1990s, several British based organisations provided training material and officers to Zimbabwe. These included lawyers sent by the British Council to both the A-G's Office and Zimbabwe Republic Police. The influence of and regard with which these people were held is hard to overstate.

Unlike the current political position, in the early 1990s the broad body of Zimbabweans, of all ethnic origins, viewed the British as providing a 'better' way of doing things, from running businesses to operating courts. The stance of the Zimbabwean government reinforced the public's perception. Its acceptance of the training and the training providers had an implicit, sometimes explicit, acceptance of the specific remit of the trainers, this being to improve local systems by moulding them along British lines.

The books and training material provided to the A-G's Office confirmed my feeling that the Zimbabwean system of investigation of fraud could be improved by learning from, and possible adopting, the British methods of investigation and prosecution of such offences. This feeling, unsupported by relevant evidence or knowledge of the British justice system, underpinned early plans for the study.

The study had one certainty. This was that many Zimbabweans considered fraud to be a real problem and an impediment to the social and economic development of the country. Reports and cartoons in the local newspaper fuelled this belief and may be viewed as supporting the suggestion that a similar situation operated in a number of other Southern African Commonwealth (SADAC) countries.

Despite commentary in local and international publications, little government attention appeared to be paid to the negative impact of fraud on national economies. In 1996 the United Nations African Institute for the Prevention of Crime and the Treatment of Offenders, had expressly called for greater examination of the issues, (UNAFRI Press Release 21 October 1996). However little research has been undertaken by SADAC government bodies or universities into either the offences or the response of the Southern Africa Commonwealth legal systems to them.

Several possible explanations may be suggested for this. Differing legal influences operate in the various countries. The impact of these should not be ignored. Whilst all SADAC countries have a system of indigenous, tribal or customary law and an imposed or received legal system from colonising nations, the extent of the amalgamation of customary and colonial law varies from country to country. This makes meaningful comparison between countries' systems and criminal justice responses difficult, given that the types of laws operating in each may differ.

Additionally, it is apparent that, within some Southern African countries, a lack of political will exists to tackle issues of crime and responses. This is highlighted in the UNAFRI Press Release (18 December 1998) that notes,

The African Regional Preparatory Meeting for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders -- held here last week -- had declared that the "root causes of corruption have to be addressed, and the political will to combat it has to be accompanied by instruments designed to bring the perpetrators to justice". Government representatives attending that meeting had noted that "the high economic and political status of perpetrators of corrupt practices and the circumstances under which such crimes are committed make law enforcement agencies relatively powerless, decreasing the likelihood of the perpetrators being reported or prosecuted".

Not only can these factors result in a lack of funding to study the issues, it can create a culture of police/ prosecutor and judicial indifference to creating, promoting and maintaining a coherent legal response to criminal activity.

Most Southern African police forces experience a significant lack of investigative resources of various types. These range from vehicles to travel to the reporting of a crime; telephone lines to assist the conduct of enquiries or text books to which to

refer as part of the investigation. An associated lack of public confidence in the police's ability to meaningfully assist or compensate victims of economic crime may discourage many from even reporting crime.

At the beginning of this study, one of the main study aims was to contrast the situation in Zimbabwe with that of England. The English context, of significant research into the substance of the law, the operation of police officers and of prosecutors, was felt to offer an opportunity to examine, in an inter-related manner, the substance of the law on fraud and deception and how that was applied by investigators and prosecutors. As the study developed, the unconscious acceptance of an assumption that the British approach would be better than the Zimbabwean, became both recognised and questioned. This progress is described in Chapter eight.

Fortunately in the early stages of the study, when, with hindsight, this assumption was most pronounced, it did not appear to have any negative impact on the study. As the study progressed, it was realised that the British approach to the investigation and prosecution of serious fraud was not automatically better than the Zimbabwean approach.

A perceived quasi insider status may have assisted in preventing such a response. My experience as a prosecutor in Zimbabwe, in charge of a unit of prosecutors with specific responsibility for the prosecution of fraud, provided points of reference for both the police officers and lawyers to whom I spoke. As with all Zimbabwean prosecutors, I had directed and required the action police officers take in their investigations, and had daily contact with senior officers in large scale fraud investigations. In addition, I had also been a lecturer at the Harare based Police College and, in 1990, had been a member of a working group into the administration of police files. These experiences had provided me with an understanding not only of some investigation methods, but also of the working practices, rank structure and its effects within the police.

The Zimbabwean police had developed, since 1980 and formal independence from Britain, from the British South Africa Police. It had retained the rank structure and disciplined, hierarchical service structure introduced by the British. As such, I was familiar with the rank structure and discipline ethos in which the first batch of respondents, the police force that I studied, operated. Terms specific to certain

aspects of policing and police work did not require explanation. Cases could be described without officers having to explain what they were talking about. However other factors prevented me from being too familiar with those with whom the respondents worked. I had been a prosecutor in a foreign jurisdiction and had been firearms trained, so was able to present myself as distinctly 'foreign' to the CPS lawyers with whom the respondents had contact. Whilst having worked within a similar system to that of the respondents, I did not present a threat, not being a CPS lawyer or part of the prosecution system, either of which they might comment upon.

This status as both insider and foreigner changed during the course of the study. Towards the end of the first stage of the study, one of the police respondents advised me of a short term employment contract with that force. That officer and others within the unit studied assisted my application for the post. That application being successful, by the time of the study of the CPS, I was employed within a criminal justice agency. However, my employment was within a unit unconnected with criminal investigations, being in the Policy Unit of the Corporate Development Department. This enabled my past work experience as a prosecutor to dominate the determination of my status within the eyes of the second respondents, the CPS.

In addition, in the first stage of the study, I had been assisted by a number of the police respondents advising friends and acquaintances in the CPS and DTI that I would wish to study the operation of those agencies. Not only did this assist me in identifying the units most likely to be of interest and relevance to the study, but it also enabled those within the units to view me as 'pre-judged' and accepted by their friends in other agencies, without reference to my existing employment.

In the second stage of the study with the CPS I was able to present myself to the CPS respondents as both a lawyer and former prosecutor, and as both foreign and English. My employment, as a policy advisor to the police, was not in a post that could be a threat to the work of the prosecutors to be interviewed or as potentially compromising their decisions in respect of any investigations that my employing force may have undertaken and referred to the CPS. However it did enable me to relate to comments as to police officers and their behaviour in a manner not open to someone who was not a lawyer and not familiar with current policing issues. As with the first respondents, my experience as a prosecutor meant frequently used expressions, certain procedures and structures did not require explanation.

By the time of the study of the DTI, the third set of respondents, my employment had altered to police solicitor, dealing with civil law matters. This role did not have contact with the conduct of investigations and it was felt that the prospect of any compromise of joint police/DTI or DTI investigations and prosecutions did not exist. However, it did enable aspects of insider status to operate. With the DTI lawyers, I could present myself as one of them, in as much as being a lawyer and ex-prosecutor. Again, the fact of not being directly involved in the type of work as my respondents, my interest in their work could appear non-competitive and unthreatening. With the DTI investigators, a number of whom had been police officers prior to their employment with the DTI, I was able to capitalise on my employment within the police and awareness of current policing issues. As with the other respondents, this provided a shared vocabulary and knowledge of topical issues.

It was with this background and status that I approached an examination of the investigation and prosecution of fraud. However, before doing so examination had to be made of what it was that is described as 'fraud'.

Fraud

The regulation, investigation and prosecution of fraud have received increasing general public attention in recent years, as evidenced in newspaper reporting (The Times, The Guardian and The Independent) and academic works on the criminal justice system (Levi 1982, 1987, 2000). Despite this, the concept of what constitutes fraud, remains imprecisely defined. In England the word 'fraud' is used by the popular media; legal and socio-legal writers to describe differing acts in differing situations. Within the Zimbabwean context 'fraud' is understood to be a crime. It is a common law offence with an established definition, being the making of a misrepresentation to another, knowing the representation to be false, with the intention of inducing the other party to act and causing the other to act to their prejudice (be that actual or potential) (Feltoe 1982). In the event of the other party not acting upon the mis-representation the inchoate form of the offence, attempted fraud may be charged and found to have occurred.

Early in the study it was realised that, for any results to be meaningful to a reader of any jurisdiction, there would have to be an explicit meaning given to the word 'fraud' within the context of this study. The understanding of fraud with which the study began was that provided by the Zimbabwean legal system.

The civil/criminal law divide in the Zimbabwean context

Prior to the European colonisation of Southern Africa, several well-established systems of “customary law” operated in the region (Kerr 1980). These were systems of tribal regulation, observed by the first European settlers in the region to be tribe-specific and not involving laws in the European sense of the word.

The systems of Mashona and Ndebele in what has become Zimbabwe shared some similarities, neither having the concept of disobedience to the state, instead operating in accordance with an acceptance of the observance of custom and practice. Whilst fraud, as understood by the Europeans arriving in Africa, did not form part of any customary law, indigenous tribes had a formal recognition and punishment of deception or the taking of advantage in a manner unacceptable to the tribe. Compensation for all types of deceptions, usually paid in the form of animals, was well established. This compensation was made to the aggrieved party, not the tribe. There was no notion of a “state” or that the tribe could have a legitimate interest in what were viewed as essentially private wrongs between individuals.

With the imposition and development of a hybrid Roman-Dutch/English set of laws in Zimbabwe came notions of divisions between person and state, civil and criminal law. Unlike the existing systems, the colonial systems differentiated between types of harm in ways not previously recognised. Distinctions were drawn between wrongs to the person and those to the state or those in which the state had an interest. Under customary law any allegations of wrongdoing to another individual, where proved to the satisfaction of the tribal “court”, would attract some compensation to them or their family. For example a complaint against a person that they had traded cattle knowing them to be ill/dry etc (i.e. fraudulent misrepresentation) could result in a direction that some compensation be given to the person complaining, be it beer, small livestock or other token of compensation. Any penalties having been provided, the character of the guilty party was restored.

The introduction of colonial law to the indigenous peoples of Southern Africa brought completely foreign notions of that state having an interest in the maintenance of good order. With this came an allied concept of punishment, by the state, of a wrong to the greater good or society. These rights of the state may be viewed as having developed almost in opposition, or at least distinct from, the rights of the aggrieved party to exact compensation/punishment. Generally, it was, and remains, the case

that indigenous people do not accept the imposition of a state penalty, such as imprisonment, as giving them personal compensation for what had occurred.

A good example of this in a non-fraud context is what in Zimbabwe is termed “statutory rape”, being unlawful sexual intercourse with a girl under the age of 16. Most prosecutors within Zimbabwe had experience of cases in which the complainant or, more particularly her family, withdrew the complaint on an undertaking from the suspect to pay *lobola* (akin to a reverse dowry). The act of intercourse with a female minor was not recognised as inherently “wrong” and certainly not a matter being any concern of the state. Provided the male relatives were compensated for a girl’s (by then, public) loss of virginity, the matter was regarded as satisfactorily resolved and of no legitimate concern to the state. Equally if a man refused compensation, the public did not generally view any legal proceedings, especially those in the rural areas, as being relevant to the loss to the family.

Fraud in the Zimbabwean legal context

In a similar way, fraud developed as the response of the criminal justice system to deception in a manner that ran parallel to an individual’s right to seek civil compensation. The two forms of redress, civil and criminal, were separate, neither having much bearing on the other. Practical experience of working with the Zimbabwean criminal courts revealed that the use of restitution orders was rare and compliance with them still less common. Frequently cases would be withdrawn, after months of investigation and preparation of the prosecution “docket” (file), if at any time before trial, the suspect agreed to compensate the complainant. This may be suggested as occurring partly due to a complaint ethos of the criminal law not affording a complainant personal compensation, as was expected within certain groups.

With reference to fraud, there was no concept in Zimbabwean law of the state regulating commercial enterprise to prevent fraud. The role of the state was specifically to investigate, prosecute and punish the behaviour of those complained of by another. It never regulated business. In the investigation and prosecution of certain business behaviour, neither the state nor the individual had a pro-active role. Legal activity, criminal or civil, arose only as a consequence of action on the part of the party. No aspect of the Zimbabwean legal system provided for maintenance of non-fraudulent activity.

Criminal and civil law in Zimbabwe provided for and supported the maintenance of a distinct division of approach to those who deliberately caused loss to others. Investigation and punishment of fraud were solely the concern of the state, whilst the individual could seek financial compensation only by reference to the civil courts. This context may explain the clarity of the definition of fraud as detailed by Feltoe (1982) being,

Unlawfully making, with intent to defraud, a mis-representation which causes actual prejudice or which is potentially prejudicial to another.

Definitions of fraud within the English and Welsh legal system

In the English criminal justice system "fraud" exists as neither a common law nor statutory offence (Kirk and Woodcock 1992). However the concept does have a degree of legal recognition, appearing in the Criminal Justice Act 1987, albeit being used without definition, and in the Companies Acts in the sense of 'fraudulent' business. Arlidge, Parry and Gatt (1996) describe the situation thus,

Contrary to popular belief, English law knows no crime by the name of fraud. Instead it boasts of a bewildering variety of offences which might be committed in the course of what the layman (or for that matter the lawyer) would describe as a fraud. What the law does possess, however, is a *concept* of fraud, a broad notion (broader, indeed, than the layman's) of what it means to defraud someone. (p iv)

This is the view put forward in a number of other legal texts on the subject, although not always in so succinct a manner. The introduction to Leigh's (1982) The Control of Commercial Fraud asks,

'What is "Fraud"?', before stating,

'This book is specifically concerned with fraud, rather than white collar crime or economic crime. Those are concepts that cannot be defined with precision, nor can the notion of business crime (Conklin 1977). Most definitions are unsatisfactory because agreed unifying elements are hard to find. For many years the standard formula was that of Buckley J. in *Re London and Globe Finance Corporation Limited*: 'To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action'. (Leigh p 7))

That formula, it is now accepted, is not exclusive; fraud can consist in depriving a person of what is his by any other dishonest means, including simple taking (Leigh 1982 p7).

Clarkson and Keating (1988) deal with fraud under the heading 'Offences involving Deception', stating that

The terms 'theft', 'robbery' and 'burglary' evoke immediate understanding in the hearer (even if that understanding is less than perfect); the same is less true of offences involving deception.

Whilst this approach would include the white collar or economic crime that Leigh specifically excludes from his work, it does not immediately invoke images of offences under company law, a number of which refer specifically to actions of a fraudulent nature.

In Cross, Jones and Card (1988) fraud was not indexed in any form other than under common law conspiracy. However the same work, in dealing with s 15(1) of the Theft Act 1968, at para 14.37 p 341 makes reference to the dicta of Buckley J in *Re London and Globe Finance* quoted by Leigh above.

Similarly, the index of Smith and Hogan's (1992) Criminal Law reveals that fraud is dealt with in relation to offences of conspiracy to commit, but it is again cross referenced to other issues, including blackmail; cheating; company directors; deception; false accounting and theft. Research Study No 14 of the Royal Commission on Criminal Justice (1993) provides a detailed study of its title subject, 'The Investigation, Prosecution and Trial of Serious Fraud', without defining the scope of the term 'serious fraud'.

Legislation relating to fraud tends to lack precise definition in a similar manner. The Criminal Justice Act 1987 that established the Serious Fraud Office described the Office's subject matter simply as the investigation and prosecution of 'serious or complex fraud'. Given that the enforcing body was to be responsible for defining its own ambit, this description allowed it a great deal of latitude. Those outside, or indeed within, that body who wish to have an understanding of the subject matter with which the SFO deals can not obtain such without reference to the SFO itself.

In contrast, legislation relating to the regulation of investments business provides definition clauses that clearly define the topics controlled by the Acts. Notable examples of this are to be found within the Companies Acts 1985 and 1989, together with the Financial Services Act 1986, which in part refer to the control of actions that fall within the *in re: London and Globe Finance Corp Ltd* definition of fraud. The Financial Services Act 1986 commences with a definition section, and contains several other sections throughout the Act that describe in detail the actions falling within the scope of the regulatory powers and bodies. Whilst none of these actions are described in the Acts as 'fraud', should the appropriate regulating authorities wish, they clearly could also fall within the jurisdiction of the police or Serious Fraud Office. In this regard Leigh (1982) comments,

The forms which fraud takes are contingent upon the economic system in which they are found; the fact of fraud is not. (p3)

The development of the legal concept of fraud in England and Wales

Recognition by justice systems of fraud as having occurred ('the fact of fraud') is also contingent upon who it is examined and what it is that defines a suspected fraud. Examination of the legal authorities demonstrated there to be no single definition of the concept of fraud and that what are regarded as 'frauds' could be any one of the 'bewildering variety of offences' (Arlidge and Parry 1996).

Legal texts reveal that the majority of frauds are described as 'offences involving deception', definitions of which are to be found in the Theft Acts. The first of the Acts was that of 1968 and represented a breakthrough in the development of the English criminal law of theft. Smith (1990) describes the situation thus,

Until 1968 the English law of stealing developed in a haphazard fashion over several centuries. The common law began with a crude notion of stealing, which covered only the most obvious and direct taking by one person of property that was in the possession of another. As the inadequacies of the law were exposed by the ingenuity of rogues, so the courts, and later, Parliament extended the law to punish the more sophisticated forms of dishonesty.

The courts generally achieved their purpose by extending the ambit of the original crime of larceny by means of fictions and strained interpretations of the concepts which constitute the definition of that crime ... Parliament's method was to create a new crime to supplement the old. In one way or

another most varieties of dishonest appropriation of the property of another were brought within the ambit of the criminal law... But this was at the price of tolerating an immensely and unnecessarily complicated structure, full of distinctions of a purely technical character...

Having set the scene as one of legal complexity and contortion, Smith continues, The Theft Act 1968...swept all this away and gave us a completely fresh start. The definition of theft embraces all - or virtually all - of the kinds of dishonest conduct that comes within the definitions of the old crimes of larceny.

As socio-economic analysis developed in the second half of the twentieth century, it became apparent that this 'fresh start' would not be sufficiently comprehensive to deal with the various forms of criminality being experienced. With an increasingly sophisticated business environment, the 1968 Act required re-working so as to enable it to be used for the control of crime in changing times.

The 1978 Theft Act commences with the preamble that it is

An Act to replace section 16(2)(a) of the Theft Act 1968 with other provision against fraudulent conduct.

Whilst section 16 of the 1968 Act had dealt with the obtaining of pecuniary advantage in its time, developments within world of business required new means of dealing with new forms of activity. The 1970s had seen the introduction of 'self service' into Britain. Enterprises that had formerly provided goods or services to customers through representatives were re-structured, removing the representatives and permitting the customer to obtain the goods or service for themselves. With this a new form of dishonest behaviour became possible; the taking of goods or services without subsequent payment.

The 1980s and 90s would see similar developments in other spheres of commercial enterprise. The widespread use of computers introduced the possibility of 'computer hacking'. This included the unauthorised acquisition of information in a manner that did not necessarily involve an appropriation. Copies of data could be obtained from the system of another whilst the data itself remained in that system. Not only was the element of "appropriation" problematic for the then existing law, the concept of "property" had to be re-examined. A greater element of certainty within the legal system was introduced by the Computer Misuse Act 1990.

Implications of the lack of definition of fraud to the present study

Many of the offences falling within the ambit of the Theft Acts would fall within the range of actions that, using the Zimbabwean law, could be termed "fraud" and dealt with by the criminal justice system as such. However, the Theft Acts also excluded actions that could fall within the common law offence of fraud, and which were regulated as such within the English justice system. In addition these Acts contained offences which were not within the study's terms of reference of serious fraud. It was for these reasons that it was decided to retain use of the word 'fraud' as opposed to 'offences involving deception' and to examine non-criminal law approaches to fraud.

The choice to examine non-criminal law responses to fraud, specifically regulation, was based on acceptance of Smith's (1990) comment that the criminal law, "is merely one amongst several methods of social control in society". In addition, Zimbabwe provides no experience of this form of social control whilst England was thought, initially, to provide an established example of an alternative to a response that criminalised certain types of activity.

Clarkson and Keating (1988) describe as 'crucial' the question of whether an action is criminalised, and the basis of that decision (p 77). Whilst it is accepted that this issue is of importance, this study was concerned more with the recognition that the criminal law is but a single form of control of fraud and that there may be interaction between the various controlling groups given the lack of definition of 'fraud'.

In this situation it was thought that there could be potential for several instances of overlap between justice agencies of various forms and other groups in their approach to fraudulent acts. Acts that one agency defines as a form of theft in terms of the Theft Acts, another as fraudulent (in terms of the Companies Acts), and another as breach of fiduciary duties or other codes of practice may be given differing descriptive terms, yet all fall within the concept of fraud. Various agencies may take as falling within their own jurisdiction or sphere of operation acts that other bodies also view as within *their* jurisdiction. If this were so, any agency may approach regulation/investigation of certain acts as 'owned' by itself whilst a separate agency/body could hold an identical position in respect of the same acts. Such a situation is not difficult to envisage in relation to the police, regulatory inspectorates, Serious Fraud Office and DTI. This could increase the potential for conflict or lack of co-ordination amongst multi-agency partners with differing powers. Thirdly, given that there is no crime of fraud, there is potential for fraudulent acts to appear to be

within the operational jurisdiction or mandate of various agencies without those agencies having a defined framework of statute or common law within which to apply their powers.

In order to examine the validity of these suggestions it was necessary to establish a definition of 'fraud' that could be applied to the work of various controlling groups. It was decided to use the *in re: London and Globe Finance Corp Ltd* sense of fraud, with some elaboration, given this was very close to the Zimbabwean common law crime of fraud. Such definition would also assist the results of the study be examined from the perspective of the Zimbabwean criminal justice system.

As English law did not contain an offence of fraud and the Zimbabwean definition of that offence was so broad as to apply to almost all the situations of dishonest acquisition not falling within the offence of theft, it was decided to use 'fraud' in its conceptual sense. It was accepted that, without limitation, many respondents could have problems in using such a definition. It was decided that a degree of restricted application could be applied by confining use of the concept within the parameters of specific types of fraud.

Theft, under the Zimbabwean common law, is an offence of dishonestly appropriating the property of another, with the intention of depriving the owner permanently of that property (Feltoe 1982). That it is very much of a physical nature is made clear by the wording of indictments drafted for this type of crime, that will assert, 'that X took and stole'. In contrast fraud may be charged where X does not take the property but fools its owner into handing it over or where the property never moves but benefit of it is unlawfully obtained. For example, whilst the author working within the Zimbabwean prosecution the following facts were present. A bank mistakenly credited X's account. X, knowing of the error, did not advise the bank but transferred the amount credited to him to an interest earning account within the same bank. When challenged X immediately released the original amount credited to him to the bank, but retained the interest earned. An investigation of such facts was referred to the Attorney - General's Office on a charge of theft, with a police request for withdrawal of charges on the basis that it would be difficult to prove the element of taking with the intention to deprive permanently, the funds never having left the bank's control. The charge was altered to one of fraud, on the basis that the opening of an account with the moneys amounted to a misrepresentation, and the matter continued to trial and conviction.

Producing a definition of fraud for the current study

Arlidge and Parry (1996) state,

...the types of conduct which may constitute fraud are many and various...and that elements of the conduct, such as deception and financial loss, whilst often occurring are not essential, as the factor that lends this protean concept some semblance of unity is not so much what is actually done as the *character* of what is done, the element of disregard for the rights of others and for ordinary standards of conduct.... This feature is commonly and conveniently referred to as 'dishonesty' (p 3 para 1.04)

It was felt this approach encompassed too broad a range of actions, and that it could be applied to those that are not perceived to be fraud. Acts such as providing false details to the police at the scene of an accident may fall within the Arlidge and Parry (1996) definition of dishonesty but would not be described by the lay person or members of the criminal justice system as fraudulent.

It was felt that fraud in the 'immediate understanding of the hearer' referred to by Clarkson and Keating (1988) would invariably include an element of financial prejudice (albeit that such prejudice may be potential). The Arlidge and Parry (1996) definition of the concept of fraud, whilst useful in its notion of an underlying character of the conduct, was too wide to be used without modification. The same was true of the traditional definition of *in re: London and Globe Finance Corp Ltd*. Whilst the latter definition contains the element of causing another to act to their prejudice, it does not convey what form that prejudice may take.

The study was not concerned with fraud to the government, such as where prejudice is to the Department of Social Security, or false benefits claims as may prejudice local government social services or the Benefits Agency. Nor was it concerned with under-declaring of income, with the potential for under-assessment for taxes, or allied frauds on the Inland Revenue. Equally, this study did not seek to examine "plastic" fraud (Levi 1991,1998). This was due to the multi-faceted nature of such fraud, that can be against individual retailers, financial and other institutions, involving overdrawn individual accounts or 'rung' cards by gangs of quasi-organised criminals.

As the study was to be of frauds perpetrated by individuals or trading entities on each other a definition of fraud was required that would fulfil the requirements of

- fitting within the context of both the English and Zimbabwean legal system;
- incorporating the element of causing action on the part of another through use of dishonesty or deceit;
- which conduct would result in action detrimental, or potentially detrimental,
- to the interests of the actor; and
- would incorporate specific reference to the injury or loss being of a high financial nature as opposed to any other form of fraudulent conduct that may fall under the Theft Acts.

The formulation of such definition was assisted by all of the above noted sources, together with that supplied by Kirk and Woodcock (1992) as,

Fraud, in criminal law terms is a generic term for a type of offence, of which the following ingredients are infinitely variable but comprise the following: the dishonest non-violent obtaining of some financial advantage or causing of some financial loss,

Kirk and Woodstock's (1992) definition emphasises the non-violent nature of this form of crime.

Use of the term 'economic prejudice' to describe the loss, or 'economic crime' to describe the dishonest conduct was unacceptable owing to their being far too broad and vague. Geis (1984) notes that,

...as a classification category, 'economic crime' proves not notably enlightening, since virtually all property crimes, and many crimes against the person, are committed to achieve economic ends. (p 139)

As the study was to be restricted to large scale financial prejudice it was thought that the conduct would, typically, occur in a business or corporate setting. If this were so the conduct could be described as 'corporate crime' or 'white-collar crime'. These descriptions also have their detractors. Not only have they acquired certain meanings but, in addition, those meanings are controversial.

The term 'white-collar crime' was introduced to legal and criminological science in 1939 by Edwin Sutherland. Whilst it is generally understood that this form of crime involves dishonest conduct by the socially well placed person, white-collar workers, in a manner directly related to their professional activities, the exact meaning of the

term remains unclear. Geis and Stotland (1980), describing the problematic nature of the definition of white-collar crime held this general comprehension as,

...an intuitively satisfying understanding of white-collar crime as a broad term that encompasses a wide range of offences, abuses and crimes whose outer boundaries are as yet ill-drawn and perhaps not precisely definable. (p11)

This approach is unsurprising given that Sutherland himself,

...was not particularly concerned with definitional precision. (p 140).

However it was not of assistance in a study that requires a clear understanding of what conduct is to be examined. The need for this clarity is discussed on the following pages, but may be summed up as necessary to ensure different groups have a shared appreciation of the nature of the conduct about which they are being asked, notwithstanding how they themselves may describe it.

That white collar crime has come to have distinct and separate meanings was demonstrated by Levi (1987), when he described it as,

The controversial and ambiguous term....,

continuing,

There is a growing tendency amongst 'white-collar crime academics to differentiate between crimes *by* business and crimes *against* business; the former are labelled 'corporate crime'; the latter 'white-collar crime'. (p xviii)

There being no way of establishing what understanding of this phrase existed within the respondents to the surveys and interviews to be conducted as part of this study, the term "white collar crime" was also rejected. That it did not necessarily convey notions of misrepresentation and the causing of financially prejudicial action on the part of another that are explicit in a definition of fraud as would be understood in the Zimbabwean context were further reasons for rejecting this term.

Having examined a number of possible definitions and found that none were covered every aspect of that form of fraud in which my interest lay, it was apparent that I would have to create a definition of fraud. The resultant definition was an amalgamation of portions of all the sources referred to above, with care being taken to ensure that it would be immediately recognisable within both English and Zimbabwean legal systems as a legal concept with the appropriate judicial and administrative recognition and use. A concept that was not legally recognised would

be of as little use as one that was not in general professional use. Essentially it had to be one not only that could be applied, but one that is.

It was for these reasons that *in re: London and Globe Finance Corp Ltd* provided the larger portion of the definition, with some elaboration. Thus the definition of 'fraud' to be applied in this study is;

The intentional making of false statements by one party to another, causing that second party to act to their financial prejudice and to the advantage of the first party.

The concept of parties, as opposed to persons, was adopted so as to avoid confusion as to whether legal persons were to be included in the discussion. The word 'unlawful' that occurs in a Zimbabwean definition of fraud was deliberately omitted. This was to ensure that conduct that may not be illegal in terms of English statute but may be nevertheless be viewed as morally reprehensible by enforcement/regulatory bodies and therefore as falling within their mandate, could be examined.

The ideal 'type' of serious fraud would be a complex, high value fraud causing serious financial prejudice and threatening public or business confidence. This is highly likely to occur in the commercial sector.

The parameters of the study

Given that the study accepts that the criminal law is not the only response to fraud, it was thought necessary that examination be made of regulatory agencies and criminal justice system agencies, together with forms of regulation other than contained in the criminal law. The police and the Crown Prosecution Service were to be the first agencies studied and thereafter examination was made of the views of personnel of the Department of Trade and Industry so as to include the operation of regulatory bodies.

These choices had two direct consequence in terms of data collection. The first, as described above, was that a definition of the conduct in issue would be clearly understood by all respondents. There had also to be a means of evaluating how these various bodies work and the opinions of their staff which could be applied uniformly to all the agencies under examination. Hutter (1988) notes that research on the work of traditional policing agencies and regulatory agencies has reached a

stage at which useful comparisons can be drawn between the activities of the two (p 7). This approach refers primarily to the styles of activity. It will be suggested that the approach can be taken further, and comparisons drawn between the actual work of the agencies (what they do), their activities (how they do it) and their motivation (why they act as they do).

The suggestion that enforcement of laws and regulations are both part of the same process has several bases. One is that of the political left's analysis of the criminal law and its enforcement as resulting from its role as supporting the dominant ideology. Sumner (1990) described this as,

In that their task is to sustain, reinforce and restore power relations, and to articulate the dominant societal ideology amidst a field of social contradictions, chaos and struggle, the criminal law and the criminal justice system are institutions lodged within the realm of political practice. (p 42-3)

Using this analysis, regulations and their enforcement may be treated in a similar manner, as they too are used to impose and maintain hegemony in situations of dissenting opinion and its related practices.

That criminal laws and regulatory laws, together with their respective enforcement, may be analysed in similar manner can also be supported by reference to the two having a shared origin, in administrative law.

Either perspective views both laws and regulations as grounded in perceptions of what constitutes acceptable behaviour. Their enforcement is based on acceptable means of ensuring such behaviour and punishing deviance from it. The perceptions that found legislation and regulation are those of the legislative arm of government. Regulation, as created by subsidiary legislation, may also be based upon the perceptions of those authorised by the legislature to regulate certain activity. Given the inherent improbability of the legislature empowering a group with views in marked opposition to its own, it is to be expected that such regulators will hold similar views to that of the government.

The concept of there being limits to governmental control of social and economic life, is ancillary to the concept of laws and regulations as parts of the same form of social control by democratic governments. Government, whilst imposing the dominant (and therefore its own) ideology in the form of laws or regulations, has to retain sufficient

social consensus for it to continue to hold political power in addition to retaining social control. Sumner (1990) noted,

...criminal justice is not just active as an external determinant of social practice and morality, it is effective also in that it is internal to the members of the body public, in particular in constituting their sense of order, safety, morality and unity as members of a collective unit...When it is unjust, inefficient, authoritarian and corrupt, our commitment to the public realm, and even to the nation itself, is seriously reduced. (p43)

This extract does not explicitly state that the above views apply to democratic societies as Sumner uses the term 'modern society', nor that regulation is to be viewed in the same manner. However this must be the case as dictatorships, or other forms of totalitarian leadership, base political power upon might, generally military, as opposed to legality. Whilst dictatorial governments remain in power their control of society is not affected by principles of accountability or popular acceptance, both features being required of regulation, as they are of legislation, in democratic society.

Democratic governments have to have other methods of imposing societal control. A common theme that emerges from study of such governments is the increasing degree of their use of criminal law and codes of regulation. The British situation is described as being one of,

...the creation of a plethora of criminal offences and the setting up of agencies to secure compliance with regulatory objectives (Rowan-Robinson 1990 p 1)

Similar views have previously been expressed by Hawkins and Thomas (1984), in respect of a variety of aspects of social and commercial life, by Cranston (1979) in respect of consumer rights, and by Hutter (1988) in relation to the environment. These examples provide an indication of the extent, in England, to which regulation is now part of societal control mechanisms.

In this situation of increasing legislation and regulation it has been stated that the American position is one in that,

To the present day Americans have failed to develop or agree upon a coherent philosophy of government activism in economic matters. (Freedman 1978)

It is suggested that the use of 'activism' is of note and should be understood to refer to a variety of forms of intervention, including criminal justice and regulatory systems, whether the latter are under direct governmental administration, or administered in terms of a self-regulatory organisation. It is further suggested that the above comment applies with equal validity to a number of other countries, including Britain. In addition it may be applied to the increasing regulation of financial dealings, as it is to regulation of other spheres of social, economic and commercial activity.

It has been noted that the growing realisation of the detrimental effects or consequences of certain enterprises has led the British government taking a more active role in such actions, demonstrated by increased legislative activity in relevant fields (Rowan Robinson 1990). This analysis is as true of pollution control as it is of other control, including that of fraud and financial mis-dealing, albeit that it is not a complete explanation.

Regulation by the government of various aspects of life (for example : the workplace; education system; welfare system; treatment of animals and children; protection of the environment) has been a part of British life for several decades. Whilst some form of regulation was imposed by legislation in the late 1800s, such as the Factory and Workshop Act regulation, a far greater degree was imposed from the 1950s onwards. This appears to correspond to the increases in industrialisation and production together with the associated increase in demographic movements. Thus the 1950s to 1980s saw the promulgation of numerous pieces of legislation designed to ensure stricter government control of aspects of life that had previously been largely in the private realm, leading to the 1990s 'plethora' of criminal offences and regulatory agencies.

With this development came the growing body of study of regulation and its enforcement. These studies provided a framework within which similar means of control of other forms of conduct, in this case of fraud, could be examined. Therefore it is suggested that the theories of regulation, policing and prosecution that have developed in other fields of social and economic activity may properly be applied to the various forms of control of fraud.

In addition these studies revealed shortcomings in the system. In 1970-72 the Secretary of State for Employment and Productivity commissioned the Robens

Committee to examine provisions for ensuring health and safety at work. The Committee concluded that there were too many provisions regulating this topic, and that these were administered by too many agencies (Robens Report 1972). The Committee's findings reveal that it accepted that control of the situation had to be maintained. However a new approach to ensuring control was suggested, it being accepted that regulation through legislation and statutory instruments had failed to provide a satisfactory level of control. Self-regulation was put forward, with responsibility for regulation or control being placed upon those directly involved in the situations being controlled, as an alternative to legislative and governmental control.

The validity of the Committee's findings and recommendations was questioned by some. Woolf (1973) argued that the Committee undertook its examination with the *a priori* premise that what he terms 'legal methods of regulation' (regulation by use of statute and statutory instruments) having failed to provide sufficient control in the past, they would continue to do so in the future. He suggests further that the recommendations in the Report demonstrate the Committee's confusion of criminal and civil duties in relation to culpability, together with the moral and technical aspects of this issue. Despite criticism, such as that of Woolf, to which official response was not made, the Report had government approval and marked the beginning of the adoption of a new form of approach.

Under the system of self-regulation a move away from direct state intervention occurred. Baldwin (1987), writing in respect of health and safety at work, suggested that the legislative process would move from the creation of offences to the creation of frameworks of rules that would promote effective self-regulation. The trend in the legislative process of subsequent years, suggests there to have been a combination of these two features. Examples of this include the Financial Services and Markets Act 2000, which established a new regulatory framework for the financial markets industry by combining in one body a number of previously existing self-regulatory bodies. The Act similarly brought together in one enactment previously existing offences and new offences, including those of a technical or administrative nature that appear in the traditional mould of regulatory legislation.

The guiding theories of the 1980s legislative process have been assessed as being products of Thatcherism, being consensus and voluntary action within and amongst those directly involved in any particular situation (Redhead 1984). Despite its name,

self-regulation should not be seen as completely independent of governmental control. This is because it has two distinct forms.

Self-regulation, together with its enforcement, may be of either a contractual or statutory form, as described by Page (1986). Both forms share the features of an acceptance by a group of individuals or organisations that regulation of their common business is in the common interest, together with a common acceptance of a set of standards, rules and duties for such business. The distinction between the two lies in the responsibility for the making and enforcing of such standards, rules and duties. In the second stage of its evidence to the Wilson Committee, the Bank of England described this distinction as being between intrinsic and common consensual regulatory forms (vol. 4 p 89 para 5).

It is suggested that this description does not make clear that statutory provision may be a prerequisite for common consensus to come about in any form other than internal agreement, or 'intrinsically'. But for the enabling framework provided by statute there could be no common consensus, other than of a contractual nature. Thus described, it is not immediately apparent that the government retains a degree of control of a self-regulatory situation. That this is so is of relevance to establishing the theoretical and legal status of a regulatory system and of its enforcement.

Traditionally there have been distinctions drawn between regulation and 'real crime', and the enforcement of both. It is suggested that this distinction is even more pronounced in the case of financial crimes and regulations. Financial crime may still be viewed as somehow different from other forms of crime, as noted by Hadden (1983),

There is a temptation, to which many left-wing commentators succumb, to treat City frauds as if they were the same as other crimes and to criticise law enforcement agencies for not dealing with them in a comparable way.

Hadden relies upon a number of assumptions to draw distinctions between what he terms "City frauds" and other crimes. However, it is suggested that the validity of his assumptions may be challenged and that the argument for distinction between City frauds and other offences must fail. His argument may be viewed as containing two flaws. The first is an implicit assumption that there exists a distinction between white collar fraud, and other fraudulent behaviour. This supports the second claim, that this is so because of changing notions of what are and are not acceptable standards

of behaviour. In terms of legal theory, it is suggested that the second assumption would apply, if at all, as a factor in mitigation, not as a complete defence.

The first assumption is based upon the suggestion that there is a continuum between legitimate and illegitimate conduct of City business affairs. This is used in an a priori argument. This argument can not be used as a basis for the suggestion that this removes City or other white collar actions from criminal scrutiny, since the same is true of almost all non strict liability behaviour that is subject to criminal law scrutiny. All criminal acts that have the requirement of mens rea in the form of intention are on the wrong side of the line that demarcates acceptable social or business conduct from unacceptable. The fact that there may be fluctuations in social or business mores does not affect the criminal nature of such conduct unless and until the legislation is changed.

As will be discussed more fully in the following chapters, two fundamental features of the difference exist between the English and Zimbabwean legal systems. The first is the exercise of discretion at all stages in the English criminal justice system's processing of suspected offences as opposed to the operation of the Zimbabwean criminal justice system. The second difference lies in the relationship of advice and review that operates between the investigators and prosecutors of crime in England and the system of instruction/orders made by Zimbabwean prosecutors to the police officers who submit crime files for prosecution.

Within the Zimbabwean system the police conduct virtually all investigations. The only exceptions would be those matters, such as animal cruelty, that may be investigated by an independent agency, for example, the R.S.P.C.A. However these could never be referred to the prosecutors by that agency; the involvement of the police would be essential for a matter to be considered for prosecution.

Unlike their counterparts in Zimbabwe, English and Welsh police officers operate within limits of discretion in the investigation of crime. In the Zimbabwean system an officer would be obliged to refer major investigative decisions, such as when to arrest, when and what offence to charge, to the prosecution service. The withdrawal of charges can not be undertaken by the police; only the prosecutors or courts can authorise the ending of criminal proceedings before completion of a trial. Unlike Britain, Zimbabwean police and prosecutors are servants of the state; neither are independent of direct government control. One effect of this status is that

prosecutors have the power to instruct or order police investigations and the manner in which such investigations should be conducted. Examination of discretion, as operated by both prosecutors and investigators, is identified as central to the study.

With this background, one of the primary aims of the study was to examine the manner in which the English criminal justice system responded to instances of large scale fraud, in the context of the law not providing a specific offence of fraud. The study also sought to examine the impact of the operation of considerable discretion on the part of the police and CPS as to whether and how matters progressed through the criminal justice system. Linked to these aims was an interest in examining whether any overlap of remit operated between the various criminal justice agencies that dealt with fraud. If an overlap was found to exist, it was intended to examine its nature and possible effects.

The format of the study is reflected in the arrangement of the chapters of this thesis. The first stage was an examination of the history and current status of the organisations to be studied together with others within the justice system that were identified as being involved in the investigation, prosecution or regulation of fraud. This is detailed in chapter two.

Chapter three details the literature review that was conducted. Chapter four describes the methodology on which the study was based. Chapters five, six and seven detail the research into the operation of specialist units dealing with fraud within the Police, Crown Prosecution Service and Department of Trade and Industry. These chosen units operated as specialists within agencies that had general investigative and prosecutorial functions. In chapter eight, the distinction between general and specific remit forms part of the analysis of the results obtained from examination of the operation of these agencies together with discussion of the relevance of the themes identified in chapter three.

CHAPTER TWO

ESTABLISHMENT AND DEVELOPMENT OF CRIMINAL JUSTICE AGENCIES

DEALING WITH THE INVESTIGATION AND PROSECUTION OF FRAUD

This chapter examines those agencies within the English justice system responsible for dealing with fraud and their historical development. Included is a description of those agencies' powers in relation to responding to fraud. As it was thought that all the agencies examined in this chapter could have dealings with each other in relation to fraud, an appreciation of the justice system within which they operated was thought necessary. In this chapter examination is made of those agencies within England thought to have the greatest responsibility for investigating and prosecuting fraud.

English justice agencies that deal with complaints of fraud

The roles and functions of the agencies within the English justice system responsible for the investigation and prosecution of fraud are closely linked. The Crown Prosecution Service (CPS) could not function but for the operation, in the most instances, of the police. The CPS came into existence following critical examination of the operation of the police within the criminal justice system in the 1970s and '80s. Similarly the Serious Fraud Office (SFO) developed following critical examination of the operation of the police and CPS, specifically in relation to the investigation and prosecution of fraud. Policing departments within the Department of Trade and Industry (DTI) share codes of conduct established by the Police and Criminal Evidence Act (PACE) to regulate the operation of the police. All these agencies operate within the same criminal justice system.

Each of these agencies, with the exception of the Serious Fraud Office, deal with allegations of criminality other than economic crimes. In these agencies economic crime is investigated and prosecuted in the same manner as are allegations of other forms of criminal conduct. It was, therefore, thought necessary to examine their general investigative and prosecutorial powers together with the general duties of these agencies, so as to gain an insight into how they deal with the specific offences that may constitute fraud.

That all the agencies have specialist units to deal with allegations of fraud may demonstrate the importance that is attached to this form of crime by the government. Fraud has been described as a 1980s 'growth industry' in western and far eastern countries. The importance of this alternative industry lies in its effects, described by Sarker as,

Economic crime destabilises the economy and security of the state. It undermines confidence, leads to uneconomic deployment of scarce national resources, corruption, and facilitates other subversive activity. It also has international repercussions given the interdependency of world economies. (Sarker 1995 p 220)

Adopting Lustgarten's description of the status of the police as,

...in the edifice of English criminal justice the police are the keystone. (Lustgarten 1986 p 7),

and the opinion expressed by Klocker that,

...in order to examine the function and powers of the police it is necessary to establish what 'the police' are. (Klocker 1985 p 5),

this study's examination of investigatory and prosecutorial powers and responsibilities begins with an examination of the English police.

The police

The term "the police" may suggest a single entity, yet there are currently operating in England and Wales 43 police forces, and a variety of other policing bodies. Included in these other policing bodies are such agencies as the United Kingdom Atomic Energy Authority police, the British Transport police, Royal Parks Constabulary and Ports police. None of these were thought to have significant dealings with complaints of fraud and as such were not included in this study.

The 1990 reprinted edition of the Macmillan Encyclopaedia provides the definition of police as being,

A force established to maintain law and order and to prevent and detect crime. (Macmillan 1990)

Whilst not incorrect, this definition does not include recognition of there being several systems of law and order operating within any area. The major forms of law and order

are based upon the civil, criminal, military and canon legal systems operating within an area. All are subject to the operation of the police in their own systems. The distinction between these systems lies in the civil police having authority superior to the other systems. The civil police powers can be exercised in respect of the operation of other systems. The reverse is not true of the canon or military police in democratic societies. Whilst certain countries, in which there is not the clear distinction between religious and civil law as exists in most Western nations, have police forces that operate in both sectors, it is not with these states or systems that this study will deal. Thus the definition in volume 14 of *The New Encyclopaedia Britannica* may be preferred, being,

The term police is now used to denote a body of people organised to maintain civil order and to investigate breaches of the law. (1992)

This definition includes the notion of the police operating within the legal system of a specific state. This study uses the word 'police' to refer to the 43 civil police forces of England and Wales. The term 'the police' is used in preference to that of 'the police forces' in the following sections. Where distinctions are to be drawn between different police services this will be made clear by use of the term 'the force(s)'.

The history of the police is relatively long although somewhat contested. Whilst the origins and development of the police have been the subject of debate, it is agreed that the entity can trace its origins to earlier times. It is generally accepted that the modern entity may be taken to have come into existence with the 1829 Act with its roots in far earlier methods of policing. Debate as to how far back in history these roots may be traced was not the concern of this study and only passing reference will be made to it.

Despite calls for reform of the police and operation of the criminal law, attempts in 1785 to introduce a professional police force proved abortive. This has been viewed as being due to the distrust of the contemporary society for a police force with close links to central government, such as operated in France and Prussia, and to the opinion of the political elite, with their preference for the parish constabulary system of policing that had successfully protected their interests from the break down of the feudal system (Alderson and Sead 1973 p 28). The popular view was recorded as being opposed to the existence of a quasi military police force owing to the notions of community self policing that had its roots in feudalism and distrust of the use of the military, except in

times of outright war or severe civil strife. However both views were to change, due in large measure to brief disruption of the social order by the Peterloo Massacres of 1819. The broad masses of the population were revolted by the harshness of the authorities' response to the protest, whilst wealthy landowners were frightened by the spectre of continuing insurrection and attacks on their position. Previously the wealthy had been secure in their social position within rural areas, to the extent that protection from any form of crime other than petty theft or poaching had been unnecessary. This they had largely controlled in ways based on the feudal origins of their status. Protection of the land owning classes' property and allied rights was achieved largely through rural workers' and labourers' ties to the land, owned by the wealthy to whom the workers owed allegiance. The Industrial Revolution broke this system down and laid the basis for the ruling elite to consider alternative means of protection of their self-interest.

These factors explain how, in 1829, the establishment of a permanent police force was given grudging social acceptance. Success was achieved, but only with considerable limitations, in the form of the Metropolitan Police Act. The considerable opposition of the wealthy to the introduction of the police led to limitation of the operation of the police from the City of London; the 1829 Act specifically excluded its application to the City.

The Act established a paid force of men with the common law powers of constables. They were to be responsible only for controlling an area termed the Metropolitan Police District. The first professional police force dealt with an area of an approximate radius of seven miles from the centre of London. The force, founded by Rowan and Mayne, was under the direct control of two commissioners, and under the overall authority of the Home Secretary. The definition of the role and function of the present day police as detailed by Pike (1985), as,

The primary object of an efficient police is the prevention of crime; the next that of detection and punishment of the offender if crime is committed. To these ends all the efforts of the police must be directed. The protection of life and property; the preservation of public tranquillity, and the absence of crime, will alone prove whether those efforts have been successful, and whether the objects for which the Police were appointed have been obtained. (Pike 1985 p11),

may be traced back to the Rowan and Mayne prototype.

Rowan and Mayne's force was gradually extended to wider geographic areas. The early years of this new police were uneasy, as opposition to the force came from all social classes. However within five years this had begun to lessen and the force to gain a measure of social acceptance. As the Metropolitan police assumed responsibility for the policing of the entire London area, save for the City, the Bow Street Runners and other forms of the old police were incorporated into the one new force. The justices' dominance over policing in the London and Metropolitan area was ended by the City being forced to adopt the Metropolitan police model.

During this period of development, the role of detection came to be separated by the new police from their other roles and functions. This development may be viewed as giving concrete form to what has been termed the 'inherent tension' in police work, that the police established for the protection of the people are required to closely monitor, and also view with suspicion, those they serve (Baldwin and Kinsey 1982 p 7).

Establishment of an investigative arm of the new police had been delayed for some years after establishment of the force itself. This was due to fears surrounding both the force itself, and the nature of plain-clothes work. In the public mind investigation by non-uniformed officers was closely linked with the actions of the *agent provocateur*, the 1833 'Popay Affair' aggravating resistance to what was perceived by many sectors of the contemporary society to be the invasive role of the police in private life. Thus, despite the wishes of the founders and subsequent Commissioners of Police, the development of the Criminal Investigation Department (CID) was slow. In 1942 the Metropolitan plain-clothes detection group comprised six detectives with the media of the day leading editorial campaigns against its increase. Over the next twenty years, an increase of only ten officers to this group occurred. It was nearly forty years from the establishment of the new police before there was sufficient public support for the establishment of a separate CID section. Thereafter this section increased rapidly. Provincial forces adopted the similar formal division between preventative and investigative functions of the police and the beginnings of the split between uniform and CID in both role and status had been initiated. Examination of literature, from Talking Blues (Graaf 1990) and Police Review to academic studies of the police, reveals this to be a division that still exists and operates strongly.

The spread of the Metropolitan police model from the London throughout England and the establishment of similar police forces were achieved in many areas with far less opposition than in London. Frequently members of the old forms of police in the watch and the local systems were simply sworn into the 'new police' (Emsley 1983), thereby limiting opposition to the introduction of professional police forces.

The operation of these forces was not to remain unaltered. Controversy would attach to various police forces and manners of policing. A historical analysis of this topic is beyond the scope of this work. Similarly, controversy that has attached to some modern English police forces will not be examined in any detail. The aspect of the development of the police that is examined is the development of investigation powers and the allied growth of specialist investigative squads.

Police powers of investigation

The primary task of the English police forces may best be termed a composite one, being a number of functions under the broad headings of prevention and detection of crime, inherited from the early model of Peel's 'New Police'. Nearly a century and a half after the formation of the police, the 1962 Royal Commission on the Police, found its role and functions largely unchanged from its origins. The Commission described the role and functions of the police as;

- i) maintenance of law and order, the protection of person and property
- ii) prevention of crime
- iii) detection of criminals and associated functions within the criminal justice system
- iv) in England and Wales, the decision to bring prosecutions
- v) the conduct of prosecutions in many minor cases
- vi) control of traffic and advising local government on matters of traffic control
- vii) certain duties on behalf of central government (e.g. some immigration enquiries)
- viii) by tradition, to befriend people who need help and to cope with minor and major emergencies (Oliver 1987 p 8, citing the conclusion of the 1962 Royal Commission on the Police)

The following section details those police powers of investigation that operated during the study.

Before January 1986, when the Police and Criminal Evidence Act 1984 came into effect, the law governing police powers for the investigation of crime was unclear and antiquated. It had developed piecemeal since the establishment of professional police forces in the nineteenth century. (Bevan and Lidstone 1990 p1)

Throughout the history of the professional police, changes in social conditions had been reflected in calls for changes to the police. The twentieth century was no exception. In 'the homogenous 1950s' (Jefferson 1990 p 24 – 32), the dominant image of the police was as peace keepers as opposed to law enforcers (Banton 1964). This social situation was to develop into the 'transitional 1960s' and the 'less homogenic 1970s and 1980s', with an associated movement of perceptions of the police from 'plods to pigs' (Jefferson 1990).

By the mid to late 20th century considerable support existed for the view that changes to the criminal justice system in general, and the operation of the police in particular, were necessary (Walter and O'Connell 1985 p 1). Change came in the form of the Police and Criminal Evidence Act (PACE) of 1984 and the Prosecution of Offences Act 1985, following the Phillips' Commission examination of the investigative and prosecution stages within the English criminal justice system.

PACE details the larger portion of powers, duties and responsibilities of the police in respect of the investigation of general crime. Whilst other statutes have conferred a variety of powers and duties upon the police in respect of specific topics, PACE and the allied Codes of Practice have had the broadest scope and greatest direct effect upon the conduct of investigations of crime. The provisions of PACE that are of the greatest relevance to this work are those in relation to the arrest and questioning of suspects, the searching of premises and seizure of documents, records and other materials. Section 24 governs police powers of arrest, providing arrest without a warrant may occur where police officers have reasonable grounds for suspecting that an arrestable offence has been committed.

An arrestable offence is defined by the Act as being either an offence for which the penalty is fixed by law, or all offences (including those under the common law) for which a person over the age of twenty one may be sentenced to a term of imprisonment of five years, or those offences specifically listed in the Act; these include offences under the Custom and Excise Acts, and several other Acts (the Official Secrets Acts 1911 and 1920, Sexual Offences Act 1956, the Theft Act 1968 and the Public Bodies Corrupt Practices Act 1889) that do not have application to this study. Case law as to what constitutes reasonable grounds and suspicion (*Castorina v Chief Constable of Surrey* (1988) 138 New LJ 180) is settled and will not be examined in this study.

Questioning, or interviewing, of suspects is governed by Ss 76 -78 of PACE. These sections provide that where an officer has grounds to suspect that an offence has been committed and wishes to question a suspect with a view to prosecuting, that suspect must be cautioned. Further provision is made for the subsequent questioning to be recorded, either in writing or in taped form. The intention of these provisions was to guard the suspects' right of silence. This was modified by section 34 of the Criminal Justice and Public Order Act 1994. This provided for inferences to be drawn by a court from a suspect's failure to mention, when questioned under caution, any fact subsequently relied upon by that suspect in his defence.

Police powers of entry search and seizure

Police powers of lawful entry, search and seizure take two forms. These are with or without a warrant. Part II of PACE, as read with Code of Practice B, defines the powers of the police in respect of entry, search and seizure. The police have additional powers of search in terms of Part I of the Act and Code of Practice A. These are not of relevance to the present study as they relate to the stopping and searching of persons and vehicles for stolen or prohibited goods. Part II powers relate to entry and search of premises, defined as being 'any place', either public or private, movable (including vehicles) or immovable. The general powers of entry arise in terms of a warrant, the conducting of an arrest and in relation to breaches of the peace and following the obtaining of the occupier's consent. Whilst *Leach v Money* (1765) 19 State Tr 1001 and *Entick v Carrington* (1765) 19 State Tr 1029 are authority for the proposition that any

unlawful entry into premises is a trespass, the wide powers conferred under Part II protect the majority of police entry and searches of premises from civil action.

Prior to PACE the police did not have any general powers to enter premises and search for evidence. Warrants had to be obtained to search for evidence of specific offences and for certain items. PACE provided that the police could apply for a warrant to search premises, including those of a person not implicated in the commission of the offence, for evidence of the commission of that offence. Warrants of this nature limit an individual's exercise of their rights and were viewed as requiring a high degree of regulation. This was provided by the requirements that such warrants be issued only in respect of searches in respect of 'grave offences' and that they be issued by a circuit judge. PACE has ensured that the police have those powers that will enable them to obtain such confidential materials as provide 'relevant evidence' of a serious arrestable offence by adding to the common law and pre-existing statutory powers of search and seizure. In this manner there is potential for overlapping of the warrants for which the police may apply in order to conduct searches. For example in certain instances the police could apply for the necessary warrant in terms of either s8 (Art 10) of PACE and PACE Order, or, s26 (1) of the Theft Act 1968. The determining factor as to which form of warrant is requested will be whether the material sought is evidence of the offence, if so the provisions of PACE will be utilised.

If the materials sought are confidential, either in the possession of the suspect or a third party who is not a suspect, s14 (1)(a)(Art 16(1)(a)) or s9-14 and Sch. 1 will apply. In the latter instance these provisions can only be applied where the offence is a serious arrestable one. Searches for non-confidential material as evidence of a serious arrestable offence may be issued by a magistrate.

Following the introduction of the Human Rights Act 1998, public funding was granted to a number of challenges to PACE powers. These included a challenge of the issue of a search warrant, the grounds of challenge being that the issue of search warrants is contrary to Article 8 of the Human Rights Act, *R v Sheffield Magistrates, ex parte C (2002)*. In *B v Chief Constable South Yorkshire Police (2002)* the challenge was that section 1 PACE powers of stop and search were incompatible with Article 8. In both

cases, the courts have taken a robust view as to whether the Human Rights Act is engaged.

In this context, it may be anticipated that, as with all other offences, police officers investigating fraud may continue to lawfully enter and search premises and seize items without a warrant, with the consent of the suspect or occupier of premises. Code B section 4 governs the conduct of such searches and seizures and ensures that the persons concerned are advised of the purpose of the search and that they are informed that there is no compulsion to consent. These provisions apply to police investigation of serious fraud as they do to all other offences.

At the commencement of the study considerable differences existed between the investigative powers of the police, SFO and DTI. Neither the SFO nor DTI required warrants to conduct searches and seize materials as evidence of the commission of an offence and could use material, usually interviews, obtained under compulsion. However in 1996 the European Court of Human Rights, in the case of *Saunders v UK* 23 EHRR 313 found that Article 6(1) of the European Convention on Human Rights (right to a fair trial) had been violated by use of transcripts of interviews conducted by the DTI. The basis for this lay in the existence of a legal requirement, or compulsion, on the part of any suspect to answer the DTI's questions.

This decision resulted in considerable changes to the operation of the SFO and DTI, which were observed when conducting fieldwork in the DTI and are detailed in chapter 6. Following the EHRR decision the operation of the SFO and DTI altered to mirror that of the police, with PACE being the legislation governing investigation by all agencies. However, the DTI investigators not having PACE powers of arrest, search or seizure, their operation altered dramatically following the *Saunders* judgement.

As litigants and courts become increasingly "rights aware", additional case law has placed further constraints on the operation of all investigative agencies in relation to the seizure and retention of exhibits. This is particularly apparent in the investigation and prosecution of fraud, see *R v (1) Chesterfield Justices (2) Chief Constable of Derbyshire, ex parte Bramley* (2000). More so than in any other offences, fraud investigations routinely involve the search of offices with subsequent seizures of large amounts of

documentation, computer equipment and such office contents as investigators believed might be relevant to their investigations.

Under PACE, police officers acting either with or without a warrant had, in practice, taken all material they thought might be relevant to their investigations. Given s8 PACE requiring only that the officer should believe that material is likely to be of substantial value to the investigation of the offence, that this situation should have developed is understandable.

R v Chesterfield Justices ex parte Bramley (2000) 2 WLR 409 altered practices. This held that possession of a warrant did not authorise police officers, and by extension any other investigators, to seize all material found on the premises named in the warrant for the purposes of determining, at another location, what is and is not relevant to their investigations. Following this case, officers are required to “sift” the material at the premises and seize only that deemed relevant to the case. Similarly retention by the police and other investigative agencies of exhibits for extended periods of time is no longer tolerated by the courts. The expectation is that the contents of computers will be electronically copied and the equipment seized returned at the earliest opportunity.

In 1996 the Criminal Procedures and Investigations Act made it a statutory requirement that prosecutors should make full disclosure to the suspects. Whilst the duty is that of the prosecutor, the statutory responsibility of the police to assist is emphasised in general works (Card and Ward 1996 p 59) and police training materials (Hutton and Johnston 2002 para 14.2.1.). Both these works draw attention to the possibility of failure to make disclosure resulting in the collapse of any subsequent trial.

In *R v Customs and Excise, ex parte Popely and Harris* (1999) the courts approved a system devised by Customs and Excise of applying to the Attorney-General to nominate a member of the Bar to sift through the documents seized from a solicitor's office, where some but not all might be subject to legal professional privilege, before a decision was made as to which of them should be retained.

In light of these developments the Court of Appeal's decision in the matter of *Attorney – General's reference (No 7 of 2000)* may be seen as drawing a fine line between the right not to incriminate oneself by remaining silent, following the 1996 *Saunders* judgement, and the obligation to provide evidence of criminality, by differentiating between statements and actions.

Notwithstanding this last mentioned judgement, during the course of the study the nature and exercise of police powers, particularly in relation to investigations of fraud, changed significantly. As may be expected, these changes within the operation of the police were mirrored by changes in the nature and operation of the Crown Prosecution Service (CPS), being the criminal justice agency with which the police may be expected to have most contact in the investigation and prosecution of crime.

Before examining the changes in the CPS, the following section is an overview of the development of prosecution within the criminal justice system.

Criminal prosecution: the police and Crown Prosecution Service

The introduction to the Royal Commission on Criminal Procedure study of the prosecution system is introduced by the statement that,

The criminal justice system in England and Wales is unusual in that, in the great majority of cases, the responsibility for both the investigation and prosecution of criminal offences lies with the police (The Royal Commission on Criminal Procedure 1980 p 4)

This was the case until 1985 and the promulgation of the Prosecution of Offences Act. This Act established a new criminal justice agency, the Crown Prosecution Service. This body was to be responsible for the instituting and conduct of all criminal proceedings deemed appropriate. It was not until October 1988 that the CPS came into full operation. Prior to this, the prosecution of suspected criminal conduct in England and Wales remained the responsibility and task of the individual police forces. The Royal Commission described this situation as,

...the present arrangements for the prosecution of criminal offences in England and Wales defy simple and unqualified description (para 6.1).

Over time thirty two police forces had come to be assisted in their prosecutorial role by bodies known as the prosecuting solicitors' departments. These departments were staffed by lawyers who advised on and prosecuted police investigation cases. Private legal practices performed a similar role for those forces that did not have this arrangement. Prosecuting solicitors departments were without statutory basis and were not subject to any national authority. As such they operated in accordance with local requirements. This allowed for great variation in operational practices throughout England. The Prosecuting Solicitors' Society existed, but even this was unable to describe the prosecution systems operating to the 1980 Royal Commission. Despite the recommendation of the 1962 Royal Commission, control of the prosecution system had, for a number of years, remained in the control of the local governing bodies.

Use of the prosecuting solicitors did not remove from the police control of the conduct of criminal prosecutions, nor the decision whether to prosecute (Mansfield and Parry 1987 p 3). In some of the forces with prosecuting solicitors, police officers continued to prosecute some matters and prosecuting solicitors prosecuted others; the latter also providing advice to the police. Local variations in practices and operation prevented the development of a single, uniform system of prosecution. Those forces that utilised the services of private legal firms retained a high degree of control over the decision whether or not to prosecute. This may have been as a result of a solicitor/client relationship existing, with firms being unwilling to advise against prosecution or to give unpalatable advice to their instructing forces, due to concerns of possible loss of that client. Whilst it may have been true that some solicitors were prepared to advise the police against prosecuting, above all else, the police were free to reject advice,

...the police always had the last word: if they instructed their solicitors to go ahead with a prosecution those instructions had to be obeyed. (Rozenberg 1987 p80)

This system of police operation was to be subjected to extensive change. "Unwritten rules' of police conduct within the criminal justice system (Devlin 1960 p 112-114) were replaced by precise Codes of Practice and legislation. Prosecution was taken over by a body established, and operating under, specific legislation and Codes of Practice. The enabling legislation and Codes specifying the criteria for prosecution decision making,

variation in prosecuting decisions may be expected to have lessened. However, due to the guidance as to what constitutes 'the public interest' it may be suggested that, in at least one of the criteria applied by CPS prosecutors, there remained the possibility of a degree of variation.

The 1960s to 1980s saw a rise in public concern as to the general operation of the police and with this particular situation. Public expectations and the situational context of policing were in the process of changing, with new styles of policing being introduced (Joint Consultative Committee 1994). Technology and the new 'science' of management were applied to the police. Introduction of such systems as unit beat policing and rapid response did not completely answer concerns as to the state of the police. The Phillips Royal Commission began its examination of the criminal justice system, the role and functions of the police and prosecution system in the aftermath of the Miners' Strike. This was a time of concern about certain police forces' decisions to prosecute for public order offences following the disturbances that had occurred during the strikes.

The Commission's findings demonstrate how far perception of the prosecution system had altered since Devlin's comments. It found that an unacceptably high number of acquittals were occurring and that some of these could have been prevented. In its recommendations for improvements a distinct variation in approach can be ascertained from that of Devlin. The latter writes simply (and very briefly) of conviction of the innocent man. He makes no comment upon, or criticism of, the decision of the police to prosecute such persons. More importantly he does not deal with the acquittal of a rising number of what Rozenberg terms the 'hopeless cases'.

It was the number of these cases that caused the Royal Commission to examine alternative prosecution systems. The Commission examined an office that operated alongside the police, that of the Director of Public Prosecutions (DPP) a post dating back to 1879. The Attorney General had, and retains, a degree of authority over the DPP's office. This is due to his powers of 'superintendence' over the function of the DPP in respect of the decision to prosecute or not any criminal matter falling within his remit. However the DPP's role was that of the specialist, being to prosecute difficult or important matters, together with sensitive matters, those referred in terms of s 49 of the Police Act involving complaints of criminal conduct on the part of a police officer.

The Commission called attention to the differing standards that operated between the police and the DPP in respect of the decision whether to prosecute. The DPP operated in accordance with what Rozenberg describes as a 'fifty per cent' rule, a term that is popular but may be misleading in the impression it creates. The preferable term is the more frequently used, 'reasonable prospects of conviction' test. This equated to a determination of the prospects of success of trial of any matter. This determination was based upon two separate enquiries. The first was the evidential merits of the case, and whether sufficient evidence is available to result in a conviction. The second is that it is in the public interest that the matter be tried. In this manner not only did there have to be more than a *prima facie* case. In addition a policy decision had to be made as to the merits of prosecuting each particular case.

The police decision to prosecute was not based on these two enquiries. In order for a police prosecution to proceed to trial it was sufficient for there to be a *prima facie* case established. The Commission noted that the police assessment as to whether such a case had been made out was liable to be influenced by the fact that the investigators made this decision. It was felt that these officers were too close to the case to make an impartial decision as to its merits.

A police officer who carries out an investigation, inevitably and properly, forms a view as to the guilt of the suspect. Having done so, without any kind of improper motive, he may be inclined to shut his mind to other evidence telling against the guilt of the suspect or to overestimate the strength of the evidence that he has assembled. (The Phillips Commission quoted at p 83 Rozenberg 1987)

The Commission's view was that this could be avoided by use of an independent 'filter', in the form of a public prosecutor responsible for assessing the evidential merits of matters investigated by the police. At this point a brief analysis of the office of public prosecutor, as examined by the Commission, may usefully be made.

The office of public prosecutor

It has been suggested that, regardless of differences in legal systems and geographic area of operation, there are certain common features of the office of prosecutor. These include the legal training requirements of the office, and that prosecutors are 'almost

invariably' civil servants, who enjoy a relatively high status within the criminal justice system (Moody and Tombs 1982)

This uniformity of position is not matched by a similar uniformity of role or function,

In the criminal justice industry the domains of the component organisations appear at first glance to be clearly defined and well established. Police do the policing; the prosecutors do the prosecuting; and the judges do the judging. But appearances can be deceptive. This image represents only the formal division of labour, the textbook description of how the system works. (McDonald 1979 p16 – 17)

Most examinations of the office of the prosecutor reveal the tensions existing between the role and the functions of prosecutors. The role of prosecutors initially appears self evident, to prosecute criminal matters on the public's behalf. This seemingly straightforward role is complicated by a number of factors, including that, in almost all Western jurisdictions, there is no requirement that all matters reported to the police should develop into criminal prosecutions.

Therefore there is an issue as to which agency exercises responsibility for the decision not to prosecute; the one that investigates or the one that prosecutes. The initial decision may lie with the police, due to several factors including that not all events reported to the police fall within the scope of the criminal law. Of those that are deemed by the police to fall within the criminal law, some may be filtered out, and so are not investigated. The police may take a decision that a matter falls within the responsibility of another agency, or that local resources are inadequate to take on investigation of any matter.

The prosecutor may play a part in these decisions and the decision, either directly or indirectly, in respect of what offence to charge. Even where the decision to charge lies solely with the police, at some stage the prosecutor will exercise the discretion to proceed with criminal proceedings, or to decline to prosecute any matter referred by the police. At this stage the prosecutor fulfils a reviewing role, assessing the adequacy for judicial purposes of the police investigations.

Other roles, such as court administrator, lobbyist and social worker may also be the province of the prosecutor. Using the notion of core and peripheral roles as is done by McDonald (1979), following Bittner's analysis (1975) of the police role, these roles may be viewed as less important than others. It is for this reason that they are referred to as being secondary, rather than primary, roles. The roles of exercising the decision to charge and of reviewer of fact and evidential quality, being core roles, fall within different categories as exercise of these tasks forms a major component of the work of all prosecutors regardless of jurisdiction.

The issue remains as to what is the core role of the prosecutor. It is suggested that no single, accurate answer can be given and that the office of prosecutor cannot be treated a single, universally occurring entity. No single role stands on its own or is fulfilled by all prosecutors in a similar manner. Certainly prosecution of criminal cases will form one of the several core roles of all prosecutors. However, the stages of criminal proceedings at which this role originates¹ and the manner in which that role is discharged is subject to great diversity. Given the extent of variation between different jurisdictions and the local operating practices of prosecutors it is suggested that all that can validly be proposed is that prosecution is one of the core roles of the prosecutor.

The functions that may be performed in addition to other core, or peripheral, roles are similarly numerous,

The variety of things which one can find prosecutors doing in at least some jurisdictions is amazing. (Rozenberg 1987)

The office of the Procurator Fiscal in Scotland, is a good example of this diversity. It is separate from the police, made up of lawyers who exercise the final decision as to whether to prosecute a criminal matter. However the procurator exert considerable impact upon the evidential quality of investigation and therefore the evidence that was placed before the courts. This is a result of their reviewing of the legal adequacy of police investigations.

What constitutes 'criminal proceedings' will not necessarily be the same throughout a number of jurisdictions. In certain areas it is taken to be those matters brought before the courts, and would, therefore, not include the charging of a suspect, whilst in others it may be taken to be those matters wherein the rules of the criminal law have been invoked. In the latter instance police or prosecutor charging of suspects would form part of the criminal proceedings

An alternative view of the procurators suggests that they are not fully independent of the police, but rely heavily upon police decision-making in relation to the largest portion of their work. This view suggests that most of the procurators' work is the routine, formal processing through the courts of material supplied to them by the police and that it is only in an exceptional case that the procurators exercise any real review function and decline to prosecute. (Moody and Tombs 1982 p 140) This view accepts that procurators are to a large degree dependent on what the police choose to refer to them and that there can exist a gulf between the official position and the day to day practicalities of the operation of prosecutors' offices. Moody and Tombs' analysis may be seen to follow the predominantly American and Canadian school of opinion in respect of the role and function of prosecutors.

Such analysis, whilst not frequently referred to in descriptions of the English justice system, has had its supporters. Prior to the coming into operation of the CPS, the problems of strict implementation of a division between the investigative and prosecution roles, and the extent to which latter was dependent upon the former, had been recognised. Writing in 1984, Edwards noted that;

What distinguished the *Poulsen* trials was the frank recognition that, as a matter of everyday practice in the English administration of justice, it is often extremely difficult to abide by a strict demarcation of functions. In theory, the investigative strategy and decision making are said to be wholly within the police domain, whilst the subsequent decisions as to prosecution, if made by the Director of Public Prosecutions or Attorney General, are said to be in an atmosphere of insulation and objectivity. After studying the system in place in other countries...the Royal Commission on Criminal Procedure in 1981 concluded that 'the two roles overlap and intertwine. This is because the decision to prosecute is not a single intellectual act of a single person but it is made up of a series of decisions of a widely different kind made by many people at various stages in the process. (Edwards 1984 p 83)

Since its inception, the operation of the CPS and the joint operation of the CPS and police have been the subject of considerable critical examination. This has been in the form of both academic studies and government directed reviews, which are examined in the following section.

The Crown Prosecution Service and its powers

The Prosecution of Offences Act 1985 has been referred to as the completion of the implementation of the Phillips Commission recommendations for the improvement of the investigative and prosecution stages of the English criminal justice system (Blackstones' Criminal Practice 1993 p 930).

Whilst the CPS has no powers of investigation, the existence within it of a section that has responsibility for supervising the investigation and prosecution of serious fraud must be examined. This section is known as the Fraud Investigation Group (FIG). The incorporation of this group, from the Metropolitan police, into plans for the establishment of the CPS, was a development of the pre-1985 system of *ad hoc* task forces of lawyers and police officers to deal with individual allegations of fraud. It has been suggested that the formalisation of this system was not a major step in the investigation and prosecution of fraud, the group not having a fixed permanent staff, but fluctuating staff levels, with police officers being seconded to the group and the CPS staff moving between sections within the CPS (Levi 1987 p 177). It is suggested that in this manner a continuity of approach is made more difficult and has ensured that the CPS does not develop as an investigative agency to any extent. This approach differs from that of another governmental agency, the DTI; the policy and operation of which will also be examined in this study.

Reference within the DTI booklet on its operation (Department of Trade and Industry Investigations - how they work DTI/Pub/1227/5K/2/94) to the CPS as one of the 'other investigatory bodies' with which it works, may be criticised as being not strictly accurate, if a strict interpretation of the operation of the CPS is applied. Such an approach would deny that the Fraud Investigation Group or any other part of the CPS plays an investigative role. The Prosecution of Offences Act 1985 may be taken as authority for the suggestion that CPS staff may advise and assist the police officers, review police files and prosecute criminal investigations that satisfy the tests detailed in the Code for Crown Prosecutors of evidential sufficiency and that a prosecution is in the public interest.

Examination of the official CPS documents (Crown Prosecution Service Annual Report 1994 - 95 HMSO London 27 June 1995) reveals that the organisation uses the phrase 'fraud divisions' as opposed to FIG to refer to those sections dealing with fraud matters. In these documents it is made clear that the prosecutors within these divisions are not involved in the investigation of allegations, but are to work closely with the police, and other agencies dealing with the investigation and prosecution of fraud, in providing an independent review of the investigative work of those agencies.

During the course of the study, the Glidewell Report, on the Crown Prosecution Service and the Auld Report, on the criminal justice system were published. Whilst both of these recommend closer working links between the CPS and investigative agencies, primarily the police, neither should be viewed as extending the remit of the CPS to include direct involvement in investigative functions. Both suggest improvement in the administrative functions of agencies within the criminal justice system, focussing on speed and quality of response to and between agencies. The effect of these Reports, together with policy statements of the CPS, it is to suggest that the CPS does not contain any section that can be said to have a primary investigative role.

In chapter 5 examination is made of the role and primary functions of a specialist unit within CPS that deals with fraud. Examination of its everyday practices are made to establish the extent to which 'a strict demarcation of functions' is applied and thereafter to assess the primacy of the various functions and roles of Fraud Investigation Group prosecutors.

Examination of the annual reports and other official publications of a number of government agencies demonstrate that this Group is not the only criminal prosecution authority within England dealing with fraud. The DTI, SFO and Department of Customs and Excise also exercise certain criminal prosecution powers in relation to complaints of fraud. These bodies may institute proceedings only in respect of those complaints of fraud falling within their legislative mandate, whilst the CPS may conduct criminal proceedings in respect of all offences (the only reservation being in relation to 'specified offences' in terms of s2 (a), a category that is very rarely used.)

Of all prosecution agencies within the criminal justice system, the CPS has the broadest statutory remit in respect of criminal offences, with responsibility to “take over conduct of all criminal proceedings instituted on behalf of a police force” in England and Wales, s 3 Prosecution of Offences Act 1985. The CPS’ exercise of its powers and duties has been subject to considerable criticism. Complaints of understaffing and lack of expertise dogged the early stages of its operation. Increases in staffing numbers have not removed the general complaint that the service has not dealt effectively with crime.

In the 1990s, due to concerns about the organisation and efficiency of the CPS, the Government commissioned a Review of the CPS chaired by Sir Iain Glidewell. His Report, published in June 1998, recommended closer working between CPS lawyers and the police, for example in “Criminal Justice Units” or “CJUs”.

It was suggested that a CPS lawyer would head these units with mainly CPS staff and that the units would need to be able to call on the police to take action in obtaining more evidence. For this reason it was proposed that a senior police officer would need to be part of each unit. The Report argued for “co-location” of CPS and police staff, so that CJUs would be housed in or near the relevant police station (Glidewell 1998 Summary para 29). Towards the end of the course of the study, a number of these units came into operation.

The Report also recommended the re-establishment of small groups of Special Casework Lawyers who would be available to provide early advice to the police (Glidewell 1998 Chapter 9, paragraphs 32 and 33). On the Law Commission’s website it is suggested that,

These examples demonstrate a pragmatic approach to the Philips principle, promoting efficiency without compromising the independence of the lawyer when taking decisions whether or not to prosecute an alleged offender or whether or not to discontinue a prosecution already up and running.

Throughout 2000 and 2001 this Recommendation was put into operation in police forces and CPS Areas across England and Wales. However, unlike other offences, in the force studied fraud remained subject to the traditional division between police and CPS. Processing of communications and transmission of material in respect of Commercial

Branch matters did not make use of CJUs nor were specialist lawyers locally available to provide advice on major fraud investigations.

Whilst too recently introduced to have been formally reviewed, this study found that, based on anecdotal evidence, neither co-location nor the re-introduction of Special Casework Lawyers had impacted upon the investigation and prosecution of serious fraud. In relation to other offences the distinction between the investigators and prosecutors was not as distinct as suggested by the Law Commission. Particularly in relation to minor offences, it was anecdotally reported that CPS lawyers would direct or instruct officers to caution as opposed to charging a suspect. Not all police officers accept that the CPS has power to direct or instruct in this manner, arguing that the decision to caution is one that lies with the police and the police alone.

Some resolution to this and other concerns as to the operation of the CPS; police and broad criminal justice system may come from the government's response to the Auld Report.

Published in October 2001, the Report has been described on the Home Office website as,

...the most extensive review of the criminal courts system for 30 years

and,

The Government acknowledges the review as an important contribution towards establishing modern, efficient criminal courts, that have fewer delays, are in touch with the communities they serve and respond to the needs of their users. It sits alongside the current review of sentencing and police reform to provide a criminal justice system that is respected, efficient and seen to deliver. (Home Office 2001)

The issue of reform of the police and the courts remains live and contentious. In February 2002 police officers overwhelmingly rejected a ballot that linked reform of police with pay regulations. In the same month, the collapse of two high profile criminal trials, one on the grounds of inadmissibly obtained evidence and allied non-disclosure by CPS, the other on the grounds that police inducements offered to a witness made her evidence "wholly unreliable", ensured that the issue of the relationship between the police and CPS retained a high public profile.

Debate on the overall state of the criminal justice system became increasingly public as opposed to political following the comments of the Commissioner of the Metropolitan Police, Sir Jon Stevens and the Head of the Bar Council, David Bean QC, in March 2002. In this environment relatively little comment has been made on the Auld Report's recommendations as they could affect the prosecution of fraud.

It is recommended that procedures for preparation for trial alter significantly, including a change in the respective roles of the police and the prosecuting authorities as to determination of charge. In the majority of cases the Crown Prosecution Service, not the police, would decide whether and what offence to charge. The CPS would have increased responsibility in relation to discharging the duties of disclosure. Most importantly it was recommended that serious fraud should be tried by a judge sitting alone or with lay members drawn from a panel, instead of a jury.

The government had, prior to the Auld Report, examined the issue of serious fraud in the creation of the Serious Fraud office.

The Serious Fraud Office

The SFO was brought into existence by the Criminal Justice Act 1987, following on from the Roskill Commission into the investigation and prosecution of serious fraud. It was something of an anomaly, due to its operation being in direct contrast to the recommendations of the Phillips Commission, that the investigative and prosecution functions should not vest in one organisation. The CPS had been created to take over the prosecution role of the police, and police investigative powers re-structured. However within two years of these occurrences the Roskill Commission reported that,

The public no longer believes that the legal system of England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right. (Lord Roskill 1986)

Whilst not all of the recommendations of the Roskill Commission were accepted, the suggestion that the investigation and prosecution of serious fraud matters should be the responsibility of a single body, comprising lawyers, accountants and police officers was accepted. The SFO owes its creation to the acceptance of the government that serious

fraud was not being effectively dealt with by the revised criminal justice system and that the merging of powers of investigation and prosecution in one body was justified. Response to concerns that this ran in direct conflict with the Phillips Commission's recommendations was based upon the government's acceptance that serious fraud was an offence of such a specific and complex nature that an exception to the general rules was warranted. Precedent for this approach lay in the adoption of far eastern fraud offices operation, and in the operation of the pre 1985 style Fraud Investigation Group of the Metropolitan police. There was precedent for adopting far eastern methods of policing, the public order tactics and equipment of the English police having been updated in the 1980s based on Hong Kong policing methods (Jefferson 1990).

The view that economic crime was different to other forms of criminal behaviour and that it required a different investigation approach was not new. Similar suggestions had been made by the 1878 Royal Commission headed by Lord Penzance (Sarker 1995). What was new was the powers that were given to the department tasked with dealing with serious fraud.

SFO powers of investigation and prosecution

The Criminal Justice Act 1987 details the powers of the SFO, section 2 relating to its investigatory powers. These were modelled upon those powers conferred by the Companies Act 1985 and the Financial Services Act 1986 upon the DTI inspectors, but are more extensive. The mandate of the SFO is to investigate any suspected offence that appears to the Director on reasonable grounds to involve serious or complex fraud (s1 (3)). What constitutes serious or complex fraud is not defined, thereby allowing the SFO considerable latitude in determining what matters to accept, as definition of the scope of its operation must rest with itself. The Director's investigative powers can be applied 'for the purpose of investigating the affairs, or any aspect of the affairs, of *any person*' (emphasis added), there appearing good reason to do so' (s2 (1)). Furthermore these powers can be assigned by the Director to any competent investigator who is not a member of the SFO, in addition being exercised by authorised members of the SFO. The flexibility of the Office's terms of reference has been further demonstrated by the lowering of the criteria of acceptance from matters with prejudice of or in excess of £5,000,000 to those involving £ 1,000,000 (The Times 2 May 1995).

The distinction between the investigative powers of the SFO and of the police is demonstrated by examination of s2 (2) and (3). Unlike the police, SFO investigators are not required to caution their suspect and could compel the answering of questions by utilising the power to bring a separate criminal charge against any person who refuses to answer. Written notice is served upon a suspect (termed 'a person under investigation' by the Act) calling upon them to appear at a specified time and place to answer questions or to produce specified documents. Such notification contains the warning that

failure without reasonable excuse to comply with these requirements is a criminal offence (Frommel 1996 p 227).

It was this removal of the suspect's right of silence, with the proviso that reasonable excuse will deter criminal liability (that carries with it the prospect of imposition on summary conviction, of imprisonment of up to six months or the imposition of a fine, or both), that has provided a large portion of the controversy surrounding the operation of the SFO.

The House of Lords ruling in *R v Director of Serious Fraud Office, ex parte Smith (1993) AC 1 (HL)* ensured that this partial removal of the right of silence was lawful not only at the suspect interview stage of proceedings, but also after the person under investigation has been charged. However, following the EHRR case of *Saunders v UK* and subsequent domestic case law, the impact of *Smith* is not as great as it may first appear.

During the time between the *Smith* and *Saunders* decisions examination of the powers of both the SFO and DTI continued, focussing on the issue of compulsion. In some ways the powers of the DTI inspectors were more draconian than those of the SFO, yet the SFO has received far greater media criticism than had the DTI. Part of the controversy over the SFO centred upon its power to compel the answering of its queries on pain of separate criminal action, often referred to as s2 powers. Argument centred on the fact that neither the police, Inland Revenue nor Customs, all of which investigate fraud, had similar powers.

One response to this criticism was that s2 powers be extended to the police. The 1993 Royal Commission on Criminal Justice, chaired by Lord Runciman, recommended the

removal of the prohibition of s 2(11) against assignment of powers of investigation, including that to compel the answering of questions, in respect of police officers working as part of the SFO (Royal Commission on Criminal Justice 1993 p 23). This recommendation was not accepted.

Article 6 of the European Convention on Human Rights and its incorporation into domestic legislation in the Human Rights Act 1998 having been used as the basis of a successful challenge to the SFO and DTI inroads on suspects' right to silence, together with judgement in *Saunders v UK* 23 EHRR 313, previous concerns as to compulsion largely declined. *Saunders* may be viewed as having had considerable effect upon fraud investigations, effectively removing the rights of both the DTI and SFO to compel response to questioning.

Prior to this change, criticism of the high cost of the SFO and its apparent lack of success predominated. The media and public response to the Office has been described as being a 'barrage of criticism' (Sarker 1995 p 59). The 1993-4 Annual Report of the SFO statement of a 80% conviction rate did not reach the public in the same manner as did reports that 'SFO investigation cost Hamilton his job' (Webster The Times 27 October 1994). Similarly reports that the SFO dropped its case against Nadir after two years of work, with investigation costs in excess of £ 3,000,000 (Mackay and Elliot The Times 1 October 1993), together with the failure of its £ 19,000,000 trial of George Walker (Ashworth The Times 25 October 1994) attracted greater attention than its successes. Reports were published as to the likelihood of the SFO being disbanded, by amalgamation into the CPS and extending section 2 powers to this combined group (Gibb The Times 1 and 13 July 1994). These reports followed the recommendations of the Working Group set up to examine the criminal justice systems response to fraud (Review of the Handling of Serious Fraud HMSO March 1994). The suggestions were not accepted, and on 1 April 1995 it was reported that,

The Serious Fraud Office was given a ringing endorsement by the Government yesterday when the Attorney General announced that it would not be abolished but would have an expanded role to tackle more cases. (Gibb 1 April 1995)

This report substantiates comments published earlier in the year that,

In all the recent media criticism of the SFO it is interesting to note that none deride the concept of a separate body of lawyers, accountants and police to investigate and prosecute serious fraud. (Sarker 1995 p60).

It was in this report that, for the first time, the successes of the SFO were mentioned. This provided a setting for the reporting of the recommendations that the SFO should extend the scope of its operation by lowering the amount of prejudice to a sum of £1,000,000 or more to serve as one of the criteria for acceptance of cases. This view was accepted and in May 1995 police forces around England and Wales were advised by the SFO of its 'new criteria' that included the amount at risk being at least £1,000,000 (SFO 12 May 1995). Even with this extension a number of cases of serious fraud could remain investigated by the police. This is due not only to the 'at risk' criteria, but to the somewhat vaguely defined 'key criterion'. The phrasing of this test is reminiscent of the wording of the Act, in that it too gives great flexibility to the SFO. This is a result of leaving definition of operational limits with the operating body; the key criterion being;

...the suspected fraud is such that the direction of the investigation should be in the hands of those responsible for the prosecution.

In the light of this document and the Davie Report (1994) there were clear indications that the SFO would continue to operate in the manner in which it has since its establishment. However, it is suggested that the response to the Auld Report into the criminal justice system and in particular serious fraud may yet alter the function of the SFO, if not its very existence.

The Department of Trade and Industry

The Department of Trade and Industry is a multi-function agency with tasks ranging from the field of insolvency, through licensing, to the inspection of company affairs. Many of its tasks do not fall within the ambit of this study. These are not examined in this section, which concentrates upon the DTI's work in relation to the investigation of fraud.

DTI powers of investigation

DTI investigative powers are conferred by provisions of the Companies Act 1985 and 1989. Part XIV of the 1985 Act, dealing with the investigations of companies and their affairs, the power to question persons and request and seize documents, are relevant,

as is Part III of the 1989 Act. The provisions of the latter extend the application of part XIV of the 1985 Act. Accordingly the provisions of both Acts need to be examined. In addition sections 94, 102 to 106 and 177 of the Financial Services Act 1986 are relevant to the operation of DTI investigations and inspectors. The DTI's publication on its investigations details the most frequently applied of these sections, and notes that the 1985 Act is referred to as amended by the relevant sections of the 1989 Act.

Re Pergamon Press (1970) 3 All ER 535 impacted significantly upon future DTI inspections. The judgement recognises that there are no formal procedures for such inspections and that these inspections are subject to no rules other than that they should be fair. Pre- 1998 Human Rights Act examination of the investigative powers of the DTI inspectors suggested these powers were not only extremely broad but also operated so as to exclude certain basic principles of the common law. These included the right of silence or self incrimination (*nemo tenetur se ipsum accusare*) and to be advised of the charge and permitted to make response to such charge (Sarker 1994 Vol15 No10 p 310).

Following the *Saunders* judgement and coming into effect of the Human Rights Act, the more draconian operation of the DTI was radically overhauled so as to avoid both declarations of incompatibility and allied failure of prosecutions. As may be seen from *R v Everson* CA [2001] EWCCA Crim 896 and *Attorney General's Reference No 7 of 2000*, the right not to incriminate oneself does not apply to compulsory provision of one's business documents or to fail to mention in questioning under caution facts subsequently relied on in trial.

Accordingly, the s 431 of the 1985 Act discretion conferred upon the Secretary of State to initiate an investigation into the affairs of a company upon the application of members of the company, or the company itself by appointing inspectors who are to produce a report upon their investigations, remains. Similarly remaining is s432 provision of comparable powers in circumstances where investigation is not requested, but circumstances suggest a company is being conducted with intent to defraud, or otherwise prejudice, its creditors or members; or where a company is, or may be, operating for fraudulent or unlawful purposes. In addition an investigation may be initiated where the members of the company have not been supplied with information about its affairs that they might reasonably expect.

All these sections relate to circumstances in which there is some indication of actual or potential prejudice to the company or its members, generally through misrepresentation or fraudulent non-disclosure. The scope of the powers conferred under these sections lies in the removal of the right of silence and in that the evidence obtained under compulsion is admissible as evidence in legal proceedings in respect of the matter under investigation. Failure to answer queries or provide any information requested in respect of an investigation conducted in terms of sections 431 and 432 is, in terms of s. 436, to create liability for separate proceedings to be brought on a charge of contempt. The inspectors' powers of questioning in the course of an investigation were extended by s. 56 of the 1989 Act. Prior to this the inspectors were entitled to question and require production of any documents for those who were or had been officers of the company. Now DTI inspectors may lawfully exercise these powers in relation to any person who 'is or may be in possession of information relating to a matter which they believe to be relevant to the investigation'. Their powers were also increased by use of the word 'documents' as opposed to 'books and papers'. The former is broader than the latter as it incorporates all forms of recorded information, including computer disks, tapes etc., anything that may produce a legible copy of the information contained within it.

Prior to 1999 s 57 of the 1989 Act provided a link between the work of the DTI and SFO. This section empowers the Secretary of State to terminate a DTI investigation where the commission of a criminal offence is revealed, and to refer the matter to the appropriate prosecuting authority. The effect of this section has been described as providing,

...a temptation for the SFO to 'circumvent' the prohibition contained in s 2(8) [of the Criminal Justice Act] and use in the prosecution for fraud the evidence obtained by DTI inspectors appointed under the Companies Act. (Frommel 1996 p 229)

Following the 1993 European Court of Human Rights judgement in *Funke v France*, that use of evidence obtained under compulsion in criminal proceedings is in breach of Article 6 of the European Convention on Human Rights and *Saunders v UK*, the likelihood of this being realised may be viewed as having decreased significantly. Following *R v Lyons and others* it is suggested it is removed entirely, save in relation to documentation provided under compulsion.

S 435 of the 1985 Act, dealing with the production of bank account records is not contentious and need not be examined in detail. Neither do those following provisions relating to the inspectors reports, the powers to bring civil suits on a company's behalf and those relating to the costs of an investigation. S 441 is of considerable importance in that it provides that the report of an inspector is admissible in evidence in legal proceedings as conclusive proof of the inspector's opinion. In this way the rules in relation to opinion evidence may have been extended. Whether this is so will depend upon the weight that a court will attach to the opinion. It may be the case that, as with medical evidence, the report may be considered as expert evidence. If this were the case it would have considerable procedural consequences. This is due to the fact that such evidence may be admissible upon its mere production and carries considerable weight in the court's determination of a matter.

Ss 442 and following relate to the other powers of investigation of company affairs that are available to the DTI. S 442 is the broadest of these since it provides for the Secretary of State to appoint inspectors and initiate an investigation into the true ownership of a company, either upon application of members of that company or upon an independent basis. The investigative powers applicable in these investigations are the same as those that apply in the previously mentioned investigation. The report that will be produced as a result of such investigations will be published. Given the effect of the publication of these DTI reports (Levi 1993 p 159) and the investigative powers that may be applied, use of this section is of considerable importance. In addition it may be noted that it has the potential for substantial political importance.

The same is true of use of the powers conferred under s.444. This section again confers considerable discretionary powers upon the Secretary of State to initiate investigations into the ownership of shares. In terms of s445, the Secretary of State may impose restrictions upon dealings in such shares if there is any difficulty in obtaining the required information. These powers are moderated by the findings of such investigations not being published, but remaining confidential. As such the importance of these forms of investigation is difficult to determine.

The bulk of the investigatory work of the DTI has been reported as being carried out under s.447 of the Companies Act 1985 (The Company Lawyer 1990 p202), which authorises the inspectors to order the production of books and papers.

The operation of the DTI has been criticised in a manner similar to that in respect of the CPS and SFO, yet there have been virtually no calls for the abolition of this department as there have in relation to other agencies. Rather the suggestion has been that the department remains in existence but improve its inspections/investigations. Even other branches of the government, such as the Trade and Industry Committee in the Third Report, that provided the basis for the White Paper on Company Investigations, have noted that the DTI does not enjoy a good reputation. In editorial comment it was noted that,

Over the years this journal has rarely discovered an opportunity to praise the Department of Trade and Industry. (Long 1990 p 126)

The national media has echoed this view, with The Times publishing comments that the reports of DTI inspections were "worthy but worthless" (Wilkins Business Letters 21 October 1994). The newspaper's own correspondents reported that,

The wheels of justice grind slowly, but they move at chariot speed compared with the progress of some DTI investigations. (Campbell City Diary, Business Section 9 February 1994)

In the same month as this report, the DTI came under further attack for its perceived failure to deal effectively with company directors and company auditors who failed to comply with the accounting requirements of the Companies Acts. Calls were made for increased resources to be allocated to the DTI investigations, to remedy the situation where, in 1993, of the 6,710 companies that were criticised for 'unfit conduct', the DTI proceeded against only 322 (Burrell Business Section 13 February 1994)

It has been suggested that the appointment as inspectors of persons who are not permanent DTI staff members has hindered the development of DTI investigative skills and that a preferable situation would be to base the conduct of DTI investigation on the operation of the police. In this manner, it is suggested the DTI would build up a group of trained investigators, similar to the CID of the police. These groups could call upon

outside sources for assistance where required. Whilst there may be merit in these suggestions, the findings and recommendations of the Roskill Committee (1986) should be considered. The Committee found that the police, amongst other agencies, were not dealing successfully with fraud. This being so there would appear to be reason not to base the operation of another investigative agency upon that of the police.

Whilst the fraud investigations sections of the DTI have not faced public criticism in the same way as have the SFO and CPS, the scope and extent of their investigation powers have significantly altered following firstly European and then domestic examination in light of the ECHR and Human Rights Act 1998. Notwithstanding the (2001) Auld Report there is no indication that the criminal investigative arms of the DTI will be abolished. As did the Saunders and related cases, it may be expected that judgements such as *R v Customs and Excise, ex parte Popely and Harris* (1999) will impact upon the operation of the DTI.

The Department of Customs and Excise

As with the DTI, the Department of Customs and Excise ("Customs"), has a very broad mandate. It has a variety of tasks, the most relevant for this study being the collection of Inland Revenue in the form of VAT and Excise duties. In this aspect of its operation, Customs differs from the police, CPS and SFO in the manner in which it performs its tasks and the extent of its powers. Whilst, in certain respects the powers of Customs are broader than those of the DTI and SFO, it has been noted that,

Although...revenue collectors have power to initiate criminal prosecution for evasion it is clear that it would be impossible to prosecute all those who fail to honour their legal obligations. Enforcement powers, therefore, must be geared to discouraging evasion by making evasion an unattractive option and by promoting voluntary compliance. (Rowan-Robinson Watchman and Barker 1990 p151)

Unlike the previously discussed agencies, this department rarely has been criticised in relation to its methods of fraud investigation and prosecution. Its function in relation to the collection of Value Added Tax (VAT) commenced with the coming into effect of the 1972 Finance Act. This Act created the concept of VAT and made Customs responsible for its collection and ancillary matters.

Customs' powers of investigation

Customs investigation powers are provided by the provisions of the 1972 and 1985 Finance Acts. Section 12 of the 1985 Act amended s39 of the 1972 (principal) Act that dealt with offences and penalties, in accordance with the recommendations of the Keith Commission on the enforcement powers of Revenue Departments. These sections detail what constitutes 'fraudulent evasion of tax'. This offence includes intentional or reckless making of false statements of material fact in relation to information required by the Act, the making and production of a false document relating to the payment of VAT and claiming of repayments to which the claimant is not entitled. The increased penalty in respect of fraudulent evasion of tax makes this offence an arrestable one under s.2 of the Criminal Law Act 1967. Both police and Customs officers have, therefore, the power of arrest where reasonable grounds exist for suspecting the offence to have been committed. The exercise of this power is to be in accordance with the principles and code of practice previously examined. Search warrants may be applied for by Customs officials in situations in which there are reasonable grounds for suspecting that a fraud offence that appears to be of a serious nature has been, or is about to be, committed.

The powers of entry and inspection held by Customs are broader than those of any other agency. S.37 (1) provides that officials may 'at any reasonable time enter premises used in connection with the carrying on of a business' for the purposes of exercising any of their tax functions. S.37 (2) permits entry into premises that are reasonably believed to be used in connection with the supply of goods under taxable supplies and the inspection of such goods. These powers are not subject to the review of a court in that application for a warrant does not have to be made. It has been noted that these powers are generally exercised with restraint (Levi 1993 p 165) which may go towards explaining why there is less controversy over these powers than over the s.2 powers of the SFO or the DTI powers of gathering evidence.

A warrant is required for a search to be conducted and seizure of any documents. Restraint similar to that exercised in relation to entry and inspection is seen to operate in application for such warrants. Applications are infrequently made and the results of authorised searches are overwhelmingly successful, with evidence of fraud being obtained in the vast majority of cases.

Other agencies that deal with fraud

A response to fraud is also provided by any of a number of civil justice agencies that co-exist and may co-operate with criminal justice agencies. At the commencement of the study the foremost civil agency was the Securities and Investments Board.

The Securities and Investments Board (SIB)

The origins of SIB lie in the Financial Services Act 1986. The Act provided for the creation of a private sector body with the status of a private company to which the Secretary of State would delegate the power to act as a designated agency, responsible for the regulation of investment business. The development of investment business had not been matched by development of regulatory legislation. The Financial Services Act was an attempt to remedy this situation. This process was continued by the Companies Act 1989. Prior to these Acts the operation of the investment business was regulated by the Prevention of Fraud (Investments) Act. When Professor Gower was appointed to examine the situation it was thought that the Government did not intend to make any meaningful improvement to the operation of the investment business. However a number of financial scandals, and the public concern that accompanied them, altered this situation.

At the same time the Government viewed with increasing favour a system of self regulation within a statutory framework. This was seen as providing a greater flexibility in the making and enforcing of rules and providing a greater distance between the government and the regulators, than would be the case with a government body. These claims were viewed with some suspicion at the time, and it suggested by one commentator that the real basis of the government's approval of the system lay in its desire to lessen government intervention and hand responsibility to the private sector (Page 1987 p 302).

Suspicion as to the increased efficacy of this system has proved to be well founded, a 'practitioner based, statute backed' system of self-regulatory having been shown to have failed in its task on a number of occasions. The media reporting of this has seen it as due to the closeness of the regulators to the regulated, a number of the latter being unwilling to regulate their business conduct to the extent required by the regulator. (Ham 29 Jan 1995)

Concerns continued as to the effectiveness of self-regulation throughout the latter half of the 1990s. Overhaul of the financial regulation system as operated under the SIB was completed on 14 June 2000 when the Financial Services and Markets Act 2000 received Royal Assent. The Act provides a framework within which a single regulator for the financial services industry, the Financial Services Authority (FSA) operates. The FSA has a full range of statutory powers. These operate in conjunction with the Financial Services and Markets Tribunal, the role of which is to regulate the conduct of financial services. Following the Act a single ombudsman for the financial services industry was created, together with compensation schemes to provide further protection for consumers.

In addition to the FSA's statutory powers to authorise, regulate, investigate and discipline authorised persons and to regulate collective investment schemes, the 2000 Act provides that certain actions constitute criminal offences and places responsibility upon the FSA to investigate and prosecute the same. The official website of the FSA described the Act as,

...intended to co-ordinate and modernise financial regulatory arrangements which are currently established under a number of different enactments. (FSA 2001)

The Act provides that FSA has four statutory objectives. These are to maintain market confidence, promote public understanding of the financial system, secure appropriate consumer protection and reduce financial crime. It is in the carrying out of the latter role that it may be expected that the FSA will have most dealings with the other justice agencies described above. The explanatory notes to the Act state that,

This provision does not by itself impose any duties on firms. The Authority is expected to pursue this objective in co-operation with various law enforcement agencies. (FSA 2001)

At the time of the study relatively little academic analysis of the operation of the FSA had occurred. That this is so is suggested as being directly linked to its relatively short time in operation. It had not been possible to assess the accuracy of the FSA's statements, of direct relevance to the study that,

We also have various criminal prosecution powers, including powers to prosecute persons who engage in regulated activities without authorisation. We work closely with other law enforcement agencies and use regulatory, civil and criminal powers. (FSA 2001)

Agencies chosen for study

Extensive criticism has been made of the operation of virtually all the agencies discussed in this chapter. This provided considerable material with which to begin the study. By contrast very little criticism had been made of the legislative framework within which these agencies operate, Ormerod's work (1999) being a notable exception. This was not particularly problematic for this study, since its primary focus was not analysis of the legislative framework within which agencies operated, but the operation of those agencies. The difficulty lay in deciding which agencies to study.

It was thought that there would be a limited value in conducting fieldwork in all of the agencies discussed in this chapter. Some of the agencies described have relatively limited dealings with fraud of the type that would fall within the definition adopted for the purposes of this study and detailed in chapter one. The Department of Customs and Excise is a prime example of this, as a significant portion of its work is concerned with taxes and other revenue due to the state. Investigations and prosecutions related to failure by individuals to pay such taxes not falling within the definition of fraud adopted for the study, it was decided not to examine this agency. As the study progressed, whilst the SIB/FSA's work could be regulatory, investigatory or prosecutorial, it was not comparable to that of other civil or criminal justice agencies. Unlike specialist units within the police or CPS, the SIB/FSA's work appeared to involve breaches of codes of conduct not necessarily connected to fraud on individuals. The volume of its work that fell within the study's definition of fraud was felt to be so limited as to make an examination of its operation in this respect of little value to the study.

The same can not be said of the work of the SFO. Of the agencies described in this chapter, it is the SFO that, were the study to be repeated, could most usefully be included. The reasons for non-inclusion of the SFO focussed on the time that the study had taken and the need to draw an end to the data collection. Examination of the operation of specialist units within the police and CPS provides examples of criminal

justice agencies that dealt solely with the investigation and prosecution of serious fraud respectively and, in that function, inter-acted with the other. The DTI provides an example of an agency that combined not only the investigatory and prosecutorial functions in a single agency but also regulatory and enforcement roles. Examination of the SFO's operation would have provided an example of another agency that combines these functions and comparative analysis may have been made between the two. However, the duration of the study was such that this was not a viable option and, reluctantly, this option had to be dropped. The constraints of the study led to a decision to examine those agencies that had a general investigative or prosecutorial role in addition to dealing with fraud as defined for the purposes of the study. This rationalised the exclusion of the SFO, since it deals only with fraud. This enables examination of practitioners' roles, work and views to be made in the context of being part of the broader criminal justice system. As such the responses to fraud and each other of the various agencies chosen for this study can be set in the context of the broader criminal justice system.

The definitional and time constraints were the primary reasons for limiting the main focus of the study to investigation and prosecution within a criminal justice context. Using the study's definition it may have been possible to examine the response of the civil justice systems to fraud. However initial indications were that agencies dealing with fraud in the context of the civil law would be difficult to access, for reasons of commercial considerations. These include the 'in-house' fraud investigation units that operate in most banks and insurance companies. It was thought that most financial institutions would be reluctant to discuss the extent of fraud within their operation, citing the need to maintain confidence and client confidentiality (Levi 1991). Were those considerations overcome, it is possible that interesting comparative analysis could be made between the response of civil and criminal law systems to the fact of fraud and the response to it.

Having responsibility for the investigation of most crime, the police provided the first choice of investigative agency. Due to the CPS' statutory responsibility for the prosecution of all criminal proceedings instituted by the police, this was the second agency chosen to be examined. It was thought that these two agencies would provide results in respect of agencies in which the investigative and prosecutorial roles were separate. The third criminal justice agency chosen was the DTI. As with the police and

CPS, this agency has a specialist unit that deals with fraud. It was thought that examination of this unit's operation would provide a comparator with which the results obtained from examination of the operation of the police and CPS could be analysed.

In the following two chapters the literature review and determination of methodology that preceded the fieldwork is described; thereafter the fieldwork conducted in the chosen agencies is detailed.

CHAPTER THREE

LITERATURE REVIEW

Introduction

As briefly described in the preceding chapters, the broad scope of the study emerged whilst working as a prosecutor in a Southern African Commonwealth jurisdiction, with very limited experience of the response of the English criminal justice system to fraud. Within many Commonwealth countries there are no formal systems of recording crime and crime trends as exist under the British Crime Survey and Home Office recording systems. In such systems the extent of the occurrence of any particular form of criminal activity, as well as the response of the criminal justice system to it, can only be approximated. Given that the extent of the problem is not known with any degree of reliability, it is equally difficult to assess what could improve the response of the criminal justice system to an offence that, if nothing else reported, the local media was announcing as occurring with increasing frequency. It was thought that the English system of recording and analysing crime would provide an insight into how the formal systems could respond to criminal activity better.

This section of the study examines the first stages of the research, that began with examination of the concepts and terms that formed the substance of the study. This chapter is divided into sections. The first examines the socio-legal development of the concept of "fraud" and the related notions of "white-collar crime". The latter concept originated in America in 1949 in the work of Edwin Sutherland. Sutherland's original theory having been developed by both British and American criminologists, branches of current criminological thought accept as relevant the concepts of "corporate crime" and "business crime" despite neither being part of the letter of English law.

Following examination of the literature on the legal and criminological definitions, examination is made of the literature on those bodies that either investigate or take formal action in respect of allegations of fraud. This stage of the research discusses in greater detail the distinction between the criminal and civil law response to fraud and the impracticability, for the purposes of this study, of conducting a comprehensive examination of all possible responses to fraud as outlined in chapter 2.

It was on this basis that the decision was made to focus upon the work of the traditional investigation and prosecution agencies within the criminal justice system, together with the Department of Trade and Industry, an agency that combines these two functions with a regulatory approach. Accordingly the review of the literature is concerned primarily with British works on the establishment and operation of the police and Crown Prosecution Service and the roles of investigators and prosecutors.

In addition to examination of the more traditional forms of response to suspected crime, such as those provided by the police and prosecution, it became apparent that other, less traditional agencies played important roles in “dealing with fraud”. These are the agencies that are capable of exercising a regulatory function in addition to prosecutorial function. Accordingly examination is made of studies of the concept and reality of “regulation” and exercise of regulatory powers, particularly enforcement, together with studies into the operation of specific regulatory bodies.

The final section of this chapter is an identification of the themes that developed as a result of the literature review.

Agencies that deal with fraud in England and Southern Africa

As detailed in the Introduction to this study, the English criminal justice system has an imprecise definition of ‘fraud’. Examination of related literature indicates that academic studies have tended to focus upon the operation of specific organisations and how they deal with certain types of criminal activity, rather than taking fraud as the subject and thereafter examining different agencies that deal with its investigation and prosecution (Levi 1987).

The earliest stages of the literature review revealed that the English agencies responsible for dealing with fraud not only investigated and prosecuted, but could also regulate business operations in a manner not recognised by the Southern African Commonwealth criminal justice systems.

Many Southern African Commonwealth countries do not have agencies that can operate on both sides of the boundary of regulation of sharp business practice and criminality. The reason for this is that these jurisdictions do not have well established or any regulatory systems as part of their justice systems. In these countries,

Zimbabwe being one, such regulation of business activity as there is, is achieved by prosecution. The prosecutions that do occur are in relation to breaches of secondary legislation, such as control of building sites, movement and control of animals, control of waste etc, as a result of investigations by the police.

In Zimbabwe police investigations into all suspected breaches of the law are forwarded to the public prosecutor's offices, these State lawyers prosecuting regulatory breaches in the same way as they do allegations of other forms of criminality. Those persons or businesses not prosecuted within the criminal justice system are not subjected to any legislative limits or examination of their personal or corporate operation. Working in such a system it was interesting to come into contact with the perspective that held the criminal justice system had a role to play in regulating business in a non-crime orientated manner.

Within most jurisdictions "sharp practice" is generally understood as conduct that the courts can not catch under the criminal law yet the ordinary person recognises as unacceptable practice. An example would be a building contractor, whose cost cutting operation results in use of faulty machinery, which machinery is used resulting in the death of an employee. In a number of Southern African Commonwealth jurisdictions, although technically possible, it is extremely unlikely that the contractor would be charged with "culpable homicide" before the criminal court. It is almost certain that they would not be prosecuted under Health and Safety legislation, since there is virtually no such legislation. It is absolutely certain that they would not be served with a improvement notice, nor would they otherwise be required to improve the safety of the operations, failing which they would face financial penalties and possible prosecution, as no such systems exist in many Southern African Commonwealth countries.

But for a death occurring, they could expect not to be prosecuted at all, despite their actions causing others to work in conditions that are generally considered bad and unacceptable. Even in those circumstances the offence charged would not be one of a regulatory nature but of "culpable homicide", the negligent causing of death of another person. In many Southern African Commonwealth jurisdictions it is almost impossible to prove the offence, as corporate negligence is extremely difficult to establish, due to breaks in the chains of communication and responsibility that are essential to establishing negligence. Similarly an investment manager who shares

their views on the prospects of various investments with their friends, to those friends' subsequent advantage, is not prosecuted for breach of investment regulations or "fraud" despite their actions increasing the cost of subsequent sales to the "outsider".

The lack of definition of the concept of fraud may in part explain this situation, as the term fraud covers a variety of actions, ranging from a "straight forward" obtaining pecuniary advantage by deception, to more involved business transactions and the failure to comply with Company Law requirements. Some actions are easily understood as "offences", based in the criminal law, whilst others are of a more civil law nature. This diversity of use may be seen as reflected in the different agencies and bodies stated as providing a response to fraud.

In the English context, the agency that may be expected to be most easily identified as having some responsibility for deal with 'fraud' is that having the term 'fraud' in its title, the Serious Fraud Office. Certain other agencies such as the Crown Prosecution Service have sections that again from their titles are expected to be involved in the criminal justice response to fraud; the Fraud Investigation Group being one example. Similarly police forces have specialised Criminal Investigation Departments (CID) sections to detect and investigate fraud, that are often referred to as being "fraud squads".

Despite these titles both the police and CPS investigate and prosecute allegations of fraud beyond these specialised groups. Non-specialised CID officers within each police area may receive allegations or complaints of fraud; so too may uniformed officers. As with all allegations of criminal behaviour, the more complex the allegations or more serious the crime (in either the impact upon the individual victim or the number of victims), the more likely those allegations are to be investigated and then prosecuted by a specialist investigator or prosecutor. This is as true of fraud as it is of assault.

It is increasingly common for the various departments within UK government agencies to be made known to the public and their operation publicised. In recent years this has been particularly true of those departments established to counter fraud. A well publicised example is provided by the Benefits Agency that publishes a

“hotline” number to which confidential reports of fraud can be made in respect of claims for income support and other allowances.

Units within the Inland Revenue sections of the Department of Trade and Industry have conducted similar campaigns in the past. Due to these, the TV or radio owning population of the British public may be expected to think that the Inland Revenue has fraud investigation and prosecution units at work, without necessarily knowing how these “deal with fraud”. Equally well publicised have been operations conducted by Customs and Excise into counterfeiting and the fraud on the public and the genuine manufacturers in the sale of such goods.

The phrase “dealing with fraud” also has a non-criminal justice sense. Again the influence of television is such that a large proportion of the public is likely to recognise non-governmental or non-organisational bodies such as “Watchdog”, or “The Cook Report” and similar as also dealing with fraud in the sense of making it more difficult for “scams” to be perpetrated on the public.

Less well known to most of the UK public are the regulatory functions of professional bodies in relation to allegations of fraud made against members of those bodies. Most professional bodies operate regulatory processes under the civil law to monitor their members’ operation and where internal governing codes of practice have been infringed, investigate and discipline those alleged to have breached the organisation’s rules. Increasingly fraud alleged to have been committed by professionals such as doctors and lawyers is being reported in the media. This may influence the public perception of “dealing with fraud”. However reports of criminal investigation or prosecution of fraudulent activity remain the primary influence on the public perception of “dealing with fraud”.

Ordinary experience is that a large number of governmental agencies and commercial organisations “deal with fraud” and that there is also considerable diversity in the manner in which they act. The response to allegations of fraud in its numerous forms may use the civil law remedies available in respect of breaches of contract and material mis-representations, employment law in respect of fraudulent underpayment or unacceptable working conditions to internal discipline measures based upon an agreed code of conduct within a particular profession. It was expected that if this response to fraud was examined there would be little uniformity

of approach and response, due not only to the diverse composition of the bodies responding but also to the branch of the law within which they were basing their action. Those agencies working within the criminal justice system were thought to be fundamentally different to bodies working in the civil law and, as such, greater degrees of comparison would be possible as the response to allegations of fraud by one agency would be based within the same legal framework as that of a completely different agency within the criminal justice system. Within the criminal justice system comparisons of response would be possible, as all the agencies would be using the same legal framework as the basis of their decision making.

In addition within the criminal justice system, agencies use the same legal framework as each other in their sometimes inter-related roles in responding to allegations of fraud. Not only do all criminal justice agencies use the same standard of proof as each other, the manner in which one agency classifies allegations accords with that of other agencies. It was thought that there would, therefore, be a common basis to the operation of these agencies and therefore any differences in operation would be the more interesting than those that many occur within the civil law.

In addition "investigation" and "prosecution" are the most widely known responses to allegations of wrongdoing. The most well known examples of this type of response are found in the operation of the police as investigator and the CPS as prosecutor. It was therefore decided that the study would begin with examination of the police and CPS response of fraud. The two agencies are related in that the task of the one is dependent upon the operation of the other. Although the immediate impact of a police investigation may be considerable, the long term impact is less so. Officers can arrest, seize assets and items considered to be evidence of a crime, and investigate complaints. In these actions are the short term effect of their operation. The long term effect lies in their investigations being prosecuted before a court and a finding of guilt or innocence of the charges recorded. No matter how great the immediate impact of loss of liberty through arrest may be; it is generally well known that detention will usually only last 24 hours. Without the operation of the prosecution the matter would end there. By the operation of the CPS there is the opportunity for the matter to be placed before the courts.

It was felt that there would not be much to gain from a simple examination of several criminal justice agencies all of which carried out one or other function, investigation

or prosecution, and their co-operation with their counterpart agency. Due to the similarities of the functions it was thought that very little of interest would be revealed by, for example, the investigative role of the police; the Benefits Agency and Department of Health in respect of allegations of fraud, and comparing these than there would be from examining an agency that combined the investigation and prosecution functions. This would permit analysis of the single function and also comparison of that function between the two types of agency within the same legal framework.

For this reason it was decided to examine the operation of the police, as being the popularly understood agency responsible for investigation; that of the CPS, again popularly accepted as having primary responsibility for fulfilling the prosecution function within the criminal justice system and the Department of Trade and Industry as an agency that works both together with the police and CPS but also carries out the investigative and prosecution role within one agency.

Before the data collection could begin it was necessary to establish the meaning of the common terminology to ensure not only the respondents shared an understanding of the questions being asked but also that their response would be properly understood. Due to the imprecise legal definition of the term "fraud" and this being the central area of examination of the study it was clear that examination would have to be made of prior studies into "fraud" so as to determine what was examined and the conclusions reached.

The criminological definitions

Writing in the American context, Calder (1994) notes that the US Government's withholding of files relating to Al Capone led to a "state sanctioned criminology" about organised crime. He suggests that by restricting information from serious, independent analysis, state agencies are able to present the "facts" in a manner that supports their assessment of the threat to social order. In addition, and of political importance, the state is able to support its allocation of resources to responding to the problem, the latter being defined by it.

A somewhat similar problem exists in relation to analysis of the British criminological studies of fraud, in that the official recording system does not encompass "fraud" or require agencies to respond to it in any particular manner. "Fraud" may be reported

but will be recorded as various offences. As such it is difficult to make statistical analysis of the extent of occurrence of fraud or compare its treatment between and amongst different agencies. However studies have been made both of the state of the legal system and the response of some agencies, notably the police, in relation to allegations of fraud.

Examination was made of previous studies of fraud (Finn and Hoffman 1976) and of those of other agencies that carried out fraud investigation functions (Rider 1979), most of which bodies operated within the same English justice system. These works confirm the conclusions drawn from the earliest stages of the literature review, that there is no single agreed definition of "fraud" or other similar terms and that various agencies could and did use the terms differently.

Despite this, a common theme to the literature is the importance of this type of activity, with authors of varying perspectives, from the commercial (Saker 1994, 1995) to the more legalistic (JUSTICE 1985) focusing upon the effects of fraud at national and international levels.

The introductory sentence to the 1985 JUSTICE study reads,

The prevention of fraud needs to be treated as a matter of high priority, both nationally and internationally. (p1)

However the difficulty in implementing this sentiment is apparent within six sentences of the same work,

The essence of fraud is deception, the use of a false representation to obtain an unjust advantage, or to injure the rights or interests of another. It follows that fraud may be an element in *any* offence from rape to avoiding taxation. (emphasis added)

This definition is so wide as to be almost meaningless in the context of an analysis of the legal status and implications of the term. However the JUSTICE definition is of assistance in that it emphasises of the breadth of the subject matter. JUSTICE's study details the national response of police forces to reports of fraudulent activity against companies. It concludes that there is a pressing need for improving the current practices and suggests a simplified approach be adopted with the creation of a specific offence in order to protect both the broader economy and the company.

Some fifteen years later the problem of definition, implicit in the call by JUSTICE for more effective investigation and prosecution processes, was the explicit basis of David Ormerod's criticism of the 1998 Law Commission's approach to whether the English criminal law would be improved by creation of a general statutory offence of fraud;

If the Commission has not defined its general offence of fraud, how can it properly analyse the positive and negative implications of any such offence?
(Ormerod 1999)

Ormerod's work examines the mandate of the Law Commission, its Report and that Report's perceived shortcomings. His stance is that the 1998 Law Commission was given considerable latitude and could have significantly influenced the development of English law. However it has failed to do so, due to the fundamental fault of not proposing a legally acceptable definition of fraud as a specific offence under the criminal law.

These two studies may be taken as representing and, by comparison with each other, revealing the unchanged nature of one of the primary issues in the examination of the investigation and prosecution of fraud; the lack of definition in a context of consistent concern for a type of criminal activity.

In the absence of an offence of fraud it is tempting to develop other terminology that can be meaningfully used in criminal proceedings without suffering from the broadness of the description provided by JUSTICE. To effectively use the term, that group has to state,

In this report we are concerned with fraud in its commercial aspect. It can range from fraudulent trading by a single person to an international criminal gang using the most sophisticated methods...But it must be remembered that at the core of the offence there must be dishonesty, and in this country that word bears its ordinary everyday meaning. (JUSTICE 1985)

Other terms such as "white collar crime", "economic crime" have been suggested as replacing fraud. All share with the term "fraud" the absence of legal meaning. In addition each has its own particular issues. Geis notes that,

...as a classification category, "economic crime" proves not notably enlightening, since virtually all property crimes, and many crimes against the person, are committed to achieve economic ends. (Geis 1984 p139)

L.H. Leigh assumes "fraud" to have a more precise definition than other terms, (This book is specifically concerned with) fraud, rather than white-collar crime or economic crime. Those are concepts which cannot be defined with precision, nor can the notion of business crime (Conklin, 1977). Most definitions are unsatisfactory because agreed unifying elements are hard to find. (Leigh 1982 p 7)

within the above definition it is difficult to establish upon what this assumption is based.

"White-collar crime"

As description of criminal activities, "white collar crime" suffers from the implication that it relates not to the action but the social status of perpetrator of the offence. Sutherland (1949) introduced the use of the term, defining it as,

...a crime committed by a person of respectability and high social status in the course of his occupation. (Sutherland 1949 p 9)

Using this definition Sutherland examines a number of differing types of behaviour carried out in the course of legitimate occupations, including some that were not criminal, such as the administrative offences regulating business such as those by laws that prohibit the emission of waste from premises into rivers.

Since Sutherland's introduction of the term, its definition and use have been criticised and developed. When considering this criticism it is important that the context, of time and social conditions of those times, be borne in mind. Sutherland wrote at a time in which "criminality" was generally regarded as perpetrated by members of the lower social classes. The types of behaviour engaged upon by developers and industrialists that led to harm to the environment or community was not viewed as being in the same category of wrong doing. Frequently their financial status protected such people from the operation of the civil law, let alone the criminal law. To establish the context of Sutherland's definition it should be remembered that, at the time of his supplying this definition, the legal system of the United Kingdom was still 10 years away from the introduction of judicial review and legal challenges to

administrative decision making. Prior to the introduction of the concepts of "legitimate expectation", the need for a demonstrable rational basis to administrative decisions and the consequence of judicial review, large corporations and government agencies operated unchallenged and unchallengeable.

In the present political and social climate it is less ground breaking, or difficult, to challenge institutions and those in positions of power. The concept of corporate responsibility or liability for organisational wrong-doing is now part of established social and political culture. The current government has accepted the desirability of establishing Commissions to examine the potential for an offence of corporate manslaughter. Were this to occur, one of the last refuges from criminal sanction for companies that may act negligently, causing deaths as a result of their actions or inaction, would be removed.

Some of those who seek to apply Sutherland's definition of "white collar crime" to the present day have developed various sub-categories of behaviour such as "economic crime" and "business crime" to avoid the imprecise nature of Sutherland's definition. Still further classification of the term "business crime" may occur, dividing the topic into employee crime against the corporate employer; insurance fraud by companies on their insurance providers, tax evasion by companies and Health and Safety at work infringements (Clarke and Wheeler 1990).

Some criminologists still see a use for the term "white collar crime" as defined by Sutherland, despite its absence from any legislation. One of these is Croall (1992) who uses Sutherland's definition, whilst accepting that its definition is both disputed (Croall 1992 p165) and controversial (p19) as a means of evaluating crime statistics and the approach of the criminal justice system including investigators, prosecutors and courts, to such "crimes". She examines the factors that affect the reporting of and subsequent dealings with allegations of white collar crime, noting that a number of factors interact in respect of both reporting and subsequent action.

Croall notes that the impact of white collar crime upon victims may be economic or physical and that, particularly in respect of financial loss, such as over-charging for goods or selling less than the stated weight of an item, the victim may simply take their custom elsewhere. Even if the consumer is so annoyed as to complain, that complaint may be made to the shop manager who may be expected to ensure that

the report will go no further. In this way businesses can repeatedly engage in the actions complained of, without the legal process becoming involved. Croall notes that, in dealing with specific types of white-collar crime, there are differences in approach within different units of the same department. In particular she found this applied to the work of Environmental Health Officers, as noted previously by Hutter (1988) (Croall 1992 p83).

Both Hutter and Croall note that different approaches to similar actions may be considered in relation to other types of offences and prosecuting agencies. Croall's emphasis upon the inclusive nature of Sutherland's definition making the term somewhat too broad to use without clarification when dealing with a specific type of fraud. That other criminologists use the term in a more restricted manner and its not being recognised by either the civil or criminal law, may be viewed as makes the term white collar crime, inappropriate when seeking to evaluate the criminal law response to specific types of criminal behaviour. However the debate over definition and utility of the term continues.

Writing in 1999, Slapper and Tombs examine Sutherland's work and criticism of it in their examination of alternative definitions of the concept of calling the wealthy and influential to account by means of the law, noting the influence of discipline on the debate (Slapper and Tombs 1999 p 11). Essentially lawyers will use terminology that is established in the law and could be relied upon in courtroom submissions whilst criminologists use a far broader approach to different ends. Slapper and Tombs use Sutherland's definition as the starting point of their development of a definition of the concept of "corporate crime" that is, based upon Kramer (1984),

...any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil or criminal law...includ(ing) acts that are subject to tortious litigation whatever the formal status of the litigant (Slapper and Tombs 1999 p 16-17)

Accepting the difference in approaches within the disciplines of law and criminology, they view the latter as a means of obtaining recognition of the importance of what they feel to be "a key crime, law and order problem" (Slapper and Tombs 1999 p 227) and removing, within the law, the invisibility of these crimes.

Whilst their views may be taken as reflecting the Left response to what for many had been a disappointing few years of Labour government after nearly two decades of Conservative government, Slapper and Tombs' work is of greater use than mere social commentary. It provides evaluation of predominantly British criminological development on this topic. In their examination of the development of Sutherland's definitions, citing Kramer, Box, Schragger and Short as influences upon their definition of "corporate crime" (Slapper and Tombs 1999 p16-19) and means by which corporate crime can be measured and quantified, they attempt to place upon the political and thereby legal agenda the issue of law breaking by "big business".

They accept that, to date, this has not been entirely successful, although it could be argued that the Left perspective has been influential in the current Government's approach to the need for evaluation of manslaughter in the context of the operation of "big business".

There remains however the essential problem with criminological terminology that is not reflected within the administrative, civil or criminal law. Terms such as "corporate crime" "economic crime" or "business crime" may well have considerable meaning for the criminologist or even reader of the financial pages of the newspapers, but all suffer from not being recognised by the British legal framework and recorded as a specific type of offence.

It is for this reason that none of these terms provide the proposed research with a commonly understood and legally accepted alternative to "fraud". Examination of the agencies was to make use the term "fraud", recognising that it does have legal recognition, sometimes even in the agencies' titles. One of the aims of the study was to determine how the chosen agencies defined this term by examination of their official terms of reference and practical application of these.

Research on "fraud"

Examination of British legal and criminological texts reveals the degree to which fraud has escaped study. A notable exception to this is the research conducted by Professor Levi into various aspects of fraud. Levi's work ranges from crime prevention guidance (Levi 1987) to examination of the jury system and its application to the prosecution of fraud (Levi 1999)

In 1987 as part of the Home Office's Crime Prevention Unit's work, Levi examined fraud from the perspective of business, noting that the victim of an act may perceive that act as fraud without it falling within the criminal law. The effect of this is that whilst the victim may not appreciate any distinction, this fact may result in the police investigating some matters and not recording or investigating others by virtue of their being considered to be civil deceptions. The work aims to assist both the business community and the police, providing guidance as to the perspectives of both groups and encouraging the development of fraud prevention strategies. Levi does not define fraud but draws a distinction between fraud against the individual and against businesses.

Although this work does not particularly develop the criminology of fraud, it provides an insight into the response of the law and commerce to a specific type of fraud. In that way it develops the concept of "commercial crime" as also referring to crime *against* companies as opposed to the "white collar crime" concept of it being committed *by* companies.

Three years later the themes identified by Levi were developed by Burrows within the same Home Office unit (Burrows 1991). Adopting a position similar to that of Levi, that of prevention being a joint police: business issue, Burrows suggests that the regulatory authorities, such as the DTI and Customs and Excise, actually confuse the issue by increasing the number of ways of recording fraud and also the number of records actually kept. He argues that a large volume of fraud does not get reported, resulting in business viewing the police as having a limited role in either recovering funds or preventing crime.

Despite possible criticism of this approach as focusing upon a role (retrieval of losses) that does not properly fall to the police, Burrows' work may be viewed as adding to the call for greater clarity within the law. The results of this could include greater understanding by the police and the business community of what response can be made to allegations of fraud.

The works of Levi and Burrow should be considered in light of the 1986 Fraud Trials Committee, chaired by Lord Roskill. This body was tasked with examination of the conduct of fraud trials in England and Wales, and how these, together with the existing law could be improved. In doing so the Committee identified some 24 types

of fraud. It noted the role of the police as receiving the majority of complaints and how the various agencies' response to investigations of serious fraud lead could lack co-ordination.

Despite this analysis, the results of the Committee's Report were not to streamline the operation and co-operation of the various criminal justice agencies, although one of its recommendations, the creation of the Serious Fraud Office, was implemented in an effort to improve the investigation and prosecution of complex frauds.

Nearly 15 years after this Report, Levi's analysis was of the system of fraud trials. Whilst noting the different organisational definitions and desired outcomes of the various agencies may differ,

...the Roskill Fraud Trial Committee has come and gone, creating the Serious Fraud Office, but - as was not intended by Roskill or the Committee in general - leaving Customs & Excise, the DTI, the Inland Revenue and the police/CPS to go their separate and perhaps quite divergent ways, using very different sets of powers and deploying very different resources to achieve (or not) their respective objectives of protecting revenue, re-engineering company law and directors duties, and punishing the guilty (Levi 1999 p54)

his concern is to some extent similar to that of the Roskill Committee, in improving the conduct of fraud trials.

Levi suggests that there are two constant features to examination of fraud; the one the need for simpler trials and the second the need for reform of the jury. In this work an offence of "fraud" is not proposed, although it will be suggested as one means of simplifying not only trials but also more importantly, the decision-making processes in the various criminal justice agencies that have responsibility for processing complaints of fraud.

Subsequent examination of the police operation under the SFO regime led Levi to conclude that there was a need for "tighter specification of objectives and more supervision than some receive " (Levi 1993 p140).

A constant theme through the work on fraud, particularly that based upon research conducted by Levi, is the effect of the lack of either a substantive offence of fraud or a shared understanding between criminal justice agencies as to what it is that

constitutes fraud. It was thought that, although the agencies may have the word "fraud" in their title, the definition of that term used by individual investigators and prosecutors may be expected to play a part in their operation and interaction with each other.

Whilst it was not the aim of the study to analyse the sociology of the chosen agencies, it was intended to assess the bureaucratic and personal factors that influenced the outcome of allegations being made, investigated and considered for prosecution.

The lack of accepted legal definition revealed by the literature review was to influence the research methodology used throughout this study. This was due to the need to determine not only which agencies would be studied but also what aspects of that operation would be the focus of examination. At the commencement of the study it was decided that its focus would be upon how several agencies defined what constituted the "fraud" with which they dealt, together with examination of how the agencies interacted and whether there were any themes common to their operation and interaction.

The literature review assists in determining what agencies would be chosen for examination, by revealing those most publicly engaged in providing a criminal justice response to fraudulent activities. The general operation of the police has been extensively examined, that of the Crown Prosecution Service to a lesser extent. It was found that most commentary upon the operation of the Department of Trade and Industry and the Serious Fraud Office appeared in the media more frequently than it did in research studies, usually in the context of commentary on specific cases.

The police

Many studies of the police are concerned with the types of behaviour or culture that occur within the organisation as opposed to the type of crime investigated and the form that investigation takes. Both Reiner and Holdaway provide considerable assistance to any studies of police officers or the organisation of policing, detailing the types of behaviour found to commonly occur in the context of police work. Reiner's (1985) work is based in observation of police culture whilst Holdaway's (1983) study is based in participant observation, whilst he was both a serving police

officer and research student. Both describe a masculine orientated environment where officers value physical activity or "action" above "desk work" and operate in a distinctly "macho" ways. Holdaway, in particular, notes the scorn officers have for what they perceive as the overly reflective analysis of their activities and the lack of enthusiasm officers have for any duties that involve desk bound analysis or reflection.

Reiner examines the context of policing activity, detailing how the origins of present day UK mainland policing are based on the concept of "policing by consent" (Reiner 1985 p61). Under this theory, the success of the operation of the police and the manner in which they act is determined by society's agreement with their actions. That this requires a broad consensus within the dominant societal group is largely unexamined by Reiner, who developed this approach as being the basis of a mid 1980s style of policing, "community policing".

One of the fundamental tenets to this theory is the ability of every officer to decide as to how to deal with an incident. Each police officer has the discretion to determine how he or she will respond to apparent contraventions of the criminal law. They may respond formally, invoking the criminal law either by reporting on summons, cautioning or charging, or informally by offering "advice", that is entirely without legal basis (Kemp Norris and Fielding 1992) and has no associated power of enforcement, or by "turning a blind eye".

This is recognised in law as being fundamental to the operation of all police officers and judicially exercise of discretion is limited only by considerations of reasonableness.

In the 1980s interest in America in the "broken windows" theories (Wilson and Kelling 1982) started to spread to the United Kingdom. Wilson and Kelling initiated a theory that if minor crimes in any geographic area are ignored, the likelihood is that more serious crime will increase. The naming of the theory "broken windows" came from observations that if individuals and or gangs in an area were permitted to break the windows of derelict buildings, they will soon "graduate" to more harmful activities. It was observed that they would progress from destroying the fabric of the building to dealing in drugs and to using the area as a refuge for other more serious offences.

Underpinning this theory is the concept that, if such buildings are made secure and mended, a decline into more serious crime is avoidable.

Both this theory and that claimed (predominantly by its proponents) as being its ideological successor, "zero tolerance" policing, may be viewed as removing a fundamental aspect of British policing identified by Reiner, Holdaway and various Home Office research studies, the discretion held by every officer as to how to deal with an incident.

Whilst most articles on "zero tolerance policing" do not define the concept, analysis of the various examples of this theory leads to a possible definition as being,

a method of policing in which all observed contraventions of the criminal law are given a police response, usually involving the immediate stopping, and searching and questioning of, or arrest of, the suspect.

It removes officers' discretion to act although partially retains their discretion as to how to act. The intended results of application of this theory are twofold. The first is that the police come into direct contact with more offenders. This contact provides a "tough on crime" message that is intended to make people believe that if they do break the law they will be caught and punished and secondly, that in dealing with apparently minor or trivial matters, more serious crime is detected. An anecdotal story appeared in the British media that, as a result of a New York officer's stopping the driver of a car due to a minor vehicle defect, that driver was asked to open the boot of the car. Concealed in the boot were a number of unregistered weapons, leading to the driver's arrest on charges of possession of these weapons (Sunday Times 2000). This tale re-inforced the government's message that in dealing with a very minor matter, serious criminality could be detected and prevented.

This theory of policing activity was introduced in America in the mid to late 1990s. Despite initial dispute as to whether the credit for this form of policing is due to Rudolf Giuliani, Mayor of New York City or to the then Commissioner of the New York City Police, William Bratton, the latter emerged as the accepted proponent of this style (Bratton 1996). Unlike the mainland UK context, within America there is no similar notion of public consent being fundamental to the operation of the police. It is therefore understandable that this is less of an issue in the USA than it is in England.

The adoption and adaptation of USA style “zero tolerance” policing in England has received relatively little academic analysis. Political analysis has focussed upon its main proponent in England, Supt Ray Mallon. With this officer’s suspension from duty following charges of mis-management this analysis decreased considerably. From such analysis as there was of this style of policing, it is suggested that it marks a fundamental shift away from the notion of discretionary policing. This view is rejected by its supporters, who claim the theory has criminological foundations in liberalism existing as much in the UK as in the USA (Zedner 1997) (Burke 1999)

Support for this perception of the criminological basis for the operation of the police as being accurate may be found in examination of the Human Rights Act 1999. Within this Act not only is there is specific acceptance that some rights, such as freedom of expression, are qualified and not absolute, as is the right to life, and that amongst the factors that may qualify exercise of certain rights are the interests of democratic society, a concept not defined within the Act but also the introduction of “anti-social behaviour orders” (ASBOs).

The Act provides that either the local authority of the police may use civil proceedings against those whose behaviour is possibly not criminal but “anti-social”, a term not defined within the Act or Home Office Guidance to it. These Orders and the proceedings used to obtain them may be viewed as enhancing police officers’ discretion as to how to deal with those who do not necessarily break the criminal law, but are a nuisance, threatening others’ “quality of life”.

The converse to this view is that the government is acting as the “nanny state”, making further use of the police to control areas of behaviour beyond their established remit in much the same way as para-militarisation was beyond the established parameters of policing by consent.

Burke supports “zero tolerance” policing, arguing that there is a distinction between the para-military policing examined by Jefferson (1990) and Lord Scarman (1981) and “zero tolerance” policing in that the latter is

part of a revised form of community policing in which the police service takes a proactive, confident and assertive central role in seeking to confront and control crime but which at the same time is highly dependent on the support and legitimacy of the community it purports to serve. (Burke 1999 p 276)

His argument that “zero tolerance” is a form of community policy is based upon the premise that somehow the community being policed establishes an agenda for the police and by so doing the resulting style of police operation is “community” based and approved.

Fundamentally, the targets and objectives of a proactive, confident, assertive policing strategy must be those identified and chosen by the community for it to be legitimately afforded the designation of community policing. (p281)

Within England and Wales relatively little use has been made of “zero tolerance” or “selective intolerance” (Burke 1999) policing. Within the Metropolitan Police it has been used in specific operations. One such operation was in response to critical commentary about lack of police response to low level crime at the 2000 Notting Hill carnival (Channel 4, News 5 September 2000). In Cleveland Police its use did not appear widespread, but used mainly by a single area’s CID offices, under the supervision of Supt Mallon.

Notwithstanding these instances of use of this style of policing, it is suggested that police officers are not routinely instructed to ignore discretion and respond formally to all instances of law breaking. The considerable media attention to the career of Supt Mallon, focussing on photo-calls with the Home Secretary and Prime Minister, may have contributed to a popular perception of this style of policing as widespread.

This perception disguises the fact that “zero tolerance” policing applies to direct involvement with the offender. The driver who is stopped for the purpose of checking their vehicle insurance and is found to have weapons in the back of the vehicle (Sunday Times 2000) typifies the type of crimes in respect of which the police are in direct contact with both the perpetrator and the elements of the offence. The same is not true of fraud, where the suspect and the offence may be quite separate, there is no outward manifestation of criminality and in corporate life there are no similar misdemeanours that necessarily foretell the development of subsequent criminality.

That the investigation of fraud by the police fits as little in community policing as it does “zero tolerance” or any other style of policing, makes examination of discretionary exercise of legal powers relevant to this study. A further basis for examining the discretionary exercise of powers is that not only the police but also

other agencies, such as the Department of Trade and Industry, to which “zero tolerance” methods of operation do not apply, use it.

Support for examination of the exercise of discretion in relation to the prosecution of fraud by the various chosen agencies may be found in the fact that prosecution of fraud is performed by several agencies, some of which have the power to act otherwise than by initiating criminal proceedings. It is for these reasons that studies of the organisational cultures of those within the agencies that investigate and prosecute are thought to remain relevant in the study of organisational response to crime. Such studies inform the examination as to the type of factors that may influence the decision-making processes.

In his works on fraud investigation Levi (1993) cautioned against stereotyping police perceptions of fraud and its investigation, acknowledging the influence of police culture. He examines the investigation of fraud as being distinct from other police work, noting its lack of appeal to most officers as being non-action-orientated investigation. Examination is made of the perceptions of fraud investigation within British police forces and the reality of the situation. It is noted that far more officers deal with non-fraud (or “general” crime) than deal with fraud. A number of factors are suggested as contributing to and influencing this situation. Levi notes that the reality of fraud investigation is that it involves a high ratio of investigation time to number of arrests. This is contrary to the “macho” crime fighter image of police officers as described by Holdaway (1983) and Reiner (1985), which image is recognised by Levi as being one of the reasons some individuals join the police.

Further, officers perceived this type of crime as being an area in which any weaknesses in their investigative abilities were more likely to be highlighted than would be the case in relation to investigation of other types of criminal activity. In addition, as the vast majority of police officers lack experience in investigating allegations of fraud, the “fear of the unknown” might be a further reason why police officers do not seek attachments to CID units responsible for investigating allegations of fraud.

Perceptions of social inferiority in police officers to suspected fraudsters are cited as additional reasons why fraud specialisation is not seen as attractive to police officers. Most “City” frauds or fraudulent operation of business involve those in business,

whilst the more usual CID crimes are typified as being perpetrated by those of the same or usually lower social class than most police officers. This perceived imbalance in social status is described as being viewed by officers as assisting them in their dealings with the more usual CID work, but working to their disadvantage in dealing with the bank managers and business persons either suspected of being fraudsters or interviewed as potential witnesses as victims to fraud.

In addition, increasing demand from the public upon what staff resources chief officers have, combine with a government demand for increasing numbers of arrests, to make fraud an area of low priority for most police forces. Those officers who are available for duties are most productively utilised in the investigation of the more usual CID type work, such as assault, more serious thefts etc., that do not entail the same length of investigation as do most frauds, and also do not have the same complexities in submission of files to the CPS, fraud files routinely having extensive exhibit lists and witness statements, as well as complex transactions.

Examination made in the course of this study as to the content of police annual reports within the last two decades supports Levi's analysis, with little emphasis being placed in such reports upon fraud investigation as an area of specialisation, as opposed to efforts to meet Home Office priorities, such as reducing vehicle crime. Most police forces' annual reports make specific reference to the types of crime perceived by the public as important or those prioritised by the Government. Often annual reports include specific reports on those branches of CID responsible for the investigation of domestic violence, racially motivated crime and vehicle crime. Far less mention is made of those units that deal with the investigation of fraud. In this may be read the relative unimportance of fraud investigation in comparison to the investigation of those crimes prioritised by the government.

Apart from the Government's not having prioritised fraud investigation in the same manner as it has certain other types of criminal activity, considerations of public expectations of the police might also influence police perceptions of fraud investigation.

Since the 1980s almost all police forces had invested considerable resources into examination of what service the public expected from them, most contributing to what was, in 1990, a ground breaking approach, publication of the Operational

Policing Review (ACPO). For an institution designed to operate upon the obtaining information from the public, this publication was the first major examination by the police as to what was expected from them by the tax payer. Previous studies of police operation and public expectations had been made by government associated institutions, ranging from University research projects to the British Crime Survey (Home Office 1982, 1984, 1988, 1992, 1994, 1996, 1998, 2000)

The British Crime Survey brought attention to the considerable under-reporting of crime, particularly domestic abuse and racial violence and played a part in improving the response of police officers to allegations of this type. The BCS did not have, however, much impact upon fraud or its investigation.

By the late 1990s enquiry by the police as to public wants and perceptions had become part of the legislative framework within which the police operate. Section 106 of the 1984 Police and Criminal Evidence Act put in place consultative committees that, although operational, did not have the same weight as the bodies established by the 1998 Crime and Disorder Act. By the latter Act, chief officers were required not only to work with the local authorities but possibly more importantly, to demonstrate that they had consulted with the public. A still further improvement upon the effectiveness of action under the Crime and Disorder Act upon the operation of s106 Consultative committees was the requirement that chief officers demonstrate the results of consultation had been incorporated into their annual Strategic Plans. The effectiveness of these requirements lies in the examination of each police forces operation by the Inspectorate of Constabulary, also known as the HMI or HMIC. On an annual basis all forces are subject to inspection by the Inspector for that area to determine how the force has operated in relation to the Government's policing priorities, including its plans of action produced in accordance with the Crime and Disorder Act.

Within the current study examination was made of the Crime and Disorder audits conducted by a metropolitan police force that had agreed to the request for research access together with its associated Authorities. In none of the four audits was the investigation of fraud identified as a policing priority. Similar examination in the course of this study of other forces' annual reports and the British Crime Surveys confirmed the lack of importance that the general public attaches to the investigation

of fraud. Despite this, academic studies and media reports demonstrated that, whatever its priority, investigation of fraud continued to be undertaken, both by specialised units within police forces and other agencies.

The literature review established that the investigation of fraud remained the subject of continued, if specialised, examination. This led to the decision that one of the initial stages of the study would be the examination of the operation of a fraud squad within a metropolitan police force, focusing upon what officers within that squad dealt with and the processes through which investigation went. This part of the study would include analysis of officers' perceptions of both their role and interaction with other criminal justice agencies. Study of the operation of the police and other agencies was grounded on an acceptance of the doctrine of discretionary exercise of official powers and duties.

The themes of types of behaviour identified by Reiner (1985), Holdaway (1983), Levi (1982, 1987, 1991, 1993) and Burke (1999) in their studies of the police would be applied to determine whether these operated in the chosen force. If these were found to operate within the chosen force, the study would seek to ascertain the extent of their impact upon the investigation of fraud and the investigators' exercise of discretion and decision making.

This was to be followed by similar examination of the operation of other agencies that the literature review had identified as having the primary function of investigating or prosecuting fraud. The closest associated agency was revealed by the literature review as being the Crown Prosecution Service (CPS).

Prosecution

Discretion

McBarnet and Whelan's (1999) description of enforcement in the context of a regulatory body was thought to be equally valid within the broader investigation and prosecution context,

Law enforcement is a process in which many factors come into play to influence outcomes in individual cases. It is in the nature of law enforcement that there are choices to be made, strategies to follow, discretion, bargaining.
(p13)

This required examination of the nature of the law enforcement decision making process, from the definition of what constitutes an offence for the purpose of an agency to the individual police officer or lawyer's decision as to the most appropriate means of dealing with a set of allegations or facts. Throughout assessment would be made of the different types of discretion exercised.

In this stage of the study regard was had to the importance of legal and organisational context to the operation of prosecutorial and investigative bodies as identified by Hutter (1988) in her analysis of the operation of Environmental Health officers,

Enforcement officials do not work in a vacuum, free from external influence and from constraint. They are constrained, to varying degrees, by the organisations within which they work and, in turn, these organisations are subject to a variety of external pressures and persuasions. The most obvious constraint upon the behaviour of all enforcement officials and agencies is the law, which at a minimum defines the activities to be controlled. However, this is not to argue that laws serve as being structures to which enforcement officials religiously adhere. Many studies have shown that the law may enter very little into enforcement officials' activities, particularly if they select informal enforcement techniques. Officials have considerable discretion to implement their own interpretation of an organisational mandate, which is itself an agency or departmental understanding of what the demands and procedures of law really are. (p 9).

In assessing the extent of an individual investigator's and prosecutor's exercise of discretion at least three distinct types of decision may be examined in relation to fraud. One is the decision as to whether a set of facts or allegations constitutes "fraud" (i.e. what definition of fraud is applied). If it is decided that the facts/allegations are "fraud" does the matter fall within the individual's remit (i.e. does the agency within which they operate define the facts as fraud) and, if so, by what methods will the matter be pursued.

A large body of research exists into prosecution and the role of the prosecutor, both within England and in other jurisdictions. That there could be a need to determine what is meant by "prosecution" before examining the operation of the well

established Crown Prosecution Service, may well appear unnecessary. However as Jehle notes;

In the history of criminal law the institution of a prosecuting authority is a relatively new feature. It first appeared in the wake of the French revolution after which it, gradually, took up its position as a central institution in the legal systems of continental Europe. It is only in the past few decades that it has become established as a feature of common law systems. (Jehle 2000 p27)

He notes, at p 28, that the “specific structures and functions differ greatly from country to country. However he suggests that there can be a commonly understood and recognised concept of “prosecution” if a “pragmatic” definition is adopted. This is proposed to be

...an intermediary stage between police and court levels. The process as a whole usually begins with an offence being reported to the police and the identification, sooner or later, of a suspect. Once this has happened in almost all of the criminal justice systems dealt with here (Albania, Austria, Bulgaria, Cyprus, Czech Republic, England and Wales, Estonia, F.Y.R.O Macedonian, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Moldova, Netherlands, Norway, Portugal Romania, Russian Federation, Scotland, Slovenia and Turkey), a decision has to be made as to whether or not the case should be brought to court, that is, whether to prosecute or not. (p28)

Jehle continues that this is not inevitably the procedure that the discovery of suspected criminal activity follows as;

...the police may also have the ability to end a case by imposing some kind of sanction.

Although the basic definition of “prosecution “ supplied by Jehle may be adopted, this study found it to have a weakness in its application to the police. Literature on the investigation of fraud identified that not all cases of suspected fraud “begins with an offence being reported to the police”. Certain types of fraudulent activity can be reported to branches of the Department of Trade and Industry, or to regulatory groups including non-governmental bodies.

The substance of Jehle’s definition of prosecution would be applicable to fraud if it is widened by acceptance of the first stage of formal processing within the justice system. In this way the first stage, the receiving of a report of suspected fraud,

would include reports made, in England, to policing or investigative agencies other than those within the 43 Home Office police forces. It was this variation of Jehle's definition that was used throughout the study to obtain the most comprehensive analysis of the English justice system's response to fraud.

Jehle does not make specific examination of the exercise of discretion in the prosecution process, but acknowledges that this plays a part in the difference of output or case loads between the number of matters dealt with by the police, the number passed to the prosecution and the number that the prosecution places before the courts.

Some years prior to Jehle's work, Ashworth (1984) had drawn attention to the exercise of discretion by prosecutors in England and Wales, suggesting there to be a need to examine the principles upon which decisions whether or not to prosecute were taken. The basic principle of Ashworth's argument for examination of the exercise of discretion by prosecutors is founded upon acceptance of the need for prosecutorial discretion, by which he refers exclusively to the decision whether or not to prosecute.

This proposal was made prior to the coming into operation of the Prosecution of Offences Act and its result, the Crown Prosecution Service (CPS). Some fifteen years into the operation of the CPS it is possible to suggest that Ashworth's suggested examination can be extended to the decisions by all prosecuting agencies, as to the appropriate charge and other means of disposal, such as cautions, reprimands and warnings, based upon his approach to prosecution as being integral in the administration of justice and the fact that it is now recognised that more than one agency is directly involved in making prosecution decisions, specifically relating to suspected frauds (Quirke 1999 p187).

In suggesting that there should be detailed examination of the factors considered by prosecutors, Ashworth does not distinguish between types of crimes or charges, although discussion is made of the Scottish procurators' approaches to crimes of domestic violence. He notes that, on facts that would evidentially support a prosecution, procurators may not necessarily pursue a prosecution as they view their role as acting as mediator between the parties. It was this suggestion that led to consideration of the theme that, in the context of investigations of fraud, was

examined by Levi (1993); the application of considerations of perceived social class to the decision as to whether or not to prosecute.

Despite the call in 1984 for greater understanding of prosecutors' exercise of discretion, little research is available on this point. Whilst some academic examination has been made of prosecution decision making within England and Wales (primarily in respect of offences of domestic violence and offences involving members of ethnic minority groups), access to much of this material is restricted.

The same is not true of the general function and operation of the Crown Prosecution Service and of the comparable system in Northern Ireland. Grosman's 1969 sociological study of Canadian prosecutors and their work culture noted the lack of research into the office of prosecutor. In light of Ashworth's views and the absence of public information upon current English prosecutorial systems, processes and personnel, it appears that this situation and context had changed little in the intervening thirty odd years.

As such, Grosman's depiction of prosecutors provides indication of issues and themes that would form part of the study. The prosecutors studied by Grosman were described as being a relatively homogenous group of younger men, having a shared professional ethos,

Although part of the legal profession, the office of prosecutor has acquired certain attributes of a sub-culture that sets it apart from the larger professional lawyer culture. The prosecutor has developed skills and sympathies which are part of a segmented interest group within the interstices of the profession as a whole. (p 66)

Mention is made of the vicarious "enjoyment" in types of criminal activity, suggesting some, at least, of the research subjects enjoyed the 'seedier' side of their work. This suggestion may be seen as predating a similar suggestion made by Holdaway (1983), Reiner (1985) and Levi (1982, 1987, 1993) of criminal investigation as being a male dominated, activity based exercise. Fraud in the sense of business crime does not appear well suited to either view of the investigator or prosecutor and, if these views are accepted, it is understandable that the impetus to investigate or prosecute fraud is lacking.

The themes presented were of prosecution as being a male orientated culture in which the machismo of investigation could be detected and might suggest possible allegiances between prosecutors and investigators in the exercise of discretion in respect of charging, investigating and prosecuting.

One aspect of the study would be examination as to whether the group ethos described by Grosman had altered within 1990s England. Examination of the legal profession and prosecution in particular suggested that variation might be expected. The legal profession was no longer the male domain examined by Grossman, with women playing a significant part in both professional and organisation management structures. During the 1990s Dame Barbara Mills held the post of Director of Public Prosecutions and several women now hold the post of Chief Crown Prosecutor, heading the CPS for specific geographic areas.

As previously noted, the role of the prosecutor had extended beyond that of the 70s, with prosecution functions being part of a number of agencies' operation, including the DTI, Customs and Excise, Department of Health and Social Security, Ministry of Agriculture and Fisheries and other multi-national/European agencies. No longer do prosecutors deal solely with crime, as was the case at the time of Grossman's study, by way of prosecution or dropping the case. Annual reports of the CPS and other government criminal justice agencies, together with studies of those organisations indicate that the role of a prosecutor within the English criminal justice system now covers a wide range of criminal, regulatory and advisory matters.

After a period of considerable media interest in the operation of the CPS, the Glidewell Report (1998) was the result of a Government sponsored examination of the primary criminal prosecutorial agency. Within this Report the prosecution of fraud, is examined from a specific perspective, of assessing and improving the CPS's operational effectiveness. Although examination was made of the constraints upon prosecutors, the aim of the Glidewell Report was not to examine or identify types of organisational culture or its impact upon decision making. One feature of the Report that was of importance for the purpose of the study is that it is the first "official" study of the English prosecutors that examines the review function that they fulfil in relation to decisions taken by the police as investigators of alleged or suspected criminality. The findings of the Report were that the CPS was not concerned with the vast majority of recorded crime (p 4) and that there had not been

the improvement in the effectiveness and efficiency of the prosecution process that had been expected to result from the establishment of the CPS in 1986 (p 6). It was also concluded that whilst the initial tensions between the CPS and police had eased, they had not disappeared, with some CPS staff seeking to retain their independence by becoming "isolationist" (p6). It was suggested that to achieve its potential, the CPS would have to re-focus its efforts, away from the majority of its work in the magistrates courts, being relatively minor cases, to more serious crime in the Crown Court. Changes in the overall organisation, structure and management of the Service were recommended, as was the adoption of an attitude within the CPS of it being an integral part of the criminal justice system, not a 'new kid on the block' (p 6-7).

In doing so it was thought necessary to attempt to establish the sociological perspectives operating within the agencies, whether these differed from those identified some thirty years earlier and if so, to assess how the new norms impacted upon the choice of cases accepted, procedures used and the effect of both sets of choices upon the final outcome.

A broader based examination was made of the office of prosecutor within the 1999 examination of the entire criminal justice system within Northern Ireland. In respect of prosecution, the Review of the Criminal Justice System in Northern Ireland emphasised the importance of decision making and the role that discretion plays within the prosecution process.

The nature of the decision on prosecution is significant. The DPP is more than a reviewer of a decision to prosecute already taken by the police and formally takes the decision to prosecute or "directs" on cases referred to him. (HMSO 2000 para 4.33)

As with the English system of prosecutions, the DPP's office is staffed by trained lawyers, responsible for making the decision whether to prosecute and upon what charges. In Northern Ireland, as in the English equivalent, the CPS, the DPP and his staff do not have direct involvement in police investigations. This being described by the RCJNI as

The DPP has no formal involvement in the conduct of police investigation, prior to summons or charge, or between the charge and submission to him of the police investigation file. It is however open to the police to seek the

advice of the DPP's staff in the course of their investigations, especially where it is apparent that complex issues of law or evidence are likely to be involved. (HMSO 2000 para 4.36)

Unlike the English system, where the prosecutors' decisions as to whether or not to prosecute are stated to be based only upon the evidence provided to them by the police, the RCJNI found that staff of the Northern Irish DPP "consult with the police, victims and witnesses and to visit the scene of the crime". (HMSO 2000 para 4.37)

It is estimated that in approximately 30% of the cases dealt with by the Northern Irish DPP's staff, lawyers proactively seek further information from the police. No similar research within the English CPS permits comparison of the two systems but does suggest two themes for further examination; what can constitute proactive involvement in police investigations by prosecutors and, in relation to fraud, to what extent do prosecutors become proactively involved in investigations? Within the RCJNI report it is stated,

The CPS has no role in supervising investigations although it advises on legal issues if asked; nor can it direct that lines of enquiry be pursued. (HMSO para 4.84)

As noted in the 1998 Glidewell Report, the view that the CPS can not direct an enquiry, may well overlook the feature that, if the CPS requests additional evidence from a particular line of enquiry, it can discontinue proceedings where that information is not obtained. Practically this may be viewed as providing the prosecutor with a role in the direction of investigations. It is recognised within the Review that in order for this system of separate responsibilities within the same system to operate successfully, joint management of the interface between the two agencies is essential. This is an operational feature emphasised in the Glidewell Report (1998).

The RCJNI report examines other prosecutorial systems, focusing upon those operating in England and the United States of America, where it is noted, the reality of the concept of separateness of the prosecution and investigations functions are so well established that there is no debate as to combining the functions within the operation of the police. By contrast, the Dutch prosecutors play a role in the investigative process and have a key priority of co-operation with the police and local

authorities. Examination is also made of the Procurator Fiscal system operating in Scotland, where the procurators have a common law duty to investigate crime, strengthened by the statutory duty upon Chief Constables to comply with the lawful instructions of the procurators. It is only in the more serious of cases that procurators are described as playing a role in the investigation, however in these matters, their assistance is welcomed. The Review panel's examination concluded that the independence of the procurators appeared to them to be respected, with relations and co-operation between them and the police being good.

The diversionary role of the prosecutor was also examined by the Review, this being the discretionary power of the prosecutor not to utilise the criminal justice system as a means of finalising and investigation commenced within that system. This was found to be valued as a considerable tool available to both the Scots procurators and the Dutch prosecutors.

The Review makes examination of the requirement that prosecutors communicate the reasoning behind their decision making and the reluctance on the part of English prosecutors to do so, save in very general terms. The Review suggests this feature plays an important part in generating public confidence in the office (HMSO para 4.111- 4.116).

The Northern Irish examination of the role of the prosecutor noted the possibility of that role playing a diversionary function within the criminal justice system. The concept of a branch of the criminal justice system acting in a diversionary manner is common to the operation of many Commonwealth jurisdictions. Prosecutors are not expected or encouraged to make decisions that fall beyond the clear dichotomy of prosecute/decline to prosecute. Either they are prosecuted before the courts or they escape criminal proceedings entirely and without any other action being formally taken in relation to their conduct that formed the substance of, usually a police, investigation.

This being so and at the beginning of the study it having been realised that a diversionary function existed within the English criminal justice system, it was decided to examine the regulatory function, both in relation to their operating as prosecutors and also as diversionary from the criminal justice system.

Regulation

Formal regulation, by government agencies, of either the workplace or work practices is a relatively recent concept within England and America. In most of the developing world governments still play little part in the regulation of work practices. In the developed nations an increasing government involvement in regulation may be seen. This is particularly so in the British financial sector after the crashes of BCCI, Barings Bank and several unrelated investment firms. Examination of the Financial Services Authority (FSA) and the coming into operation of its associated enabling Act, the Financial Services and Markets Act 2001, reveals that whilst promoted as a wholly non-governmental body, the FSA does have close links with the government, including linkage through its website of "fsa.gov.uk".

Despite the work of this and other regulatory agencies in the developed world, the study of regulation is not as developed as are studies of other aspects of socio-legal operation. It is recognised that there is a body of work on regulation in Australian nursing homes and pharmaceutical industry (Braithwaite 1984, 1989) and on regulation of pollution in the United Kingdom (Hawkins and Thomas 1984, Hutter 1988, Weait 1989). In addition, the discourse in 1990 between Pearce and Tombs and Hawkins has done much to inform current thought on the role and nature of regulation in the developed world. Much of the debate between these three, together with the work of Braithwaite, focuses on the role of regulation in the corporate sphere and the need for it to be either punitive or advisory.

Whilst Braithwaite's works provide a Commonwealth perspective on regulation, its role and place in a state's justice system, there is no corollary in any other developing nation. As indicated above, whilst Commonwealth states other than Australia may have a few nominal regulatory agencies, the work of such bodies is significantly more limited, in volume, impact and the extent of the areas regulated, than are the British, America or Australian agencies.

Upon beginning this study into the investigation and prosecution of serious fraud and allied methods of "dealing with fraud", there was a body of work upon regulation in both Britain and America predominantly increased and enhanced by the work of a small range of academics. During the course of the study this altered. Particularly in respect of financial regulation, one significant influence upon this change was the Financial Services and Markets Bill (1998), and subsequent Act (2000). This Bill was

described as "the demise of self regulation" (MacNeil 1999 p725), brought about by government dissatisfaction with self-regulation. Prior to assessing the impact of the Bill and Act, examination should be made of the concept of regulation and its application to the specific area under study.

In the early stages of the study on regulation and specifically its enforcement Hawkins and Thomas wrote;

The debate over the design and enforcement of protective regulatory laws is complicated by the nature of the problems that these regulations address. Unlike many areas of traditional economic regulation, the problems governed by the legal framework of protective are, for the most part, not specific to any one industry. The number of potential targets of regulation confronting the agency bureaucracy is vast, resulting in resource constraints on finding violations as well as patterns of partial enforcement. (Hawkins and Thomas 1984 p 4)

In examining their theory of enforcement of regulation, Hawkins and Thomas sought to establish and define what constitutes "enforcement policy", the "regulatory process" and the impact of the position of the regulator in the legal and social organisation. Through examination of specific agencies they sought to analysis the ways in which regulation is applied. Their position was significantly influenced by their assessment that,

The regulatory agency has primary responsibility for the development of substantive policy together with the implementation of that policy. (Hawkins and Thomas 1984 p10)

They accept Kagan's (1978) proposition that a specific legislative goal, such as protection of the environment, will be interpreted more strictly and enforcement policy be more punitive than that occurring in relation to legislation more ambiguously worded as exists in the situation of balancing the public interest protection of the environment against protection of pursuit of economic advantage. They highlight the different forms of regulatory response, including the distinction between compliance and deterrence, and the impact of both on the concept and practice of bargaining that they state as "central to both the formal and informal processes of regulation". (Hawkins and Thomas 1984 p 15)

Hawkins and Thomas' analysis is that, whether compliance or deterrence orientated, the enforcers of regulation fulfil a role that is more preventive than punitive within the justice system. This position is similar to that adopted by Kagan's 1980 study where comparison and contrast was made of the roles and operation of the police and inspectorates in relation to industry. He describes the latter as,

... special police force for industry...legally empowered to intrude upon private property, examine books and records, take samples and interrogate executives and workers in order to uncover evidence of non-compliance with the law. They can issue citations that can lead to fines, expensive remedial orders and, in some cases, criminal penalties. (Kagan 1984 p 37).

After noting the similarities in the roles and operation of the police and inspectorates, Kagan noted the main differences between the two agencies. His assessment is of the police having been established to protect private property whilst the inspectorates were established to carry out the opposite social role of controlling those with property and their use of it in the pursuit of profit. He noted, as did Hawkins and Thomas, the importance of the social context in which the inspectorates operate and the "pressure" this exerts upon the inspectors to respect, implied as being more so than in police operation, the individual's "legal rights and personal dignity" (1984 p47). A further distinction is drawn in that the police act against the individual whereas the inspectorates operate in relation to businesses, corporations, and legal entities as opposed to persons. Central to this assessment is an allied assessment of those with whom the inspectors deal that Kagan had proposed in 1984 of corporations as being of one of three types, "amoral calculator", "political citizen" or "organisationally incompetent" (1984 p67-8).

"Amoral calculators" is the description of those bodies that determine their action solely on the basis of maximising profits and have no regard to other factors, including employee welfare or protection of the public. If such bodies do not have regard for others, it must be imposed upon them by way of stringent policing of regulations and severe, usually financial penalties for failure to comply with the rules. In this way it becomes more cost effective to abide by regulation than to ignore it in efforts to make a profit.

Kagan's analysis of corporations was that they are predominantly not "amoral calculators" and as such the emphasis upon deterrence, with the regulatory enforcer acting as "policeman" is not appropriate.

The assessment of the role and function of the enforcers of regulation as proposed by Hawkins, Thomas and Kagan was to influence studies of regulation enforcers for nearly two decades. The effect of their analysis was to suggest that regulation could be over-enforced. The importance of this lies in that, in efforts to increase the effectiveness of compliance with regulation, enforcers are shown as best deployed as "consultants" to the industries that they operate within, seeking to inspire compliance as opposed to obedience through fear of regular "raid" style "policing".

In 1990, in the aftermath of the Union Carbide disaster and blatant disregard of large companies for their responsibility for worker/public safety, the established perspectives of the regulators and the regulated were challenged by Pearce and Tombs.

In 1990 they sought to re-examine the view of Kagan, Hawkins *et al* that they summarised as being that "illegal conduct of corporations necessarily calls for different forms of regulation than other kinds of law-breaking" (Pearce and Tombs 1990 p 423). Pearce and Tombs at p 432-433 compare the law in respect of employment and motoring as the basis of their argument that the application of those laws, or their regulation, in respect of health and safety violations and motoring offences should be the same. Their argument is based upon three fundamental premises.

The first is that motoring and employment in business are essentially lawful activities. The second is that that most health and safety violations and most motoring offences are due to "carelessness". The third is that motoring offences are judged on a defined code of conduct, the Highway Code, that equates to "law" whilst no such body of "law" exists in respect of employment. In the latter context they argue that health and safety violations are based upon informal Codes. These premises permit the conclusion that the fact of a defined code in relation to motoring and an undefined one in relation to employment allows a difference in the standard of care by which the actions of drivers and corporations are assessed.

Apart from the problem of identity that is inherent in their argument, in that motoring offences are by necessity committed by one individual whilst corporate offences may be committed by a legal entity or individuals within that entity acting in a manner not known to the office holder, a further difficulty lies in acceptance of the premise that the existence of an informal employment code is the only feature that permits the standard of examination of carelessness to be based upon considerations of “reasonable practicability”.

Examination of discrimination case law, based upon non-compliance in the civil law with legislation as opposed to codes of conduct, reveals that the Sex Discrimination Act 1975 permits a successful defence of reasonable practicability in relation to claims of vicarious liability for employees’ actions in the workplace. Within the criminal law, save in offences of strict liability, where a finding of guilt does not require that intent must be proved, an employer could escape liability for an otherwise criminal act committed by its employee by establishing that such a person acted without the employer’s authority and the employer could not reasonably have known or prevented their actions.

Pearce and Tombs argue that the motorist has to do,

... everything possible to avoid endangering others on the roads; an employer on the other hand, only needs to avoid endangering his or her employees to the extent that it is (economically) “reasonable” and “practicable” (Pearce and Tombs 1990 p433)

They suggest this distinction is unjustifiable as supporting the argument for more punitive enforcement of regulation.

Hawkins’ response to their argument was swift and critical. He notes (Hawkins 1990 p 445) that Pearce and Tombs confuse the focus of his work, upon practice, as being the same as Kagan that is upon enforcement policy. From this point he criticises their “mis-interpretation” of his studies of regulation enforcement within Water Authorities and their development of the argument of him as supporting the “compliance school” of regulation. Further criticism is made of Pearce and Tombs’ discussion of the “amoral calculator” and others, notably Kagan’s, analysis of it (Hawkins 1990 p 454).

A significant portion of Hawkins' response to Pearce and Tombs' argument is in the nature of the offences committed by businesses. He asserts that most of the regulation violations are not perceived by the public as being criminal and that if some measure of acceptance by the regulated to the regulators is not secured through methods including bargaining the whole regulation scheme will break down. It was thought that these two assumptions, the relevance of the public perception of the offence and the need for the goodwill of the regulated, would be central to examination of the operation of the DTI.

Themes identified within the literature on fraud, the prosecution function, investigators and prosecutors

Themes identified by the literature review include the need to ascertain what the chosen agencies defined as fraud and the impact that this had upon both their operation (what did they deal with) and their interaction or co-operation with other agencies (how did these agencies deal with matters). Given the lack of definition of both these topics identified in the literature review, it was thought that there would be potential for over-lap of both definitions and functions but also the opposite, a lack of uniformity of definition in apparently related agencies.

Closely linked to examination of the definition of fraud used by each of the chosen agencies is an identification and examination of other factors that influence action. These were thought to include organisational, cultural and personal factors, all of which had been identified in the literature review as playing a significant role in determining the scope of the agency's operation and its success in that role.

Research and literature revealed that the decision-making processes of investigators and prosecutors were central to their operation and co-operation and should form a central part of the study of the chosen agencies' operation. Incorporated into this is an examination of whether formal or informal strategies or a mixture of both are used by and between agencies and what factors operated to determine the type of process adopted and its effect. This includes examination of means of referral of matters between agencies, official and informal.

From the early studies of the prosecutor by Grosman (1969) to the 2000 Review of Criminal Justice in Northern Ireland, the existence and reality of the independence of the prosecutor from both the government and also from the conduct of investigations

is emphasised. The importance of this was taken to be the need for objectivity of decision-making, including the review function of the CPS in relation to police investigations. Examination is made of the members of each agency's perceptions of their own independence and that of the agencies with which they worked in responding to fraud.

Equally important is the reality of the role and function played by the prosecutor, both in the "straight" criminal aspect of fraud as occurs in the operation of the CPS and also in the *criminal/regulatory framework* of other agencies. Subsequent chapters of the study seek to examine the extent of the role of offering advice when requested and to what degree, in practice, this could become a means of lawyers directing investigations as occurred within the police and DTI.

The themes identified in this chapter contribute to the parameters of the fieldwork conducted in the chosen agencies. Particular reference was included in the interviewing of investigators and prosecutors of the accountability of one to the other; the extent to which members of one agency could influence the decisions of members of other agencies and the form of communications between agencies.

Examination is made of the stage at which lawyers became, and are thought should become, involved in the investigation. Allied to this is examination as to whether that involvement is perceived as directing or supervising investigations and how these perceptions accord with the Code for Crown Prosecutors. Examination of the operation of the police and CPS includes analysis as to the giving advice by CPS to the police, with this being compared to the results obtained from fieldwork in the DTI where the two roles, investigation and prosecution, existed within a single unit. In all agencies, examination would be made of investigators' and prosecutors' discretionary diversionary powers, including the power to discontinue cases, the extent to which this was used and the impact upon the investigators.

The main themes of the research having been identified, the next stage of the study was to consider the various methodological approaches within which the study could progress. These are described in the following chapter, together with explanation of the methodology chosen.

CHAPTER FOUR

METHODOLOGY

The purpose of this chapter is to establish the methodological context within which the research was conducted and to detail the nature of the research. In addition examination is made of the methods by which the research could be carried out, those that were used together with description of the reasons for the choice of those methods.

Background

As described in more detail in Chapter 2, for some years, fraud and related offences have been viewed as considerable problems within several Southern African Commonwealth countries. The local media of the various Southern African Development Community (SADAC) countries have commented upon this as a problem that taints political administrations and hinders development. However, despite commentary in local and international publications, including UNAFRI (Press Release 21 October 1996), expressly calling for greater examination of the issues, little research has been undertaken into occurrences of fraud or how the SADAC countries' legal systems respond to this. It was not possible to look to these....for relevant methods.

In England and Wales there has been significant research into the way fraud is detected, investigated and prosecuted. Typically research into the work and operation of prosecutors (Rozenberg 1987) and police officers (Levy 1987, 1999) in England and Wales and America has involved examination of files and interviews with prosecutors and police officers. The status of prosecutors and police officers as civil servants and public officer holders respectively has had a significant impact upon research conducted into their operation.

On the one hand they are easily identifiable as members of a group that has a clearly defined structure and functions. In this respect this form of social research differs from research into purely social groups, such as that conducted by Foote Whyte (1943). Unlike research into non-employment/work related relationships, this study sought to examine individuals' views in relation to their work and interaction in an employment environment. Whilst in researching social group composition and the interactions between individuals it may be necessary to identify an individual's

position and role within the group by reference to other members of the group, this was not so necessary in my study. The reason for this lay in the formal and defined nature of the relationships existing in the context of the criminal justice system. Not only were these easily discernible for external source material, but also the concern of the study was less with the social than professional relations between members of different agencies.

It was also important to look at the physical, and hence social, context in which people worked. In the organisations to be studied it was common for an office to be identified as being for the use of a particular individual with a particular role, or for a group with a particular purpose. Thus the head of a department would usually have their name and job title on their office door. Specialist groups might be similarly identified. Within the police uniform and insignia also assists in the identification of rank and, to a lesser extent, role. Within a single CID office several different investigative functions and roles may be conducted and, whilst CID officers do not wear police regulation uniform, it is visually possible to distinguish between these. Those more likely to be dealing with the investigation of fraud are more likely to be wearing suits than those investigating drug offences, who will be wearing more casual clothing. The office space of the two was also likely to be marked by plates on doors.

So too in prosecution offices, it was expected that titles on doors would often assist in the identification of the work group to which an individual belongs. The type of files in an office could also assist this identification. An office with a large number of relatively thin files relating to many individuals in unconnected offences would be less likely to be used by a fraud prosecutor than a generalist. The fraud prosecutor would be more likely to have a large number of voluminous files relating to a small number of connected persons and offences.

This ease of visual identification of research subject, as compared to other types of social research, is counterbalanced by the relative difficulty of obtaining access to the subjects, again in comparison to other social groups. Research access to both has to be sought and obtained by formal means. Unlike other forms of social research, however for criminal justice agencies the compliance of the subjects themselves is insufficient to ensure that legitimate access is obtained. However the views of the subjects are important as the research was to be overt and not covert.

Holdaway (1983), for example, had official authorisation to conduct his research, the fact and reasons of which were hidden from his research subjects. He details the strains brought about by this situation, compounded by his being in a situation of “participant observation”.

This study sought to avoid that situation and sought to capitalise on the co-existing similarities and differences between the research subjects and myself, described in Chapter 1. It was thought important that these features be apparent to the respondents.

This was done by expressly advising both those authorising the research and the subjects as to the background to the request for research access as being based on an interest in the investigation and prosecution of fraud that originated from working in a Commonwealth criminal justice agency. Both sets of people were also expressly informed that the purpose was to study both the work and perceptions of members of English criminal justice agencies so as to report on these in a research context. In making this known to the research respondents it was accepted that, as in most overt observational studies, the research subjects might report their perceptions with their best interests in mind.

It was for this reason that access to examine the files upon which they were working or had worked and their annual workload was also sought. The purpose of seeking objective analysis of the files and statistical data was to obtain some empirical data against and with which the individuals’ views could be analysed.

Choosing research methods

The information that the study sought to obtain and analyse had several layers. At the one level it was intended to ascertain what is contained within a police and prosecution file. This was to be done by examination of the files and interviews with police officers and prosecutors. Thereafter comparison could be made between the views of the two and assessments made as to the nature of the relationships, practical and perceived, between the two agencies.

Consideration was given to the research methods by which the information could be obtained. Given the nature (formal, professional groups subject to codes of professional behaviour) and location (generally in an easily identified office or group

of offices) of the research subject, the use of questionnaires had some obvious advantages. These were that, as the subjects were easily identifiable, a single 'mail shot' delivery of a questionnaire could probably be arranged for the purposes of obtaining statistical data and some reports of perceptions. One of the disadvantages of the use of questionnaires was thought to be that it would not allow development of the respondents' views as would be possible using interviews. The main disadvantage is as detailed by Bell (1999), being low response rates to questionnaires.

Respondents within all three groups chosen for study worked in units made up of relatively small numbers of staff, being members of specialist groups within a larger subset. Had questionnaires been used the response rates in terms of numbers of individuals within the groups would have been so low as to make the results non-representative and unreliable. As the numbers of respondents could not be varied, due to the nature and sizes of the groups to be studied, it was decided that use of questionnaires would not be an appropriate means of obtaining statistically reliable data. This decision was based on prior research and texts on the design of research projects, notably Bell (1999) that suggested that the likely results would be unreliable as indicators of general trends.

Some social research, such as that conducted by Hutter (1984), had made use of observation of the research subjects in the course of their work. The legislation and professional context of those to be studied prevented such observational methods being used in the study, in respect of both police officers and prosecutors. Were permission to have been obtained for such observational research from either the police or CPS, which in itself was thought to be doubtful, legislation relevant to both sets of respondents could have required disclosure of research notes. The Criminal Procedure and Investigation Act (CPIA) 1996 could have required disclosure of any notes made during examination of specific investigations. Disclosure in terms of the provisions of the CPIA would certainly have had to be made to the CPS and defence teams and probably also to the police.

In addition to all respondents being aware of the overt nature of the research, it was thought essential that every individual should remain anonymous. Several reasons existed for this. Not only does this accord with the requirements of ethical social research, described below, but also so as to prevent identification and contravention

of the Data Protection Acts of 1984 and 1998. Given the duration of this study, both the 1984 and 1998 Data Protection Acts applied to the study material. As detailed in Chapters 5,6, and 7, a number of the respondents did not appear concerned that their identity was protected. However it was felt that they would feel less constrained to comment on the operation of their units or that unit's working relations with other agencies, knowing that no comment as may be made could be attributed to them.

The first stage of the research was to examine the law so as to determine what types of fraudulent activity were to be the primary focus of the research. This stage of the research indicated, in very broad terms, two categories of fraud. The one was a generic type whilst the other related to the operation of companies and businesses. Both types had degrees of seriousness, from the relatively trivial to the more serious. To both there are two types of response, that of the criminal and civil law. It was decided to examine the response of the criminal justice system to the more serious cases in terms of loss and complexity, of both generic and corporate fraud.

The next stage of the research was to identify the agencies providing this response. As detailed above, in Chapters 1 and 3, previous research and reference to official literature assisted in identifying which agencies would be approached. These were decided to be the police, the Crown Prosecution Service and the Department of Trade and Industry.

In dealing with all agencies a similar method was employed to obtain research access and, thereafter, to conduct the study. This method combined pre-interview examination of the official statements as to the work undertaken and that agency's relationships with other agencies within the criminal justice system, interviews with members of the agencies, examination of their work, files and attendance at meetings and discussions. Examination of official statements of remit was intended to occur prior to approaching the agencies for research access, although frequently after the initial approach for research access, more official information was provided. Once research access was granted the first interviews were carried out and, at about the same time, examination made of a selection of files. This followed the methodology of Petrus Van Duyne's (1981) work on prosecutors in seeking to establish the criteria applied and working practices of officers and lawyers through examination of their work and their comments upon that work.

Details as to the means by which access to each of these agencies was obtained appear within the chapters of this study detailing the examination of the agencies, at chapters 5 to 7. The methods of data collection in each of these agencies were the same; it is this that is detailed in this chapter.

Ethical and legal elements

In seeking and exercising research access to the various agencies confidentiality, both to the respondents and in relation to the material provided, had to be established as a priority. Some of the agencies required acceptance of conditions based upon the Official Secrets Act 1911 in respect of the material to which access may be given. There was no difficulty in providing this, nor complying with the Data Protection Acts 1984 and 1998 in relation to those named in files. A point sometimes overlooked in relation to data protection is that the “personal data” provisions of the Acts apply not only to suspects but also to “third parties”. In the case of research on files, this description would apply to those members of the agencies and any other agency who were named in the file, even if only in correspondence between colleagues within the various criminal justice agencies. As such, none of the respondents could be described in any way as might enable their identity to be established.

Having worked within the same environment as the respondents, there was an awareness of the possible concerns that individuals may have in relation to their comments being made known to the office management. All were assured that neither their comments in ‘rough’ form nor the subsequent chapters produced would identify them.

This point was of relatively little concern to the majority of the respondents, however it was felt important to conform to the British Sociological Association ‘Ethical Guidelines’ ‘concept of informed consent’ as discussed by Hornsby-Smith (Gilbert 2001 p 64) as far as possible. Hornsby-Smith, quoting directly from the BSA, describes informed consent as being the researcher’s responsibility to,

... explain as fully as possible, in terms meaningful to participants, what the research is about and how it is to be disseminated (2001 p 64)

Discharging this responsibility and obtaining informed consent was aided by the initial research access request being based upon a clear statement of the aims and

scope of the research to be undertaken. This was first provided to the agency in the letter seeking access and thereafter in discussions with them. All agency heads approached were told of the author's research background as having begun as a prosecutor in Zimbabwe, and having had, at various times, responsibility for heading the serious crime and fraud prosecution sections. They were also informed of the aims of the study as being to determine the various responses of the English criminal justice system to fraud and assess the merits, advantages and disadvantages of that system with a view to its application to other jurisdictions.

It was made clear that any notes made in the course of the research would be disclosed to no one and that no respondent would be identified by name. The heads of department to whom the request were made all appreciated that, in that capacity, they would be identifiable. None raised this factor as being of concern to them. They were advised that the research would be submitted in the usual academic format of a thesis. None of the agencies required restriction on publication as a pre-requisite to provision of research access.

Upon research access having been agreed and respondents identified, those individuals were told, at the beginning of the initial interview with them, of the research scope, aims and proposed dissemination in the same terms as used when research access had been sought. That some respondents indicated an interest in reading the thesis after its submission was encouraging.

Detailed methodological issues

At the commencement of the study consideration was given to the format of the data collection. The initial request for research access sought to examine official documents, in the form of annual reports, internal statistics and the paper work in respect of that agency's operation, the police/CPS/DTI files. This stage included plans to interview a selection of operational decision makers. This was to obtain their views of the official statements as contained in their agency's publication (including definition of the agency's remit and work), to explain the official statistics and to provide their views on what worked well; what did not and why.

The semi-structured interview model described by Fielding (Gilbert 2001 p 136) was felt to be best suited to the nature of the interview context and of the interviewer. All the respondents were professional people, trained in investigation or advocacy. As

such they would be used to an interview format that asked specific questions and developed themes within the answers provided.

It was felt that questionnaires or interviews could be used to obtain and record personal views. Due to the nature of the material sought it was apparent that closed questions would be an inappropriate method to use. Newell describes closed questions as,

... drafted in advance, complete with all possible answers that could be given. Each respondent is asked to choose from one of the answers. (Gilbert 2001 p101).

As it was just those 'possible answers' that were sought, preparation of these answers would not be possible.

Similar considerations operated in the decision to use interviews over questionnaires. As noted by Fielding (Gilbert 2001 p 140), the interview permits probing of the respondents, to get a 'fuller response' than is possible in a written questionnaire. Use of questionnaires does not permit development of the answers in the same manner as is possible in a discursive situation. Fielding notes that an interview is concerned with communication, a two way process. It was thought this would permit the respondents to provide avenues of interest that a questionnaire would not necessarily do; the use of the 'comments' section is often little used.

In addition it was anticipated that in order to obtain an academically acceptable response rate to questionnaires within busy offices, the target population would have to be 100% of the operational decision-makers and even then an acceptable and reliable return rate was not certain.

A vast number of individuals work within the agencies that were chosen to be studied. As with most studies of the operation of large organisations, it was clearly impracticable to seek to obtain the views of all of those within the chosen agencies. Not only would some of them not be involved in decision making, but also there is recognised benefit in studying the response of a few. Arber notes,

...researching a sample can yield more accurate results than using the complete population. For instance, in survey research, if fewer people are studied, more resources can be spent on each interview, permitting better quality interviews ...Decisions about the sample design for a research study

must always take into consideration the trade off between using a larger sample or studying a smaller one more intensively. (Gilbert 2001 p 69).

Samples have been described (Gilbert 2001 p 38) as providing study of a representative subsection of a clearly defined group, the purpose of their use being to provide information from which inferences can be drawn about the entire section or 'population'.

As Arber notes,

The first step in most research is to define the 'population' to be covered...
the 'population' is any well-defined set of elements. (Gilbert 2001 p69).

From this the sample can be determined. In this research the population was to be those undertaking operational decision-making in either investigation, prosecution or regulation of fraud matters brought to the formal attention of the agency within which those individuals worked. The term 'operational decisions' refers to the content of the work of that agency as opposed to the administrative decisions taken by clerical and administrative staff. Whilst the latter are important, it was felt they are unlikely to affect the manner in which matters are dealt with to the same extent as will legal or technical decisions. Those making the operational decisions were assessed to be the case lawyers within the CPS, officers within the police and investigators and lawyers within the DTI.

Similarly, Gilbert suggests that,

... it is usually neither practicable nor wise to interview everyone and observe everything. (2001 p xii).

In some agencies dealing with serious fraud was a specialist aspect of that agency's standard work. This tended to result in relatively few operational decision makers working within one numerically relatively small office. In other agencies, responding to serious fraud made up the greater part of that particular part of the agency's work and greater numbers of operational decision makers were involved.

Due to this feature, designing a sample upon statistical lines was felt to be inappropriate and unlikely to provide reliable data. For example, in a small office, choosing a sample based on one respondent for each ten members of staff could

have resulted in two respondents' views being presented as representative of that population. In most of the chosen agencies efforts were made to have samples in which numerically the respondents constituted at least one third of the population.

The determination of the population made it easier to identify the formal gatekeepers from whom agreement was required before the research could occur. As the population was to be those making operational decisions in relation to the serious fraud work undertaken by an agency, the obvious person to approach first was the head of the department involved in that work. As described in chapters 5, 6, and 7, access to these people was often aided by informal contacts and a form of 'snow ball sampling' where members of one agency would refer me to another agency, sometimes assisting by arranging meetings with their counterparts within the other agency.

The first stages of negotiation of access to each agency involved obtaining an indication as to numbers of possible respondents from that agency. In general once access had been negotiated with the head of the relevant department, the details of members of their staff who 'may be of interest' were provided.

Where this system of referral operated with those identified being informed of their selection and of the aims of the research, this was a considerable advantage. However it was also found that not all of those making the selections for referral informed their staff of that. Such surprises could be minimised by making informal contact with those identified prior to the formal interview, so as to give them time to verify the referral.

In practice it appeared that those identified had been selected on the basis of a belief that they would be the most likely to be interested in participating. Of course, this may have given rise to a subsequent biased sample, an unavoidable disadvantage given the need to talk to heads of departments. Particularly in respect of inter-agency referral, the system appeared to save considerable time in identifying persons who would be prepared to assist, once formal approval had been obtained. In some cases, it was those identified in this manner who advised how best to obtain formal approval.

In one particular agency a list of staff whose comments would be of interest was provided. This raised concerns that the list might just be of those who would provide the "party line". So as to avoid alienation of the "gate-keeper" that had provided the list, those on the list were interviewed and used to provide introductions to other members of staff not on the list. This was achieved by picking up on cases featuring shared responsibility or by taking up chance remarks. As it turned out, those named from this agency were the most interested in the research, or in research generally, and the most informative, supporting the assumption that this was the reason for their being identified. It became clear that although these presented the most enthusiastic representation of the office they were also those with the highest caseloads and able to provide the greatest information. Due to the need to obtain the views of others, the sample in that particular office was larger than had been initially envisaged.

Types of data collection

The literature review in Chapters 1 and 3 revealed that, unlike Zimbabwe, the legal system of England and Wales does not recognise a specific offence of fraud. This required clarity as to what it was that the agencies and each respondent within those agencies referred when using the term 'fraud' as defined in chapter 1. This was a further reason for use of questionnaires not being considered best suited to the aims of the research.

Use of official documents provided the official definition of the role of operational decision-makers and operational statistics. However, decision-makers' thoughts as to what constituted fraud, their role and issues of an operational nature can not be obtained by documents or statistics. It was felt that due to the imprecise nature of fraud, a questionnaire, even one using open questions, would not elicit as much information as would be obtained through interviewing the respondents.

The format of all interviews began with an explanation that the anonymity of the respondent, their views and any official material to which they might refer, would be assured. The consequence of this was to require a very basic coding system to allow subsequent identification of which respondents had said what. It was soon found best to use a numbering system based upon the sequence in which the interviews were conducted together with some indication as to the agency, such as PO to represent the police respondents. Some of the agencies prohibited use of tape

recording equipment, whilst others did not object. However in the interests of consistency, it was decided to use written notes made during the course of the interviews.

Due to the generosity of access granted both by the respondent agencies and the individuals within those agencies it was possible to go beyond this accepted form of obtaining research data, whilst remaining within the stated aims of the research. This occurred when invited to join the respondents on social functions. In these settings the main problem was recording comments. As Holdaway (1983) experienced, it is not always easy or appropriate to disappear to the lavatory to make notes. Noting words on palms or legs only works to a limited degree; the writing up of notes of both 'formal' and informal interview material had to be completed if not that day then certainly the first thing the following morning.

In preparation for the conducting of interviews in the first agency, a pro forma 'crib sheet' was drafted. This was used in the first interview and various improvements identified. These were incorporated into the pro forma that was used in all subsequent interviews, in all the chosen agencies.

Initially interviews were conducted with the interview plan on separate sheets of paper to the notes made to record the respondents' comments. After the first few interviews this system was modified and an interview plan used for each interview with space left between the questions for recording of comments. This system had its drawbacks, as respondents' answers to one question could lead to other questions that did not necessarily follow, on the interview plan, immediately after the original question. This problem was overcome by gaining familiarity with the questions, enabling me to go to the correct page of the interview plan without too much delay or turning of pages.

This pro forma took approximately an hour to work through with each respondent. However, due to the freedom of access that was provided, a number of interviews exceeded this duration as the respondents identified issues of particular interest or concern to them, or they elaborated on their answers to the questions on the pro forma. Most formal interviews were conducted in the respondent's office. Where office space was shared, the respondent's colleagues tended to leave the office,

apart from one particular group of individuals within an agency who worked together and who all participated in what became a 'group discussion'.

Throughout the formal interviews notes were made, using the pro forma sheets and additional paper where required. Any observations, including such 'non-verbal communication' that I thought striking were also noted on the interview pro forma sheets.

In addition to the formal interviews, 'informal' interviews were also carried out with the respondents during coffee breaks and at meetings. At these times specific cases were discussed in addition to perceptions of working practices, colleagues and the nature of the work. Records were made of the respondent's various responses and comments by way of notes, that were made as soon as possible after the discussions.

In addition to 'informal interviews', informal observation was possible as permission to attend meetings and case conferences had been granted. At these it was possible to note the manner in which different individuals within the agencies related to one another and their colleagues in other agencies. In this way it was possible to assess the formal and informal procedures used by and between agencies. This occurred in the context of non-participant observation where all at the meetings or case conferences were aware of my attendance in the capacity of research student.

In addition to the interviews and observations, permission was granted for examination of current and finalised files. These are made up of case papers, statements, exhibits, memos between officers and lawyers. Following Van Duyne's (1981) methodology, the contents of those files were discussed with the various individual respondents within the chosen agencies so as to obtain an understanding not only of what they did but why they did it, the decision making process and the factors influencing that process.

Differing numbers of files were examined in the various agencies for a variety of reasons that included constraints of time, space and sheer volume. The research soon demonstrated that there is no such thing as an 'average file'. Any two files in relation to a given offence may contain significantly different numbers of exhibits, witness statements, professional correspondence and pleadings. The duration of

the alleged offence can impact upon the size of the file, as can the geographic areas over which the offences are alleged to have been committed. The amount involved in each count can similarly impact upon the size of the eventual file. Investigation files will not have the same volume of documentation as will occur in a prosecution file, due to the absence of pleadings and legal professional correspondence.

In addition, comparison of files within an agency does not produce an average. Within any one agency a file for a specific offence, based on one set of facts and allegations, could easily be some hundred pages, whilst another file in respect of the same offence but different allegations, could occupy in excess of four full lever arch files without there being any suggestion of un-necessary paperwork.

What was sought was a comparative examination of files between the agencies. This was attempted by asking the individual respondents how many cases of what type they would work on in a year, and their being requested to select a representative sample of that work. This was recognised as by no means perfect, however an objective assessment, in the absence of records of work – not maintained by all agencies – was not possible.

In total, approximately four to five months was spent in each of the agencies. Of this time, about a month was given over to examination of the files within that agency.

Data analysis

The statistics and interviews were analysed along two related lines. The statistical data and consideration of the agencies' documentation, including file content, provided an insight into the procedures and work rates of the particular agency. These could be compared between agencies to determine whether there were common ways of working, what these were and what were the dissimilarities in working procedures.

The importance of this analysis was identified by the interviews in which respondents from the different agencies described the extent to which their operation depended upon or involved that of other agencies.

The comments of the various respondents within each agency were examined to determine the common themes of views or perceptions within each agency. These

common themes were then considered between agencies. In this way it was possible to suggest perceptions shared by the different agencies and also the importance that the various agencies appeared to place upon them. Some of the themes were suggested by the literature whilst others were introduced by the respondents.

CHAPTER FIVE

AGENCIES STUDIED

The following three chapters describe the work of each of the chosen agencies. What constituted the work of each agency was ascertained by examination of either internal or public documents that detailed the operational terms of reference of those agencies. In each of the following chapters' description of the agencies' work is followed by an examination of the operation of those agencies. This took the form of an examination as to the type and number of cases that sections within the agencies dealt with on an annual basis, as ascertained from departmental statistics. In each agency this was followed by a period, of approximately four to five months, during which examination was made of the operation of staff within those sections, attendance with them at case conferences, together with examination of the files on which they were or had worked and recording of their comments on their work.

THE POLICE

The first agency studied was the police. From prior experience of prosecuting in Zimbabwe, it was expected that within the English and Welsh Home Office police forces there would be specialist units responsible for the investigation of allegations of specific forms of criminality. The force approached confirmed this to be correct and that a specialist unit for the investigation of fraud was well established.

Commercial Branch

The unit studied formed a section within one of the metropolitan police forces. It was referred to within that force as 'Commercial Branch', and operated from that force's Headquarters, based in the city centre.

Organisational structure

The unit was a CID section, headed by a Detective Chief Inspector (DCI), assisted by a Detective Inspector (DI). It comprised three distinct sections; Financial Investigation Group (FIU), Cheque Squad and Commercial Branch, the latter being a subset of the larger unit with the same title. For the avoidance of confusion the larger group, that includes FIU, Cheque Squad and Commercial Branch, will be referred to throughout as 'Commercial Branch', whilst the group within that entity will be referred to as 'Commercial Branch unit'. The staffing and arrangement of the units at the time of the study are described in detail in the following sections that deal with the three units. These arrangements were due to alter, as Commercial Branch was to move to alternative accommodation and it intended that additional officers would be joining the units, either on attachment or permanently. Ten years ago the section that has become known as the Commercial Branch comprised nine officers (Home Office 1986 appendix G p 231). The number of officers within what is still termed the 'fraud squad' (being the three units of the Commercial Branch) of the police service studied has nearly doubled in ten years.

All three units and their support staff operated from a single, open plan area, that was separated from Crime Intelligence Section (CIS), Drugs Squad and the Firearms section by rows of filing cabinets. This arrangement was disliked by all officers and the subject of considerable complaint. The public address system, conversations of CIS and Drugs Squad officers, not to mention the occasional discharging of

weapons by the Firearms section operated to make quiet working conditions impossible. There were four telephones for the Commercial Branch officers' use, one on each group of desks. As telephone calls came directly through to these 'phones rather than to the administrative staff, office work was further disrupted, particularly if a set of desks was unoccupied, as officers from nearby desks answered calls. This task was almost entirely a message taking exercise as in the absence of the investigating officer (also referred to as the officer in the case) it was unlikely that the officer answering the telephone would have any knowledge of the case about which enquiry was being made. The open plan arrangement and office layout made private conversation impossible, and officers generally did not choose to interview witnesses in the office due to this fact. The office situation was taken by most of the Commercial Branch officers as indicative of the regard, or lack of it, with which the Commercial Branch was viewed within the force. It is thought that this is unlikely to be a correct assessment of the situation, as all operational units within the Police Headquarters operated on this basis, Commercial Branch being treated no differently from any other unit.

The following section describes the study conducted of the operation of the Commercial Branch, carried out from April to June 1995.

Research access

The initial request for research access was answered with a very wide authority to study the daily operation of the office, examine, and take note of, records of past cases over a three year period and interview officers within the Commercial Branch. As the study commenced this very wide authority was extended to permit attendance at case progress meetings, without prohibition being placed upon the taking of notes at such meetings. Access to the force computer was granted in order to assist the recording of statistical data and complete freedom of access to the files containing details of the conduct of enquiries for the years 1992 to 1995 was given. The study was further facilitated by the provision by the head of the Commercial Branch of a large number of documents that were thought to be of relevance and assistance in detailing the terms of reference and operation of the section. In this way it was possible to gain relatively quickly an appreciation of the official role of the section, its place within the broader force framework, together with an understanding of its operation. In addition further documents were provided that detailed the operation of

other fraud squads, thereby setting the context of the Commercial Branch in the broader context of the general operation of the English and Welsh police.

After progress had been made in this stage of the study, examination of the details of ongoing work of the Commercial Branch was undertaken. This was to be the starting point of the statistical data collection stage of this study and began with the provision of details of the number of ongoing matters for 1995 and for those undertaken in 1994. The terminology used within the Commercial Branch will be used throughout this chapter, and requires explanation.

At the commencement of this study the Cheque Squad had been in existence for only three weeks and no records existed in relation to the work being undertaken. This was due to the fact that its officers were conducting limited enquiries whilst examining the operation of similar units within other forces. This was a relatively small section, being staffed by one Detective Sergeant (DS) and three Detective Constables (DCs). It dealt exclusively with the investigation of reports of the passing of fraudulent cheques and fraudulent use of 'plastic'. It did not operate within published terms of reference at the time of the study, although it was expected that such terms would be prepared once the operation of similar units had been examined.

The FIU operated in accordance with internally published terms of reference, dated May 1992. Its role is not the investigation of commercial crime but of providing assistance to investigations of any 'major incidents' by undertaking investigations into the movement of the proceeds of crime or the obtaining of what is described within its Terms of Reference as 'evidence of a financial nature which is likely to be of value during the investigation of major incidents'. The term 'major incident' is one common to the operation of all English police forces, and can be applied to the occurrence of a wide range of suspected criminal activity, from the non-economic crimes of murder to armed robbery and terrorism. In addition the unit undertook the compilation of production orders, search warrants and restraint orders in relation to the Drug Trafficking Offences Act 1986 and the Prevention of Terrorism Act 1984; assistance in the preparation of affidavits and production orders under PACE 1984; and the providing of 'advice and assistance on accountancy matters relating to any criminal enquiries involving complex business or personal accounts'. At the time of

the publication of its terms of reference FIU comprised two DSs, two DCs and an accounting technician. The latter worked on all Commercial Branch matters and not exclusively on specifically FIU matters. The staffing arrangement of the FIU did not alter during the study.

Neither of these two units were described as being, nor were they found to be, primarily involved in the investigation of serious fraud. Their operation was therefore not the focus of the study.

Remit of the Commercial Branch unit

The Commercial Branch unit's terms of reference, internally published in May 1992, suggested it to be the sole unit within the Branch directly involved in such investigations. This being so, those terms of reference may usefully be quoted in full;

The investigative role of the ___ Police Commercial Branch can be quantified as follows;

1. The investigation of most allegations of Public Sector Corruption.
2. The investigation of complex/high value allegations of commercial fraud. No hard and fast rules can be imposed, but the governing factors to decide a Commercial Branch case are as follows;
 - a) that the crime cannot be clearly placed on one ___ Police division or even one force area
 - b) that the investigation would entail a disproportionate use of divisional resources.
 - c) that the case involves a degree of complexity or is in a specialist field, requiring the expertise of Commercial Branch staff
3. The maintenance of an index/intelligence section containing information obtained from various sources relating to :-
 - a) all enquiries under investigation by the department,
 - b) past investigations
 - c) active and potentially active fraudsters

- d) information regarding bankruptcies, winding up procedures and liquidations.
- e) matters under investigation by other agencies
- f) intelligence relating to offences of fraud committed in other Police areas.

Structure and operation of the Commercial Branch unit

Those within the unit were a DS awaiting promotion, two additional DSs heading two teams comprising a total of five DCs, and an accounting technician. All three units shared the services of a clerk, a typist, an administrator and two accounting technicians. The Commercial Branch unit operated under a team system, with two of the DSs being loosely responsible for supervision of the work of the DCs in the unit. This one of the supervisory officers described as,

You don't want to look too closely and find something you have to deal with, too close supervision could lead to officers refusing to co-operate at all.
(PO1)

Examination of the operation of the teams suggested that the assignment of DCs to any one team was relatively flexible. Within a two month period several changes occurred in the teams' composition as officers were moved between units within Commercial Branch, and from the supervision of one to the other of the DSs. Distinct differences in supervision were apparent between the teams, which are explicable by reference to the manner in which work was allocated and the personalities involved. That there were only two teams tended to highlight the differences more sharply than may have been in the case in a larger group.

Allocation of investigative tasks was made directly from the DCI or DI to the individual officer, and not from them to the DS for distribution within his team as is the more usually applied police procedure of work allocation. Use of this system was suited to the supervisory system in operation whereby DSs monitored the work of DCs within their team but did not actively direct it. It was thought that this system resulted from the absence of OSU monitoring of cases. As described above, supervising officers were aware of the ambivalence of their supervisory role.

This system was not invariably used, as examination of files revealed. Complaints could be received and actioned by individual officers without first being referred to the senior officer. This occurred when officers received telephone enquiries (as discussed following in relation to *B*) or information that could be investigated, albeit to a fairly limited extent, prior to reporting the substance of the contact to the DCI or DI. As has been discussed above, this aspect of operation can be problematic as, in the absence of a clear remit, wastage of time can occur as officers pursue preliminary investigations that they believe warranted, a view that may subsequently not be shared by their supervisors. Given that this system operated, it was considered important to determine how officers decided what type of complaints to accept or reject as falling within their remit.

Another drawback with this system of case management was that it required the head of the section and his immediate deputy to play a primarily administrative role. It also required close and frequent contact between these officers and those conducting investigations and diminished the supervisory role of the sergeants. Where the system operated it would be expected that the senior officers' perceptions of what constituted the remit of the unit would be applied. When the system was circumvented there was scope for officers to apply their own perceptions and filtering processes to either accept or reject matters.

These features have both advantages and disadvantages. A number of officers stated that "any enquiry leads to the completion of a *pro forma*". Whilst it was true that at some stage, a *pro forma* sheet would be completed, it was found that some time could elapse before this was done. In this way an officer could undertake at least initial work before being subject to any supervision.

As a general rule, whatever the way an enquiry entered the office it would at an early stage be recorded, on the *pro forma* sheet, as an 'enquiry' and recorded as such in a running file maintained by the DI. Given that an officer may delay in reporting an initial enquiry there may be a delay in it being recorded in the running file. Whilst this was found to have occurred, the delays in recording the enquiry were generally short, being of weeks rather than any longer period. After the initial presentation, exploratory investigations were assigned to an officer by either the DCI or DI to determine a number of aspects, unless the matter was deemed not within the remit

of the unit. These discussions included the potentially divisive issues as to whether a matter fell within the remit of the unit and the likely investigative requirements, together with the less problematic as to the substance of the report. A decision that a matter did not fall within the unit's remit would be taken by the DCI, with input from the officer to whom it had been assigned.

The results of these investigations were presented by the officer and discussed, either at a case meeting or more informally, and a determination made as to whether the enquiry should be afforded 'project' status and investigated in greater detail. Once an enquiry had been assigned, although a degree of informal discussion might occur, the progress made in the ensuing investigations would be the subject of case progress meetings at some stage. It was observed that efforts were made by the two senior officers to ensure that these meetings were held on a regular basis and that officers reported back on, at most, a monthly basis. Brief details of their reports were recorded by one of the two most senior officers and endorsed upon the enquiry sheets under the date of the meeting, together with details of the targets that had been set for the investigating officer. In this way, despite an officer approaching one or both of the two most senior officers, meetings would still be conducted and records made as to what had been said by the officer during the informal discussion.

The timing of the meetings appeared to be almost invariably the decision of either of the two senior officers, and appeared to be based upon their estimation of the time that was needed to complete the investigative targets set during the meeting. As even projects in which virtually no progress was being made were still subject to regular meetings it appears that these meetings do not necessarily represent stages of the investigative process but are a combination of this and administrative supervision.

Processing of complaints by Commercial Branch

In one of the initial interviews of this stage of the study, the head of the unit described how a matter that came to the formal attention of the Commercial Branch was processed. The initial step was described as being that it was recorded as being an 'enquiry'. By 'formal attention' it is intended to convey the situation whereby a matter is recorded, by the police, as being officially dealt with, i.e.

investigated, by them. An enquiry could come to the Commercial Branch as a complaint; as information provided by a third party or by an informant. In addition matters might be sent for investigation from other sections within the same force, or other forces. In a similar manner matters or information might originate from other criminal justice or Governmental agencies (such as the DTI, CPS, Official Receivers' [O.Rs'] Office or Customs and Excise). In the description of the processing of matters, it was concluded that an "enquiry" was taken as being synonymous with "complaint".

Although the existence of a complainant, as the latter term may imply, may not be apparent on the initial referral to the Commercial Branch, examination of files revealed that the existence of at least one complaint was a pre-requisite for any enquiry to be accepted by the Commercial Branch in order that a full scale investigation could be undertaken.

The head of the unit described that once received by the Commercial Branch, all enquiries were briefly investigated to determine whether the substance of the matter fell within the remit of the Commercial Branch. Observation of the officers' work concluded that no generalisations could be made as to the extent or depth of these preliminary investigations.

Officers described how each matter was treated on its merits and afforded such initial investigations as was deemed, by the supervising officers (who were almost invariably the DCI or DI), to be sufficient to establish whether the enquiry should be accepted for further and more detailed investigation, or referred to some section of the force, other force or other agency for their attention.

If, after the preliminary investigation, an enquiry was deemed to warrant investigation by the Commercial Branch, it could become a "project". This term appeared to denote simply that the substance of the enquiry was such that it would require extensive investigation and that it had been found to fall within the scope of the Commercial Branch remit. The process of development of an investigation was not observed to proceed by set stages. It was apparent that an enquiry might continue to be investigated by the Commercial Branch for some time after the preliminary

investigations despite not being recorded as a "project". It is therefore not clear what purpose was served by the classification of an enquiry as a project.

Commercial Branch statistics

This system of management was introduced in November 1994, prior to which several differing recording systems operated. Prior to this time no records were maintained of those matters that came into the offices as enquiries but were not afforded project status and were, therefore, not investigated further. It is, therefore, not possible to ascertain the reasons for non-investigation by Commercial Branch of these matters. Nor is it possible, as it is with the post November 1994 matters, to determine whether these matters were referred to other police divisions; other forces; or other agencies, or whether they were classified by the Commercial Branch as civil matters at a stage prior to any detailed investigation having been undertaken and the length of initial investigations. In November 1994 a new system of record management was introduced, and a number of ongoing initial enquiries that had not previously been recorded were included into the records of the office. It may be assumed that inclusion of these matters in the 1994 records would swell the figures recorded in the previous years. This was not borne out by examination of the Commercial Branch's Annual Report for 1993, that nevertheless included statistics relating to 1994, and showed the number of new enquiries for the years 1990 - 1994 to have been fairly consistent.

Comparison of the figures for 1993 and 1994 revealed there to have been four more enquiries received in 1993 than in 1994. This may be seen as unexpected in light of the changes in recording process to the inclusion of all enquiries as opposed to only those that went to project status.

When the DI was asked about what appeared to be anomalies in the annual report, he referred the query to the officer who had been responsible for the preparation of the report, saying, "I don't want to hear him lie about this", having already indicated that he viewed the official figures as inaccurate and completely unreliable.

The officer responsible for the compilation of the report explained the details succinctly, stating when asked where he had obtained the figures, "I made them up"

(PO 6). In an apparent effort to demonstrate the report to have some credibility, this officer explained that he had gone through the existing records to determine the number of ongoing projects, then had asked other officers, "What have you got on your desk" before adding in a "few" (this being an unspecified number) of cases that he 'knew of' as being ongoing enquiries. The inclusion of the 1994 details added to the unreliability of these official figures. Commercial Branch apparently had been late in filing its report and so submitted its 1993 report in 1994. At this stage no explanation was requested of inclusion of the 1978 - 1992 figures, largely due to the impression of the unreliability of the methods used.

Examination of the statistics produced by the Commercial Branch for 1992 appeared similarly unreliable as several figures had been amended in pencil and the typewritten totals not altered. In addition some figures were marked with a pencilled question mark, raising doubts as to their accuracy and reliability. Furthermore there appeared to be no means of establishing how these statistics had been compiled as no-one in the office could recall who had compiled the figures nor the basis upon which they had been compiled.

Accordingly the diversity of recording styles made meaningful analysis of the official figures produced by the Commercial Branch difficult, if not impossible. This being so another method of data collection was thought necessary in order to attempt an analysis of the work of the Commercial Branch. It was decided to use the details taken from the hand-written enquiry sheets and case progress report notes (where applicable) to produce an analysis of the number and type of matters dealt with by the sections on an annual basis together with details as to the outcome of the matters. Where possible details of the dates of receipt of a complaint/query and its finalisation were recorded, as were the reasons for finalisation. These dates were recorded in order to determine the duration of police involvement in each investigation. The reasons for finalisation were recorded to ascertain a number of features, including the extent of referrals to other police divisions, to other police forces and to other agencies. It was intended that comparison of these reasons with the dates (indicating the length of time an officer had been engaged in investigations) would reveal the cost effectiveness of the Commercial Branch.

It was recognised that use of this method of data collection would have its drawbacks. The foremost of these was that no means existed of ensuring that all incoming enquiries had been recorded on these sheets, nor that all had been filed in the office filing system upon completion of the enquiry/project. There was no solution to this problem, but as there appeared no logical reason for the exclusion/non-filing of details to occur to any greater extent in respect of one type of query than another, it was assumed that the margin of error would operate equally across the year's work. Thus it was assumed that whilst there may be an element of under representation of the work undertaken, this would operate equally across the year's work, with no one type of case being artificially excluded.

When asked, the view of senior officers was that this method was more likely to present an accurate reflection of the work undertaken than the officially prepared reports and that very few report sheets would be missing. In the absence of any more reliable method, the method of using closed enquiry reports together with case notes for the years 1992 and 1993 was adopted to record details as to the type of matters that the Commercial Branch had dealt with for those years, together with the manner, explanatory reasons, and date of finalisation of these matters.

In some instances it was not clear that a matter had been finalised nor were dates of receipt of the initial complaint/query necessarily recorded. The latter aspect is a particular problem when its implications, that had not been immediately apparent, were recognised. It was only when examination of one set of case notes revealed that an enquiry had been received some eight months before being allocated for investigation, at which stage progress report meeting dates commenced, that it became apparent that use of the dates of initial and final progress report meetings was an unreliable indication of police involvement. At best these dates provided an approximation as to the length of actual investigations. This was not a completely satisfactory or reliable method, but was thought to be preferable to relying upon officers' memories as to when a matter had been allocated to them, and the time period that had elapsed from that time to the holding of the first progress report meeting.

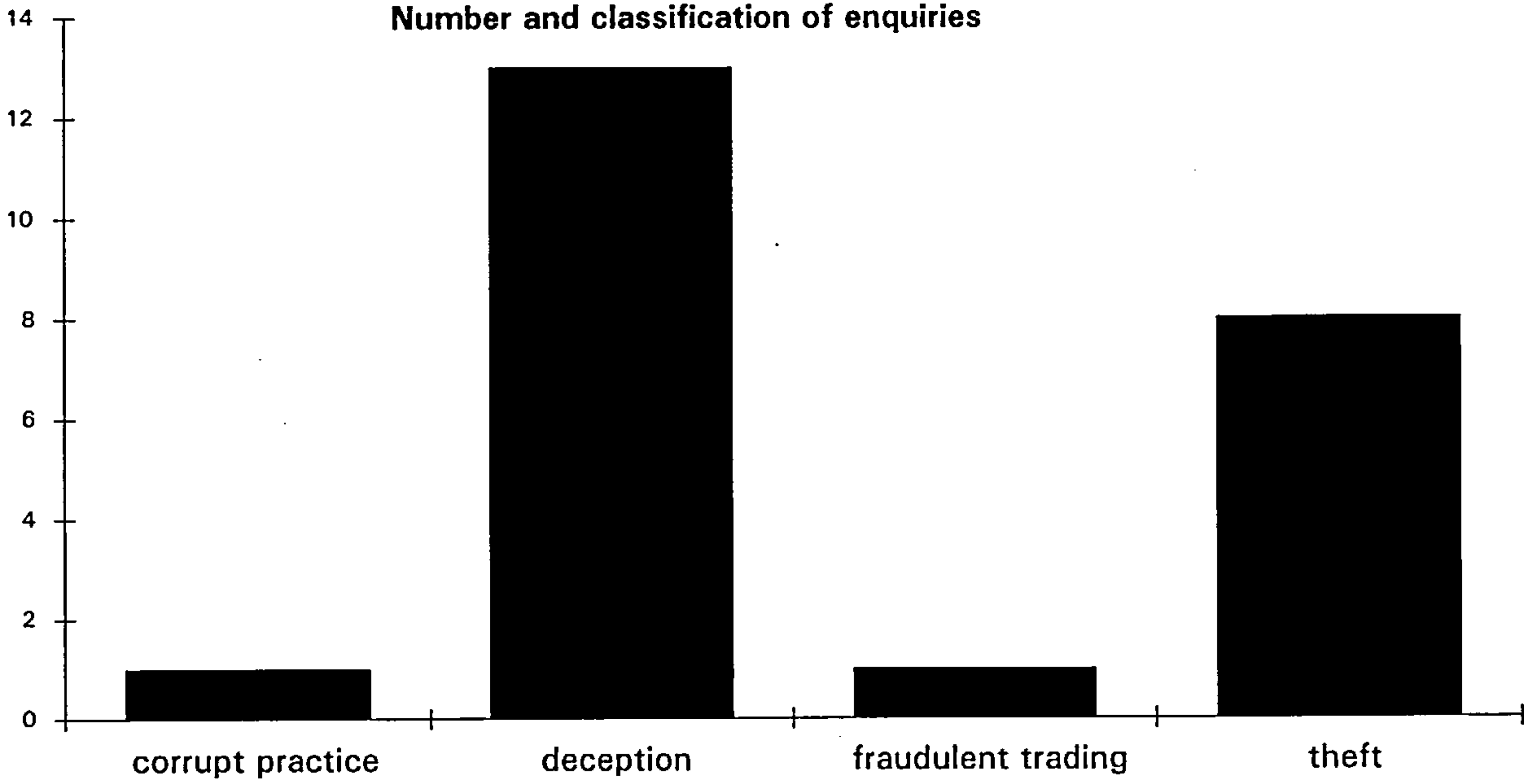
A further problem, in respect of the 1994 and 1995 matters, became apparent when the files of case progress meeting reports for those years were examined. This was

that the 1994 file contained only those matters that had been undertaken and completed in 1994, whilst those that had been undertaken in 1994 but not completed were filed in the 1995 file. To a more limited extent this problem occurred in the 1992 and '93 files, with some matters being recorded as taken on as projects in 1993, whilst bearing dates that indicated that they had been accepted into the Commercial Branch prior to 1993. Several methods could have been used to overcome this problem. The most obvious was to use the date of initial report, where available (or the date of the initial progress meeting where such date had not been recorded) and use this to sort the matters based on date. This, and other methods, were rejected as it was felt that this would present figures other than those recorded by the Commercial Branch. Within the unit the disparity between the dates was explained as being due to the fact that the initial investigation of a matter, to determine whether the matter fell within the remit of the branch; whether any criminal offence was disclosed etc., could be a protracted business, and that it was only after this had been done and sufficient details establishing jurisdiction found, that the matter might be taken on as an enquiry and afforded further investigation. Such further investigation could result in the matter being given project status and still further investigations carried out, or being marked 'no further action', referred to as being NFA-ed. If continued the matter might progress to trial, at which stage extended delays might have been encountered as papers were prepared, conferences held and dates set. The completion of these stages could, and frequently did, span well over a year. In this manner notes of a matter initially received in 1993 might well be maintained in the current year's file. This being so, it was thought best to compile the following analysis on the details as maintained by the Commercial Branch

These details comprise the statistical analysis of the work of the unit for a complete three year period, from 1992 - 1994 inclusive, together with an analysis of the January - June 1995 details. The results presented below, using the descriptions that were given to the alleged offences under investigation, show the number and type of matters received by the Commercial Branch on an annual basis, together with details of the outcome of those investigations and the reason for the outcome. The descriptions given to the actions under investigation are not necessarily legally recognised, although some may be. An example of the former is those actions termed 'advance fee frauds'. Although this may be a recognised description, it is not an offence under the current criminal law.

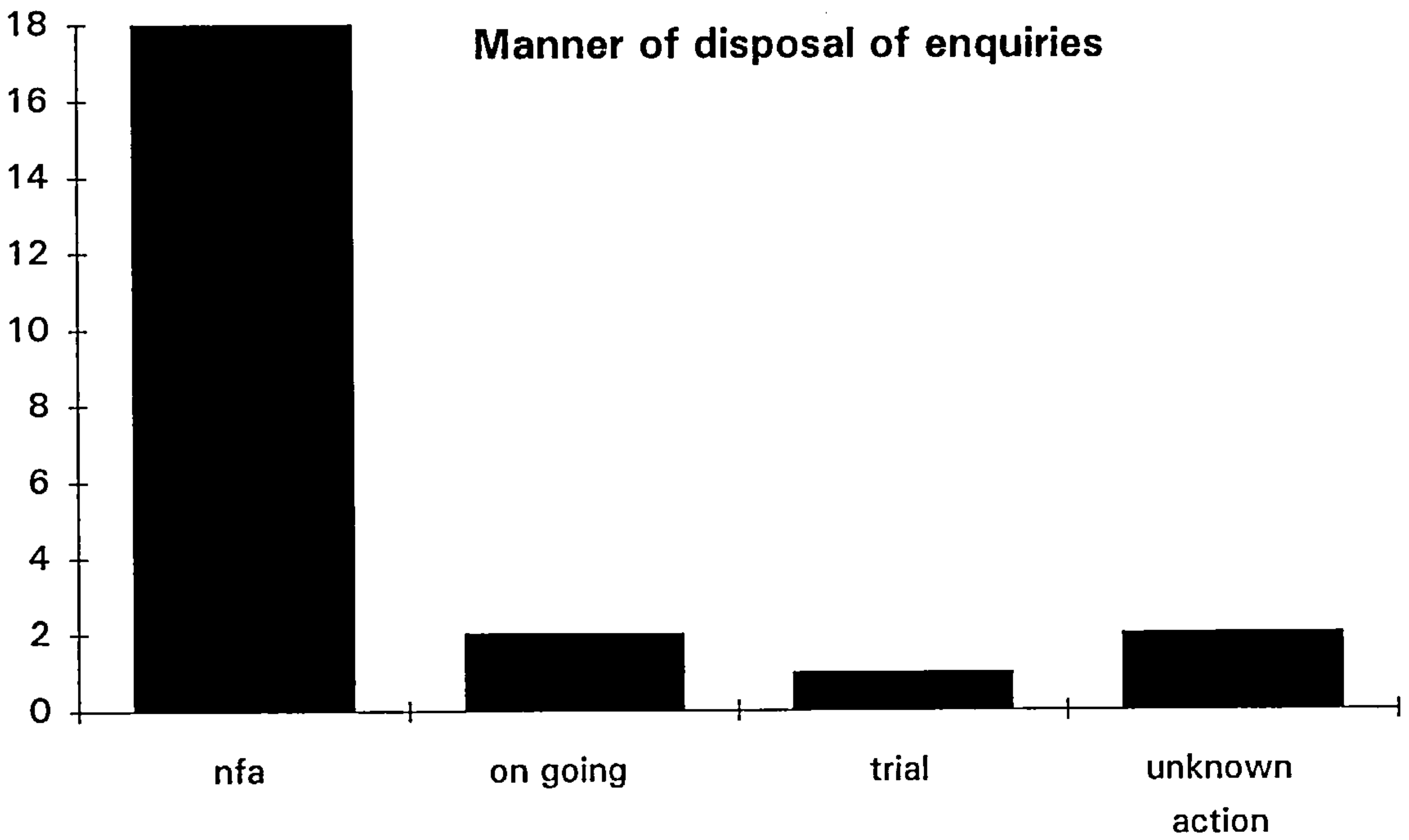
Commercial Branch 1993

Number and classification of enquiries

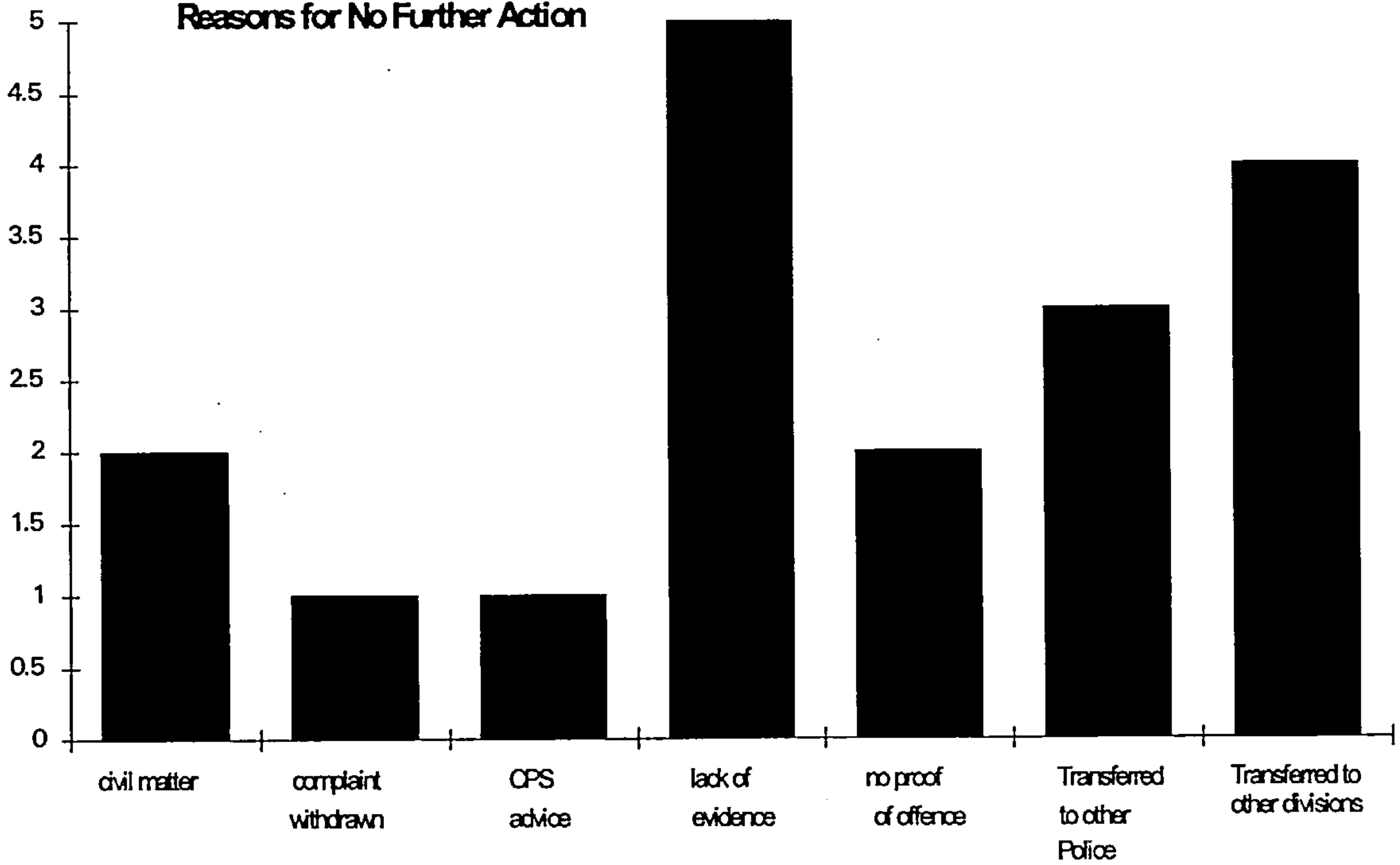


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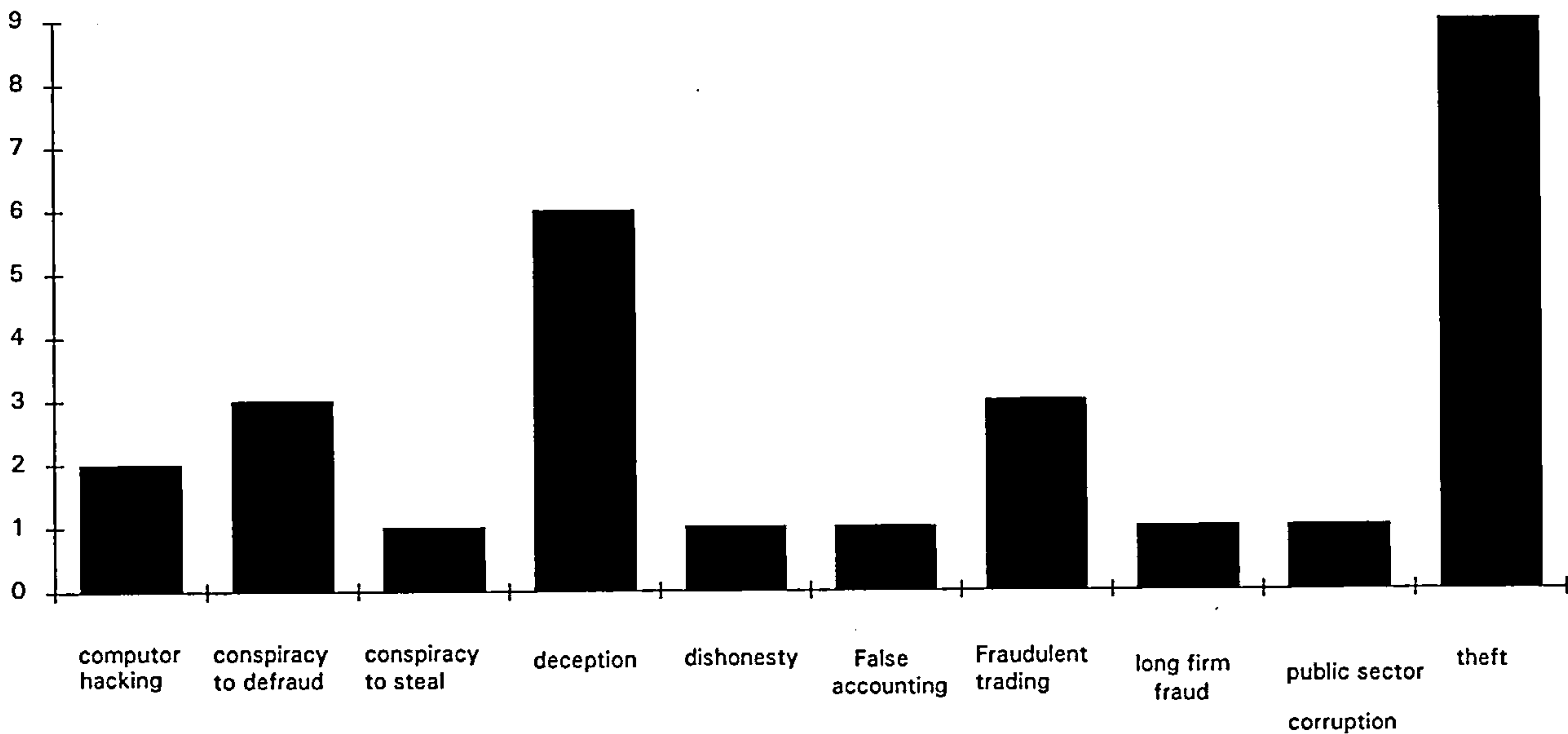
Manner of disposal of enquiries



Commercial Branch 1993
Reasons for No Further Action

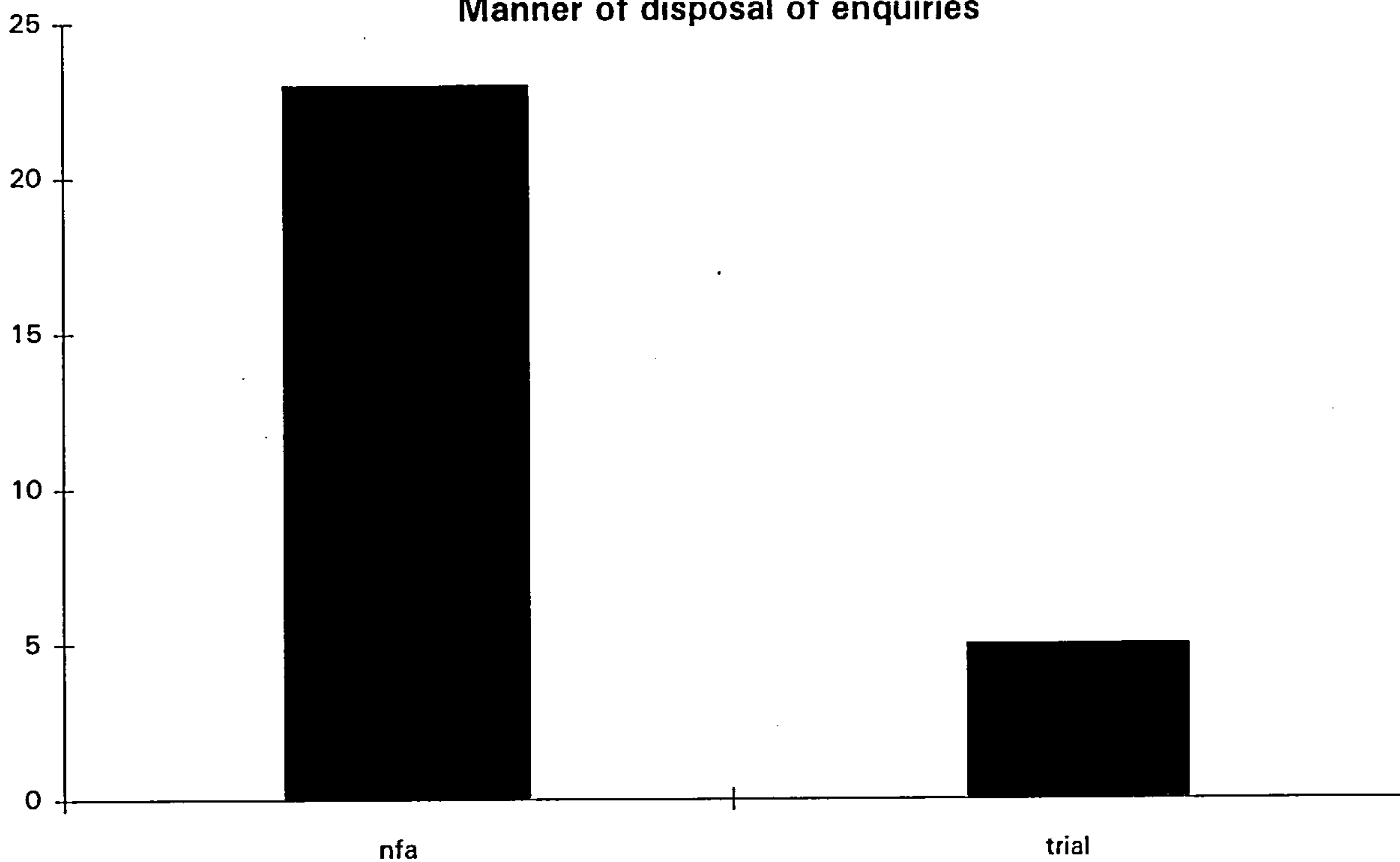


Commercial Branch 1994
Number and Classification of Enquiries



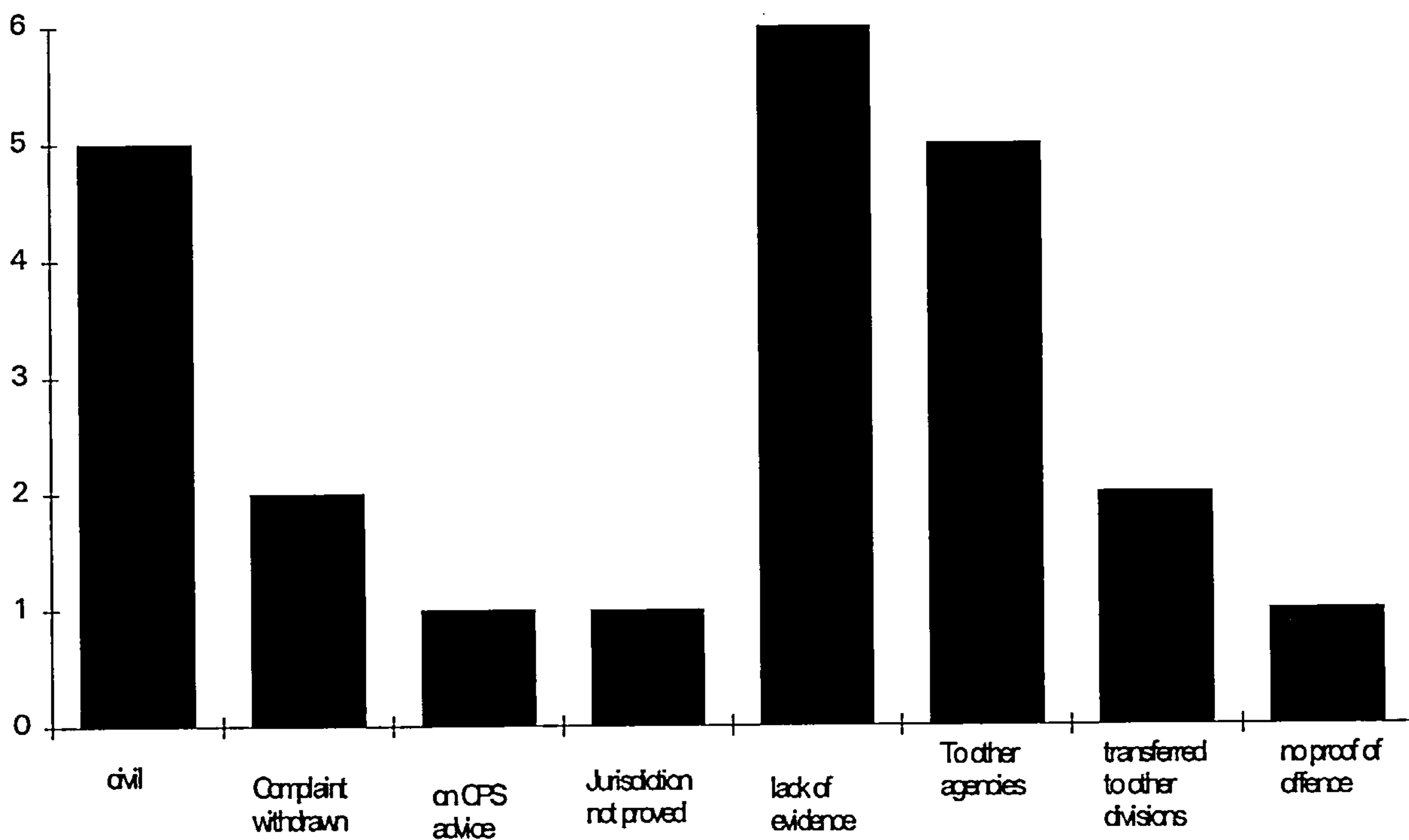
Commercial Branch 1994

Manner of disposal of enquiries

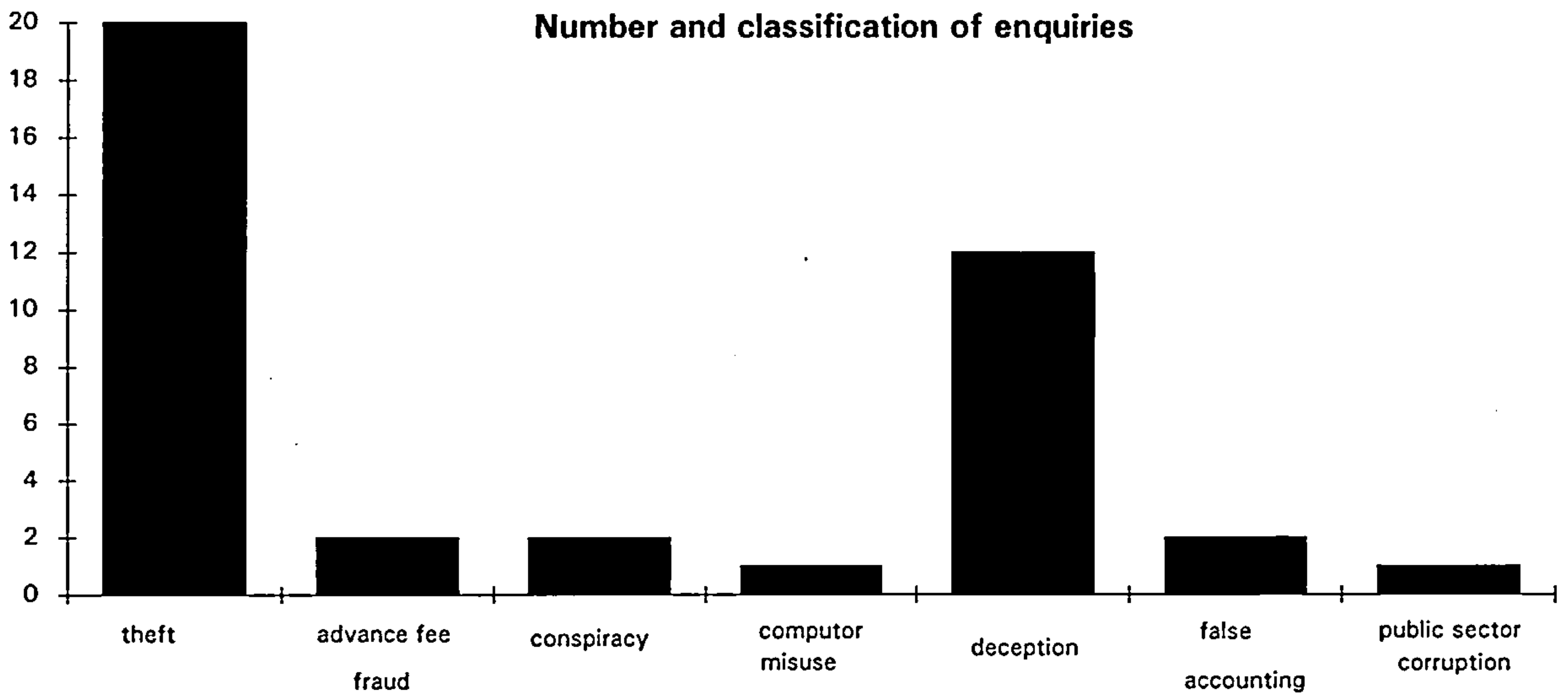


Commercial Branch - 1994

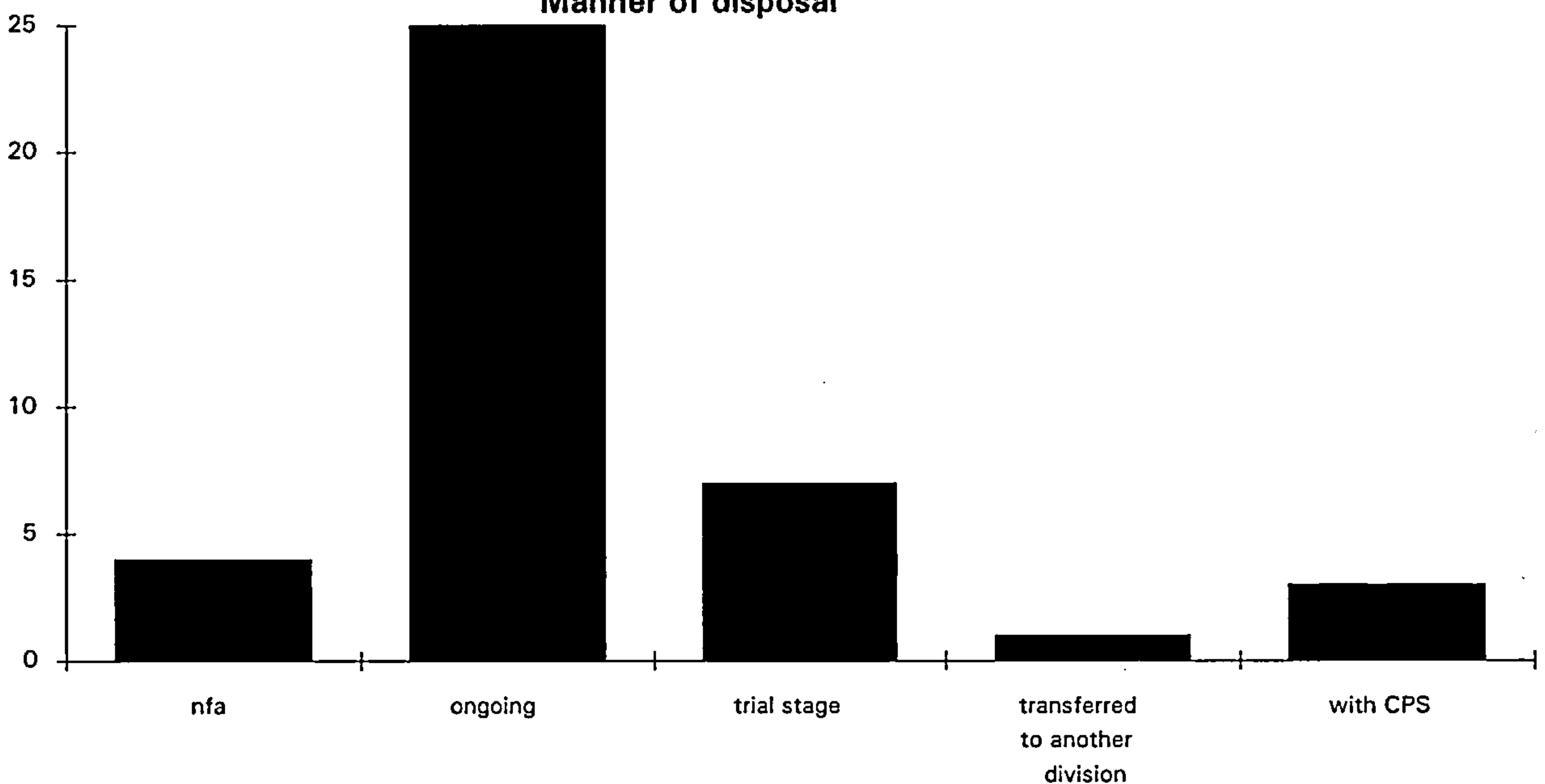
Reasons for No Further Action



Commercial Branch 1995
Number and classification of enquiries



Commercial Branch 1995
Manner of disposal



The above graphs depict the work and its outcome as recorded by the Commercial Branch. Even cursory analysis of these recordings suggest several possible issues, including terminology and whether reliable comparisons between years may be made. For example “dishonesty” is not an offence, although it may well be expected to be an element of most if not all of the cases investigated by the Commercial Branch. Equally the description of cases as being referred to “other agencies” is of little assistance in identifying which agencies the unit works with and the processes and practices used.

The second stage of this study was concerned with examining the reliability of these official figures, ascertaining whether they accurately reflect the operation of the Commercial Branch and examining some of the issues they raise, particularly what the unit deals with, referral paths of complaints to and from it and relations with other agencies.

What is "fraud" for the Commercial Branch

When questioned as to the content of the work of the Commercial Branch unit, none of its officers made mention of the official terms of reference. Most used the term fraud, but were to varying degrees hard pressed to define what they took this to include. When asked 'What do you define as fraud' answers included the comments,

I wouldn't be able to give you a 'law' definition. For me it's the theft of large sums of money by people in high positions in business, and firms of solicitors by means of false accounting, and criminal deception. A bobby on the beat would give you a different definition from us. (PO 1)

There's no such offence - it's to sort of commit theft, the way is usually by deception.... It's an umbrella to cover theft, sections 1-7 of the Theft Act. (PO 5)

I'd say that would be any theft where there's an element of trickery, not straight run of the mill theft, but some sort of trickery to conceal it. (PO 3)

Fraud, that's a hellva question, there's no true definition of fraud in law as you know, so it's investigations of financial crime, basically white collar crime, basically theft, deception, forgery in sophisticated ways. (PO 6)

Whilst comments such as these may be understandable given the legal system within which the officers operated, they also indicate the lack of certainty in the unit's remit that allows subjective determination as to whether a matter falls within that remit and of the decisions as to the evidence and charges that will be made at a number of stages in the investigation progress. In addition, the primary interpretation, that of the head of the section, may be expected to vary with changes

as to who holds that post. If this is so, variations in the unit's decisions as to whether complaints were accepted and investigated may be anticipated.

Accepting that it is not possible to lay down definitive rules as to what constitutes 'complex/high value' allegations of any form of criminal behaviour, it is suggested that the wording of the terms of reference is so loose as to severely limit consistent practical application. This supports the Commercial Branch applying its own definitions and thereby defining its parameters of operation. This may be desirable in that it can provide flexibility and allow investigation of differing types of activity should the social and economic situation appear to require this. However this flexibility can also limit uniformity within the unit were its officers to have unfettered discretion as to how they define their remit. Observation of their operation demonstrated that officers' discretion was not this wide, a degree of uniformity of approach being provided by the regular meetings with the head of the unit.

Whilst defining the terms "serious" or "complex" is difficult, other organisations, notably the SFO, have used a monetary amount to provide a definition. Were this to have been done in the Commercial Branch's Terms of Reference a level of guidance would have been provided to those officers referring matters to Commercial Branch, and to officers within that section receiving initial reports, together with their supervisors in determining the merits of accepting investigation of any such report. In the absence of stated limits no restriction operates upon the unit's freedom to determine the limits of its own operation. As has been previously noted, this may have had both desirable and detrimental affects upon the operation of the Commercial Branch. Whilst it can encourage flexibility, there is potential for a lack of uniformity in the initial decision making stage of investigations that can have important consequences upon the internal operation of the Commercial Branch, relations with other agencies such as the CPS and the processing by the criminal justice system of complaints of fraud.

Referral paths to and from the Commercial Branch Unit

The internally published terms of reference document supported the head of unit's description as to the manner in which matters could come to the Commercial Branch. The official statement of referral paths was that matters could be received

directly from members of the public; or directly from commercial concerns; by referral from a police division, via the Detective Chief Superintendent; by referral from the Department of Trade and Industry (DTI); or the Crown Prosecution Service's (CPS) Fraud Investigation Group or from self regulatory bodies under the supervision of the Securities Investment Board (SIB).

On the basis of this document it was apparent that the Commercial Branch could be approached by almost anyone, anywhere in England and Wales, in connection with a broad range of matters.

Examination of the police cases revealed that referral paths between other agencies and the police operated as a matter of routine, without any formal requirements being apparent. The case also demonstrated the unreliability of the referral paths and how several agencies, including civil non governmental bodies, could be involved in examining different aspects of the same matter.

The criminal investigation and case of *R v H* originated with an SIB investigation into *DG* (a company carrying out, amongst other activities, investments and financial advice) of which N was the managing director, major share holder and main operator. This SIB investigation was referred to the DTI, which conducted its own investigation for the purposes of petitioning for a declaration of insolvency in respect of the company. The DTI investigation revealed N controlled a number of additional companies, all of which were running overdrawn bank accounts. At the same time as the DTI investigations were being conducted a compliance officer from an independent financial advisory body reported apparent irregularities in the running of N's businesses to the police. The police investigations were complicated by several factors. The two most obvious were that the DTI and the independent advisory body required many of the police exhibits for their individual purposes. The problem for the police lay in the legal requirement of "best evidence", that original documents would be admissible in court whereas copies might not, where the originals were known to still be in existence. The second problem was that two separate police forces appeared to have received similar complaints and to be conducting substantially similar investigations. Officers in the force being studied described the other force's activities as,

What concerns us is that they're still dithering about. (PO 10)

The other force was described as "wanting to take on" the DG investigation, whilst the force under study did not want that force involved at all and wanted a broader investigation into other companies controlled by N.

A mistrust of the abilities of other forces was reflected by another officer who described the situation by reference to requests for statements to be taken by other forces of witnesses within their force area.

(It is) not feasible. Either they won't do it or won't do it well (PO 11)

It is suggested that these views relate to situations of two forces wanting to or dealing with the same case. That officers did not entirely denigrate the views and abilities of their counterparts was demonstrated in their explanation as to comments on matters of which they had no direct knowledge. A prime example was in relation to working with the SFO. When asked, separately, for their views and comments two officers commented that their views were from others,

At the social in (area) last year P (an officer from another force) told me if they get involved you can pull the plug. They treat you like you know what and there's very little local input. (PO 9)

I get everything I know about them from people who have worked with them. H (an officer from another force) hates them, thinks they are an absolute waste of space. (PO 1)

The informal and sometimes convoluted nature of referral paths was also evident in the case of W. A report of theft of documents was made to a senior member of the force being studied by a private individual. The value of these documents was given as being £10.00. The matter was investigated and the complainant subsequently advised that the matter would not proceed any further unless additional evidence was discovered. Some six years later the complainant provided what initially appeared to be additional evidence. Investigations revealed complications as to the admissibility and reliability of the evidence obtained, in part contained in a book written by the complainant. The complaint was considered politically sensitive and

for this reason was passed to the Commercial Branch, notwithstanding the value of the property.

The case of *B* was initiated by a telephone call from a financial institution in respect of what the police described as “internal discovery of irregularities” (PO 12). The police interviewed an employee suspected by the institution. That the institution’s own investigations continued was evident from the fact that after this police interview an internal audit was conducted, leading to the discovery of further irregularities. These were reported to the police and the suspect re-interviewed. This resulted in ten counts of theft being charged and the case being referred to the local CPS.

One of the unit’s matters that was in its early stages *project 67* evidenced how matters could be referred in-force and to other agencies in very informal ways. This case concerned information received by a different specialist unit within the force being studied, from one of that unit’s registered informants, involving alleged theft of clients’ funds totalling about £100,000.00. That information was relayed to the Commercial Branch, officers of which interviewed the informant. This was necessary to compile their own file. Having done so a decision was taken to refer the matter to an independent professional supervisory body, L. This was done and that body conducted its own investigation. In discussions of the case the police expressed concern as to that body’s lack of success,

The dilemma is do we leave it to L. We can’t go fishing when L’s been in and not found much.

In light of these comments, it may be asked why the unit had not conducted raids on the suspect’s premises as had occurred in the case of *N* detailed above. It was beyond the scope of the study to examine in detail the reasoning behind operational decisions, however, from conversations with the respondents directly involved in this case it was felt that an underlying issue for the police was the professional status of the suspect.

Time limits and delay

A feature of the work of the unit appeared to be the considerable delays that could occur from the time a complaint had been received by the unit, to the time when a final decision in relation to the investigations had been made. As discussed above in

relation to referral paths, the unit's final decision in relation to a complaint could have any of a number of outcomes. These included that the matter not proceed any further within the criminal justice system, by virtue an NFA decision, or that it remain within the system by referral to another criminal justice investigation agency, usually on the basis that the complaint fell more within that other agency's remit than it did in that of the unit. A matter could also remain within the criminal justice system by being referred to the CPS for that agency's decision to prosecute. In the majority of complaints investigated by the unit it was noted that the CPS had been involved in dealing with the case for some considerable time prior to the unit's final decision being made. By this is meant that, throughout the unit's investigations of any complaint, the advice of the CPS was usually sought well before the final decision to refer the completed investigation file to that agency.

Due to the wide research access granted, it was possible to examine the operation of the unit so as to assess both the nature of the delays that occurred and consider possible reasons for these. That delay was an inherent part of police work in general and the operation of the unit in particular was accepted and recognised by the head of the unit. In conversation the head of the unit made reference to a study of which he was aware in which analysis had been made of the working hours of a detective constable. This he described as concluding that in a month, approximately 40 working hours of a DC's time were spent advising and assisting the public or other police sections. This analysis he applied to the operation of the Commercial Branch stating,

There is no reason to think this has changed. (PO 10)

A time analysis study of the officers' work was not carried out although the head of unit authorised the study to be extended to include this towards the end of this stage of the study. It was suggested that a time analysis study be made of the operation of two specific DCs within the unit as an extension of the study that would not impede the two officers' operation and would provided management information useful to the unit.

The two officers identified worked from desks next to that provided to for the purposes of the research. The contents of their desks were clearly visible and

majority of their conversations audible from the desk provided. It would have been possible to observe and record their actions without this being apparent to the officers or others in the office. However it was thought that the proposed extension of the study in this manner would not be in keeping with the original undertakings and explanation of the study provided to the officers. Although an initially attractive notion, the research ethics of the proposal were thought to be so questionable as to be highly undesirable.

It was therefore necessary to inform the head of unit that this suggested extension of the study would not occur and to do so in a manner that did not question his judgement. This was done by explaining that due to the exactness of the observation and recording that was possible, it was thought that either or both of the officers would become aware of what was occurring and that this could be disruptive. The head of the unit accepted this. Without conducting a time analysis of officers' work it was possible within the study to examine which, if any, time limits applied to the operation of the unit.

Time limits

Blackstone's Police Manual notes,

In the law of England and Wales the general rule is that there is no restriction on the time which may elapse between the commission of an offence and the commencement of a prosecution for it. ...However, there are a number of statutory provisions prohibiting proceedings once a certain time has elapsed. (2001 p13)

For the purposes of investigation and prosecution of crime, the foremost of these is s127 of the Magistrates' Court Act 1980. This requires that prosecution of the vast majority of matters triable in the Magistrates' Court must be commenced within six months after the date of the offence. Those matters that are indictable only (triable in the Crown Court) or triable either way (in Crown or Magistrates' Courts) are expressly excluded from these time limits. As such, subject to case law, these matters may be investigated and prosecuted at any time after the commission of the suspected offence. The Attorney-General's Reference No 1 of 1990 (1992) 95 CAR 296 and case law significantly limits the apparent absence of time limits.

Attorney-General's Reference No 1 of 1990 (1992) 95 CAR 296 provides authority for the proposition that, even where the delay could be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. At this time the law stated that no stay should be imposed unless the defendant could show on the balance of probabilities that no fair trial could be held. The case law in the early 1990s supported the proposition that staying of proceedings as a result of delay was the exception as opposed to the rule. However in the mid 1990s this situation began to alter, with an increasing emphasis upon the European Convention on Human Rights.

At the time of the study officers within the unit worked on the principle that a delay of four years from commencement to conclusion of investigations was likely to result in abuse of process arguments. It was not apparent as to the origin of this view although the subsequently decided case of *R v Metropolitan Stipendiary Magistrates, ex parte Department Of Trade & Industry* (1999) supported the reasoning.

In *ex parte DTI* (1999) it was held that the magistrates had been entitled to stay criminal proceedings against the defendant as an abuse of process of the court as a result of the delay of proceedings being brought. The case began in September 1996 with allegations that the defendant had fraudulently removed company property between June 1994 and June 1995 and made false statements relating to the company's property or affairs on or about 10 August 1995. In March 1998 the defendant was informed of the decision to prosecute, and summonses were served in May 1998. At committal it was asserted that the proceedings should be stayed as an abuse of process as a result of the delay in bringing the proceedings. This application was granted, leading the prosecuting authority taking Judicial Review proceedings. These proceedings were unsuccessful.

By 2001 and *Attorney-General's Reference (No.2 Of 2001) sub nom R V J* (2001) [2001] EWCA Crim 1568 the shift in judicial focus was more distinct. This case held that the relevant starting point for calculating whether there had been an unreasonable delay under Art.6(1) European Convention on Human Rights was normally the formal charge or summons, criminal proceedings should only be stayed as a result of a breach of that right if the accused was prejudiced to an extent that interfered with his right to a fair trial. The accused had been charged with violent

disorder following a serious disturbance on 26 April 1998, suspects being interviewed in June and July 1998. On 11 February 2000, informations were laid against the seven accused and the matter went to trial on 31 January 2001. The judge concluded that the period of delay between the interviews and the summonses was unreasonable and that the appropriate remedy was to stay the charges, specific reference being made to consideration of the European Convention on Human Rights.

At the time of the study, this shift had yet to be reported, but in all agencies studied varying levels of concern that delays in the investigation processes might result in abuse of process arguments were voiced.

Type of delay

As detailed above, weekly meetings occurred between the DSs and the DCs they supervised. In addition all investigations were, at some point, subject to discussion on a monthly basis with the head of the unit or his deputy. Although the head of the unit or his deputy were the only two officers within the unit who were entitled to make an NFA decision, much of the day to day investigation was found to be governed by the decisions of the DCs as supervised by the DSs.

Despite this relatively focussed, directed and supervised investigation, examination of the cases revealed that most had been under investigation by the unit for several months, some for more than one year. It was apparent that delay could occur in one of several forms. Unlike studies of other forms of police investigation, examination of files revealed that delays within Commercial Branch investigations did not only occur in the file preparation, after the investigations had been completed.

i) Lack of co-ordination of effort between the investigators and prosecutors

In the first fortnight of the study the case of *R v H* was discussed with the DCI. One of the investigation team reported that he and an officer had been to a financial institution to collect details of an account held by the suspect.

We were surprised to learn that it was a mortgage account and not a savings account

This led to a discussion with the DCI, the DI and investigation team as to the possibility of another branch of the enquiry, described as “mortgage fraud” opening, separate and distinct from the investigations that had already commenced. Throughout the course of the study this new aspect of the investigation developed. However, at the same time, the original investigations were progressing, with two additional officers joining the team, specifically for the purposes of dealing with the exhibits.

Although predating the Criminal Investigations and Procedures Act 1998, and the statutory requirement to make both primary and secondary disclosure in all cases, the work of the unit was found to involve considerable time spent in dealing with requests for access to exhibits. In one case studied, *Operation Bill*, exhibits and statements were collated from approximately 200 witnesses, involving a number of potential criminal charges. Defence solicitors requested access to the material, arguing that this should be received and studied prior to their clients being interviewed. This was agreed, the DCI deciding that a specialist firm should undertake the photocopying and supply of exhibits. Copying of the material took two months. Many of the suspects had not been interviewed by the time this stage of the study had been concluded. It was subsequently learnt that one suspect was indicted on six, specimen, charges.

One of the original investigation team (PO 1) explained that of the original charges, the CPS had chosen six as representative of the criminality involved. They had decided to proceed with a prosecution on these charges on the basis that prosecution of any of the other, remaining matters investigated would not have attracted any difference in sentencing. However the police had not been informed of this, or the likelihood of a decision of that nature being taken. For this reason the investigation had involved many months of gathering, collating and analysing evidence and interviewing suspects on charges that were not relevant to the subsequent prosecution. This may be viewed as acting to re-inforce officers' negative views of the CPS. Cases such as this illustrate how lack of communication between the CPS and the police may result in perceptions within the police of lack of common ground between the two agencies. The officer who described what had occurred in this case, whilst accepting the CPS power to make such decisions, appeared to question the propriety of those decisions, without having any formal

means of making his views known or receiving any response from the CPS to such views.

ii) delay in identifying witnesses, exhibits and suspects

Examination of the investigations in *Operation Acorn* revealed the difficulties investigators could face in their presentation of their investigations. This was an investigation into a series of linked mortgage frauds. The original allegation was that the suspects had obtained a mortgage over a property that they did not own. A check of the Land Registry revealed a number of other properties registered to the suspects. These were examined further and it found the provision of finances to the suspects had been secured against properties that they did not own. In addition the suspects were found to have purchased properties on the basis of significant mortgage funding and thereafter not made any repayments. The individual mortgage applications were separate, yet linked, transactions. The first link was through the suspects. The second was by the applications falling into one of two types of deception. The one type of fraud was the making of an application based upon the deception that a property was owned by the suspects when it was not, the other was the making of serial applications for financing over different properties without repayment being made.

Due to the two types of fraud and that different groups of people were involved in each, officers faced difficulties in ensuring the continuity of exhibits and presentation of a case that flowed in both time and type of fraud. In addition considerable practical difficulties were experienced in obtaining original financial documents referred to in witness statements. Officers expressed the views that this was due to concern on the part of the financial institutions as to any prosecution bringing attention to their lack of diligence in scrutinising the applications.

iii) delay in receipt of complaint

Project 71/94 illustrated how considerable time could be placed, arguably misplaced, into an investigation that officers accepted was not going to proceed within the criminal justice system. As will be recalled, this matter was referred to the unit some 2 years after the suspected offence had come to light. A report was compiled for the CPS suggesting that the matter be NFAed due to the age of the complaint and delay in investigating. Despite this feature, the CPS had requested a full file be

submitted before any decision to terminate the investigation or other criminal proceedings was made.

Duration of an investigation case

One of the aims of this stage of the study was to assess the time span that could elapse from a complaint being received by the unit, through its investigation to the conclusion of the unit's responsibility for the matter. It was concluded that assessment or calculation of an average duration of an investigation would be neither reliable nor meaningful due to a number of factors. These included the unreliability of the unit's statistics; the findings detailed above as to the different routes into the unit and that a matter could be dealt with in any of a number of ways after its receipt by the unit. In addition, due to the opportunity for officers to receive complaints and commence investigations before formally recording the complaint as an investigation accepted by the unit, it was thought that there would inevitably be an element of error in any assessment of the length of time taken for investigation once a complaint had been accepted for investigation by the unit. It was thought that the extent of this error would be of less relevance than that arising from the unreliability of the data held by the unit. As will be recalled, a senior member of the unit had expressed considerable reservations as to the reliability of the official statistics produced by the unit. In addition these statistics did not take account of the fact that cases could, and frequently did, remain within the unit from one year to the next.

As illustrated by the graphs produced from the unit's statistics, of the three years operation studied, in only one did more cases proceed to trial than were marked "no further action" ("NFAed"). It is suggested little should be read into this as, but for the final year, the statistics did not record ongoing investigations. Examination of the files of the unit suggested these were a broadly accurate assessment of both the annual volume of work and the manner of disposal of the unit's cases. Unfortunately what was not recorded, as occurred in other departments within the Force studied, notably Discipline and Complaints and the Criminal Justice Administration Department, was the year in which cases commenced and the year in which they ended.

After it had been accepted that the official statistics were too unreliable and limited for use in calculation of the duration of investigations, consideration was given to other methods of calculation. The first was thought to be examination of the actual files. It will be recalled that the study had revealed that complaints could be received some months before investigations were commenced, in one instance eight months having elapsed. However more problematic was thought to be the determination of the end point of cases within the unit.

The obvious end was that of the final decision. This in itself presented difficulties as that final decision could be anything from a decision that the unit's investigations be referred to another agency, cease (NFA), be referred to the CPS for advice after which the investigative decisions could be taken over, to varying degrees, by the CPS, or that the investigations were complete and it could be referred to CPS for prosecution without any further involvement of the unit.

Due to the variety of different outcomes that could occur, it was thought that any calculation of an average duration would be, at best, of doubtful validity and of little relevance to the realities of the unit's work. A meaningful alternative was thought to be an assessment of the duration of the cases examined.

This revealed that, in relation to the total number of cases being investigated by the unit, a few would be investigated for a period of anything from several months to just over a year before a decision was taken by either the IO or the head of the unit that, for whatever reason, the matter would not be investigated further by the unit. Examples of this duration were *projects 61 and 71/94* (both detailed above).

These and other cases revealed the decision could be made on the basis of an assessment by either the IO or the head of the unit on the basis of any of a number of factors. These could include that the act complained of did not amount to criminality, that criminality was involved but of a type that did not fall within the remit of the unit or of the police or that for evidential reasons (absence of witnesses etc) a conviction was unlikely.

Other cases examined in the course of the study (such as *W*) revealed that, once accepted by the unit, a matter could remain “live” for in excess of six years, albeit that investigations tended not to be conducted after approximately the first ten months after the complaint was received by the unit.

It is suggested that these case should not be dismissed as “one off” instances. Due to the number of such cases it is suggested that the preferable approach would be that they should be viewed as a small but predictably consistent portion of the work of the unit.

Examination of files shows the largest proportion of the unit’s work involved on-going investigations. These files revealed that a matter could remain within the unit for anything from two to three years to in excess of five years. It should not be thought that this equates to investigation of the original complaint or that this was the investigation time. In a number of the files examined it was found that the initial complaint had triggered an investigation of the suspect or activities that led to discovery of more instances of criminality. The time a file remained with the unit included its referral to CPS for advice and the possible resultant further enquiries.

In addition, files remained “live” or ongoing in the unit throughout the committal and trial proceedings. Since committal and trial proceedings are more usually taken as CPS proceedings, inclusion of these stages in the calculation of the duration of police investigations may be challenged. It was thought, however, that, due to the need for the investigating officer (IO) to obtain additional information or provide clarification to the prosecution throughout the trial, this was justified in the context of this study.

Examination of those cases that progressed to trial made clear that the police decision making did not end with the referral of the case to the CPS for trial. After the referral of a matter to the CPS police involvement in investigations continued with responsibility for interviewing of suspects, ensuring all statements were of the content and format required. Following the coming into operation of the Criminal Procedure and Investigations Act 1996, statutory responsibility lay with the police for providing a disclosure officer. Whilst this Act placed responsibility upon the CPS for advising the

defence as to what constituted primary disclosure, the police retain responsibility for cataloguing, preserving and providing access (to both members of the CPS and defence teams) to this material.

As *Operation Trophy* revealed, these tasks could occupy officers for up to eighteen months as preparation was made for trial, and trials were conducted, the duty ending only with the finalisation of the criminal trial. Some six years later, in 2002, the impact of disclosure experienced by the unit was being commented upon by other branches of the police that dealt with allegations of complex criminality. The director of the National Crime Squad was quoted as stating that its operation was “seriously disrupted” due to 20 % of its officers being tied up dealing with disclosure,

Detectives are also disclosure officers who spend years going through disclosure issues raised by the defence. It can take five years for a case to come to court. (Orr-Munro 2002)

In relation to the Commercial Branch, it was thought that all these reasons would make reliable assessment of the average duration of an investigation impracticable. What was thought possible was the drawing of some general conclusions.

It was clear that the unit could receive complaints some months before investigations were commenced, several cases supporting the assessment that a six month delay was not unusual. Once initiated, investigations of anything up to a year could be conducted to determine if the original complaint fell within the remit of the unit. This was not required in all cases as the initial complaint could provide sufficient information to establish, either by the amounts of money or victims involved that the complaint was within the unit’s remit. In most cases examined, these preliminary investigations were concluded well within a year, most taking approximately six months. Once completed these would be presented at the monthly case conferences to the head of the unit and investigation parameters agreed.

Once this was completed, the duration of an investigation was assessed as being controlled primarily by the IO. It was accepted that, in theory, the head of unit could curtail investigations that deviated from the parameters previously agreed. In practice, however, officers could delay advising the head of unit of what they were

doing. In addition, when presented with evidence of new lines of promising investigations, particularly those suggesting a different type of criminality to that originally complained of, the head of unit appeared more likely to agree to the broadening of the investigation parameters.

Within the first three years of any investigation, no time limits appeared to be placed on the main investigations. As investigations neared being ongoing for four years, both officers and members of the CPS were found to comment on the possibility of arguments of abuse of process. In all but investigations involving very complex chains of evidence, exceptionally large amounts of money or large numbers of victims, such arguments were found to lead to a conclusion of investigations and submission for considerations for trial. In some cases, where the CPS had not been involved prior to this stage, the investigations were finalised and marked no further action at this stage. Where there was prior CPS involvement, the investigations tended to be concluded and the contents of the file referred to CPS. During the study access was provided to one of the unit's more complex investigations. Due to CPS and police concerns as to abuse of process arguments, investigations were concluded just over four years after receipt of the initial complaint. Some two and a half years later the criminal trial concluded.

The overriding conclusions from this portion of the study were that lack of set investigation time limits operated. In addition absence of formal mechanisms for involvement at set stages of the CPS and allied absence of focussed review of IOs' decisions could result in cases being protracted over a number of years or ended after considerable time but little progress. The decisions of individual investigators could limit or expand the investigations from the original complaint. The primary time limit, found to be applied by officers and CPS whilst cases were still in the domain of the police, was that of abuse of process argument.

Relations with other agencies

Examination of the police files revealed that referral of complaints could and did come from a number of different sources and routes. Despite the findings detailed above, that the unit was demonstrated to have dealings with a number of different agencies and organisations, officers stated that they did not have much contact with

other agencies. Whilst it was not possible to provide a definitive list of those described in the statistics as "other agencies", examination of the files revealed that the most extensive contact was had with the CPS.

a) CPS

One officer described the relationship as,

Ours is different from other police. On the fraud side it's so involved that there is quite a lot of contact, but they don't understand how long it takes.
(PO 11)

Explanation of this sentiment was provided by reference to a case the officer had dealt with,

I interviewed this man as a potential suspect and took his statement. Now they want me to make it into a witness statement.

The statement was shown, being a 100 page statement under caution, that in the particular force is typed up in a question and answer format, making transfer into the statement of a single person, time consuming. The officer explained that as the case was to be sent to committal proceedings in some two months time, the full file was required by the CPS one month prior to the committal date, for the purposes of fulfilling legal requirements in respect of disclosure. These time limits provided the officer with a month to complete the statement, a situation he described as,

You can only stretch an elastic band so far. (PO 11)

Examination of cases and attendance at case conferences also revealed the nature of the relationship between the officers of the unit and CPS. Examination of the comments in case conferences and interviews with the officers revealed that their perceptions of the relationship with CPS were based on the actions and approaches of individuals within both agencies.

In a briefing by a DC to the DCI, on *project 71/94*, the former commented on the CPS decision making by reference to the individual prosecutor,

It's that woman; she won't make a bloody decision until she has a full file.
(PO 12),

71/94 was a complaint from an insurance company that had been received two years after the events complained of. The DC had sought advice from the CPS as to his views that the complaint should be "NFAed" due to the lapse in time. The CPS reply had been that a full file was required in order to advise, effectively requiring a full investigation. With the particular lawyer in question it appeared accepted, but not liked, that advice would not be made in the absence of a full investigation.

The tension between the roles of the police, investigation, and CPS prosecution, in respect of complaints was succinctly described by another officer as,

They think they're in control, we think we are (PO 2)

The same officer spoke of his good working relationship with a specific lawyer in CPS, whose office he would visit to request advice, would obtain verbal advice as to what evidence was required and what not and would conduct his subsequent investigation accordingly.

It was apparent that some CPS lawyers conformed to the police perception that contact with them was,

... always formal. The woman I saw yesterday will have been writing down what I said as soon as I left the office and I did the same. There'll be a conflict some time and I keep my notes so I can say 'You didn't say that'. (PO 11)

Whilst others operated informal lines of referral and advice, the operation of which largely depended on inter-personal relations than formal procedures.

When (X) was first arrested, my boss wanted to make sure before we went any further, not to waste time, so during the weeks following arrest CPS was approached and (they) advised to go ahead.... I will probably see him (CPS lawyer) again, as he will be responsible for the case (PO 7)

b) Other agencies –

i) the Official Receivers Office

When asked as to relations with the Official Receivers Office, one officer commented,

... very little contact... It's all one way. We don't have a good relationship. They want information from us, but it's all one way way, they won't tell us anything. (PO 11)

Another, described his relations with the same agency as

...very helpful. It's all been one way. They've wanted nothing from us (PO 2)

ii) the Serious Fraud Office

It was apparent from interviews and examination of cases that the unit had little contact with the SFO. Comments of those officers who had dealings with the SFO suggested that formal procedures, such as the setting of financial guidelines by the SFO, did not result in that agency accepting responsibility for the investigation and prosecution of all matters that fell within those guidelines or for smooth relations between the two agencies, the officer viewing the application of the guidelines as,

One of the things they'll look at is whether they can win this one. That will be one of the unofficial criteria that they apply (PO 9)

Another officer described inter-agency relations in general as,

We're working to different agendas. When you bring in things like performance indicators and budgets it's not surprising that we don't see eye to eye. (PO 1)

Responsibility for "fraud"

The comments of officers and examination of cases on which they had worked suggested potential for disagreement between the various investigative agencies and independent organisations as to whether one or the other should investigate a matter. Considerable scope for complaints of fraud to be rejected by the police, other investigative agencies or regulatory bodies and thereafter the CPS or SFO, indicated the possibility of complaints escaping attention from either of the criminal or civil justice investigative, prosecutorial or regulatory agencies.

Due to possible internal uncertainty as to what matters fell within the remit of the Commercial Branch, all officers within the unit complained of their work situation,

many doing so strongly and outside of the research setting. The comment of officers that,

.. .there's a load of bloody rubbish (PO 12),

to,

...severity levels are going down all the time. (PO 9),

may be viewed as indicating the officers had thoughts on the subject. It was the extent to which such comments were made, across all ranks, that suggested that this situation was a matter of some importance to the officers.

Uncertainty as to what "fraud" is for Commercial Branch

In a similar manner the unit's terms of reference did not state how "commercial fraud" differed from any other type of fraud, or what constituted a "specialist field". The terms do not provide a clear, functional basis upon which enquiries can be assessed. It is therefore not surprising that their content was not well known by officers within any of the Commercial Branch units. In such a situation it is unsurprising that a commonly repeated comment was that,

...this sort of job should never have been taken on,

without officers substantiating their comments or providing a definition of a "proper" job for investigation. This may explain that, whilst this and similar comments were made, no direct confrontations between officers occurred in relation to the investigation of any matter.

The terms of reference of the Commercial Branch refer to its "expertise", and it was referred to in conversation by CID officers as a "specialist" squad. Interestingly, the Force's Good Practice Guide did not include Commercial Branch under its list of specialist squads. The 1993 Annual Report detailed of the operation of the Commercial Branch on the final page of the Report. Under the index, The 5 Key Service Areas, the topics that preceded the very brief eight line report on the Commercial Branch were, calls from the public; community consultation; reassuring the public and keeping the peace; traffic management and crime management. It is in this section that the Commercial Branch report is the penultimate entry. In this Report no mention is made of the millions of pounds 'at risk' with which the Commercial Branch dealt with on an annual basis, whilst anti-crime initiatives such

as Operation Picasso, directed against 'graffiti artists' who caused £15,000 of damage is mentioned. The importance of this, it is suggested, lies in that it was viewed by the majority of officers within the unit who were interviewed as reflecting the actual force perception towards fraud and its investigation. It was felt that 'they don't understand fraud' and that this caused the unit to be regarded as less important than other sections. Throughout the study it was noted that officers within the Commercial Branch unit perceived a number of apparently innocuous factors to be a slight upon the work of the unit and themselves as investigators.

Unlike other police units and sections, the Commercial Branch had no set 'ground' (Holdaway 1983 p36) that its officers could call their own. By virtue of its terms of reference, the Commercial Branch operated in a manner different to all other sections within the police force. It was specifically authorised to accept as its responsibility that, which all other sections within police forces try to avoid, matters involving investigations in more than one force area. This being so, there were no certain and established territorial limits for its officers to work and establish power relations within. Accordingly not only did the nature of its work differ from that of other sections within the police, but also the manner of its operation.

Holdaway (1983), in describing the operation of a different section of the same force, wrote of the 'primacy of police control' that other organisations were obliged by the section to respect in relation to its work. The situation in which the Commercial Branch officers operated differs considerably from the more traditional police culture, as described by Holdaway. The unit relied upon the assistance of various groupings that other CID squads will never deal with, such as the banking and financial sector. Whilst these sectors can be obliged by court order to provide certain information or documents to the unit, the unit had no control over their operation as does general CID over a number of criminal justice or social welfare agencies.

Other features operate to distinguish the unit from general CID. The Commercial Branch was described internally as being 'the most autonomous section within the force' (P.O. 10), a description used and accepted by officers from other sections of the force. This has several important effects. Firstly it permits operating procedures that are not to be found in the majority of the force. The prime examples of this are the supervision of work within the unit and contact with the CPS. Force Regulations

stated that use was to be made of the Operational Support Units (OSU), formerly known as the Administration Support Unit (ASU). Commercial Branch did not route its requests for advice nor its submission of files to the CPS through the OSU, but through its own senior officer. To function effectively this system requires close supervision of the senior officers within the section. This could either take the form of the senior officer maintaining direct supervision of the work of all officers, rather than use the more usual supervisory pattern of inspector or higher ranking officers supervising a few sergeants, who in turn supervise a larger number of constables. Alternatively the DSs fulfil a close supervisory role whilst referring all matters in which they feel investigations to be completed, or requiring CPS advice, to their senior officer. The system can produce repetition and may explain why the former system was used within the unit.

Unlike other sections, both uniform and CID, the Commercial Branch officers could virtually never generate 'action' to fill in the dull portions of the day. Their work involved no fast cars or urgent calls for assistance. Instead they were either in the office, or out, obtaining statements or information from individuals, a number of whom worked within the professional sector. If officers were in the office they would be working on statements, preparing reports or trial documents or talking amongst themselves. Some days were marked by extended periods of relative inactivity, with much of the conversation being of a social nature, or a large portion of the day spent answering the telephones, particularly if a number of officers were out of the office. Raids upon premises and dramatic arrests were few. Most of the Commercial Branch suspects were requested to attend rather than officers being sent out to arrest them. The daily work of officers was remote from that of uniform or general CID and there was little 'action' that could break up the routine.

Yet some elements of the traditional police culture were discernible, as may be expected given that all officers joined the section having spent time in general CID. All officers spoke of the 'outside' when referring to non specialised, usually CID, police work and it was their work on the outside that formed the substance of the majority of 'tall' tales. The impression given was that excitement was to be had on the 'outside' rather than in the operation of the Commercial Branch. In such circumstances it may be expected that there would be less communal spirit than in other sections. At the time of the study this appeared to be the case. Groupings

that were said to have previously existed had been largely broken down by retirements and transfers. Thus not only did the unit lack a ground, it also lacked a sense of alliance amongst the officers as a whole.

None of the officers within the unit mentioned exhibited any of the proprietary behaviour described by Holdaway (1983), in respect of complaints of fraud. They appeared resigned to playing second fiddle not only to other agencies and institutions but also within their own organisation. This manifested itself in a widely held belief amongst a number of those officers who had been in the Commercial Branch for any length of time that they were overlooked for promotion and career advancement, and that they would fail to achieve either if they remained in the Commercial Branch. The fact that during the period of the study three officers successfully applied for positions in other sections, all of which carried prospects of promotion and career advancement did not affect this view, but re-enforced the belief that officers had to leave the section to obtain advancement. Given that it has been accepted since the time of Operation Countryman and the investigation into the West Midlands Serious Crime Squad that officers from within any section should not be promoted to a high station within that section, but in other sections, it is suggested that there was nothing out of the ordinary in this.

Unlike the work of other CID sections, Commercial Branch work was primarily desk based, and relied upon analysis of figures and documents. Its detection lacks the machismo and excitement that form a considerable portion of the 'canteen culture' of the police (Reiner 1985). All officers in the Commercial Branch spent several years operating in terms of that culture, and may unwittingly have been applying its emphasis on excitement, action and danger to their present work, that clearly lacked these characteristics. In this manner they could become their own harshest critics. The opportunities for this to occur were thought to be increased by the fact of their working in close proximity to sections such as Drugs and CIS, that embody the "canteen culture" values.

Whether this perception of the work of Commercial Branch was justified could not be ascertained by this study, as it did not seek the views of police officers in postings other than Commercial Branch as to the operation of the unit. Given that, during the time of this study, a number of officers applied for transfer or attachment to the

Commercial Branch, may be viewed as indicating that the negative views of officers within the unit as to its operation were not, necessarily, reflected in the general perception of the unit. This may be supported by the assessment that a poor perception of the unit and its work was apparent in the comments of a number of its longer serving officers, than those officers who had joined the unit more recently. The latter group viewed posting to the unit as providing opportunity for acquisition of greater skills and career advancement.

A number of officers commented that their work in the unit was under-appreciated within the force, most commenting that it was not properly understood. Comments made by Cohn in discussion of the police: public relationship may be applied to the situation of the Commercial Branch and the broader body of the force, if 'citizenry' is replaced with 'force',

There is no doubt that the police suffer from the fact that their role has been misunderstood. But the police frequently contribute to this level of misunderstanding by their lack of concern, unwillingness to share information, and/or lack of desire to involve the general citizenry in policy formulation and implementation. (Cohn 1979 p11)

Whilst 'lack of concern' should not be held to suggest indifference within the Commercial Branch in respect of their work, it was clear that the feelings of ambivalence in the unit as to the worth of that work were communicated to those outside the unit, rather than positive impressions as to the importance and extent of the work. A higher profile could be given to the work by ensuring that other sections know more of its work. This has been successfully done by one of the units, FIU, who enjoyed direct contact with a number of other divisions and sections throughout the force area. Unlike the Commercial Branch unit, FIU had clearly defined roles. It may be that this feature assisted both the FIU and other sections within the force in that there was certainty as to what the FIU did and when it should be involved or approached for assistance by other sections. It is possible that a sharper focus upon what is and is not the remit of the Commercial Branch unit may assist in creation of a similar situation within that unit and in the force.

The entire Commercial Branch was described by both its own officers and senior management within the force as operating in terms of an unusually high degree of autonomy. This autonomy can be seen to operate on two levels. The first is that, as has been previously described, the usual supervisory arrangements did not operate as they did in other sections, with the work of a large number of constables being monitored by a smaller number of sergeants, who in turn were responsible to still fewer inspectors. Secondly the unit was not subject to the same type of control and direction from senior management/commanders as were other CID sections.

The implications of these factors are that the unit could set its own terms of reference and criteria for accepting (and thereafter conducting) investigations, or for declining to do so. The consequences of the second aspect are that decisions of the Commercial Branch might not necessarily either be referred to (or back to) other sections within the force, or to other forces or agencies, or that investigations might be stayed as *no further action (NFA)* is taken.

Accordingly the decision-making process as to whether to accept a matter for investigation is of considerable importance. It is this that, in all probability, will be the sole determinant as to the outcome of a matter coming to the attention of the unit.

Examination of the views of the officers within the unit revealed the extent of the lack of clarity, and the consequences of this in the creation of personal criteria. This is of importance given the initial question asked of all respondents was 'what is the work of your section'. As was anticipated, all answers mentioned 'fraud'. This uniformity permitted the asking of questions designed to determine what this term encompassed and its practical application within the unit. These were (1) what is fraud, (2) what type of frauds do you deal with, and (3) what type of frauds do you not deal with.

Whilst officers tended to define fraud either in terms of type (mortgage frauds, advance fee frauds etc.) or in terms of form (involving substantial amounts of money or complex investigations), the answers to question (3) revealed two interesting features. The first was that considerations of both form and type were applied in

determination of what was or was not an appropriate matter for investigation by the unit. The second was that despite appearing to apply the same criteria officers within the same section could apply very different criteria as a result of the lack of definition as to what constitutes large amounts and serious or complex investigations. One officer (P.O. 1), in referring to monetary limits within the terms of reference (that do not exist) mentioned the sum of £20,000, whilst another (P.O.3) took the limit as being £ 40 – 50,000.

The relationship between type and form was shown to be bound up with this limit, the same officer stated,

I would not take anything that was a simple theft,

theft being the criteria he applied to acceptance of a matter as being within the unit's remit. "Simple thefts" were explained to be 'shoplifting, that sort of thing'. Further questioning revealed that 'non-simple' thefts were those where a number of complainants existed or a lot of money was involved.

Use of these criteria was thought to be problematic, as cases revealed, notably that of *W*, involving £10.00. In addition, allegations of criminal conduct involving relatively small amounts could nevertheless be complicated matters, due to the nature of the conduct and the investigations required to prove it. The case of *R v H* at first involved relatively small amounts (£100,000), but required examination of several different business concerns and business accounts, some of which were based in foreign jurisdictions. Equally the reverse could also be true, allegations involving large sums of money being simple to prove and investigate. Complications could arise from the status or position of the parties involved as much as from the manner in which the deception was achieved, as suspected in the matter of case 67.

It was concluded that complaints could be referred formally and informally to the unit, and to individual officers within it. The perceptions of the officer receiving a complaint were of considerable importance in determining not only the form of investigations, but also whether an investigation was warranted and its extent. Given the diversity of referral paths, it was concluded that these perceptions would not necessarily be those of the head of the section, but could be of individual investigators who received a telephone referral. Whilst the unit operated reviews of

officers' decision making and progress of investigations, contact with other investigative agencies could result in complaints not being accepted for investigation by an agency or by more than one, leading to possible confusion and conflict amongst the investigators that did nothing to progress the case in a coherent manner to a stage at which it could be referred to a prosecution agency.

Of those investigations that were processed beyond the first enquiries, most of the unit's cases were found to be referred to the CPS for prosecution. Only a small number of the unit's cases were found to be referred to other investigative agencies or to prosecutorial agencies other than the CPS. Referrals to the CPS were found to usually occur in the early stages of an investigation for advice. Case examination and officers' comments indicated that the processes by which CPS advice was sought and obtained were not consistent or reliable, personal relations impacting significantly upon the nature and outcome of contact between the agencies.

It was apparent that neither the unit nor its prosecutorial counterparts within the CPS operated a shared definition as to what constituted fraud or how such cases should be processed. As such it was concluded that a considerable number of factors could influence the investigation of a complaint, chief amongst these being personal definitions, perceptions and approaches to the role of the respective agencies. The main focus of the study was the progress of complaints of fraud through the criminal justice system. This stage of the study concluded that this was erratic and selective, with the suggestion that progress through the civil justice system was similarly complex and subject to chance.

The next stage of the study was to determine how matters progressed through the criminal justice system once they were not within the sole domain of the police and were moving or had moved into the stage at which they were being processed for prosecution. Examination of police files and discussions with officers suggested the CPS to be the agency with which the police had most dealings as complaints of fraud progressed through the investigative stages to prosecution.

CHAPTER SIX

THE CROWN PROSECUTION SERVICE (CPS)

During the study undertaken with the police, examination of police files and discussions with officers showed that, in the investigative stage of a complaint of fraud, the majority of police dealings with other criminal justice agencies were with the CPS. This confirmed the findings of the literature review, that the CPS was the criminal justice system agency with primary responsibility for prosecuting police investigations.

It was ascertained that a specialised group within the CPS operated in respect of fraud prosecutions. This was the Fraud Investigation Group, generally referred to as FIG, the offices of which were based in London. Whilst the local CPS offices occasionally dealt with Commercial Branch investigations, examination of Area CPS files revealed that Area offices were more likely to deal with investigations involving smaller amounts of money; smaller numbers of complainants. It was concluded that, in general, local CPS offices dealt with the less complex investigations; the more complex or larger (in terms of amounts or numbers of complainants involved) cases being referred to the FIG.

As, in the study population, the CPS was the prosecuting authority for all police investigations, the aims of the next stage of the research were to discover what criteria were used to determine which police investigations went where and how those whose task it is to advise and review matters that have been investigated related to the police who undertook that investigation.

Status of CPS

The CPS is a creature of statute. The 1986 Prosecution of Offences Act provides that the Director of Public Prosecutions shall appoint a staff sufficient to carry out the functions of the DPP, these being,

- (i) to take over the conduct of all criminal proceedings, other than specified proceedings (being those specified by the Attorney General) instituted on behalf of a police force...
- (iv) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences

These roles are governed by the Code for Crown Prosecutors that states,

The police usually start proceedings. Sometimes they may consult the Crown Prosecution Service before charging a defendant. Each case that is sent to the Crown Prosecution Service is reviewed by a Crown Prosecutor to make sure that it meets the tests set out in this Code...

Review, however, is a continuing process so that the Crown Prosecutor can take into account any changes in circumstances. Wherever possible they talk to the police first if they are thinking of changing the charges or stopping the proceedings. This gives the police the chance to provide more information that may affect the decision. (HMSO 2000)

The Code details the evidential ("realistic prospect of conviction") and public interest tests that are applied in reaching these decisions.

As one of the concerns of this stage of the study was to determine when and in what manner the CPS would become involved in a case, examination is made of the terms "advise" and "review" in practice, given the considerable prosecutorial discretion provided for in the Act. It was thought that any agency empowered to operate "to such extent as considered appropriate" was likely to exhibit variations in practical application of the Code for Crown Prosecutors. Interviews with police officers supported this assessment, and the suggestion that different definitions could be given to the same words by different agencies, with potential for differing perceptions and a mutual lack of understanding between the police and CPS.

It was thought that in carrying out their functions of "advise" and "review", prosecutors would have the greatest degree of contact with police investigations. For this reason examination of these two terms is made to determine what, for CPS purposes, constituted a case and whether this differed from the police definition.

Examination is also made of the term fraud, to determine if its use within the CPS is as undefined as in the police. It was thought that if the perceptions of investigators and prosecutors differed, potential exists for differences in practices and working relations between the two agencies. Another aim of this section of the study is to establish if differing definitions are applied between the two agencies and, if so, the significance of this.

The Fraud Investigation Group

At the time of making the request for research access to the CPS head offices the FIG was a group, based in London, comprising lawyers and administrative staff who had previously been described as "CPS Headquarters – Fraud Division". Approval was obtained to conduct interviews with members of this office. During the last weeks of the study the Northern region division of the FIG began to operate from offices in York. It was suggested that there would be little merit in examining the operation of that office at that point in time, as it was anticipated that much of work generated from police forces in that region would continue to be channelled through the London offices for some time. This suggestion was accepted on the basis of letter from Head of Fraud Provincial Division to all Chief Constables, dated 20 June 1995, confirming the referral route as being through the London office for some time, until the York offices were fully operational.

The FIG Office

The London FIG was situated within the City, in modern accommodation that also housed the CPS Headquarters. The staff comprised the Head of Division, twenty four lawyers of CPS grades 6 and 7, eight staff in the Accountancy unit and fifty two other support staff of whom four were Higher Executive Officers; three were team leaders (executive officer grade) with the remainder being almost equal numbers of caseworkers of executive and administrative officer grade. Equal numbers of administrative assistant caseworkers and support staff to lawyers completed the staff.

The FIG occupied one floor in the building. The first offices on the floor were allocated to the lawyers, most of whom shared their office with at least one other lawyer, generally being in the same "team" as those with whom they shared an office. The final office was a large semi open plan office occupied by the caseworkers and other support staff, whose desk arrangements bore no correlation to the grouping in which they were officially supposed to operate. The caseworkers' area of this office did not have the space or privacy of the lawyers' offices. Whilst there were some comments as to the noise of the general office there were no real complaints, the over-riding view of the caseworkers being that their work was assisted by their close proximity to forms and to each other, rather than to the lawyers in whose group they were listed as working. All CPS personnel had access to the well-stocked library was on another floor within the building.

Methodology

The initial request for research access to the FIG was made by letter. The response to this was an invitation to meet with the head of the FIG to discuss the request. The meeting that took place resulted in an agreement that access would be permitted, subject to the signing of an Official Secret Act declaration and the CPS's own research declaration. It was further agreed that the timing of research access could be negotiated directly with the unit. This was done and a date agreed on which the study would start. On that date it appeared the substance of the first discussion, particularly the requirements of signature of undertakings, either had not been communicated or was not considered essential.

On arrival at the FIG offices it was apparent that the respondents were not aware of the nature of the study and the first day of the agreed access was largely spent drinking coffee with members of the FIG who were either interested in, or undertaking, further education, particularly research studies. It was through this contact that one of the respondents offered the use of a desk within their office. That offer resulted in an accepted space within the office for the duration of the study and assisted freedom of access to others within the FIG and to all the facilities of the FIG office.

The study of the FIG took place over five months : August to December 1997. During this time periods of a week to a fortnight were spent each month with the FIG so that, in total, approximately three months were spent with the Group. After the first meeting with the head of the FIG, no further contact was had with this individual and all further arrangements were made directly with the lawyers and staff of the FIG. Once the respondent lawyers were made aware that I would not be in their offices on a daily basis, an arrangement was reached whereby either a time was diaried for the next few weeks or it was agreed that files would be left in their offices for collection and that these could be examined in the absence of the lawyer. Examination of the files was permitted using either the office of the file provider, or the office space that had been made available on the first day of the study.

The informality of the study arrangements, both in terms of timing of the study periods and understanding as to its exact nature, had distinct advantages. Once the members of the office grew accustomed to a new presence, it was possible to move

largely at will and be accepted as somehow part of the Group. Not only did this result in access to a wide range of materials, it also resulted in informal conversations as to the workings of the office that possibly might not have occurred but for this quasi-insider status being presumed.

A second result of the lack of notification of the proposed studies was that none of the FIG staff expected to be interviewed. This was slightly overcome by the coffee session of the first day, during which some members of the Group agreed to discuss their work. A number of these interviews took place during the first week of the study, after which the quasi-insider status appeared to have become accepted, resulting in the remaining members of the Group agreeing to timetable discussion of their work.

During the first week, three of the respondents undertook to discuss in greater depth various aspects of their work. At this stage of the study it also became clear that, due either to a lack of information supplied to the Group and resistance to providing information that had not been specifically sanctioned, or due to genuine difficulties in making a meaningful correlation between the figures and changes in the composition of the FIG, access to annual statistics would not be provided.

In light of this opposition to providing statistics it was accepted that the quantitative aspect of the study would have to be dropped. In order to attempt to discover the types of investigations being referred to the FIG; the identities of the agencies referring such investigations; the type of work undertaken by the FIG and the relations between the agencies, it was decided to examine a sample of the files of one lawyer from each of the divisions within the FIG. This was done by asking a lawyer from each division to estimate their annual case load and to describe the charges under which prosecutions were taken, so as to assess the frequency of usage. The same lawyers were then asked if examination could be made of a sample of the files in relation to the list of charges. In all cases, those to whom this request was made, agreed to it.

Whilst this method gave some insight into the working of some members of the FIG, its main disadvantages were that the numbers of cases were, at best, an estimation of the work of specific individuals and that their responses could not be verified independently. In relation to the request to examine files, it had to be accepted that

the lawyers' choosing of cases could be influenced by a number of variables, such as providing "evidence" of a particular view or to give an impression that all the matters dealt with were of a complex nature; involved large amounts etc. As the study of this specialised unit progressed it became apparent that this estimation of caseloads would provide, at best, a highly unreliable indication as to the work loads of the unit. This was because the distinction had not been made between cases followed through by the lawyer to prosecution and those that had been dealt with before referral to other lawyers within the unit. The possibility, as detailed later in this chapter, that a case could be dealt with by a number of FIG lawyers during the processes of advice review and prosecution led to a real possibility of cases being counted more than once. It was for this reason that, although the estimations were recorded during interviews, this means of data collection was not included in this chapter.

The absence of statistical data also prevented comparison of disposal rates between the various agencies and analysis of which agencies shared the greatest number of cases. Examination of files could only provide an indication as to the length of time a complaint had taken to be processed once it had come to the attention of the FIG. What this examination made clear was that files were submitted to the FIG at any of a number of stages, from almost initial complaint to virtually completed investigations, and that FIG involvement with an investigation could last for several years before finalisation of the matter

Due to the unreliability of the data collected or the absence of data, direct correlation of caseloads between the CPS and the police was not possible. What was possible was to establish the parameters of the FIG operation by reference to perceptions of its lawyers and examination of a sample of its files and to compare the results obtained to similar studies undertaken in the other chosen agencies.

All the interviews were recorded at the time they were conducted, using a crib sheet with large gaps in which notes of what was said could be written. For the more responsive, this was by no means ideal. However, during the first meeting, use of tape recorders had been specifically excluded as a means of data collection. Where informal discussions occurred it was usually not practicable or possible to make notes. In these situations the respondents' comments were written up as soon as possible after leaving the meeting places. It was recognised that this method would

not always produce a totally accurate account of what was said. However, it was thought better to use this method than to compromise the quasi insider status that appeared to have become accepted.

In the approximately two months spent with the FIG offices, the majority of lawyers in the FIG were interviewed, together with the Higher Executive Officer, whose job included acting as office manager. Examination was also made of a number of case papers and files that individual lawyers had made available.

Operation of the FIG offices

a) Referral paths to FIG

1. From the police

One of the early stages of this part of the research was to identify the means by which cases entered the FIG. This was done by questions posed to the lawyers who dealt with those cases once the FIG had accepted them. One of the responses made mention of the CPS computerised case management system known as CAMES. Interviews with a member of the administrative staff as to the operation of this system revealed that, in theory, all matters originating from the police were first received into the FIG by the Administration Support Officer who logged them onto CAMES. Unlike most other police to CPS referrals, fraud matters did not usually pass through the police Administrative (or Operational) Support Units, ASUs or OSUs. It is for this reason that, in the investigation to referral to CPS stages in the processing of a complaint of fraud, all decisions on the conduct of investigations and file content were made only by police officers and not police support staff. This was unlike the situation occurring in all other criminal investigations. In this way the investigation of fraud remained very much the remit of those officers dealing with it and no one else, until matters were referred to the CPS.

In describing the operation of the CAMES system, it was said that the FIG examined these referral by the police upon receipt. Examination of that process in operation showed that this examination did not include any legal analysis of the files submitted. The examination observed to occur was of documentary details. Administrative staff would examine whether details of the suspect; complainants and officers had been provided and that there was a summary of the case as the police assessed it to be. The importance of this was that all submissions by the police of a report or file to the FIG were guaranteed to get the matter onto CAMES and into the system for consideration, without filtering out at the initial stages.

One of the consequences of this was that, on being allocated to a lawyer, a matter could be assessed as not falling within the remit of the FIG and referred to either the local CPS offices or to other agencies for them to prosecute. The importance of this lies in the potential for delays in processing of the complaint. It was thought unlikely that these would be of significance to the progressing of the case through the justice system but could impact negatively on the complainants who might perceive their complaint as being passed around and not dealt with. Of more importance was thought to be the impact of possible misconceptions as to the remit of the receiving body and that body's resources levels.

Given the lack of internal certainty in the police and CPS as to what fell within their own remit and the remit of each other, it was thought that referrals to other agencies could be similarly affected, with the result that a complaint could be sent to an agency not best placed to process it.

The description of the CAMES system indicated that this was possible in the FIG, as the initial examination was more a recording of the names of the defendants/suspects, the charges or proposed charges and the investigation force, than "examination" of the file. Thereafter matters were given a unique and permanent FIG reference number, which together with the details first recorded were logged onto CAMES, after which the new FIG file was sent to a FIG Grade 6 team leader for consideration and allocation to a lawyer for detailed examination and/or review within a time limit specified by the team leader. It was at this stage that legal analysis would occur and the impact of definitions of terms of reference might be expected to occur.

Interviews with lawyers and examination of files demonstrated both that the official system could be relatively easily and successfully avoided and that the initial material submitted by the police could vary case to case to significant degrees. Comments included,

Files are supposed to arrive via the front line CPS Branches and area.

Frequently the police approach us directly however. (CPS 11)

(I) Rarely receive matters direct from officers (CPS 10)

I'm just given work (CPS 7)

Another lawyer described a dual system, in which some matters were accepted directly from officers whilst others were allocated in accordance with the official system

Only in relation to mortgage fraud and art and antiques where I (receive files) from officers. All others are allocated. (CPS 12)

This system may be explained by this lawyer's comment

Art and antiques is a personal preference.

Referrals of complaints "via the front line CPS" were shown by reference to cases not to be without definitional problems. In the case of *R v L* these concerned what constituted "serious" fraud.

This case was the result of a report from the auditor of a group of companies called (name removed) which was sent to (...) Police in December (date removed) following which it was referred almost immediately to FIG in London via the branch Crown Prosecutor. The branch Crown Prosecutor offered to retain the case even though he acknowledged that it involves sums at risk over £6 million (as it then appeared). The case regarded as straightforward by him subject to the provision of accountancy support to investigate it.

Examination of files and discussions with lawyers illustrated that the form of referrals varied from anything from a preliminary police report of between 2 and 30 pages, in which the police are "seeking directions" to a virtually complete police investigation file that was submitted for a decision as to whether the suspect is to be prosecuted. In some instances the first referral of a matter to FIG was as basic as the forwarding by the police of a report as to their suspicions, together with a request for advice, as illustrated by the case of *R v L* above.

That such variation could occur leads to the conclusion that there was no clearly definable stage at which a matter can be called a police "case". The relevance of this for the study lay in the possibility of there not being a practical or formal test of whether a matter falls within the FIG remit before it enters the CPS system for review or advice. The official means of entry into that system were clearly avoided by both lawyers and police officers, suggesting that personal perceptions of role and remit could have a significant effect upon the progression of a case through consideration for prosecution.

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Discussions with the lawyers showed that officers with good relations with them were able to approach the lawyers directly and, particularly if the case took the interest of the lawyer, complaints could be entered into the system and progressed by the lawyer for some time without reference to the formal remit of the unit or to other lawyers. This may explain how the consideration of matters referred to as “arts and antiquities” could be accepted by a lawyer within the unit despite that category of work not appearing in any of the official descriptions of the unit’s work.

It is suggested that the importance of this feature of the acceptance of work lies in the possibility of the development of informal procedures and practices of advising, reviewing and considering cases for prosecution that are only effective whilst those persons involved remain the same.

The reverse situation was thought to be equally possible, where good relations did not operate and contact between the referring officer and the lawyer could be adversely affected by perceptions of remit and role.

It is suggested that the importance of either situation is that the manner in which a complaint may be dealt with by the police and thereafter by the CPS is largely a matter of chance, dependent on the perceptions and approached of those to whom the complaint is allocated.

2. Referral from other agencies

In addition to referral paths to the FIG from the police, discussions with lawyers and examination of files revealed that different methods of referral of matters to the FIG could occur. All the lawyers interviewed were asked in which agencies the cases that they dealt with had originated. Their answers shown that a number of non-police agencies were involved in the investigation of fraud within the criminal justice system. The agencies mentioned by prosecutors included the Official Receivers (CPS 4), Ministry of Defence Police (CPS 12), DTI (CPS 4, 5, 6, 10 and 11) and Customs and Excise (CPS 10)

These referrals proceeded in the FIG in the same way as investigations referred by the police.

3. Referrals from the FIG

Examination of the cases revealed that matters could be referred to the FIG by an agency other than the police and subsequently from the FIG to the police for further investigation.

The case of *R v B* demonstrated that the processing of such referrals could be difficult,

By my letter dated (date removed for reasons of research confidentiality) we referred this matter to the (name of Force removed for reasons of research confidentiality) Fraud Squad with a request that they undertake an investigation.... About a fortnight later I had a brief discussion with (...) Police about it and they expressed some concern bordering on reluctance to investigate the matter. The Fraud Squad office indicate that they think it unlikely that Police Headquarters will allow them to investigate the matter...They point out that the matter was referred to us in (date) by (another justice agency) but that they (*the police*) were not requested to investigate at the time.

From the case papers it was ascertained that several months after the above notes were written the FIG discontinued this case. The lawyer who made the decision to discontinue the matter expressed his views as to the police reaction to the referral, as

I suspect the Detective (...) would wish to protect his force from any allegation that they failed to investigate the matter. I may be overly suspicious but I suspect that attempts are being made to "set up" the CPS on the basis that this matter should have been referred in 19... than in (one year later) and that continued references to abuse of process are symptomatic of that. (CPS 3)

Further in the papers the same lawyer suggested other reasons for the police approach,

It should be borne in mind however that in addition to the large fraud enquiries the police have, there has been, of late, a dramatic increase in violence/sex offences in (area) and a large increase in the "clear up" rate. The police particularly in (part of the area) are under immense strain. (CPS 3)

Three issues were thought to be raised by this case. The first was that, notwithstanding the official description as to how the FIG became involved in a case, it was apparent this type of referral could proactively be made by the FIG to the police. Secondly, that referral could be made with very little if any prior consultation or negotiation and thirdly, the effective refusal of the police to investigate the complaint would result in criminal justice processing of the complaint ending. This being an exercise of police discretion it was recognised that the CPS, unlike the SFO, could not ensure that the investigation occurred. This was described by the prosecutor as,

I regret that this situation has occurred but this office has no power to compel a police force to undertake an enquiry. (CPS 3)

This file suggested a willingness on the part of the FIG lawyer to play a proactive role in directing police investigations and a marked reluctance on the part of the police to commence an investigation, despite the specialist fraud units of both agencies being involved. This apparent anomaly led to a more detailed examination as to what definition of fraud the FIG applied to its consideration of complaints and the working relations between the police and FIG.

What constitutes "fraud" for the FIG

Despite reservations as to the possibility of lawyers providing only the more "glamorous" of their self-assessed work load, it became apparent that the lack of definition of the terms "fraud" ensured considerable latitude in interpretation of the formal guidelines as to what work fell within the remit of the FIG and permitted use of the police based definition of serious fraud that linked the nature of the offence to its size and complexity in investigative terms. Both comments made in interviews and the files themselves suggested that matters involving relatively small amounts were submitted and taken on by the FIG. It was not always self evident from the case papers that the matters were complex in the sense of involving difficult chains of evidence or procedural or factual points. Examination of cases accepted suggested that rather than "complexity" being the determining factor in the FIG's acceptance of a police investigation, the prospect of lengthy investigations, involving a number of witnesses, was significant. The written FIG instructions to the police in the investigation "R v G" demonstrates both this and the extent to which some lawyers may be involved in and direct the investigative stages of the processing of a complaint of fraud,

“Although on the face of it, the matter appears complex due to the retrieval of all documents (although a large volume of papers) and a full knowledge of the witnesses involved, the matter is clear cut. G is not aware of police involvement at present and I suggest whilst this is the case the majority of statements should be obtained. Following this G will be arrested and charged”

When asked about police reference of such matters to the FIG, the comments of several lawyers indicated an acceptance of the police view on and definition of the fraud, that links size to seriousness, rather than an objective application of any FIG guidelines. One lawyer described the approach of the police to some fraud investigations as,

All police officers think their baby's beautiful (FIG 6).

If this approach is accepted, it would suggest that a number of lawyers either do not wish to, or due to other factors, do not tell the police otherwise or refuse to accept investigations as falling within their remit.

Given recognition within the English legal system of prosecutorial discretion (McConville et al 1991) and application (in the existence of the Prosecution of Offences Act and Code for Crown Prosecutors), the reason for any reticence of some prosecutors is not their lack of power or status in the criminal justice system.

It is suggested that the basis of a reluctance to refuse police assessments as to what constitutes a case and the reverse situation, where lawyers direct what the police investigate and even charge, lies in the absence of any definition of the term “serious fraud”. Examination of the FIG files and interviews with lawyers supports this suggestion that, as found in the operation of the police, the extent to which an individual’s personal definition is applied in their dealings with cases and other agencies is both significant and the determining factor in the progressing, or not, of a complaint of fraud through the criminal justice system.

As demonstrated in the comments of lawyers and examination of some of the files, what constituted the work of the FIG was not clearly defined. Both official statements, such as the text of the statement delivered by the Attorney General in the House of Commons on 31 March 1995,

The (Davie) Report emphasises that fraud covers a wide spectrum from the highly sophisticated frauds involved for example in the collapse of BCCI or the Guinness case to relatively straightforward deception.

and initial discussions with the FIG lawyers confirmed that, as far as the CPS generally and the FIG in particular were concerned, the term "fraud" did not have precise definition.

Study of the Glidewell Report revealed this situation had not changed,

Fraud encompasses a wide range of crime from the relatively trivial to the most serious. Many fraud cases are neither more complex nor more time-consuming than the prosecution of other offences of dishonesty. It is, therefore, entirely appropriate that cases in this category should be prosecuted by CPS staff in Areas (Glidewell 1999 p 151 at para. 37)

Given this context, it was not clear how both the FIG lawyers and those within other agencies with whom they worked would determine what matters fell within the remit of the FIG.

As a result attempts were made to ascertain what, if any, criteria were applied to determine what matters were dealt with by local CPS and what were referred to the FIG.

The Glidewell Report noted that whilst the less serious cases could properly be dealt with by local CPS, the most serious cases "go to the SFO" (how and why is not examined by the Report). The review panel had concerns as to the distribution of what they refer to as intermediate level fraud cases. Of these it is noted,

We have failed to understand the justification for the sharing of serious fraud between Central Casework and Special Casework Lawyers. There are, we realise, established criteria for deciding into which three categories the non-SFO frauds should be placed, but the criteria do not justify there being so many categories (Glidewell 1999 p 151 at para. 39)

Throughout the study it was found that within the CPS, these criteria were either not clearly understood or, if understood, not consistently applied. In interviews conducted at local CPS level it was stated that,

There is no hard and fast rule as to what I take, there are guidelines but they are only rough guidelines.... There is a lot of flexibility within the system, there's no set criteria. The sort of things considered are the amount, three quarters of a million pounds, and national publicity (FIG 6)

Despite local CPS reference to this (in this interview the criteria were read out from the Code for Crown Prosecutors), the description given by a lawyer, who had only recently joined the FIG, was,

I think I've picked up from others, no-one's said, that it's £750,000.(FIG 7)

Although most respondents made mention of there being some tests as determining what they should deal with, given the vagueness of the mention it was thought open to question as to the accuracy with which these were applied

What constituted a typical FIG file

Examination of files that evidenced FIG acceptance of matters that did not satisfy the financial aspect of the official criteria, together with the fact that not all the respondents correctly referred to the tests, calls into question the accuracy with which these could be applied. Similarly, references to the complexity of matters, which occurred throughout this stage of the study, from the statements of the AG to interviews with several of the FIG lawyers, were not necessarily supported by the content of the FIG files examined.

It was thought that, as had been found in respect of the police decision making, assessment of complexity was a subjective judgement and one that could take account of a number of variables. In the context of prosecutorial discretion, an additional subjective element was introduced through the requirement of the Code for Crown Prosecutors that a prosecution should be in the public interest. The study revealed considerable differences of approach in the exercise of prosecutorial discretion and decision making. Whilst one FIG lawyer might consider whether to accept an investigation from the perspective of its presentation to a jury, another worked on the basis of the volume of transactions or actions to be evidenced, as being the "complexity" of the case, and another from the perspective of the public interest in a high profile prosecution.

From observations of the operation of the FIG offices, examination of matters and interviews, it was thought that both acceptance into the system and subsequent treatment of any matter was therefore entirely dependent upon the approach of the individual lawyer that received it. This view conflicts with those (McConville, Sanders and Lang 1991) that suggest that the CPS is both entirely dependent upon and largely influenced by the police. These differing perspectives of the operation of the CPS are examined below in relation to discretionary decision making.

Teamworking

During the first interview it was stated that teamworking was fundamental to the operation of the Group (FIG 1). Given both the context of the meeting and the position of the maker of this statement this was taken to be an official statement of the operation of the FIG. In the subsequently produced Glidewell Report (1999) it may be noted that in March 1995 (some few months before the first interview was conducted),

in an internal memorandum pointed out that progress towards "integrated working" in the Fraud divisions has been stopped. Integrated working was the author's preferred form of teamworking....(Glidewell 1999 Appendix E paragraph 10)

The Glidewell Report briefly discusses teamworking within the CPS as being a sharing of the work arising from prosecutions and that the introduction of teamworking in the particular form used within CPS has caused resentment. From this description and observation of teamworking in practice within the FIG, it was felt that, at best, the meaning and position of teamworking within the FIG may be described as vague. In practice there appeared a clear and sharp distinction between the lawyers who were appointed to specific groups or "teams" and the caseworkers and support staff that assisted those teams. As has been described above, the office accommodation reflected this.

No evidence was gathered of resentment of teamworking, rather it appeared to be ignored by the lawyers. None of the lawyers or the support staff interviewed described themselves as part of the teams within which they were officially listed, nor were they observed to work in a team. Instead each lawyer dealt with his or her own matters. The teams to which lawyers were notionally assigned were based upon a

description of the work reflecting its geographic origin. The teams were London City; London Metropolitan; Provincial South and Provincial North.

It was not possible to determine how the original allocation of lawyers to teams or to offices had been made. In some instances, prior to re-organisation of the FIG into the groupings that existed at the time of the study, lawyers had been working on substantially the same type of work. Those who had joined the FIG more recently appeared to be more likely to have been allocated to their team as a result of successfully responding to vacancies or having been relocated. The allocation of offices to lawyers appeared to be similarly random. Some room allocations followed assignment of an individual to work from one of the geographic regions whilst other officers from different teams shared offices. From what was said or implied in interviews and informal discussions it was concluded that those lawyers with longer service in the FIG appeared to have a relatively strong input into the type of work that they did and their room allocation.

One of the offices in particular appeared to be shared by friends who, prior to various internal re-organisations of the Group from sub sets dealing with London City and London Metropolitan, had worked together for a number of years and had chosen to stay together as part of a team. Whilst this group of friends often discussed their cases with each other and appeared to know what cases other members of the group were working on, this was not true of all the lawyers. A number of the lawyers within the FIG appeared to work primarily on their own. Interviews and discussions with the people with whom they shared offices demonstrated that their colleagues had virtually no knowledge of the matters with which they were dealing.

The overall impression gained from this part of the study was that members of the FIG did not consider themselves to be part of a cohesive group or as part of any particular team within that group. Although all the lawyers dealt with broadly similar allegations of criminal conduct, most of those interviewed defined their work as being different to that of their colleagues by virtue only of their being part of different sub-groups within the FIG. Examination of the groups revealed them to be based upon geographic areas. The content of the work within those geographic areas was largely similar, with the same broad categories of alleged criminal activity being dealt with by all the groups.

Only two of those interviewed described the work undertaken by themselves and their colleagues as being fundamentally the same, or the elements of that work as being the same. Interestingly these two individuals did not work within the same team. The evidence suggested was that team working was largely a notional, as opposed to actual, feature of the operation of the lawyers within the FIG.

The same impression was not gained in respect of the operation of the lawyers and their caseworkers and support staff team members. Most of the support staff in any particular team provided relatively accurate accounts as to what the lawyers in their team were working upon when asked. Comprehensive interviews were not conducted with the caseworkers and whilst this did not appear necessary in terms of the aim of the study, being concepts of fraud and how these affected operation, they may have provided a greater insight into the internal operation of the FIG.

Management

A commonly mentioned feature of the operation of most of the lawyers was of their being under threat from adverse scrutiny of the DPP (FIG 10, 4 and 9). No one interviewed produced any evidence of this and it was never clear from what was said whether there really was a threat or whether the complaint was based upon a perception of the management of the CPS. A number of those interviewed discussed their feelings of working in a situation of adverse publicity and media threat of examination and change.

Without it being apparent how this had come about, there appeared to be a general resentment of a number of the management issues. These ranged from the threat of adverse review and possible cuts in staff, which was seen as being imminent, described by one lawyer as being,

It's not that the writing is on the wall, they are putting up the neon signs (FIG3), to the management style of the then DPP as being over-bearing.

The lawyers in one of the teams, that appearing to be a group of friends, had made a collage of less than complimentary photographs, cut from newspapers and other publications, of the DPP. This covered the greater part of the internal side of the office door and was clearly visible once inside the office as the door was kept closed. Whilst the study was being conducted a visit was anticipated from either the DPP or a senior member of staff and the collage was removed, only to be replaced once the

time of the visit had passed. The attitude of this group was one of determination to continue with protest that, judging by the informal comments of other lawyers, had become either ignored or discredited.

When questioned in a formal interview context as to the main problems encountered in the prosecutions with which they dealt, none of the respondents (including members of this group) spoke openly of what appeared to be obvious discontent with the management of the CPS. Publication of the Glidewell Report supported the assessment of discontent, p 51 at paragraph 23, reporting that of the CPS staff who wrote to the review panel mention, a large number were highly critical of senior management (90% of 235 letters).

In less formal discussions, all of which occurred away from their offices, several of the lawyers described how they wished to remain in their line of work but to move into a less threatened or more receptive environment. Two spoke openly of wanting to move to the Serious Fraud Office (SFO). Some time after the study was completed it was learnt that both they and another of their colleagues had left the CPS for the SFO. The perceptions of job insecurity noted in the Glidewell Report appeared to operate equally in the FIG as does the Report's comment that this is,

... far higher than would conceivably be justified by the reality of the situation (Glidewell p51 at para. 20).

In several interviews feelings of lack of understanding of their work; lack of recognition for that work and low morale were expressed. The police respondents expressed similar views. This may indicate a potentially worrying trend of those being responsible for dealing with examination and trial of allegations of serious fraud feeling alienated within their respective organisations and the criminal justice system.

The suggestion that the creation of a single offence of "fraud" could improve this situation is clearly open to criticism as being too simplistic and in conflict with existing English criminal justice theory and practice (Omerod 1999). However, given the potential and in some instances actual extent of co-operation and involvement of lawyers in decisions falling within the remit of the police, it is suggested that a shared understanding of the offence could be of greater assistance than closer working relations between these two agencies.

As discussed in chapter three, examination of the criticisms of the SFO indicates that, in relation to complaints of fraud, the provision of closer working relations between the police and lawyers has done little to improve the decision making process. In part this may be attributed to the SFO's power to select for itself those cases that it wishes or deems appropriate to accept as its own. However, as discussed by Levi (2000), two factors additional to this feature of the SFO's operation may influence the current situation. These are firstly the negative impact of the lack of a substantive offence of fraud and secondly the absence of a shared understanding existing between the investigators and prosecutors as to the subject matter with which the other deals. In addition consideration may be given to the impact of a lack of shared operating procedure between police and lawyers.

Application of criteria; advice; review; and discretionary decision making

In the informal conversations mention was made of,

... being free to get on with the real work. (FIG 4).

This view was expressed by several of the lawyers, who, in a number of conversations commented that there was too much bureaucracy, resulting in less time being spent on the "real work" that was described as being,

...dealing with files and advising the police (FIG 5).

However as discussed above, what constituted the subject matter of that work was not clearly defined. The processes of the work were ascertainable by reference to the Code for Crown Prosecutors as being to advise and review police investigations.

a) Advice and review

Within the interviews conducted in the FIG only one respondent made specific reference to the Code. This reference was made in describing the remit of the section within which they worked as being,

(To) review cases investigated by the police and, if the criteria laid down in the Code for Crown Prosecutors are met, prosecute them (FIG 10).

It was apparent from this respondent's description of their work that contact with the police and provision of advice to them, either as a result of the review process or through a direct request, was not a feature of this respondent's work. In response to

the question "What is the role of the Fraud division in the conduct of investigations", the same respondent answered,

We do not and should not become involved in the investigation. Before charge we advise only. That matter should be made clear to the police. Operational matters, in particular, remain the domain of the police. (FIG 8).

and of "Do you encourage (the police) to approach you directly with queries, why/why not", the terse response was given,

No I don't. Too much work. Drives me mad. (FIG10).

confirmed the assessment that this respondent preferred to work at a distance from the police, on a fairly mechanistic or legalistic basis. This was unlike the majority of other respondents in the FIG whose comments, when asked at what stage they felt the FIG should become involved in a police investigation, indicated a common desire for an early and often greater involvement, in such statements as,

.. pre charge, always (respondent's emphasis) (FIG11),

whilst the first respondent again adopted a more distanced approach, stating that,

... it depends entirely upon the nature and the circumstances of the case so there's no blanket answer. (FIG10)

In the case of *R v L* the involvement of lawyers in the investigative process was recorded by more senior CPS lawyers in a complimentary manner without expression of reservation as to the extent of that involvement,

Case conferences were held relatively regularly (on average about once every six weeks) and full and comprehensive minutes of some of the excellent and apposite discussions are kept on the file. It is clear from the tone of the minutes that the case lawyers from time to time (there was a change of case lawyer in this case at least once) were involving themselves in decisions relative to the investigative stages of the case and giving advice and making decisions about the areas to be investigated, setting timetables, abandonment of enquiries etc....

The main management control of this case appears to have been through the case conference system in respect of which minutes are very full and helpful. Good advice appears to have been given and accepted and acted upon.

This situation may be contrasted with that in *R v B*. Two immediate differences between the two cases are (i) *L* was referred by the police to CPS, *B* was referred by

the CPS to the police (ii) the officers in *L* were of relatively low rank whilst those involved in the decision making in *B* were of significantly higher rank. Although the two cases involved different police forces, the referrals to and from CPS occurred at about the same time. As such issues as to other calls on investigative resources may be expected to have been similar in both forces. However, without it being possible question the officers involved, it was not possible to delve further as to the reasons for the different outcomes, *L* resulting in a prosecution and *B* being discontinued upon the police refusal to accept the referral for investigation.

Within the FIG it was realised that there are potentially problematic issues in the less formal approach. The main issue spoken of can be described as advising in situations in which there is very little evidence on which advice is sought. Some lawyers, whilst wanting to early involvement in investigations, also sought some protection of their position, stating ,

I think it would be a good thing to have CPS in the police station, I give informal advice to the police over the 'phone but say, "I'm not quotable on this" (FIG 7)

and,

As a general rule (I am approached for advice) after the defendant has been interviewed but before he's charged. The police will present me with the evidence they think can go to make a case. More frequently they are coming to me before interview. I'm quite happy with that but the only problem is that it is sometimes hard to give definitive advice. I've got no papers, they come and discuss, there's a potential for misunderstanding (FIG 6)

Comparison of the different responses revealed how greatly the individual prosecutor's attitude appeared to determine the nature of the review and advice processes. Whilst it was recognised that the perceptions and practices of the police should be taken into consideration (in their analysis of the Lawyers at Police Stations (LAPS) scheme Baldwin and Hunt (1998) found that the police seeking of pre-charge advice was a "rare occurrence", taking place in only 11 of 600 cases (1.8%) of cases examined), it was felt important to examine the formal processes so as to ascertain what, if any, limitations or restraints were imposed upon the individuality of approach as to what constitutes a case suitable for acceptance by FIG and what form advice should take.

The comments of one of the lawyers may be viewed as seeking to extend their advisory role to operational decisions,

The investigation was not particularly complex but was hampered in a number of respects. The most obvious was that there were only ever two policemen assigned to the case and they were not operating full time in relation to it. Some difficulties were encountered at one point when the Case Controller and Counsel had to make firm representations about the possibility of these officers also being withdrawn from the case. (*R v L*)

Another lawyer, in described his perception of his role as being;

We'll try and turn a case into something decent. (CPS 6).

Not all respondents shared this approach. Some lawyers were more prepared to advise the police that there was insufficient evidence to justify a prosecution, with some going so far as to indicate that, in their opinion, there was no reasonable prospect of obtaining such evidence as would be required to justify initiating proceedings.

The vigour with some lawyers advised or, as in *R v L*, became involved in operational matters themselves was in marked contrast to the view that the CPS is entirely dependent upon the police, as expressed by McConville, Sanders and Leng (1991). On this issue the primary conclusion drawn from the study was that the personality and perceptions of the individual lawyer had a disproportionately high effect upon case handling and operated without formal check.

b) Discretionary decision making

Examination of files and interviews revealed an advice file would receive a formal, written response. In contrast there was no systematic recording of informal advice or advice provided during telephone conversations. Similarly no system operated by which the reasons were recorded for a particular course of action being decided upon. Whilst McConville, Sanders and Leng (1991 p 133 – 172) discuss the lack of CPS independence from the police, the operational practice observed within the FIG suggested that in practice, the police did not exercise significant control over the CPS operation.

Very few of the files examined evidenced any scrutiny of the individual lawyers' decisions by other lawyers, at the time those decisions were made. Nor was there evidence of any CPS procedure for review of decisions taken by lawyers once a matter had been submitted by the police or other agency. As such, some cases may be anticipated to pass through the criminal justice system without anyone save for the Investigating officer and reviewing CPS lawyer examining its progress. In practice this could result in the processing of complaints of serious criminality being undertaken by two individuals, who could have differing perceptions of their remits and little practical chance of referring the matter to another agency should either determine that investigation or prosecution was inappropriate or not within the remit of their agency.

Given evidence that some lawyers appeared to work in complete isolation, with not even the person sharing their office being aware of their work, and the possibility of their being disinclined to have close contact with the police, the limits upon discretionary decision making appear almost non-existent. Equally, in the absence of functioning lines of communication of officers' discontent or concerns to either the individual lawyer or anyone else within the CPS, the chances of a lawyer's decision being formally challenged and reviewed appear remote.

Thus, whether a complaint of fraud was accepted by either the police or FIG was largely a matter of personal perceptions on the part of the investigating officer and reviewing lawyer. Once accepted by either, the manner in which the complaint was progressed was equally influenced by individual decision making in a context of an almost complete absence of others reviewing the decisions of the investigator or reviewing lawyer until such time as the matter was prepared for trial. Should either the police investigator or CPS lawyer determine that the matter not progress to trial, the likelihood of that decision being challenged appeared remote.

It can be concluded that in practical terms a FIG lawyer has the ability, that is not subject to either formal scrutiny or challenge by the police (or other justice agency), to terminate a prosecution on receipt of what may be an evidentially scanty initial report. It has to be accepted, each case being different and relying on unique evidence, there are valid reasons for requiring such decisions to be made on a case by case basis. However there are also good reasons, not the least of which is the

interests of justice, for there to be a system of examination or review of such decisions.

It was not possible to obtain statistics on the cases dealt with by the FIG so as to ascertain whether in making these decisions the stated criteria were applied, at which stage they were applied, or to determine the role of the complexity of a matter. Similarly lack of statistics prevented a numerical analysis of the agency of origin of the prosecutions or the methods of disposal. It was thought that the reluctance to permit access to statistics lay in concern as to the possibility of criticism of the work of the FIG that could not arise from the qualitative side of the study. Given the need not to alienate those who had granted research access, the quantitative aspect of the study was not pursued.

Another result of this was, as previously indicated, that it was not possible to assess the duration of case progression through the CPS. Examination of some of the files provided suggested that, as with the police, delays in processing of cases through the justice system could be considerable.

Delay

Within this chapter it has already been noted that some delay in CPS processing of fraud investigations could occur in the initial assessment by lawyers within the FIG as to whether a case fell within the remit of the Group. It was thought that such delay was likely to be relatively short. It has also been noted that files could be submitted to the FIG at any time during their progression through the investigative and prosecution stages. Due to the lack of statistical data, it is not possible to determine the average time within which the FIG files were processed, nor the reasons for variations from any such average. Examination of FIG files demonstrates that some matters could be within the unit for a period in excess of a year before progressing to trial or finalisation. This did not necessarily equate to delay in processing the matter, given that the referral could have been made at an early stage in the investigations. In such cases, the time a matter was within the FIG also represented a significant portion of the duration of the entire investigation, there being no clear division between its progression from investigation to prosecution case.

It was apparent that not all cases that had been within the unit for long periods of time could be explained in this manner. Examination of files suggests that the personal views of prosecutors and police as to the role of the CPS in the investigative process had significant influence upon the processing of files. As previously discussed, the CAMES system was avoided by those prosecutors who accepted requests for advice from the police without requiring that the files be sent through the official channels. Such officers may be expected to respond more positively than do others to prosecutors' requests for additional evidence.

It may be expected that this procedure would speed up the processing of cases as in such cases it appeared more likely that the case would remain the responsibility of one prosecutor and that that individual could ensure that all the evidence they thought necessary was obtained. However even in this system quite lengthy delays could occur. As discussed above, due to the number of differing referral routes to the FIG and the stages in the processing of a complaint at which these could be used, no universal conclusions can be drawn as to the length of delays that occurred once a file was accepted by the FIG.

What was apparent from the case studies is that due to prosecutor inability to direct police investigations, lack of police resources had considerable impact on delay in processing files. The case of *R v B*, discussed in detail in the following section of this chapter, illustrates that, had the police been more honest in their dealings with the FIG, this case could have been discontinued far earlier in its time in the FIG than it eventually was. The reason for eventual discontinuance was lack of evidence, the police not having the personnel to obtain the necessary evidence.

The case of *R v L* shows how procedural requirements can delay the processing of FIG matters. In this case a delay of several months occurred in the obtaining of statements from willing witnesses in the banking sector in Scotland. Further delay in preparation of the full case had been caused by the fact that in interview L had refused to comment. This had prevented the prosecutor's consideration of what evidence needed to be gathered by the police in respect of what subsequently was stated to be L's defence.

Reasons for delay

Examination of FIG files indicates that the time cases may be dealt with by that unit varied from case to case. It was clear that in some matters delay was occasioned by factors beyond the influence of the FIG, including the operation of the laws of criminal procedure and evidence.

Unlike the situation observed in the police, delays in processing FIG files did not appear to be the result of lack of FIG resources. In all the files examined, decisions not to continue with proceedings were based on the lack of police resources, not on a lack of prosecution resources.

It is apparent that some prosecutors' disinclination to engage with the investigators and preference to remain at arm's length from police investigations resulted in files being referred to the FIG on a number of occasions, each time dealing with separate evidential issues, rather than dealing with a set of issues that appeared likely to be linked. In contrast, some prosecutors provided pre-emptive advice to investigators.

What is clear is that personal style on the part of the prosecutors and investigators, in addition to resource constraints on the police, could not only delay a case but also, effectively, end processing of the matter within the criminal justice system. It is also apparent that there was no formal process within the FIG by which delays in processing or decisions to end a case could be challenged.

The impact on the role of the prosecutor of legislative powers to direct investigations

At the time of the study, there was precedent for the role of the CPS prosecutor in the investigation and prosecution of fraud within the criminal justice system to be other than it was. Both DTI and SFO lawyers had, and still have, statutory powers to direct the course of a criminal investigation. In the Scottish prosecution system the procurator fiscal can direct that certain actions or investigations be undertaken, criminal liability attaching to non-compliance with their advice.

As I had come from a background in which the prosecution effectively had *de facto*, if not *de jure*, power to direct the manner of investigation, and was able to build up very close links with the investigators, I was interested in the views of CPS prosecutors as to this aspect of their role. One of the questions asked of the FIG lawyers was whether they thought their impact upon the prosecution of fraud could

be improved, either by gaining powers comparable to section 2 of the SFO or by playing a greater part in the investigation.

The majority of those interviewed were opposed to the acquisition by FIG prosecutors of anything similar to s2 powers. Most argued that their statutory function required that the CPS be completely independent of the police and that s2 powers would erode that independence. With the successful legal challenge to use of powers that compel response, *R v Lyons and others* [2001] EWCA Crim 2860, and the recommendations of the Glidewell (1998) and Auld (2001) Reports, it is suggested that the processing of fraud cases is more likely to be effected by changes in prosecutors' powers to direct investigations than by the provision of powers of compulsion to the police.

The involvement of FIG lawyers in a fraud case can end with their decision that there is sufficient to justify placing the matter before the courts¹. At the time of the study and in relation to all the files examined, the actual prosecutions of such cases were briefed out to barristers. They were not conducted by CPS in-house or employed barristers. The reason for this may be found in the principle that employed lawyers lack the necessary independence to prosecute the same matters, having been directly involved in the cases. However, during the course of the study there was discussion of this changing, with the suggestion that CPS lawyers should, as a function of their office, be entitled to exercise full rights of audience. Whilst this was not realised during this study, towards its end a number of CPS lawyers gained "higher rights". This enabled them to act as solicitor-advocates, with rights of audience in the Crown court and higher courts. These lawyers were able to present the CPS case in these courts, as opposed to appearing only in magistrates' courts. Whilst this occurred in some criminal cases, the study found no evidence of any FIG cases being presented by the CPS's own solicitor-advocates.

¹ In some instances involvement can end prior to that stage as in the matter of *F Ltd* the non investigation of which was described by FIG 3 as "The ... Constabulary have continued to maintain that they have no resources available to investigate this company or indeed its successor. I have not been offered any prospect of an improvement in this situation. In those circumstances the matter is likely to become too stale within a relatively short period to allow any proceedings to go forward. Any prosecution would likely be stayed by the Court on the basis that the proceedings were an abuse of process. I regret this situation has occurred but the question of allocation of officers is one solely for the police. The CPS is unable to compel the police to undertake any investigation."

Throughout the study, most FIG lawyers went to court with only the less serious matters and then only for the purposes of remands or listings. These proceedings were usually in the magistrates' courts. The lawyers' involvement in advocacy and actual prosecution at the trial stage of cases was negligible. However they had considerable power in respect of the progress of a police investigation to the prosecution since it is they who determined whether or not the matter could be placed before the courts. There was no official or formal route by which the police may challenge that decision or seek more detailed explanation of it. Similarly, no formal system existed by which case-lawyers' decisions could be reviewed.

In the absence of a formal system, particularly in relation to lawyers who discourage direct contact with police officers, there is potential for the police to be aggrieved by, or not to fully understand the reasons underlying FIG decisions. As these decisions need not be discussed those with the police, lawyers might have been unaware of the impact of their decisions on police perceptions of them personally and their work. As such police resentment or feelings of isolation from the final stage in the progress of "their" case can develop. This has potential for negative future dealings with either a particular lawyer or with other members of the CPS in general. On a point of practical improvements being achieved, important issues of aspects of law, evidence or presentation may not be incorporated into the police operation as they might were there to be greater explanation and discussion of lawyers' decisions with the officers in the case.

Both the FIG and police stand to be disadvantaged by the absence of an official means of challenging or simply seeking more detailed explanation of decisions. The disadvantage is probably greater upon the police, given a legal system that obliges them to rely upon the CPS/FIG for prosecution of most of their fraud investigations. However the FIG lawyers could also benefit from a formal system of case review, by being required to explain their decisions and possibly receive a second legal opinion, with potential for sharing the combined FIG legal experience. Additionally, given that there were only a relatively few police officers in fraud squads and that tenure within these units tended to be longer than in most police sections, greater shared understanding between officers and lawyers could create a situation of improved knowledge of current legal and judicial issues, from the earliest stages at which a complaint of fraud enters the criminal justice system through its investigation and consideration for prosecution.

Under the FIG operating system the extent to which the police could benefit from the experience of FIG lawyers during any trial may be limited by a combination of the perceptions of the individual lawyer and the FIG procedures. Once a case lawyer had taken the decision to place the matter before the courts, use of the office management system might result in the file being passed to an administration officer for preparation of a brief to Counsel, after which the matter might be dealt with by the appointed barrister from that stage onwards, with no further contact with the original reviewing lawyer.

The FIG law clerk might go to court with Counsel for committal and trial, being responsible for taking notes at all court appearances. These notes will be extensive or brief depending upon any requests from the case lawyer or, if none had been made, the perceptions of the law clerk. The police would not, in the usual course of things, be aware of these notes or their contents and would be unlikely to discuss aspects of a case with the law clerks.

Where this was the situation the police could only approach the barrister to ascertain what is happening with the case. This was not always possible or encouraged. In such circumstances there was potential for the strengthening of police perceptions that their role stands in isolation to the prosecution role, with there being little harmony in the legal process.

During the study it was observed that there were lawyers who made it their responsibility to keep abreast of the progress of their cases from the law clerks, dealing with telephone enquires from the officers whilst other lawyers would refer such queries to the Administration Officers.

Interviews with the lawyers suggested that those observed taking a proactive and responsive approach to the police were more in favour of adoption of a role similar to that of the SFO lawyers, with s2 powers,

The absence of section 2 powers was a considerable handicap in this case (*R v L*). Two particular areas have been highlighted by the case lawyers. The first is that the obtaining of banking evidence from Scotland took a very long time - over three months - from witnesses that were otherwise willing to co-operate. Section 2 powers would have solved that problem practically overnight. The other was that

some of the defendants, notably L who was aggressively defended, refused to make any comment when interviewed about the offences and filed an inadequate case statement. It was felt that Section 2 would have enabled his defence - which was not identified until late in the trial and was somewhat curious in nature - to have been identified at an earlier stage (if it had been a real one) and more consideration could have been given to dealing with it. (FIG 3)

In respect of another matter it appeared that the lawyer would have preferred a primary role in directing the investigation, such as may arise from use of section 2 powers, as opposed to acting as an arms length advisory and reviewing body with no direct powers over the police,

This is a clear illustration of 'taking a horse to water, but not being able to make it drink'. I take the view that the police are making an artificial excuse for refraining from investigating this matter. In the cold light of day it has nothing to do with the matter not being referred earlier. A good deal of work was done by this office and the DTI between 1988/89 to target the necessary lines of the police investigation. Had the police been called in at the earlier stage as they suggest then it is likely that much duplication of effort would have taken place. The real reason for not investigating is a simple lack of resources. The flavour of recent correspondence from the police indicates their wish to escape through the back door by asking us to condone 'an abuse of process argument' (FIG 12 in respect of *R v B*).

It was these lawyers who were found to be more likely to arrange conferences with Counsel, attending along with the police. Such lawyers appeared to be perceived by operational officers and to adopt the role of being the individual to look to for explanation of events and the law. They did not appear to regard themselves as investigators or exhibit what one CPS, non FIG, respondent described as,

I get lawyers wanting to requisition size ten boots to go on raids with the police, you have to tell them they can't do it. (CPS 15).

Another respondent, who was observed to prefer working closely with the police, described his perception of advising, drawing a distinction between carrying out an operational decision and advising as to what decision should be made and how it could be carried out. In advising on the execution of decisions his perceptive was how best any trial could be served. He drew a distinction between becoming

involved in putting into effect police operational decisions, this being unacceptable involvement, and informing the making of those decisions by advising in relation to them, this being acceptable involvement,

The police will come to me for advice and increasingly they are coming to the CPS at an early stage of investigations. We have to be careful not to become part of the investigation process. We shouldn't say how people should be questioned in the interview room but we can say 'If you bring me this sort of evidence it will be admissible in court'. Sometimes it's a fine line. Evidence collection and operations are for the police but I'm happy to advise as to how it will affect the subsequent trial. (FIG 6).

In the absence of definition of the nature of the review and advice provided by the FIG it was the individual lawyer's perceptions that determined the service provided to the police. It is this that ensured that the official FIG office system could operate either to engender a very close relationship in which the lawyer could exert considerable influence over all police decisions in relation to an investigation, including operational decisions, or a more separate relationship in which lawyers played no part in any decision of a vaguely operational nature, primarily concerning themselves as to whether the police investigation satisfied CPS criteria.

From the comments of members of FIG and examination of a sample of the FIG files it appeared that a number of factors impacted upon the effectiveness of the operation of the FIG and its co-operation with other agencies. Some of these, such as financial and personnel resources, are enduring and can not reasonably be expected to improve markedly. The impact of others, such as varying management styles, can not realistically be assessed. From discussion with CPS lawyers and examination of FIG files it was concluded that the processes of reviewing and advising were largely determined by the individual lawyer with little, if any, internal scrutiny.

It was hoped to compare the results of this stage of the study with those to be obtained through examination of the work of the DTI. In the DTI the prosecutors' and investigators' functions are undertaken within the same agency, DTI lawyers having the power to direct rather than advise on the process of investigation. It was hoped that these studies would permit, firstly, assessment of the effect upon both the investigation and prosecution of fraud in a situation in which the roles of each branch

are more clearly understood as being part of an integrated unit or the use of a system that includes the power to ensure that the lines of investigation believed to be required are undertaken. Secondly it was hoped that comparison could be made between this operation and that of the CPS.

CHAPTER SEVEN

THE DEPARTMENT OF TRADE AND INDUSTRY

After completing examination of the operation of the police and CPS in relation to the investigation and prosecution of fraud, the next agency examined was the Department of Trade and Industry (DTI). Of the three agencies studied, the mandate of the DTI is the broadest and most extensive. Its various units deal with matters ranging from the issuing of import licences to the investigation of 'live' operational companies, winding up insolvent companies, instituting disqualification proceedings against company directors and prosecuting companies or individuals that breach statutory provisions.

In an official publication, "DTI Objectives for 1999", this is described as,

The purpose of the Department of Trade and Industry is to increase UK competitiveness and scientific excellence, generating sustainable growth, good jobs, opportunities and enhancing the quality of life for all

The same publication lists the DTI objectives as being to

- improve the openness efficiency and effectiveness of markets at home, in Europe and across the world
- ensure the Science and Engineering Base achieves standards of international excellence
- ensure consumers are given a fair deal, by improving provision of information, advice, representation, protection and redress
- improve and enforce the regulatory framework for commercial activity, while removing unnecessary burdens on business
- ensure secure, diverse and sustainable supplies of energy to business and consumers at competitive prices
- improve the framework of law and regulation for employees and employers in a skilled and flexible labour market founded on the principle of partnership
- increase the capacity of businesses, especially SMEs to grow and to improve their productivity, through innovation, adoption of best practice and investment
- increase the capacity of business to exploit market opportunities abroad

- increase competitiveness, economic growth, enterprise and opportunity in the regions
- ensure that science, engineering and technology are used across Government and in industry to maximise sustainable growth and quality of life.

Subject identification and research access - Legal Services (Prosecutions) Unit

Given the DTI's diverse purposes and aims, before any fieldwork could be undertaken identification had to be made of a branch or unit whose work was most relevant to the study. Determination of relevance encompassed assessment of the roles and functions of the unit, together with assessment as to whether its work fell within the definition of fraud detailed in chapter one. In making these assessments, considerable assistance was had from police officers whose work had formed the early part of the study. Not only were they able to identify particular units as being of possible interest, but one of the officers who had been part of the unit described in chapter five had retired from the police and joined the DTI as a fraud investigator.

This individual suggested that of the various sections within the DTI that dealt with fraud, the work of Legal Services (Prosecutions) would be most relevant to the study's definition of fraud. Not only was this the section within which the individual worked but also the section was officially described as dealing with both the investigation and prosecution of matters and staffed by both investigators and lawyers. It was suggested that any request for research access be addressed to the head of the Legal Services (Prosecutions) unit. This was done and for some time a correspondence occurred with the DTI as attempts were made to obtain access.

The initial response to the request was encouraging but the study was not able to progress due to the request being referred to another Directorate in order that the necessary documentation was completed. Upon query it became apparent that whilst the approval of the Head of Legal Services (Prosecutions) was sufficient for the study to proceed in principle, it was thought within the DTI there would be a set documentation process that required completion. The request had become lost in obtaining this documentation.

In an attempt to resolve this situation, a discussion was arranged with the head of the Legal Services (Prosecutions) unit and the nature of the research discussed. Although arranging a time for the initial discussion was problematic, once this was

overcome and the meeting occurred, an offer of research access was forthcoming. During the first meeting it became apparent that this issue of formalising research access was unlikely to be speedily resolved. This was due to the various internal authorisation forms not having been sent to the Legal Services (Prosecutions) unit. During the discussion it was possible to present this as becoming a cause of concern, which was accepted and, once the parameters of the proposed research were discussed in greater detail, it was informally agreed that the research could proceed, provided that the Official Secrets Act was understood to apply.

After this was agreed, the work undertaken by this section of the DTI and its staffing were explained in detail. This discussion unexpectedly became both the first interview of the study and a means of ensuring access to members of the unit.

The unit consisted of investigators and lawyers, there being approximately 20 investigators and 18 lawyers. The number of investigators was not fixed as several posts were in the process of being either advertised or appointed. Once the numbers of investigators and lawyers were known, it was possible to request interviews with a representative number of staff from both groups. An offer was made that the DTI would provide the names of a selection of investigators and lawyers with a range of experience and that all arrangements for interviews would be made direct with these individuals. This offer was accepted, recognising the potential for this sample to be less representative of both groups than would a random selection of those to be interviewed. The advantage of this offer was that it facilitated entry into the agency, leaving open the possibility of seeking interviews with additional staff should it become apparent that the range was too restricted. When all the interviews had been conducted it was apparent that the individuals selected represented a broad range of experience, in terms of years of work experience within the DTI, and views.

During this discussion, a specific request was made for access to information that could provide statistical data relating to the operation of the unit. It was anticipated that, if granted, this request would equate to conducting a trawl through the archives to ascertain the number and type of matters with which the investigators and lawyers had dealt, together with details of the outcomes. However the head of the unit suggested that the officially produced statistics be used, although these had only been recorded in computer generated form since 1996. These were immediately

provided. These statistics provide an indication of the work of the unit and enable a detailed analysis of the unit's operation of the unit over a three year period, being April 1996 to September 1998. They also established the context within which the interviews with the investigators and lawyers were conducted.

Methodology

Given the small numbers of staff, particularly lawyers, within the Unit studied and the operation of the office, described below, there was concern that use of any case as typifying the work of the unit would identify the individual lawyer or, to a lesser extent, the investigator. This was one of the reasons that, within this chapter, case details were not used to the same degree as they are in chapters five and six in respect of the work of the CPS.

This concern was expressed in all interviews with the DTI staff, none of whom expressed any reservations about being named and quoted. All were extremely concerned that the anonymity of the companies and individuals that had been the subject of their cases should be maintained. Provision is made for this concern by not using examples of cases as had been possible in respect of the other agencies. Access was granted to examine the live and finalised investigation and prosecution files within the unit. The early stages of a number of these had been reported upon in the media, again making use of details of any case, as had been possible in the examination of other agencies files, impractical.

In some cases the investigation subjects are either live companies or company office holders who continue to operate after receiving advice or return to "the trade" under another name or form, without the company in which they work itself being involved in any illegality. For example, an individual who, by prior DTI action, is disqualified from being a director, may re-offend by subsequently acting as a director of another, unrelated company. The second company itself commits no offence and can lawfully continue to trade. The effect of these factors is to make it very difficult to make any significant use of case studies in this section of the study without revealing the identity of the subject of the case.

In contrast, it was agreed that unrestricted use could be made of the unit's statistics that had been provided. These did not provide any details from which either the

subjects of investigations or prosecutions or those involved in those processes could be identified.

Official remit of the Legal Services (Prosecutions) unit

A guidance manual provided to all Legal Services (Prosecutions) staff, although described within the unit as primarily prepared for the unit's investigators, detailed the unit's remit as,

This branch ... has the principal responsibility for deciding whether or not to initiate a criminal investigation following the receipt and consideration of the reports outlining criminal allegations. Ninety percent of its work consists of cases sent by the Department of Trade and Industry Insolvency Services Executive Agency which relate to offences uncovered during corporate or personal insolvency proceedings undertaken by the Official Receivers throughout the country, after having been vetted by the Agency's Prosecution Unit....In addition cases are sometimes referred to the (unit) by Companies House (also an Executive Agency) and by other DTI Departments whose responsibility is to award grant for various schemes under the Industry Act.

The makeup of the Legal Services (Prosecutions) unit

Of those agencies examined in the course of the study, the Legal Services (Prosecutions) unit had the longest history of lawyers and investigators working as part of the same unit. Although the police, CPS and SFO all work with each other to varying degrees, none work as a single entity. The SFO is the closest in composition but does not have a permanently staffed investigative arm as does the Legal Services (Prosecutions) unit. The SFO has police officers are seconded to it for the duration of enquiries and investigations supervised by its permanent staff of lawyers. In the Legal Services (Prosecutions), investigating officers (IOs) are permanent members of the unit's staff.

Documents published by the DTI describe the unit as being within the Legal Services Directorate D. These describe the unit as dealing primarily with allegations of contraventions of the Insolvency Act 1986, the Companies Act and the Companies Directors Disqualification Act 1986, although also dealing with allegations of theft or other dishonesty if these emerge in an investigation primarily involving breaches of any of these Acts. The documents also describe the unit as staffed by 18 lawyers

who work from the DTI office in London and a larger number of investigators based within five sites, Manchester, Nottingham, Watford, Croydon and Gloucester.

The number of lawyers included the Director or head of the unit whose primary role is as head of the section but who also maintains an active case load; 4 senior lawyers (range C11); 11 lawyers (range C10) 1 legal officer (range C10) and a legal trainee (range B5). These individuals worked on the same floor of the DTI offices together with a support staff of typists, and a 'practice manager', who was a senior member of support staff. The Chief Investigator (CIO) was based upon the floor above this section of the staff.

Two Deputy Chief Investigators (DCIOs) were based at each of the three regional offices in Manchester; Croydon and Watford. The remaining two regional offices, Gloucester and Nottingham, were each headed by a single DCIO. The DCIOs were responsible for a staff of between 6 and 10 investigators (IOs). Most, but not all of the IOs were ex-police officers, often of Superintendent rank. There were a small number of IOs who did not come from a previous career in the police. At the time of the study there was a single female in the investigative staff, in the position of DCIO.

Work of the Legal Services (Prosecutions) unit

a) remit

The Head of the unit described its work as being,

... investigation and prosecution of offences arising from insolvencies, either corporate or private individuals.

A senior lawyer stated,

Our role is to look at the offences to see if sufficient evidence exists to justify prosecution (DTI 2).

Unlike the other agencies studied, the unit regularly produced concise information as to its operation. This includes statistics covering the number of matters dealt with, the origin of those matters and the outcome. When it was asked whether there was a possibility of this being noted for the quantitative aspect of the study, an offer was made of a photocopy of the most recent statistics. The request for previous years' statistics was met with a similar response, photocopies of which were provided at the end of the interview (Annexe A).

The Head of the unit encouraged a policy of its senior lawyers conducting presentations to other agencies, both commercial and governmental, as to its remit and composition. In order to ensure uniformity of presentation content, these lawyers worked from a set of computer based notes. Of all the agencies studied, none but this unit had such an active policy of self-promotion or self-examination.

When asked as to the reason for the production of monthly statistics, it was explained that that they were to,

... spot trends. We like to know how many cases are coming in, like to know what to expect. The Insolvency Service let us know what they expect to send to us, we would like it to be a regular flow but its just like any other part of the criminal justice system, you say ' We can't take any more' and the next one is a rape or a murder and you have to take it, you can't not. It's like that with us. (DTI 1).

Despite the last aspect of this statement, there appeared to be a distinct difference between the work of the DTI lawyers and those of the CPS. The former held regular monthly meetings with their main 'supplier', the Insolvency Services (IS), and were to a degree able to plan their workloads to an extent that did not appear to operate in the police / CPS relationship.

The DTI/IS relationship was similar to that of the CPS / police in terms of investigator/prosecutor inter-dependence but quite different in operation. One of the primary differences appeared to be the degree and nature of contact between the DTI and IS as compared to that between the CPS and police. The Head of the unit and more experienced lawyers operated a system of regular meetings with the IS Examiners. Due to the regularity of this system the lawyers and examiners did not meet only when there were disagreements over DTI decisions as could occur in the CPS police relationship.

The ability to plan workloads was reflected in the relatively even statistical analysis of in-coming matters and in the comments of those interviewed as to the use of information on incoming, on-going and out-going matters. This was perceived as being necessary,

...in order to be able to deploy resources. If we found out that all our Manchester cases had folded and the lawyers had no work, we would want to know so we could redeploy them. (DTI 1).

Copy of these notes was supplied at an early stage in the research, as were statistical data, following it being asked whether there was an official definition of the work of the unit and, if so, the content of this. These notes detail the entities and offences with which the lawyers deal. These are divided by identity of alleged offender, being companies and bankrupts (Annexe B)

Statistics and Analysis of the work of the Legal Services (Prosecutions) unit

The official statistics compiled by the Legal Services (Prosecutions) unit confirmed the extent to which the IS was the main 'supplier' of matters, the average breakdown of case referrals being,

Insolvency Service	75%
Companies Investigation Branch (CIB)	10%
Other (CPS; referrals, Companies House and the Employment Service)	15%

From the statistics provided it was possible to determine the origin and processing of the work undertaken by the unit. Taken over a three year period the "Prosecution statistics – throughput of cases" revealed that between 72% and 85% of all cases dealt with by the unit originated from Insolvency Service referrals, making that Service the unit's largest supplier of work. Over the same period the CIB provided 5.5 to 6% of the unit's work. The remaining 22 to 11% of referrals to the unit were described as "other", which the head of the unit explained as being,

... mainly voluntary referrals, from the CPS. They are under a duty to report to the DPP any insolvencies. (DTI 1).

These statistics made no reference the "other DTI Departments whose responsibility is to grant awards...under the Industry Act", referred to in the unit's official remit as providing it with work. It was noted that the official remit did not mention receipt of work from the CPS, though that accounted for a sizeable portion of the annual cases received by the unit.

The head of the unit described it as receiving approximately 900 cases each year. Further statistics were provided that evidenced the numerical monitoring of case progression. From these figures it was possible to calculate in percentage terms the results of cases being referred to the unit.

Over the same three year period, between 30 to 285 of referrals to the unit resulted in the matter being processed by way of court proceedings. The number of referrals that the unit initially accepted but thereafter not process any further appeared both high and variable, being between 37 and 44% of all cases received by the unit. These figures would suggest that just under a half to a third of all referrals to the unit did not get processed by the unit. This appeared to be a very high level of refusal. Further examination of these figures and their explanation by members of the unit reveal that approximately a third of all "turn downs" were "warning letters". These letters did not have a statutory basis. They were described as intended to notify the suspect of the DTI's examination of their operation and concerns as to the manner in which that was occurring. The main purpose of these letters was to "warn" against repetition, emphasising the regulatory work of the DTI that conformed to the deterrence model.

The statistics revealed that the number of cases on-going in the unit for every month since April 1996 was recorded in detail. The source or agency of origin of Legal Services (Prosecutions) referrals was recorded, together with the number of cases going to court; the outcome of court proceedings, and the number of "turn downs". A "turn down" was established as being a discontinuation by the DTI that equated to the "NFA" used within the police and CPS. The DTI recorded the stage at which this type of decision was made, being divided between pre- and post-investigation discontinuation. The number of "other actions" was also recorded. These comprised a further break down into number s 216 Companies Act warning letters, "advice cases" in which the individuals or companies are offered advice as to the operation or practices (these also being the informal "warning letters") and 'other reasons' which were explained to include referrals to other agencies.

Unlike the situations that had been experienced in the two other agencies, the Legal Services (Prosecutions) unit was both able and willing to supply statistical data as to their work. The ability to do this may be explained by the considerable use made by all lawyers and IOs of computers. One result is that a considerable amount of

information was stored in a readily accessible form that was freely available for research purposes upon the express understanding that complete anonymity of all those involved, location and court was guaranteed. It will be recalled that, in theory, a similar system of computerised case tracking was observed in the CPS. Unlike the CPS system, the Legal Services (Prosecutions) unit operated its system to maintain contact between its lawyers and investigators. It was also used by lawyers to monitor and control the conduct of investigations.

Interviews with lawyers provided indications as to the annual number of cases that each could deal with and the processes involved. Those lawyers without supervisory roles in relation to other lawyers within the unit described themselves as dealing with 200 cases a year (DTI 4) and 110 cases in six months (DTI 6). Unlike the situation in the CPS, the primary work of these lawyers was high volume matters that could be quickly processed by the lawyer, as opposed to all being major investigations.

Discussions with the lawyers also revealed that once a decision to prosecute had been made a lawyer was at liberty to hand over conduct of the case to an “agent”. Agents were explained as being barristers or lawyers in private practice. This was explained in terms of the high volume of work undertaken by lawyers and costs,

I don't want to spend hours on the train to do 10 minutes of court submission (DTI 5).

It was explained that all queries on a case would be received and responded to by the lawyer who had made the decision to prosecute, with the agent being instructed by that lawyer and answerable to them (DTI 6). Whilst the costs and resources argument was accepted, it became apparent from the interviews with the DTI lawyers that the perceived complexity of a case would usually result in the lawyers handling all aspects of a case, including court appearances,

If a matter is complex or likely to attract publicity or serious, I like to keep them in-house (DTI 5).

Practical issues of workloads were also alluded to,

When you see a case with 20 boxes of exhibits you say 'that's one to send to the agents!' (DTI 4)

Areas of work studied

At the time of the study the high media and political profile of the DTI was immediately apparent from the national media. Considerable media coverage had

been given to the Kevin Maxwell case (The Times 16 March 1999) and to Peter Mandelson's resignation from office as Head of the DTI. All such coverage had emphasised the position of the DTI as a Government agency. This was a position emphasised throughout the unit. In the job description accompanying an advertisement for the CIO this was reflected as,

Good investigations (particularly those where there is a strong public interest) with a successful outcome presents not only the directorate in a good light but in today's climate when law and order is looked upon as a major political issue the image of the Department as a whole is viewed favourably and one of its objectives of maintaining confidence in the market is achieved.

As a result of this approach, it was felt important to explore not only the relationship between the unit's lawyers and IOs and their respective functions and roles, but also to examine whether both viewed their work as being influenced by politics. The respondents were asked what, if any, is the effect of the influence of politics upon their operation.

Before being able to undertake this, it was essential to have an understanding of the official description of the work of the unit in respect of both lawyers and IOs and thereafter to examine the perceptions of both groups as to the nature and content of that work.

The media commentary on the operation of the DTI did not appear overly to concern the unit's lawyers. This is confirmed by a number of the unit's lawyers, who stated that they viewed media reporting as to be expected, in the circumstances of the DTI being viewed as a single entity, although un-deserved and therefore of less relevance to their particular unit,

At the end of the day it's the inspectors who went after Maxwell. The DTI is huge and an easy target. (DTI 2).

A number of the lawyers interviewed referred to the media presentation of the criminal justice system in general, the work of the DTI in particular and expressed hopes that "playing to the media" would be avoided,

I think that sometimes the CPS look too much to The Sun or Daily Mail headlines (DTI 2),

...the media is fickle (DTI 4).

Interviews with lawyers and examination of the unit's cases reveal that no financial limits or filters were applied to the matters received by the unit. Accordingly, for example, lawyers and investigators would accept and process a complaint of the statutory offence of a bankrupt obtaining credit in excess of £250 pounds without declaration of their status as a bankrupt, whether the credit obtained was £251 or thousands of pounds. Many in the unit referred to the bulk of their work being "book offences", which are described as being failure to keep proper books of account as required by the Companies Acts.

The more complex cases and those usually involving sums of money similar to the complaints investigated by the police and prosecuted by the FIG are those of fraudulent trading. These involve companies trading in the knowledge that insufficient assets are held to cover the company's liabilities and companies trading as,

...scams from the outset, such as furniture companies getting orders, never having any intention of supplying (DTI 1).

Having established the work of the unit, the next stage of the study was concerned with establishing how that work came to the unit.

Referral paths to the Legal Services (Prosecutions) unit

Official statistics reveal that most of the unit's work came from the Insolvency Service (IS) and was in relation to the operation of companies that had been liquidated or of individuals who had been declared bankrupt. If the IS, in their dealings with such companies or persons, found a range of behaviours, from failure to keep proper books to fraudulent trading, they provided the unit with a report that incorporates their investigations and actions. Allocation of these matters to lawyers within the unit depended upon the type of wrong-doing and the experience of the lawyer (DTI 1).

Upon their receipt of matters, the lawyers considered the reports against the Code for Crown Prosecutors, the allegations having to meet the requirements of sufficiency of evidence and being in the public interest. It was at this stage that, due to the potential for different interpretations of 'sufficiency of evidence' and 'public

interest', it was thought possible for differences in decision making and so the outcome of a referral to occur.

This was considerably minimised by the way in which decision-making occurs and also monitoring of files within the unit. If the two tests under the Code are satisfied, the matter was referred to the CIO for allocation to an IO for 'investigation'. In some instances this was something of a misnomer, as there was very little investigative work carried out, as the offence was self-evident and the IOs task was to obtain statements as required by the lawyers. As shown in case study C, in some cases, much of the evidence gathering had been completed by the time a matter was referred to the unit,

The Inspectors have gathered a substantial amount of direct and circumstantial evidence and it seems to me that it is unlikely that an IO would uncover any significantly new material. It may therefore be sensible if you are planning to go to counsel for advice as to whether there is a realistic prospect of obtaining a conviction, to do so at this stage. If Counsel is of the opinion that the case is worth pursuing then an IO could be appointed to obtain such formal evidence as may be considered necessary

Reports from the CPS were another source of in-coming work. All private liquidators are obliged to report to the CPS any irregularities found when conducting voluntary liquidations. Should the DPP consider that offences under the Companies or Insolvency Acts have been committed, the liquidator's report is referred to the unit.

The actions of live companies were dealt with by the unit through its interaction with the Companies Investigation Branch (CIB). This section of the DTI received complaints from the public or other companies as to the operation of live companies. After investigation by CIB a report was submitted to the head of the Legal Services (Prosecutions) unit for consideration as to whether there was sufficient evidence to justify prosecution. If the CIB wants advise on the prosecution the matter was referred to another Directorate, D1, that was the advisory arm of the DTI to the unit's prosecution remit.

Referral paths within Legal Services (Prosecutions).

The referral paths within the unit were described in detail in the Investigating Officers' manual, that stated that once a lawyer has assessed a matter as meeting

the requirements of the Code for Crown Prosecutors, it is to be forwarded to the DCIO for allocation to an investigator. Thereafter,

The Investigation Officers are to stay within the lawyers' written instructions and depart from them only after consultation with the lawyers. In cases where the Investigation Officer discovers further enquiries which might be relevant to the investigation or another possible it is essential that he seeks the lawyer's consent to extend the ambit of his enquiry as the lawyer is ultimately responsible for the overall conduct of the case. (DTI Guidance Manual).

Referral paths from Legal Services (Prosecutions).

The IOs' manual details the three main types of referral from the unit. The first was in relation to matters considered not to be in the public interest to prosecute. The lawyer making that decision formally notified the O.R.s of their decision. A system had been introduced whereby the O.Rs were given 6 weeks to respond to this notification. Within that time, representations could be made and considered by the lawyers, if necessary with the adjudication by a senior, supervising lawyer. The head of unit stated that, since introducing the system approximately 18 months prior to the interviews, he had not had to arbitrate on these discussions for "several months". Another lawyer whose duties included arbitrating decisions not to prosecute described the situation as,

...I can't think of the last time I did, I can think of some of my decisions that have been challenged. We have such good relations with the agencies that they tend to respect our decisions and discuss them with us (DTI 2)

The system was stated as having been introduced to replace the "confrontational" model that had previously operated and to ensure that the O.Rs received more information that had previously occurred.

If you sit down and discuss it, it takes the heat out of the situation. I also think it's important that the lawyers are aware that they may be called to account and must have valid reasons. (DTI 1)

This system was described by several others interviewed and thought to operate as a matter of routine. In its existence and uniform operation, the system differed notably from the situation in respect of the police notification of CPS decisions, that had been found to be informal at best and often non-existent.

Examples of the second type of referral from the unit were not observed within the unit, although one form was recorded in the official statistics, being referrals to the police. The Manual refers to this as being in relation to matters,

...when all allegations are of pre-bankruptcy Theft Act offences,

and,

If the lawyer feels that the case requires investigatory powers which the Directorate does not have. (DTI)

In addition, mention was made by lawyers, and the Manual, of the fact that if very large fraud cases were received, consideration would be given to referring these to the SFO due to lack of resources and/or PACE powers.

Decision making

i) official guidance

New lawyers joining the Legal Services (Prosecutions) described their being provided with an official guide and definition of the work of the unit. A copy of that document was provided, detailing the specific offences with which they would deal. That the amount involved in the alleged wrongdoing was a relevant consideration was apparent from the use of the description "prescribed monetary limits" in the guidance. Similarly the relevance of likely penalty to be imposed was assumed from its inclusion in the guidance. A copy of this guidance was provided, unlike in the CPS where no internal guidance to prosecutors had been available for the purpose of the research. This distinction between the two agencies has to be considered in the light of the timing of the study. After the CPS stage of the research, the change in CPS senior management resulted in its being increasingly open about the Guide to Crown Prosecutors and removing restrictions upon its publication beyond the original limits of immediate employees.

Although not much importance was made of the supervision of lawyers in the DTI there was a definite procedure for the supervision of less experienced lawyers in which the Head of the unit played an active part. All the more experienced (and senior in terms of scale) lawyers spoke of having responsibility for the supervision of less experienced lawyers. The Head of the unit saw supervision as comprising allocation of the in-coming matters,

... to try and marry a lawyer's experience to the type of work, and to direct examination of their decisions, being very rigorous in the early stages of their

joining the unit. Those new to the department, I'd check every file they do. I also look at every file they turn down as it is a very important decision to make. When a case goes out for investigation and comes back I dip into the cases to make decisions as to whether to prosecute or not. That gives me a chance to see the instructions that went out and the quality of decision making.

Whilst undertaking the research it was observed that lawyers would move between offices, discussing issues with their colleagues, as opposed to formally submitting files or written requests for advice to them. This relatively informal exchange of views and ideas continued in the meetings that the Head of the unit encouraged with the IOs. This system was based upon monthly meetings attended by two or more lawyers, one of whom was an experienced DTI prosecutor whilst the other, or other two if more than two lawyers were attending, would be a lawyer of less DTI experience. During these meetings recent case law would be presented and its implications discussed.

A system of "marginal meetings" that took place with Examiners of the Insolvency Service was another venue within which the less experienced lawyers were provided with an opportunity to participate in situations of disagreement resolution. At these meetings legal advice was given to the IS and a common understanding of the remits and law promoted through discussions.

If they (the Insolvency Service) think that a case isn't worth running they won't send it to us. If they are in doubt there will be a marginal meeting. Once a month we (DTI 3, 2 and 12) go and sit down with an Examiner and go through 20 odd cases and give them on the hoof advice. Either they go back to the IO or drop it. That system works very well. We sit and advise, taking a young lawyer with us. They bring in 3 new ORs from other areas (DTI 3).

As with the DTI's IOs, this lawyer felt it important that the two groups had a shared understanding of each other's remit, that was brought about through a common interpretation of the concept of 'public interest,

I see it as a good way of establishing common standards and a uniform approach to 'public interest'. In some areas you could get examiners applying different notions of what constitutes 'public interest'.

In this way not only did the less experienced lawyers meet with other new members of the DTI with whom they would eventually work but also their instruction as to the DTI interpretation of 'public interest' was re-inforced.

All those lawyers interviewed who were new to the unit spoke highly of the more experienced lawyers in relation to their personal style and the manner in which they performed their managerial role. This was particularly true of the Head of unit who was viewed as "leading from the front", being easily accessible and approachable.

The Head of the Unit spoke of moving away from "confrontational" procedures and intentionally introducing an ethos and accompanying systems of accountability. This was described as

I also think it's important that lawyers are aware that they may be called to account and must have valid reasons (for their decisions and instructions). I don't second guess their decisions, it's very undermining for lawyers.

The unit's management situation could be contrasted with that observed in the CPS. Lawyers in the latter agency did not appear to have regular or in some instances, any, contact with the head of the section and were generally disparaging in their views of the most senior management. Interestingly during the course of the DTI study reports were published as to the style of the new DPP with particular emphasis upon his initiating contact with prosecutors by telephoning them to congratulate them on their work or to enquire as to how they were progressing. This was reported as having a considerable beneficial effect upon the previously demotivated staff (Gibb 1999).

These two examples suggest the importance of providing both professional and personal support to staff in promoting job satisfaction and encouraging a common sense of purpose, both amongst the lawyers and those with whom they work most closely .

The Code for Crown Prosecutors was described as binding upon the DTI lawyers' decisions,

There is a need to keep it in proportion and stick to the Code. it's not that we're immune to public opinion but if we are wedded to the criminal justice system we must remain within it (DTI 3)

This description drew the distinction between an emotive viewpoint and a more empirical standard in the interpretations that could be applied by either agency as to the 'public interest' requirement. There being no standardised definition as to what constitutes 'public interest', every agency that makes decisions based upon this concept can have its own definition or definitions.

If differing definitions are applied by the 'suppliers' (the investigators - police or IOs) and the decision makers (the lawyers) the potential exists for mis-understanding and at worst conflict between the two.

Within the DTI such potential appeared to be minimised by a number of factors. These were;

- the close supervision of lawyers new to the unit
- supervision of lawyers' decision making and IOs' investigations by senior lawyers reviewing the files
- the integrated nature of the unit's investigators and lawyers and
- the nature and extent of the contact between the IS and DTI.

An additional reason for the ease with which both groups accepted the definition applied as to 'public interest' was thought to be the similarity between the IOs and lawyers as to the rational of their work.

ii) notification of decisions, complaint and review mechanisms

Since the I.S. was the unit's main source of work and its IOs were the means by which referrals were progressed, it may be expected that the unit's lawyers had the greatest contact with these two groups. The examination of the CPS and police had suggested this expectation would be correct in relation to the relationship between those two agencies.

The most noticeable difference in the relationships between the DTI and the CPS/police in their sources of work and investigations was that the DTI contact is systemised whereas the CPS/police contact appeared to vary according to the views of individual prosecutors and police officers.

The DTI system of notification was described by the Head of the unit as,

... we are in a sort of a sterile environment. If we come to a decision not to prosecute we notify the clients. If they have representations to make they do so. But our decision must be in accordance with the Code for Crown Prosecutors. I can say to them 'I know your views but we are here to be an independent body'.

In respect of both the official procedure was that a minute was sent to the referring body, setting out the decision and giving them 6 weeks to respond. All lawyers, including the Head of the unit stated that this time limit was never adhered to.

Perceptions of role and function

a) lawyers

Many of the DTI lawyers saw themselves as prosecutors first and foremost but all also mentioned that there was a regulatory role to their work.

We see ourselves as prosecutors. As part of the regulatory framework there are circumstances that lead to *de minimis* arguments, we want to prosecute but use regulatory methods (DTI 2)

This dual approach was described by one of the senior lawyers when asked about the official statement that the DTI role was being to "enforce the regulatory framework for commercial activity",

'Regulatory' must be taken in its broadest sense...s221 of the Companies Act, (requirement of keeping of proper accounting books) where someone breaches that they must, where possible, be prosecuted if the public interest is satisfied, but we also have warning letters that regulate behaviour....we see ourselves, as prosecutors, as part of the regulatory framework (DTI 3).

Another illustrated the duality of the role by example,

I am prosecuting an insolvency practitioner for acting whilst not authorised, I see that as strengthening the regulatory framework (DTI 2).

and

I see myself as a prosecutor, I'm very clear about that. I'm enforcing Parliament's statutory regime. I can see that there is a regulatory function in a successful prosecution. (DTI 3).

The comments of others made it clear that different personal emphasis could be placed on the same work, whilst achieving the same regulatory and more usual criminal justice ends,

Unlike the CPS, the DTI wears three hats, regulator, also promoter of trade and industry and lastly prosecutor (DTI 5)

The comments in one of the case studies showed the extent to which the prosecuting role of the DTI was viewed as assisting regulatory bodies, again for the perceived good of the public,

There is an obvious need for the regulators to make their presence felt...The difficulty arises in whether it is in the public interest to have a trial of R and M if the principal malefactor has escaped prosecution...The likely penalty to be imposed by (the regulatory body) may, in the particular circumstances, constitute sufficient penalty. (Case study C).

As with the IOs, and unlike the lawyers in the CPS, all the DTI lawyers expressed strong moral judgements about their work,

There is a need for large scale fraud to be stopped and punished, (DTI 5)

I see myself as a prosecutor. I only enjoy the cases that I feel people have done something really naughty, I feel more comfortable with a high level of dishonesty. (DTI 4)

and

There is a need to protect the public. When we woke up to read Mandelson's statements in the press (about permitting those who had breached company laws and regulations to be permitted to continue to operate) and thought 'Oh no', to give them a second chance would require a change in the law.(DTI 6)

Some of the respondents had been CPS prosecutors prior to joining the DTI and commented on their perceptions of the two

The review stage and decision to prosecute is considered more. It's down to time. There is more uniformity of ability here but it is primarily down to time (DTI 5)

This was clarified by the explanation that he had worked in local CPS, leaving specifically to concentrate on fraud.

b) the IOs

Determining the official description of the work of the IOs, as with that of the lawyers, was made easy through the official guidance available. A copy of the final draft of their procedural manual was provided in response to a similar question to that posed to the lawyers.

Production of this manual had been the work of the DCIO in question and he was justifiably proud of the result. Given the support and encouragement that the Head of the unit had provided it was possible that its production and quality was not coincidental but part of a unit wide policy of actively encouraging corporacy and self assessment from statistically verifiable data.

The official description of the IOs work was,

The principal function of the Investigating Officers Section is to carry out structured investigations into criminal allegations as directed by the Prosecution Lawyers (Investigating Officers Manual)

and

The Role of the Investigation Officers

6.8.1 The Investigating Officer will have assigned to him by his Deputy Chief Investigation Officer files for enquiry....The Prosecution File will contain the Official Receiver's report together with other various documents. The Prosecutions File will contain the lawyers instructions and an allocation sheet completed by the Deputy Chief Investigation Officer in accordance with the Units Allocation System.....

6.8.2 Lawyer's instructions on a case should be clear, targeted as to the offences which are to be proved and precise as to what enquiries the Investigation Officer is to carry out.

6.8.3 All lawyers' instructions should be in writing. The Investigation Officer should be in no doubt about the number of witnesses to be seen and the nature of the evidence they should be asked to give. The instruction should also make it clear as to whether or not the defendant should be interviewed.

The Investigation Officer should make the necessary enquiries with expedition and in a most effective manner. (Manual chapter 6)

All the IOs interviewed described their role and function by direct reference to the unit's lawyers, describing their work as,

... to receive queries instigated by DTI lawyers, (DTI 8)

and,

... to ensure that the investigations that are referred to the section by the lawyers are properly and effectively dealt with in a structured way. (DTI 11)

The operation of the DTI's IOs is, within the criminal justice system, unique in two ways. Firstly the IOs have no statutory powers whatsoever, unlike the police in the CPS and SFO investigations/prosecutions. As a large number of the IOs were ex-police officers of considerable service, it was thought that they would be well placed to draw comparisons between their operation as DTI IOs and the operation of the police in similar matters. This proved correct, all IOs commenting upon the differences between the investigatory role in the two agencies.

The second distinguishing aspect of their work was that it was entirely dependent upon directions of lawyers. Not only did the lawyers determine what matters were referred to the IOs, but the lawyers also determined the exact nature of the investigation, as noted in relation to referral paths within the unit. IOs commented that,

We're working for lawyers entirely. (DTI 10)

What we can't do is extend the investigation beyond what the lawyer has said we need (DTI 11)

Every investigation was referred with specific written directions from the lawyers to the IO as to what questions were to be asked, what witnesses were to be interviewed and what evidence gathered. Possibly as importantly the lawyers directed, in terms of hours, how long each section of the investigation was to take. This estimation of time related to every aspect of the case, from reading the file evidence to interviewing witnesses and preparing statements.

Apart from the possible implications in terms of their employment contracts, the obligation on the IOs to adhere to the directions as to focus and content of the investigation and its duration was at the risk of incurring a financial penalty. Although there was a mechanism for the IOs to ask the lawyers to reconsider any of these decisions, there was no requirement that the lawyers accede to such requests. Any IO that exceeded the original allocation of time was at risk of failing to meet the

target for the case. Whilst this would not jeopardise their basic pay, it could lead to a loss of the performance related pay portion of their salary.

Each investigation was allocated a number of units where a unit was equal to 10 hours work. At paragraphs 20.3 – 20.6 of the IOs' manual the calculation of the units was detailed as based upon the DTI working year, being 223 days, with London IOs working 7.2 hours per day and regional IOs working 7.4. Multiplying both by the number of days produced the annual work hours of 1,606 and 1,650 respectively. A unit being 10 hours, London IOs had an annual total of 161 units allocated to them for their enquiries and regional IOs 165 units.

Each case had a number of units assigned to it as a direction to the IOs as to exactly how long the investigation and preparation of evidence will take. Every case had allocated to its investigation what was termed a 'fixed element'. This was an established number of units apportioned to a case on the sole basis of its classification. Investigations of allegations of fraudulent trading and insider dealing matters were always given 6 units (60 hours). In this time the IOs was to read the file, absorb the instructions and undertake certain lines of enquiry in relation to the specific directions or requests of the lawyer.

In the event of the lawyer requiring the taking of statements, each statement had a 1.3 unit value. In effect, this equated to the IO being on notice that they had 13 hours in which to prepare for an interview with a witness, travel to that witness, take their statement, compile it in the accepted format (typed and in proper layout) and arrange for its signature.

Interviews had a similar unit allocation, so that the preparation, travel, interview, typing and signature of the notes of interview was to be completed within a 13 hour period. The formula that was applied to each file that reaches a DCIO was;

- fixed element units

- 1.3 units per defendant to be interviewed

- 1.3 units per witness statement to be taken

The result of this calculation was binding upon the DCIO, as confirmed by the IOs' manual,

Normally the DCIO will have no discretion to deviate from the above formula, except for those cases where there are special circumstances outside the norm (Manual 20.9)

Special circumstances were defined as being

where the above pre-determined allocation criteria can not be established...For example - those occasions when a lawyer asks for enquiries only; or asks for enquiries to trace a particular person; or to establish whether or not a particular activity/offence is being continued....Units will be allocated retrospectively in line with the actual time spent in carrying out those duties, irrespective of what activity is involved (Manual 20.10)

The fact of these directions and the certainty of their application may explain why delays of the duration found in the police context, were not found in the operation of the Legal Services (Prosecutions) unit.

Relationship between lawyers and IOs

Observations of the units operation, together with the comments of those within the unit, led to the conclusion that relations between lawyers and between lawyers and investigators were far closer than those that had been observed within the CPS or those observed between the police and CPS. Lawyers and IOs evidenced strong views of professionalism and pride in the unit's work in its general and personal sense. All staff had access to the officially generated descriptions of their role and functions. Their comments in interview suggested that they appeared aware of both their own and other's roles and responsibilities within the unit. Most of those interviewed attributed the atmosphere within the unit as originating from and sustained by the head of the unit.

The head of the unit acknowledged that the unit's size and the fact that a large portion of its work involved fairly small cases assisted in building good working relations within the unit. He also emphasised the importance of lawyers and investigators working as part of the same team, with both groups understanding the different but complementary roles, functions and objectives of the other.

We think one of the benefits of our system, and I know we are dealing with smaller cases, is to involve lawyers at the first. The trouble with the police, some of whom are very good fraud investigators, is that they don't know where

the case is going. We've very scarce resources, sometimes it causes friction between investigators and lawyers. Investigators will say 'We know what's going on' and lawyers say 'Yes but the case will never finish'. The lawyers have the final say. (DTI 1)

All those interviewed confirmed the determining decision being that of the lawyers. None commented on there being a negative friction between the two roles. In this the findings of the study were distinctly different from those views encountered in both the police and CPS. Unlike the situation observed in either of these agencies, the views of members of the DTI appeared to be grounded in use of the formal referral, monitoring and negotiating processes, rather than on personal interactions.

One of the unexpected features observed was the distinct difference in perception of the investigation subjects. All the lawyers stressed the need to protect the subjects' anonymity, be they individuals or companies. This was expressed more in terms of their continued operation and the role of the DTI in encouraging trade than in terms of the Data Protection or Official Secrets Acts.

The IOs interviewed had a viewpoint focused more upon the moral blameworthiness of the subjects, commenting,

they are all just criminals and ought to be treated like that (DTI 10), possibly incorporating police values into the role of the DTI as opposed to the lawyer's emphasis upon the harm occasioned by them. Despite this, the IOs were as concerned as the lawyers that the anonymity of the subjects of their investigations be maintained.

Several IOs commented upon the difference between their role in the DTI and the one they had fulfilled whilst police officers,

It's not like the police, where the job is to prosecute, ours is to investigate, there's a difference. To us it does not matter if it goes to prosecution or is knocked back (DTI 9)

We're working for lawyers entirely, we're only evidence gatherers whereas the police have some autonomy, they can arrest and push CPS by saying 'Here's someone - deal with it' (DTI 10),

the inference being that within the DTI this approach was not possible.

Possibly the major reasons for this can be found in the investigating system, where the IOs had absolutely no statutory powers of operation. In terms of their operation this was described as,

... they can't arrest, they can't get a warrant. (DTI 1)

and by an IO

It's a little hard to investigate sometimes as we've no powers (DTI 17).

This was a factor recognised by the lawyers, one of whom commented,

I don't think that the present powers of investigations are sufficient. Our IOs are often operating with one, sometimes two, hands tied behind their back.

They need PACE powers in order to be able to do their jobs properly. (DTI 3).

The perspective of an IO gave an indication as to tensions that have been commented upon in earlier chapters as to the relationship between the police and CPS,

It is the older IOs who have a problem with not doing it on a wing and a prayer (DTI 10).

although there was no direct evidence of this being so, one of these officers stating his view of the IOs work as,

Our interviews are not to solicit information but to give an opportunity to provide explanation. We can't compel attendance (DTI 7).

That some of the lawyers felt challenged by the IOs whilst others encouraged the IOs to suggest means of dealing with individual investigations appeared to be dependent upon personality more than procedures. One lawyer commented that, in her view, the IOs,

... do tend to see themselves as police officers, you should hear them talk....A lot of us (the lawyers) tend to be women and younger. You can just imagine after we tell them 'I think that you should do this', slamming the 'phone down, saying 'Jumped-up little madam' (DTI 4)

This lawyer stated that she had little direct contact with the IOs but had been given responsibility for dealing with one particular office and was encouraged to visit them at their offices. This appeared to have produced a more positive view,

To my surprise I'm not cynical to an away day. Its easier to talk to someone who you've just sat down with and had a drink. (DTI 4)

Another, female, lawyer said

Every case I get, I ring the IO ...Generally they are right, they are experienced officers who know what's right, generally they are quite sensible...Providing you can justify your decision against their report recommendations, they are all right. (DTI 6).

but also,

Although we are in the 90s, they aren't quite with us, for a young woman there is a real problem. Last time I went to (...) it was like stepping back twenty years. There are nude photos on the walls and they have female secretaries. If I were there I'd complain but at their age they are not going to change. (DTI 6)

Conversely a young male lawyer's view of the IOs was,

... it amazes me how they won't exercise any initiative. They are very experienced people, I don't find a difficulty in their attitude. They just can't get to grips with the law.....I think that we need police experience. There is a clear difference in their ability to collect, collate and obtain witness statements between them and the investigators of other agencies that are non-police. (DTI5).

This lawyer provided details of his experience in a previous post, making the point of what he took to be the general incompetence of the other 'investigators' in comparison with police officers with whom he had worked.

An older male lawyer observed,

All ex-police officers come with a good dollop of common sense (DTI 2)

Observation of the office interaction, conducted when several IOs visited the lawyers' offices, was that all the lawyers, female and male, appeared to have a better informal relationship with the younger IOs than appeared to be the case in respect of some of the female lawyers and older IOs. The reason for this appeared to be personality based as opposed to grounded in any organisational culture. On professional matters it was noted that all communication between IOs and lawyers was consistently polite, clear and constructive.

Some of the older IOs mentioned the gender of the lawyers in an almost indirect manner, it nevertheless being presented as a criticism,

One of the main problems is the high turn over of staff, the lawyers tend to be young women and they are here for a while, then go on maternity leave. (DTI 11)

Of the young lawyers of both sexes who were interviewed, there was an equal division in both sexes between those who did not see the unit as being their long term career and those who did. Some male and female lawyers viewed their time within the unit as interesting but essentially a means of gaining experience and transferring across postings within the Government Legal Services whilst others, male and female, were content to stay for a number of years in the unit. In neither of these two groups was any reference made to gender as playing any part in their career preferences. Given this it was felt that there was no basis for taking past years' employment records to determine whether the IO's views were historically accurate in their basis.

In practice, possibly chauvinistic attitudes did not appear to compromise the efficient working of the two groups. The same IO who made comments of a sexually discriminatory nature also stating that,

Our job is to respond to the needs of the lawyer, but that does not stop me from challenging them. At the end of the day, the lawyer is the one who is in charge. (DTI 11),

grouping all the DTI lawyers together and making no distinction made between male and female, experienced and less experienced.

That the individual could be more challenging of female lawyers than male could not be discounted, nor could the possibility of there being some substance to the views of the female lawyers quoted above. However none of the DTI respondents cited sexism as negatively impacting upon efficiency or working relations in dealings between lawyers and IOs within the unit.

What constitutes fraud for the Legal Services (Prosecutions) unit

Reference to 'something really naughty' appeared to be directly linked to lawyers' perceptions as to potential or actual harm to the public. That an individual or company may have 'got away with it' once appeared to increase the likelihood of the lawyers deeming prosecution to be in the public interest,

It is difficult to accept that as an experienced broker he was not aware of the full implications of what he was doing...Although no losses were incurred the way the business was carried on in violation of the provisions for the company to be authorised, the public were put at risk. (Case study T)

In another case, that was described in the Decision to Prosecute form as,

... the latest in a string of failed freight forwarding businesses operated by C with unfortunately the carriers that he hired suffering huge losses. Despite the deficiency in the company, C drew £ 69,000 from the company

the 'public interest' section reading,

... repeated company failures and fraudulent trading, (Case study Cr)

without mention of the losses involved.

It was not only in the research context that sentiments as to the need for regulation were expressed, as demonstrated by the DTI correspondence to the prosecuting agency of another jurisdiction that was showing a distinct lack of willingness to assist in the obtaining of evidence,

One of the stated objectives of the Department of Trade and Industry is to 'develop a fair and effective legal and regulatory framework'. This is done by various sections of the Department, of which the Legal Services Directorate is a part. Prosecution, we would contend, is one way of carrying out this objective. (T)

Political influence

The Code of Code for Solicitors, published by the Law Society, governs all lawyers' professional conduct, and requires

A solicitor shall not do anything in the course of practising as a solicitor ...which compromises or impairs or is likely to compromise or impair any of the following:-

(a) the solicitor's independence,...

In light of this requirement of independence, it was anticipated that to question the respondents as to their perceptions or experiences of political interference of the type suggested by the media in respect of the Maxwell cases, would be potentially difficult or offensive. However at the time of the study there had been widespread media coverage of interference by the Zimbabwean Executive in criminal cases.

This provided a basis for asking the question from one who had worked within a system of direct governmental control and direction.

Using this approach none of the respondents appeared offended by the question, but more interested in its application, several commenting that they could not tolerate political interference in their decision making. One described their operation as,

We are in a sort of a sterile environment. If we come to the decision not to prosecute we notify the clients. If they have representations to make, they do so. But our decisions must be in accordance with the Code for Crown Prosecutors. I can say to them 'I know your views but we are here to be an independent body'. (DTI 2)

The same lawyer specifically referred to the Department's Aims and Objective of "to improve and enforce the regulatory framework for commercial activity, while removing unnecessary burdens on business", stating,

We can only do this by an objective standard, we apply the Code, it sends a clear signal to us.

Other lawyers described the context of their work as

I am not interested in the policy and what goes on in the large scheme. I think we get on with it in a vacuum. I don't think we want Ministers breathing down our necks (DTI 4)

Other concerns

Of far more concern to the respondents was the impact of the *Saunders* 23 EHRR 313 and anticipated European Court of Human Rights decisions. The effect of the *Saunders* decision is that answers obtained under compulsion can no longer be used by the unit in its prosecutions. This was described as being,

... a bombshell, its had more impact upon how we operate than any statutory provision within the last 10 years (DTI 3)

and

Our department, its policy, until *Saunders*, was to use information that had been obtained by other agencies....*Saunders* was the biggest change as from time immemorial we had been able to use answers and then we had to re-think how we scoped our enquiries. (DTI 1)

The other significant problem was considered to be the potential impact of the Human Rights Act as read with European Court of Human Rights decisions in respect of retrospective punishment. The offences prosecuted by the unit included breaches of the Insolvency Act that are retrospective, in that the behaviour to be punished would occur before the company/individual becomes insolvent. In this way actions are examined with hindsight.

Given that Article 4 of the Human Rights Act provides the right to a fair trial, many expect this form of criminality to be found to be in conflict with the Act as it is argued that no-one can receive a fair trial if they are on trial for actions that occurred within the 2 years preceding their insolvency, as is currently permitted.

Comparison between DTI and CPS

Some of the DTI lawyers interviewed had worked within the CPS prior to their current roles and were able to compare the operation of the two in much the same way as the IO compared their current role to their previous experience as police officers.

Of the lawyers in that position, all preferred the operation of the DTI to that of the CPS. The group known as the "Civil Service Lawyers" is one that allows qualified lawyers to apply either to a particular branch of the Civil Service or to the wider body and, whatever the original application, thereafter to move between Directorates and Civil Service bodies. All the DTI lawyers had therefore sought employment within the DTI.

In most instances the reason for doing so was described as wanting to concentrate upon fraud matters. However one lawyer stated that application had been made to the DTI as a means of entering into MI5, received wisdom being that the DTI was a good route into the latter agency (DTI 6).

Some lawyers were of the view that the CPS lawyers are more involved in the investigative aspect of matters than was generally acknowledged,

In the CPS about 80% of the time you are investigating as you are sending out memos "Do this, get that, hold an ID parade". If that's not investigating I don't know what is (DTI 5)

but acknowledged that, unlike the CPS, in the DTI it was unquestionably the lawyers who were in charge of the investigation,

The lawyers here conduct investigations, as the IO acts on the lawyer's instructions. At the end of the day they do what we tell them to do. (DTI 6)

Internal management

Amongst lawyers the only division found was to be between experienced and less experienced DTI prosecutors. The office management structure was observed to be fairly informal as was the allocation of case responsibility, in that prosecutors did not have an inflexibly defined function, for example responsibility for long firm frauds or 'book offences'. There appeared to be an understanding that certain individuals did certain work but would also deal with matters beyond those parameters. Particularly the more experienced lawyers tended to deal with the more complex cases whilst the less experienced lawyers had responsibility for specific types of less complex offences.

Although the lawyers commented upon the flexibility of the system, the operation of the office appeared to be quite structured around responsibility for specific types of cases/matters. The comment,

The roles are not as divided as they have been in the last few years. We were divided in groups to concentrate on specific areas, but that's been eroded away. (DTI 4),

may be correct in relation to the past and in relation to division into teams but could not be viewed as accurately describing the work of the lawyers, all of whom described their work by reference to the specific type of case load with which they dealt. The same lawyer continued, stating,

I look after all cases that are sent to our agents.

Although the unit was a part of a very large Directorate, a distinct internal management culture of empowerment and responsibility was observed. In the stage of the study involving the police, repeated reference had been had to that unit's "autonomy", in circumstances amounting to isolation, both from the Force and the CPS. Within the Legal Services (Prosecutions) unit no such references were made, yet very individualistic systems had been introduced and operated consistently within the unit and in relation to its suppliers of work, without apparent comparators in the Directorate. Lawyers and investigators knew and acknowledged their different roles in a relationship that recognised the contribution of each to a shared or common aim. The situations of conflict of role and perceptions between investigators and

prosecutors observed in the police and CPS appeared significantly minimised by established and consistently applied procedures, known and binding on both groups within the unit. Opportunity for dispute as to which group had the final decision had been removed, by formal recognition of this being the remit of the lawyers. However tensions between the investigative and prosecutorial/regulatory functions could be eased by use of several systems, including the “marginal meetings” and the requirement that lawyers explain their decisions to the work suppliers and to IOs .

The regulatory function of the unit was found to repose in the lawyers as opposed to the investigators. Rather than there being a divide between compliance and deterrence as suggested in some of the literature, the two functions were concluded to be co-existing easily both in perception and practice. This was found to be achieved through a mixture of warning letters, that were acknowledged by the lawyers to be of no legal force, but in keeping with one of the Directorate’s main objectives and by use of prosecution for matters individuals assessed as being more blameworthy. Lawyers were observed to combine pragmatism with perceptions of being guardians of independent assessment as to the evidential and the public interest merits of referrals to the unit.

Conclusions

The unit had been chosen for examination on the assumption that its operation would provide an interesting comparator to the operation of both the police and CPS. This was based on a recognition that the work of the unit combines investigators and prosecutors in a single group. Having examined the operation of both these agencies prior to examining that of the Legal Services (Prosecutions) unit, this stage of the study commenced with an desire to ascertain whether the themes identified in the preceding agencies would be found in the Legal Services (Prosecutions) unit. As examination of the unit progressed it was concluded that whilst there were similarities in operation between all three agencies, the Legal Services (Prosecutions) unit exhibited unique features of remit; composition; operation and inter-agency co-operation.

Examination of files and interviews with the unit’s staff revealed the legally qualified staff could not adequately be described as ‘prosecutors’, despite this being how they self-referred. Whilst the official description of the unit emphasised its regulatory function, this was not the primary reason for the suggestion that the term

“prosecutor” did not properly describe the remit or operation of these staff. Interviews with these staff identified that they recognised the regulatory role. In addition a number of these lawyers operated practices that accorded with the types of behaviour identified by Hutter (1988), Braithwaite (1984; 1987) and others as being typical of regulators. It was assessed that, in practice, the unit’s lawyers operated dual roles of prosecutors and regulators.

Unexpectedly no indications were observed of this causing conflict, in either their operation or their work with the investigators. In the examinations of the operation of the police and CPS it had been found that a decision by a prosecutor not to refer a matter to trial could lead to considerable conflict between members of the two agencies. In the Legal Services (Prosecutions) unit the lawyers’ decisions were not only recognised as final by the investigators, a fact often grudgingly acknowledged as opposed to accepted by police officers, but also investigators within the unit recognised regulation of future commercial dealings as being a legitimate outcome of their work.

It should be noted that regulation of the future was not a function of or an outcome available to the other agencies studied. Police officers were found to be interested in obtaining a “result” in relation to past conduct, where a result equated to criminal convictions. The approach and attitudes of CPS prosecutors were found to fall into two broad categories. The one approach was of a strict adherence to the remit of advice and review, that drew sharp distinctions between legal decisions, that were seen as being the remit of the CPS, and operational decisions that were viewed as solely the remit of the police. The second approach saw the lines between operational issues and legal issues as inter-twined and took a far broader approach to what constituted appropriate advice.

Within the Legal Services (Prosecutions) unit there was no such distinction amongst the lawyers. This may be suggested to be the result of a management style that actively required close working links between investigators and lawyers with a shared understanding of the hierarchy of decision making, combined with a need for transparent accountability for the decisions made.

Examination of the operation of all three agencies leads to several major conclusions. The first is that the response of the criminal justice system to fraud was

unlike the treatment of any other offence falling within the criminal justice system. The operation of the police and CPS in relation to their respective parts of the response is assessed to lack co-ordination and mutually supportive remits. In contrast to this, examination of the operation of the Legal Services (Prosecutions) unit leads to the conclusion that co-ordinated and effective responses to fraud were feasible within the existing justice system. Investigators and lawyers in the unit were assisted by a shared ethos of acceptable results, which was both reactive and proactive, operating within a clearly defined legal framework of specific offences. One of the primary conclusions of the study, described in more detail in the following chapter, is that the dis-functional response to fraud of the main criminal justice agencies is more likely than not to continue whilst the substantive law does not encompass a specific offence of fraud.

CHAPTER EIGHT

ANALYSIS

In this chapter analysis is made of the remits of the three specialised units studied and of the statistical data as to numbers and types of cases processed by these units. Examination is made of the official descriptions as to what type of complaints each agency was described as dealing with. Within this analysis consideration is made of whether each agency was stated as applying any definition of fraud and if so, whether there was any commonality of definitions between the agencies.

Thereafter analysis is made of the respondents' comments as recorded during the interview process in relation to their work and of what constituted fraud for the purposes of that work, together with examination of the contents of the files or cases that were examined during each stage of the study. The aim of this examination is to determine how, in practice, complaints of fraud were being processed within the English and Welsh criminal justice system. In this section assessment will be made of the routes by which complaints could come to and be sent from the agencies and of the delays that could be experienced in the agencies' processing of complaints of fraud.

Examination will also be made of the organisational structures of the three units and the possible effects this may have on referral paths of complaints and organisational relationships between the different agencies responsible for dealing with fraud.

Throughout this chapter, the comments of the respondents and examination of the cases for which they had responsibility are considered in light of the themes that were identified in the literature review. Of the themes identified in the literature review, particular discussion is made of the "compliance v regulation" debate, in relation to the results obtained from the fieldwork

Within this chapter assessment is made of the relevance of the operation of the three agencies and whether these agencies, together with the Serious Fraud Office (SFO), provide appropriate and effective processes and methods of dealing with fraud within the English and Welsh legal system.

Remits of the chosen agencies

Of the agencies studied, only the DTI's Legal Services (Prosecutions) unit was found to have a clear official statement as to what type of complaints fell within the unit's remit and what constituted the work of the unit. As detailed in chapter 7, the Legal Services (Prosecutions) unit's statement of remit was found to be based upon reference to specific offences.

Official descriptions of the remit of both the CPS and police included mention of their having specialist units dealing with the investigation or prosecution of fraud. Unlike the Legal Services (Prosecutions) unit, neither of these agencies' specialist units were found to operate as closely as did the Legal Services (Prosecutions) unit to a specific remit.

At the commencement of the study into the operation of the CPS Fraud Investigation Group (FIG) no official description of its work was found. Various prosecutors made mention of unspecified criteria as to what matters fell within the unit's remit. Efforts were made to determine the basis of these without success. However during the study a file was provided that contained a document titled "Criteria for referral of fraud cases to HQ Casework", HQ Casework being the predecessor of the FIG. This document specified five criteria; amount lost or at risk; national publicity; the case having arisen from the work of liquidators and administrators; the need for 'highly specialised knowledge' and international enquiries.

Examination of this document revealed that although the first mentioned criterion appeared specific, neither this, nor any of the other criteria, provided the degree of certainty given by the official statement of the remit of the DTI's Legal Services (Prosecutions) unit.

The first criterion was thought to demonstrate the lack of clarity of the tests applied by the CPS to determine within which of its units a matter fell. The first criterion stated that 'the amount lost or at risk is not necessarily an indicator of suitability for referral to HQ. It is an objective and recognisable signpost of the seriousness and likely public concern attaching to the case'. This was followed by the statement that case involving of and above £750,000 should be referred to HQ Casework, "so as to provide an opportunity of considering whether a more detailed referral is required." Under the criterion 'national publicity', specific mention was made of cases of

corruption, an offence that need not involve an element of fraud. This did not amount to a direction that all cases involving that amount would automatically be dealt with by the specialist unit.

At the time of the study, the status of that document was uncertain, the FIG having replaced HQ Casework and there being no official confirmation that the document transferred to applying in the FIG. As such, and in the absence of any other official document, it was concluded that the FIG did not have an official remit.

It was also concluded that there could be confusion between various units within the CPS as to whether a fraud matter should be dealt with by the FIG or Branch CPS. This resulted from guidelines stating that certain amounts of loss would trigger the specialist unit's consideration of the case, not that the unit would automatically accept such cases.

Unlike the FIG, the Commercial Branch of the police force studied was found to have an official remit. However this was found, as with the HQ Casework guidelines, to be somewhat imprecise. This document stated that "no hard and fast rules can be imposed" in determining which component of the force studied would have responsibility for investigating complaints of fraud. It made use of criteria that could not be quantified objectively. These included that "the investigation would entail a disproportionate use of divisional resources" and that "the case involves a degree of complexity or is in a specialist field, requiring the expertise of Commercial Branch staff" without stating the expertise of the unit.

Official definitions of fraud

During the study of their operation it was found that, despite both the CPS's FIG and the police Commercial Branch having remits that specifically referred to "fraud", in neither agency was an official definition of fraud provided. The official remit of the DTI's Legal Services (Prosecutions) unit did not make specific reference to "fraud", but to more criminal offences arising from insolvency,

This branch ... has the principal responsibility for deciding whether or not to initiate a criminal investigation following the receipt and consideration of the reports outlining criminal allegations.

Examination of the files of the Legal Services (Prosecutions) unit revealed that, unlike the police, cases were recorded by reference to specific offences. Fraud not

being an offence under the English justice system, the absence of use, definition or reference to this term by the Legal Services (Prosecutions) unit was not considered surprising.

Within the police it was found that terms making specific reference to fraud were commonly used. These included terms such as “commercial fraud”, that appeared in the unit’s remit, “long firm fraud” and “advance fee fraud”, both of which were used in its statistical analysis of its work. None of these terms were recognised by the justice system as being offences. Within its own remit, the Commercial Branch acknowledged the difficulty of defining what it dealt with and why.

The creation of a CPS “Fraud Investigation Unit” may be viewed as an assessment that “fraud” was deemed sufficiently important by the government to require an institutional and legal response. This assessment may be viewed as undermined by the absence of definition of one of the main terms in the title of the resulting institution and the absence of a remit that reflected organisational changes in the operation of the CPS. However this context supports what Calder (1994) described as ‘state sanctioned criminology’, based upon his analysis of the failure of the American Federal authorities to permit access to official records relating to a major criminal. By failing to make information available, Calder argues that the US authorities were effectively able to both define the “problem” and present their response to this as appropriate. It is suggested that this analysis can be applied to the English context of fraud.

Support for application of Calder’s approach to the English justice system may be provided by examination of the number of government promoted anti-fraud initiatives that occurred during the course of the study. These included publication in the media of the actions and successes of a number of government agencies, including the CPS, SFO, DTI and DHSS/Benefits Agency, in tackling various forms of fraud.

If Calder’s suggestion of “state sponsored criminology” is accepted as applicable to the English response to fraud, it is suggested important consequences follow. Firstly state agencies are able to define what constitutes the “problem” and thereafter implement as the “solution” still other state agencies specifically tasked with dealing with fraud. These may either be, as in the case of the Serious Fraud Office, police and Crown Prosecution Service’s FIU, tasked with dealing with fraud generically, or, as in the case of the Financial Services Authority, with dealing with specific forms of

fraud. In providing a “solution” in the generic form the government has failed to provide an actual offence of fraud within which that solution would operate. Whilst the DTI and FSA operate within the context of specific legislation, other agencies than these two that are tasked with responding to complaints of fraud do not have such parameters to their operation. This may be suggested as of necessity limiting the impact, effectiveness and accountability of any such agency’s response to fraud where that fraud does not amount to a specific contravention of the law.

One of the central tenets of Ormerod’s (1999) analysis of the operation of another body specifically tasked by the government with examining what improvements could be made to dealing with fraud, the Law Commission, may be seen as supporting the application of Calder’s criticism of this form of government approach.

Due to this approach, the operation of the SFO can never be examined by the courts. The courts can examine the operation of virtually any other government agency because of the specific offence based framework within which those agencies work. Should any of these agencies fail to or negligently discharge any of its legislative functions, the courts can criticise this by reference to the agency’s legislative purpose. The failure of any agency to respond to suspected fraud can never be criticised by the courts in the same manner as could an agency’s failure to discharge a statutory function. Unlike an agency that failed to intervene in a situation of suspected child abuse, the failure of any government agency to prosecute suspected fraud is unlikely to be criticised.

It may be suggested that this assessment could apply equally to the SFO, police, DTI, or FSA. However the SFO is the only agency that is tasked with nothing except dealing with fraud and, with the exception of the police, the other agencies operate in a context of remits defined by specific offences. Criticism of the FSA and DTI, as expressed in the media, in respect of the mis-management of financial institutions, may be reflected in judicial analysis of claims arising from such situations. The same can never be true of the SFO, as it does not have similar legislative parameters within which to work.

Due to the legal vagueness of the terms and associated context within which agencies operate, together with the differing approaches, regulatory or enforcement, that they may operate, the definitions that those within the chosen agencies gave to “fraud” was thought to be of considerable importance.

Definitions of fraud applied within the chosen agencies

Interviews with officers of the police unit studied and with members of the FIG revealed that neither agency operated with or within a consistent definition of fraud. As noted in chapters five and six, individual respondents described and applied various different definitions of fraud. That this was so may be the result of a number of factors. These include the lack of official definition of the term; the lack of supervision or review of various decision making stages of their operation; differing outcomes sought by the various agencies or a combination of these factors.

Whatever the cause, this, in part, accords with the findings of Croall (1992) in relation to dealing with reports of white collar crime. Croall's work utilised the analysis of Hutter in 1933 as to the operation of Environmental Health officers, applying the notion that those within an agency could operate either as enforcers or regulators. It is suggested that, in light of the results obtained from the DTI, the validity of this dichotomy can be challenged.

Regulation v prosecution

Writing in 1987, Braithwaite's analysis, based on the works of Vogel (1986) and Hawkins (1984) suggests that the debate as to regulatory policy is in danger of becoming "sterile" if its focus remains upon the dichotomy between compliance in the English model and sanctioning in the American model (Braithwaite 1987 p 559). Within England, some of the subsequent debate on regulation (Pearce and Tombs, 1990, and Hawkins, 1990) may be subjected to the same criticism. However relevant and useful points of clarification are achieved. It is, however, suggested that the distinction, drawn by Hawkins (1990 p 4460), as to regulatory policies and regulatory practices within the context of law enforcement is not necessarily valid. This does, however, focus debate upon how regulation is enforced and the role of the criminal law in protecting a particular activity, these being major themes in terms of which the results obtained in this study are analysed.

It is suggested that the current debate on regulation and law enforcement may be subject to two criticisms. There may be a continuum within the criminal justice system as opposed to the dichotomy suggested in the heading of this section. In addition it is suggested that regulatory policy and practice need not be analysed as separate issues, but that theories applicable to the one apply equally to the other and

to separate the two may ignore common aspects of the development of appropriate legal solutions.

Comparison of the operation of the police and the CPS with that of the DTI may be viewed as supporting a dichotomy; that, within the context of criminal law enforcement, regulation and prosecution are in opposition to each other. Under this analysis, the issue is not of compliance and sanctioning/enforcement but compliance or sanctioning/enforcement.

Examination of the mandates and remits of the police and CPS, with specific reference to fraud, reveals there to be no continuum of law enforcement powers. The options available to the police are investigation or not and to the CPS, prosecution or not. There is no issue of the operation of either body seeking, as a primary objective, compliance with the law. Both agencies operate re-actively in respect of events that have occurred. As discussed in chapter five, complaints of frauds such as of pyramid selling were unlikely to attract investigative resources. Reasons for this included the mobility of the suspects and the absence of a continuing crime within the force area. Strangely, given that one of the core police tasks is the prevention of crime, the official Home Office crime recording systems in operation do not provide for account to be taken of preventative work. As such, in the context of fraud, there is little incentive for police officers to seek to encourage compliance with the law and significant incentive to focus on law enforcement.

This is not true of all crime, as in some circumstances ensuring compliance will prevent the need for further action, usually involving time-consuming paperwork, to be taken. Police training emphasises the need to avoid physical confrontations with suspects. In instances of disorderly behaviour, depending upon the circumstances, officers may have powers of arrest under the Criminal Justice and Public Order Act 1996, to prevent breach of the peace, or because the offence of being drunk and disorderly is suspected. To avoid confrontation, the first option is to seek to “quieten down” the suspect. Should they comply, the offence has passed and exercise of officers’ discretion enables them to avoid processing the suspect.

In contrast, in relation to the work of the police and CPS in respect of fraud, there is no offsetting reward to time spent on fraud cases that do not progress through the criminal justice system. Effectively such time is “wasted” for crime recording purposes. In such circumstances, attention focuses on enforcement of the law in

respect of complaints and cases that can be recorded. That compliance or deterrence is incidental to the results culturally acceptable to either agency accords with Hutter's (1984) analysis of the organisational constraints on enforcement officials' operation.

It may be suggested that, public reassurance being a Home Office required priority for police forces, there is potential for prevention of fraud to alter this situation. Were this so, which, it is suggested, is not due to the lack of public concern with fraud in comparison to crimes such as robbery and burglary, this does not detract from the argument that there is no continuum in criminal law enforcement. The option available to police officers and CPS lawyers is either to enforce the law (by investigation or prosecution) or not.

Analysis of the operation of the DTI suggests that law enforcement, by lawyers as opposed to investigators, can occur in a manner that combines regulation and prosecution in a single process and system of law, as opposed to these functions being separate as they are in relation to the operation of the police and CPS. In keeping with the approach identified by Carson (1970), it was found that assessments of moral culpability by the unit's lawyers are directly linked to the likelihood of prosecution as opposed to other action being taken by that agency. The same was not true of the operation of the police or CPS. In these agencies account is taken of assessment of moral culpability in the application of the "public interest" test of investigation and, more overtly, of prosecution. In all three agencies this assessment is made in the context of considerable discretion, making comparison of the decision making possible.

The same is not true of the work of the DTI investigators. These individuals do not have the powers of the police. Unlike police investigators, whose views can materially influence subsequent processing decisions, the views of the DTI investigators do not have a significant impact on the decision as to what form of action is deemed appropriate and they are obliged to comply with the directions of the DTI lawyers. The enforcement role within the DTI is played by the lawyers, who unlike their investigators, will have had no contact with those complained of or the complainants. There is, therefore, less relevance to suggestions that compliance is sought to maintain credibility in a context of not having punitive powers.

Braithwaite states that,

The world over,... business regulatory agencies have a strong aversion to law enforcement (1989 p 564).

It is suggested that, in the context of the operation of the DTI, this is not an accurate reflection of the situation. As discussed in chapter seven, notwithstanding the Department's focus as being primarily regulatory, lawyers within the Legal Services (Prosecutions) unit stated that they saw themselves primarily as prosecutors. A general consensus was that regulation could be achieved through prosecution, it being accepted that the "worse" the actions, the more likely that punishment would also be seen as necessary.

Unlike the CPS, the aim of the DTI lawyers was not solely to seek punishment of past actions, but also to seek future compliance through punishment. A distinction between the two agencies is that an intended outcome of CPS processing of a case is to prevent further action on the part of the suspect. The aim of the DTI is to encourage future action, in ways that are legally acceptable. As such it is suggested that law enforcement can be in the forms of compliance, deterrence and prosecution that co-exist as progressions on a single scale of powers and, as noted by the respondents, prosecution can ensure future compliance. To an extent this assessment is supportive of Pearce and Tombs' call for a punitive regulatory strategy (1990 p 423).

Where this study does not support that call is in that the results obtained do not indicate there to be a valid distinction made between compliance and punishment in relation to either corporate or individual conduct. In contrast, the operation of the police and CPS is assessed as supporting the proposition that where the options available are punishment or nothing, actions may be ignored by agencies.

The non-availability of recordable outcomes being important, the results of the study also revealed the importance of any system of law enforcement operating in a context of the legal position being clear. As discussed below, the absence of a substantive offence of fraud and an allied lack of understanding as to whether a matter was civil or criminal and if criminal what offences could be charged, lead to the conclusion that debate as to the distinction between enforcement polices and practices is secondary to an understanding of what it is that is being enforced.

Fraud, corporate or "white-collar" crime

Examination of the definitions of fraud applied within the police and CPS generally supported Slapper and Tombs' (1999) noting of the "invisibility" of corporate crime within the justice system. Within the police it will be recalled that only one of the respondents made specific reference to the position of the alleged perpetrator, making however reference to the fact that other investigators may well apply a different definition,

For me it's the theft of large sums of money by people in high positions in business, and firms of solicitors by means of false accounting, and criminal deception. A bobby on the beat would give you a different definition from us.
(PO 1)

Whilst other officers used the term "white-collar crime" it is suggested that this was not used in the criminological sense but to reflect an element of sophistication in the commission absent from other complaints of standard offences,

... it's investigations of financial crime, basically white collar crime, basically theft, deception, forgery in sophisticated ways. (PO 6)

As discussed in greater detail below, the definitions applied by the police and CPS reflected those agencies' focus on punishment of individuals as opposed to regulation, deterrence and control of on-going business operations, this being a far greater concern of the DTI. This approach follows Kagan's (1984) analysis of the operation of the police in relation to the conduct of industry. In this analysis Kagan drew attention to the differing focuses of attention, the police acting against the individual in contrast to the inspectorates' focus on businesses, corporations, legal entities.

Unlike the police and CPS, the DTI operation was found to be very closely linked to allegations of contraventions of legislation. The impact of this may be seen in the definitions of fraud applied by the Legal Services (Prosecutions) unit.

The definitions of fraud applied by all respondents were examined in light of Braithwaite's (1984) suggestion of enforcement operating on a hierarchy of wrongdoing in which the likelihood of punishment as the desired outcome is directly linked to the seriousness of the offence. Within the DTI a version of this approach was found to predominate. As will be recalled, lawyers made direct reference to enforcement for more serious matters, stating there to be,

... a need for large scale fraud to be stopped and punished.

Their perception of their role was as prosecutors with specific reference to the seriousness of the offences,

I see myself as a prosecutor. I only enjoy the cases that I feel people have done something really naughty, I feel more comfortable with a high level of dishonesty.

The different approaches applied within the DTI did not depend upon the identity of the alleged wrongdoer but upon the seriousness of the consequences of the wrongdoing. In contrast discussions with police officers in relation to *project 67*, detailed in chapter five, led to the conclusion that the professional status of the suspect could impact upon the decision not to follow all the powers available under a strict enforcement approach. The case of *W* indicated that political considerations could also impact upon the decision-making processes. Considerations of these types are, it is suggested not the most important or commonly occurring factors.

The cases studied suggest that within police and CPS decision making, seriousness of complaints is most commonly linked to the amount of loss suffered. However great the loss it was found, in both the police and CPS, that management considerations of the cost of an investigation could outweigh the desire of either investigators or prosecutors to commence or continue investigations. Given the set unit systems of investigation in operation in the DTI, these considerations did not apply to the same degree within DTI decision making.

Notwithstanding Pearce and Tombs' (1990) dislike for an established criminology of differentiation between corporate and non-corporate wrongdoing, the study found that, in practice, distinctions could be drawn between groups of suspects that may, at first assessment, be based on the legal identity of the suspect. Difficulties in establishing the identities of the wrongdoers and the offences committed were found to operate equally in complaints of fraud allegedly committed by individuals acting together as in complaints against companies. Case files of investigators and prosecutors demonstrated an acceptance that a single successful prosecution was unlikely in matters involving a chain of separate dishonest actions, the end result of which was loss to the complainants. The negative cost implications of investigating such cases were unlikely to be countered or overcome by the prospect of a trial or a trial resulting in a conviction. No evidence was found in such cases of management decisions not to permit investigations being directly linked to the corporate or other nature of the suspects. Instead these decisions appeared to be linked to the

prospects of the costs of investigations being without “result”, as defined by the police with reference to conviction.

In the context of fraud in or by companies it is to be expected that a number of individual office holders may carry out separate acts that may only be related by reference to the fraudulent conclusion of the chain of acts. It may be expected that in themselves some of the individual acts may not, without reference to the end result, amount to criminal offences. In the absence of an offence of fraud, in which the individual acts could be linked to the end result, it is suggested that the distinction between corporate and individual wrongdoing is explicable in terms of the practicalities of obtaining a conviction.

This is less true of regulation of fraudulent practice in business as a number of offences, including many of those dealt with by the DTI, place responsibility for corporate actions on individual office holders. This may support the findings of the study that the DTI operates across the boundaries of prosecution and regulation.

The absence of this framework to the operation of the police and CPS may explain the findings that whilst both were found to apply degrees of enforcement in their operation, neither moved beyond that approach to one of regulation.

Numbers and types of cases dealt with by the chosen agencies

At the commencement of the study it had been intended to compare the numbers of cases dealt with annually by each of the units. It was also intended to compare the type of cases that each unit dealt with. These intentions were based on experience of working in Zimbabwe, where the number of police investigations of any offence correlated directly to the number of prosecutions and NFAs of the same offence. It was therefore anticipated that a direct comparison of agency caseloads would be possible. This was expected to form a basis upon which examination could be made of the rate of and reasons for matters not being processed to trial.

It was found that such analysis would not be possible. Unlike Zimbabwean criminal law, fraud is not a recognised offence in the English criminal justice system. This, together with the fact that non official definitions of fraud operated within the chosen agencies, led to a conclusion of significant uncertainty as to whether a “like for like” comparison between agencies’ work could be made. Before the empirical data collection commenced it was thought that there could be differences between what agencies defined, and therefore dealt with, as fraud. Once the data collection began

it was apparent that within the same office differing definitions and acceptance criteria operated, making reliable comparison of the work within, let alone across, the chosen agencies unrealistic.

An additional effect of these factors was that, unlike the situation in Zimbabwe, a single complaint of fraud could be dealt with by more than one of the investigative and prosecuting agencies. Within Zimbabwe a complaint of fraud would always be made firstly to the police, assessed by the police and thereafter sent to a division of the Attorney-General's Office for a decision as to whether prosecution was appropriate. As detailed in chapters five, six and seven, it was found that in England and Wales a complaint could be received by any and all of the chosen agencies. Such a complaint could be accepted by one agency or referred to another that, in turn, could forward part or all of the complaint to still other agencies. In this manner a complaint could be investigated simultaneously by two or more agencies. Equally the investigating agencies could be referring their investigations of the complaint to differing prosecution agencies. A possible result of this was that a single complaint could be recorded as being dealt with by as many as four agencies.

In the first agency studied the respondents themselves commented upon the unreliability of the official statistics. In an effort to make a statistical assessment of the unit's work, an alternative approach was adopted. This made use of the unit's on-going files as a sample of the number of cases and type investigations undertaken.

Whilst this was possible within the police, within the CPS similar access to all the unit's case was not available. At this stage it was concluded that an assessment and comparison of the type of work undertaken by the chosen agencies would only be possible using case samples. Due to the lack of official definition of fraud used by the agencies, the focus of this analysis was a determination as to whether similarities existed as to what type of case each agency dealt with.

The relevance of this was thought to be twofold. Firstly it was hoped this would indicate whether more than one route into and through the criminal justice system could operate for complaints of a similar nature. Secondly it was felt that the results obtained by this analysis could indicate the importance, if any, of the choice of route upon the progression of a complaint through the justice system.

As the study progressed it was concluded that the results from the statistical analysis originally intended would be both unreliable and meaningless in assessing the response of the English criminal justice system to fraud. This was therefore abandoned and substituted by a focus on the significance of referral paths to and between the agencies.

Although it was realised that a direct comparison of agencies' caseloads would not have the relevance originally anticipated, alternative means of assessing annual caseloads were attempted. This was in an effort to determine if there was any correlation between the caseloads of the agencies and if so what it was. As detailed in chapters 4 and 5, this was also abandoned due to the results provided being considered unlikely to produce reliable estimates of annual caseloads, disposal rates and outcomes. Given the detail of the data as to numbers of cases received, manner of processing and outcomes obtained from study of DTI's Legal Services (Prosecutions), it was regretted that comparison of the caseloads of the chosen units had not been possible in the format originally intended.

The type of fraud examined

As discussed above, the agencies studied were found to operate imprecise definitions as to what constituted fraud for the purpose of their respective operations. Despite this, the interviews and case studies revealed some similarities in the type of complaints dealt with by these agencies.

The primary similarities were found to be that the behaviour complained of was alleged to have been on the part of companies, businesses and individuals towards members of the public, causing the latter financial loss. Studies of the case samples within each unit led to the conclusion that none of the specialist units studied were primarily concerned with complaints of fraud between companies or corporate entities nor of frauds against government agencies. The official remit of the Commercial branch of the police expressly stated that the unit was responsible for the investigation of "most allegations of public sector corruption", listing this first on the unit's remit. From this statement it might have been expected that this would form the primary work of the unit. However as demonstrated by the statistics produced by the unit, it dealt with no such cases in 1993, one in 1994 (of a total of twenty eight cases dealt with by the unit that year) and one case in 1995 (of a total of forty cases). These statistics indicated that the bulk of the unit's work was investigations of what it described as "theft" and "deception". Examination of a

sample of the cases being investigated by the unit revealed that these cases, most of which would have fallen within the Zimbabwean common law offence of fraud, involved the dishonest acquisition of thousands of pounds from individual complainants.

The official statements as to the remit of the FIG made clear that its primary work was in relation to fraud, without specification as to what types of fraud. As with the police, examination of a sample of the FIG caseload revealed that it too dealt mostly with complaints of fraud made by members of the public involving large amounts of money, usually in the tens of thousands.

Given that the remit of the Legal Services (Prosecutions) unit of the DTI stated that its main responsibility was for dealing with offences of dishonesty committed in relation to insolvency, it was anticipated that the complaints dealt with would relate mainly to the operation of commercial entities. This was confirmed by discussions with both lawyers and investigators, together with examination of a sample of the unit's cases, all of which arose from the operation of business concerns or companies.

The seriousness of the matters with which each agency was to deal was found to be largely undefined, although police investigators and lawyers made reference to financial limits. In the vast majority of the agencies' files and cases the victims had lost or stood to lose thousands of pounds as a result of the fraudulent activities alleged. The rare exceptions to this conclusion were matters, such as *W* and *R v H*, that made direct reference to other factors directly linked to the agency's assessment of the "complexity" of the complaint.

On this basis it was concluded that the amount involved was one of the main features that determined whether a complaint was referred to these units by those outside them. In many cases it was concluded that the same approach had been adopted by those within the unit in determining whether to accept a referral.

However the issue of the complexity of a case could also determine its being referred to these units. This was noted particularly in the operation of the CPS where branch prosecutors had attempted to retain a matter by reference to its relative simplicity notwithstanding the amounts involved. That this case was taken over by the FIG could suggest that loss was viewed as a more significant determining factor than was

complexity. However this suggestion should be treated with caution since the request to retain the case was made contingent upon the provision of additional technical support. Given that the FIG had that support, one reason for its acceptance of the case could have been the fact of resources being more readily available within the FIG than in branch CPS.

The cases examined in each agency were found to involve a number of victims unconnected to each other but for the fact of their being complaints about a similar type of activity by the suspect. From this it was concluded that the seriousness of the fraud dealt with by these units lay in its general societal impact, in the impact such action had on individuals and also in the specific impact on commercial society, both within the United Kingdom and in the broader commercial economy. Direct reference to this latter feature was included in the formal remits of the DTI whilst reassurance of the public was one of the objectives of the police force within which the unit studied existed, together with upholding the law, that could apply equally to individuals as to corporate entities. The requirement of the Code for Crown Prosecutors that a prosecution be in the public interest was felt to be sufficiently broad to cover both the individual and commercial impact of the investigation and prosecution of fraud.

Further similarities between the work of the three specialist units were felt to be such that meaningful comparison could be made of their operation and co-operation in relation to the processing of fraud in the English criminal justice system. Three main similarities in the work of the chosen units became apparent from examination of the representative case samples and interviews. These were the type of fraud dealt with, that significant amounts of financial loss had been suffered by the complainants, of whom there could be a number in each case, and that the units operated within the criminal justice framework of the English and Welsh legal system. Comparison of the units' operation was further assisted by the fact that they had and operated formal means of passing complaints to each other.

In addition the similarity of context and shared lack of clear definition as to what each agency deal with and what, in practice, each accepted as being fraud and falling within its remit, led to questioning whether there could be an overlapping of remits between the agencies studied. One of the concerns of the study was to assess whether in practice each agency dealt with a specific type of conduct or whether any of the three could deal with a matter and whether this was of any significance or importance.

The case samples of the three specialist units revealed that a complaint of fraud by a member of the public against a company involving loss of significant sums of money could be made to any of the agencies, including the CPS, and thereafter be referred between all three agencies. In order to assess how it was that fraud could be dealt with by the English and Welsh criminal justice system, the remits of the chosen agencies and referral paths to and from them were thought to be important.

Outcomes

In analysis of the progression of complaints the term “outcomes” was preferred to that of “results”. The latter was thought to be too closely linked to the statistical data examined in each agency, this not always reflecting the non-numeric aspects of the cases.

The aims of this aspect of the study were to examine the extent to which and processes by which complaints, once accepted by an agency, progressed through that agency. These were assessed to be closely related to the referral paths that operated in and between agencies and it is with these that this section commences.

A) Routes by which complaints enter the agencies

1. Referral paths to agencies

Experience of working in a Commonwealth jurisdiction in which the police undertook all criminal investigations and referred all their investigations to a single prosecution body led to an expectation that similarly well defined lines of referral would operate within the legal system on which that Commonwealth justice model was based.

It was expected that the police would receive complaints, would investigate these and that the CPS would prosecute the resulting investigations. Examination of the first agency removed this expectation. As detailed in chapter five, the official statement of referral paths described that complaints could be received directly from members of the public or commercial concerns. Complaints could also be referred from police divisions within the particular Force. The official description of the unit’s operation detailed that others including the Department of Trade and Industry (DTI); or the Crown Prosecution Service’s (CPS) Fraud Investigation Group or self regulatory bodies under the supervision of the Securities Investment Board (SIB) could refer complaints to the unit.

It may be noted that whilst this document and the head of unit described the fact *that* this could occur; neither described *how* it could or did occur. That this was so was to be a recurring theme in the examination of the operation of the three agencies. This led to the conclusion that whilst there was clear provision for such referrals, the manner in which they could occur was far less circumscribed. Whilst the DTI investigators described themselves as certain that their work originated with the DTI lawyers, examination of the official manuals of the unit and case samples studied demonstrated that within this organisations there were gaps in understanding as to where and how work originated.

Examination of the first agency studied demonstrated that the referral paths from agencies were not as had been expected at the beginning of the study. As detailed in chapter five, the statistics of the Commercial Branch operation revealed that every year a number of complaints of fraud received by that unit were not investigated to prosecution by the police but referred to other investigative agencies. Due to the need to maintain anonymity it was not possible in the course of this study to track what became of these referrals. The prospect arises of these matters not being accepted for further investigations or prosecution by the agencies to which they were referred

Upon study of the other agencies it was concluded that several types of referral paths operated in practice, within, to and from agencies. Contrary to expectation, the flow of work to and from agencies did not support the traditional model of investigations going *from* the police *to* the CPS. Whilst this form of referral was found to be the most commonly occurring, so too was the less usual referral, as described in chapter six, *from* the CPS *to* the police, *from* the CPS *to* the DTI for purposes of investigation and *from* the DTI *to* the CPS for prosecution.

The Southern African Commonwealth model of referral of complaints of fraud was not observed in the operation of the English and Welsh criminal justice agencies. One of the factors leading to this was thought to be the existence in the latter of a level of response not found within the model. This was embodied in the written remit of the DTI's Legal Services (Prosecutions) unit. This document placed the operation of the unit in the criminal justice system and at the same time made express reference to a regulatory function not generally associated with prosecution agencies.

The existence of a prosecution department within the DTI tasked with dealing with fraud committed in situations of insolvency, together with this document, suggested there to be routes into the criminal justice system additional to those provided by the police and CPS. Examination of its operation confirmed the assessment that it provided scope for differing methods of processing complaints, though regulation and prosecution to that provided by the operation of the police and CPS.

B) Significance of a variety of referral paths to agencies

The significance of this feature in relation to complaints of fraud was thought to lie in the criminal justice system having more than one agency and set of processes by which a complaint could be received, considered and actioned. It was concluded that, in practical application, the existence of alternative agencies did not equate to choice. The referral paths illustrated in the majority of Legal Services (Prosecutions) cases and those in some of the FIG cases indicate that the reporting of frauds occurring in circumstances of insolvency were numerically more likely to be made from professional bodies than from members of the public.

This may be unremarkable in the context of the police being considered as primarily responsible for investigations of suspected criminal conduct. Its implication, however, is that members of the public, who comprised the victims in the type of fraud studied, do not exercise a choice as to which agency they complain, there not being a general public awareness of the work of the DTI in this regard. Once a complaint was within the criminal justice system, generally via the police, a number of routes were found to exist by which it could be progressed. Due to lack of understanding in and between agencies as to what they and each other did, referral of complaints may be viewed as based more upon chance than informed choice.

Examination of cases referred between the agencies demonstrated the impact of police discretion and the inability of the CPS to direct whether or how a matter should be investigated upon the progression of a matter through the criminal justice system as being that investigations could be terminated or undertaken in ways that CPS lawyers did not perceive as conducive to successful prosecution. The importance of systems of checks and balances in the English legal system is well documented, particularly in relation to the operation of the criminal justice system. This tradition has been reinforced and strengthened through various pieces of legislation. The underlying principles of control, checks and balances introduced in the Police and Criminal Evidence Act and the Prosecution of Offences Act have been continued

through legislation, such as the Criminal Investigations and Procedures Act and the Regulations of Investigations Act, as well as government led examination of the operation of the system such as the Glidewell Report.

In relation to the investigation of fraud, however, it was found that many of the forms of control existing in relation to other offences did not apply. Investigation decisions whilst in theory subject to close scrutiny by the head of the unit, could be retained by individual officers for considerable periods of time. The referral of cases could occur in ways that either permitted the investigating officer and the reviewing lawyer to work hand in glove or at arms length. On the one hand officers could choose to effectively end a case by referring it to certain lawyers, whilst on the other they could approach lawyers known to be sympathetic to what were effectively operational decisions as to the manner in which investigations could be conducted.

The fact of such referrals between the police and CPS and the decision-making of both types of lawyer were found to be almost entirely devoid of any supervision or review by either agency. Non-use of ASUs or trials units for fraud matters and high levels of autonomy within both agencies enabled this situation to continue without significant interference. The Glidewell (1998) and Auld (2001) Reports suggest that the CPS and police should work in a context of closer contact with the other; that administrative processing of cases should be improved and that lawyers should have the power to require the police to gather evidence. If these recommendations are given practical application in respect of the processing of complaints of serious fraud, as is suggested in the Reports, this situation may be anticipated to alter to one similar to that found occurring within the DTI.

Within the DTI a prevailing culture of explanation of decisions was found, with procedures having been put in place to ensure the routine applications of this. Investigators were set both tasks and targets by the lawyers. That investigators pay was directly linked to these tasks and targets being completed and met may be viewed as encouraging compliance with both. In contrast, there was no obligation or compulsion upon police investigators to comply with any advice provided, usually by the CPS. As noted by prosecutors in the cases detailed in chapter six, the CPS did not have a means of seeking to obtain compliance with its advice. Should officers fail to meet time limits set by the CPS prosecutors, the only sanctions available to the

CPS were to complain to the force concerned or to discontinue the proceedings, arguing the likelihood of abuse of process arguments.

Examination of the files of all three agencies revealed that referrals of complaints of fraud between agencies could occur at a very early stage in the processing of those complaints within the agency that received the complaint. These files also illustrate that the branch of any agency that receives a complaint of fraud need not conduct a full investigation into that complaint, but could refer it to specialist units, either within the same agency ("internal referrals") or to another criminal justice agency.

Examination of the specialist police unit revealed that, as a direct result of one internal referral, Divisional CID officers had been seconded to the unit to assist in the investigation of the complaints referred. What is not clear from either the official sources of information nor from interviews with officers, is the manner in which such referrals were made or whether a non-specialised department would know that a complaint would fall within the remit of the unit. This supports the conclusion that the importance of referral paths for the investigation of fraud lies in the possibility of the public being unaware of the identity of the investigative agency most appropriate to investigate their particular complaint.

Whilst it is clear that most frauds can be dealt with by any of the agencies, it is also apparent that specialist units are better organised and equipped than their generic counterparts to process complaints of fraud. In addition examination of the cases of the agencies suggests that, in practice, their staff were accustomed to dealing with certain types of complaint by established procedures and practices.

Specific cases in which the investigation deviated from these established procedures and practices were observed not to progress as smoothly or successfully (in the sense of resulting in a prosecution) as those in which the most usual approach was followed. The views expressed by most of the police investigators and CPS prosecutors were that their counterparts in the other agency were not especially good at their role. Where individual investigators within agencies were able to or had developed professional relationships with their prosecution counterparts, their comments were found to reflect increased co-operation and provision of assistance in specific cases

As discussed in chapter five, the comments of police officers in relation to referrals by the CPS of police investigations to the SFO indicated that such referrals could be included in the category of cases deviating from established procedures and practices.

Referral paths from agencies

a) "Cross referral"

A second type of referral of complaints of fraud was found to occur in the three agencies studied. This may be termed "cross-referral" whereby one investigative agency refers complaints for investigation to another agency. In none of the agencies studied did there appear to be formal procedures or a shared informal understanding as to how or when such referrals should occur. Thus the police statistics demonstrated that in 1994, 5 of the 23 complaints received by the unit (21.7% of its cases for that year) were referred to "other agencies" without it being specified whether these referrals were for investigation, prosecution or some other action. Due to the inability of the study to track referrals between the agencies, due to constraints of respondent confidentiality, it could not be determined what happened to these cases or for how long they remained within the criminal justice system.

b) CPS referrals.

Three types of CPS referrals were noted. One occurred in the context of the police referring an investigation to the CPS for advice or review and in effect the CPS referring the matter back with specific instructions to the police.

As detailed in chapter six, the fact and extent to which this type of referral was made by the CPS was assessed as being influenced mainly by prosecutors' perceptions of their role. Some lawyers expressed reservations as to the extent to which specific referrals should be made to the police,

We have to be careful not to become part of the investigation process. We shouldn't say how people should be questioned in the interview room but we can say 'If you bring me this sort of evidence it will be admissible in court'. Sometimes it's a fine line. Evidence collection and operations are for the police but I'm happy to advise as to how it will affect the subsequent trial. (FIG 6)

whilst others operated more proactively in referring matters.

This is a clear illustration of 'taking a horse to water, but not being able to make it drink'. I take the view that the police are making an artificial excuse for refraining from investigating this matter. The real reason for not investigating is a simple lack of resources. The flavour of recent correspondence from the police indicates their wish to escape through the back door by asking us to condone 'an abuse of process argument' (FIG 12 in respect of *R v B*).

In some instances of this type of referral, an apparent reluctance was noted on the part of the police to assume responsibility for an investigation or prosecution that had previously been the responsibility of another agency. This may be attributed to a number of factors, from concerns as to being the agency facing abuse of process arguments to difficulties with co-operation between police forces, described by one prosecutor as,

It's difficult because the independent police forces have feuds with each other's Chief Constables, over drinks, twenty years ago. They are proud and jealous of their independence. (CPS 4)

Jehle's suggestion that the police have "the ability to end a case by imposing some kind of sanction" (Jehle 2000 p 27) was found to be entirely non-applicable to investigation of complaints of fraud. Prior to the coming into operation of the Criminal Justice and Court Services Act 2000, the police had been able to issue cautions. Neither those cautions, nor the post-Criminal Justice and Court Services Act system of cautions, warnings and reprimands, are applicable to offences of fraud committed by adults. Home Office guidance on the administration of cautions, warnings and reprimands provides that these sanctions are not available to the police in respect of all offences or in all circumstances. Offences of fraud of the type studied, even where fully admitted by the suspect, do not fall within the Home Office guidance for the administering of a caution, warning or reprimand. By contrast the DTI can take action amounting to the administration of a caution in dealing with fraud, in their use of warning letters.

In the absence of the possibility of such a finalisation, any refusal of the police to investigate complaints of suspected fraud will, in the absence of another agency accepting the referral, end the criminal justice system's processing of that matter. Given that a trial will not have occurred it would be technically possible for the matter to be reinstated into the criminal justice system at a latter date. However, as noted

previously, the CPS can not direct the police to undertake any investigation. In light of Article 6 of the Human Rights Act (right to a fair trial within reasonable period of time) and the possibility of argument that re-investigation is an abuse of process, it is suggested that the CPS is unlikely to attempt such re-instatement. As indicated above, should the recommendations of the Glidewell and Auld Reports in respect of fraud cases be put into effect, this exercise of police discretion could be severely limited.

At present it is concluded that, in practice, there is a prospect of this type of referral from the CPS resulting in complaints of fraud being investigated to a degree but thereafter either being ended "NFA" by the police or discontinued by the CPS for lack of evidence. Some support for this conclusion may be seen in the statistics of the specialist police unit, which demonstrated a high level of "NFA" matters each year. It has to be accepted that there are likely to be other reasons for "NFA" results being recorded, particularly in light of the police statistics recording that some investigations were not progressed any further on the basis of "CPS advice".

Whatever the reason for termination of investigations without formal or court action, it is clear that complaints of fraud that may come to the attention of one branch of the criminal justice system need not be referred to, accepted by or processed within that system. As discussed above, this situation supports the conclusion that referral of a matter through the "wrong" channels could effectively end the processing of that matter within the criminal justice system.

The importance of this is that not only might it be unclear to the public what was the "right" agency to which to make a complaint of fraud, but that there may be similar lack of clarity within the criminal justice as to what is the "right" agency through which to channel further investigations. In a context of often complex and large amounts of evidence, very large sums of money and multiple victims, it is suggested that the influence of chance upon the progression of a complaint of fraud through the justice system is unsatisfactorily high.

Another type of referral found to occur was where matters referred to the CPS were forwarded by that agency to agencies including the DTI, the Official Receiver's Office and Customs and Excise. Cases involving this type of referral could either be for purpose of investigation or for prosecution.

In respect of the operation of the DTI, this system of referral appeared to operate successfully on the part of the CPS and DTI. One reason for this may be the fact of the referral being a statutory obligation on the part of the CPS and the remit of the recipient agency specifically including acceptance of this type of work.

Within this context clarity on the part of both agencies as to their roles predominated. There was no conflict between the agencies nor examples of either taking on the role of the other nor delays in referred matters being processed. In the context of fraud investigation and prosecution this situation was the exception to the general trends, procedures and practices observed.

One of the conclusions of this study is that the current response of the CPS and police to fraud is influenced to an unacceptable degree by personal perceptions of those responsible for its investigation and prosecution. It is further concluded that the degree of variation in perceptions is to a large extent created by the lack of shared understanding as to what matters fall within each agency's remits. This situation is less apparent in the operation of the DTI, where certainty as to offences and responsibility of the agency is provided by specific statutory provision. These features are reinforced by inclusion in the unit's remit and working practices of its investigators and lawyers.

Chance or choice? – individual discretion and organisational mandate

Examination of the agencies' cases and interviews with their staff leads to the conclusion that complaints of fraud can be made to any of the agencies studied. It is further concluded that processing can occur along a variety of referral paths and approaches. That this is so is clearly due, in part, to choice. Officers chose to approach certain lawyers within certain agencies; lawyers chose to accept referrals of matters other than in accordance with formal procedures; investigators and lawyers chose to seek or give advice of a nature and extent that they selected. Although the formal systems operating in the police and CPS are predicated not on personal choice but personal application of set procedures within specified parameters, in both agencies the means of ensuring compliance with the latter was severely limited by absence of review of decision making.

As examined in chapter three, the impact of discretion is an acknowledged feature of the criminal justice system. As such, some inconsistency of approach within agencies' decision making may be expected. In the context of uncertain definitions

and imprecisely applied remits, the numbers of “NFAed” cases were felt to be so high as to be indicative of some feature other than the exercise of discretion. Interviews with police officers and CPS prosecutors suggest that this assessment is correct and that the other feature could be chance.

One of the matters examined in the CPS sample of cases contained comment that was thought to support this assessment that the processing of complaints was due to chance rather than to choice. In the CPS analysis of *R v L* it was noted that,

Shortly after the commencement of the investigation it became apparent that the case was linked with a parallel investigation by Customs & Excise into a VAT fraud relating to the same company and, some time later in the case, a joint investigation was embarked upon with all that that entailed in relation to the sharing of information and evidence.

.....

There never seems to have been any doubt throughout the life of the case what were the areas to be investigated, and the shape of the investigation and prosecution did not materially change at any time.

If the second paragraph is accepted, one assessment is that it is difficult to accept that two investigations, so similar that they could be co-joined without variation in the investigation or prosecution, can result other than by chance acceptance by both investigative bodies, rather than one agency referring the matter to the other. An alternative approach is to suggest that the lack of internal monitoring and reviewing of decisions permitted individual discretion within each agency to predominate over compliance with organisational mandates. In this manner chance would be replaced by organisational failings of internal management.

Significance in the processing of complaints

Whether through chance or organisational failure, the importance of the choice of agency to which complaint was made is suggested to lie in the effect of the types of approaches that may be adopted and the referral paths used. The effect of these factors is revealed by the study to be inconsistency of outcome, with increased risk of matters being finalised without trial and increased delays where finalisation decisions are not made.

In this result the outcomes sought by the different agencies are of importance. As discussed earlier in this chapter in respect of the debate on regulation, the literature

review indicated that the outcomes sought by the police would be beginning, conducting and concluding an investigation. Their concern is not primarily with affecting future behaviour but with obtaining a statistical result. The trend demonstrated within the police unit studied, of greater numbers of matters being finalised by way of no further action (NFAed) than processed to trial or successful conviction, may not be viewed as supporting the literature review. However interviews with officers revealed that finalisations were counted as results. Although not as desirable as a “win”, if taken early in the investigation, finalisation by way of no further action, could be presented as a completed investigation, recorded as a result for crime recording purposes and the resources of the unit deployed to other matters. As such they could be administratively preferred to a case that progressed through investigation, to trial and thereafter did not result in a conviction. In crime recording terms, the early finalisation by way of no further action and an acquittal could be recorded as “insufficient evidence”.

That a high failure rate operates in respect of fraud prosecution and that the government priorities are violent crime and reduction of burglaries, may provide a rationale behind police managers’ apparent lack of interest in accepting large scale frauds for investigation by their units. Examination of FIG files provides support that these two factors have a significant and negative impact upon police decisions to accept fraud complaints for investigation.

Comparison of the investigative statistics supports the suggestion that the DTI model (of combined prosecutorial and regulatory roles) appears to result in fewer complaints being finalised before a decision to prosecution is made than does the police/CPS model. The stated objectives of the DTI combining to be the general bettering of the conduct and operation of business within the UK, it may be expected that this agency will place a lesser emphasis on statistical results than on an intangible result of improvement. Unlike the work of the DTI, that of the police and CPS has no means of achieving a regulatory function. As such it is to be expected that the focus of these two agencies will be on compliance with the law as opposed to regulation of continuing operation.

The DTI’s statistics demonstrate that, over a three year period, 45 %, 54% and 63% of matters sent for investigation proceeded to a decision to prosecute. Over a three year period, police statistics show that 5.55%, 16.66% and 15% of its investigations proceeded to a decision to prosecute.

Examination of both the police and CPS files demonstrated that a finalisation (“NFA”) decision might be taken at any stage in the progression of a complaint through the criminal justice system. As discussed above, several important consequences attach to the failure of a complaint to progress to criminal prosecution. In addition to these, the fact that exercise of discretion may occur in the initial stages of processing of a complaint suggests that some instances of fraud may, notwithstanding the making of a complaint, avoid any criminal action or sanctions.

In the DTI model it is suggested that this result is statistically less likely to occur. It is acknowledged that the DTI model is by no means a perfect model. Regard must be had to criticisms of delay in DTI investigations and suggestions of its lack of independence from ministerial control (Campbell 9 February 1994, Burrell 13 February 1994 and Wilkins 21 October 1994). It is suggested that such criticism be viewed in the context of, at the time of the study, the considerable work undertaken by the unit to counter such suggestions. Training to increase awareness that delay in the processing of complaints could lead to abuse of process arguments had been provided. An awareness of the need to demonstrate prosecutorial independence was found to be encouraged. Training to avoid delay was reinforced by the unit’s lawyers setting and monitoring case progression timetable. Demonstration of independence and explanation of decision making was promoted by meetings with investigators and those referring complaints.

The official statistics and observation of the chosen agencies indicated that the current response of the criminal justice system to complaints of fraud lacks consistency or cohesion. The importance of this lies in the involvement of large sums of money, with consequences for the individual and the long term attractiveness of the English commercial sector. The rationale underlying this study originated from working in a country that manifestly was not “dealing with fraud” in any meaningful manner.

That the English government is committed to sustaining the attractiveness of the economy may be evidenced in its creation of a new regulatory service, the Financial Services Authority. Unlike the government’s response to fraud in general, concerns as to the unchecked manner in which the financial services sector had been operating, resulting in large scale prejudice through fraud in the sector, were met with

the creation of both a body of offences and an agency tasked with drawing together both the new legalisation and pre-existing regulatory regimes.

Reports of the comments of the chair of the Fraud Advisory Group, George Staples, ...authoritative estimates of the sums lost through fraud range up to £12million, fraud is only a priority for a handful of police forces (Company Lawyer 2000 p 307),

have yet to be reflected in a similar approach to law and practice.

In 1999 Omerod's analysis of the then current judicial and legal climate suggested that overall reform of the substantive law as it related to fraud was unlikely.

The future of fraud investigation and prosecution – is there a need for a specific offence or creation of a single agency?

As detailed in chapter three, fundamental to the current English legal system is the notion of discretionary law enforcement. Recognising this, other alternatives to the current police procedures and practices may be considered, based upon retention of the current division of investigative and prosecutorial roles and exercise of discretion. This would not prevent examination of the organisational structures and consideration of amalgamation of the prosecutorial and regulatory roles as has effectively occurred in the DTI and FSA.

One of these alternatives could be the provision of shared and common training to specialist police and prosecutor units. Historically, the training of police investigators and prosecutors has occurred in isolation of each other. That this remains so was indicated by the Home Office provision of training on the Human Rights Act 1998. However, the suggestion within the Glidewell Report (1998) of far closer working relationships between the police and the CPS may accommodate adoption of the training, and thereafter operating, model provided by the DTI.

Within the police force studied, the Glidewell Report was the catalyst for "co-location", office accommodation shared by police officers and CPS prosecutors and the creation of a "trials unit", a designated police unit staffed by officers and support staff with direct contact with prosecutors on a regular basis. This contact included twice weekly courts attended by a senior officer in the unit alongside a prosecutor for the purposes of agreeing disposal of the listed cases.

Within this operation queries as to the discretion and impartiality of investigators and prosecutors have been raised and discussed, with an acceptance by both of their autonomy and inter-dependence. Whilst some conflict of roles may be inevitable, it is suggested that there is potential for this model to be applied to other offences, including fraud. In this manner the lack of review of individual decision making observed in both the police and FIU could be removed without re-imposing the use of the OSUs and thereby increasing the procedural formalities and delays of referring files between agencies. A further result may be to improve the consistency of decision making by investigators and lawyers.

The suggested use of the DTI model may be countered by the observation that such a model already operates, in the form of the SFO, which is the subject of sustained criticism (Mackay & Elliot 1 October 1993, Ashworth 25 October 1994, Webster 27 October 1994, Verkaik 3 July 1998). The extent of this criticism may suggest that, whilst the model may work well in the DTI context, in application in the SFO, despite its reported 80% conviction rate (1993-4 Annual Report), it is unreliable.

It is suggested that several significant distinctions between the DTI and the SFO models operate to make the two distinguishable. The former is permanently established and operates as a composite entity whereas the latter has a body of lawyers and administrative staff, with police officers being either seconded from their forces or the SFO working with them whilst an investigation remains in-force. The importance of the effect of the permanence of the DTI's establishment and the lack of the same in the SFO lies in the sharing of objectives between investigators and lawyers within the DTI and the differing objectives between the police, to investigate, and the SFO, to prosecute.

In addition the DTI does not have the discretion, as does the SFO, as to which cases of a certain type it may accept and progress. Whilst the DTI may exercise more control than does the CPS as to the rate at which matters are referred to it and thereafter processed, it can not choose its cases in the manner of the SFO.

Account has to be taken of the context in which complaints are made to the DTI. In terms of the Insolvency Act, obligations are placed on professionals to report actions and inaction to the DTI. The consequences of this may be found in the seriousness with which such complaints are viewed and processed in comparison with complaints

from members of the public. Whilst within the study this was not noted, this suggestion can not be entirely discounted.

Another factor not expressly examined in the study was whether differing screening processes were required in relation to complaints from professionals required by law to report their suspicions or observations, compared to complaints from members of the public. The results of the study suggested that some screening of complaints occurred in each agency. The DTI's Legal Services (Prosecutions) unit was statistically the most likely to process complaints internally but examination of its files revealed a willingness to refer the reports from professional bodies to other agencies. By contrast the police received the majority of complaints from members of the public and were the most likely to end examination of a complaint by finalisation without further action (NFA-ing) of it.

The possibility of the work of the DTI being easier as a result of it originating from professionals has to be considered. It is suggested that allied to this consideration should be that of the offences referred. One possibility suggested is that the work of the police and CPS in filtering what are and are not appropriate cases for investigations and prosecution would be made simpler were there to be other processing options available.

Unlike the police, CPS or SFO, the DTI operates in a framework and manner that combine regulatory and prosecutorial functions and powers. In its operation these two approaches were not as distinct and irreconcilable to each other as suggested in some of the literature reviewed. The work of Hawkins and Thomas (1984) suggests a distinction between compliance and deterrence theory (Pearce and Tombs 1999), although Hawkins has attacked this analysis. McBarnett and Whelan's analysis that

It is in the nature of the legal process that there can be two sides to every case, competing interpretation of what the law means or how it should be applied. (1999 p13),

continues the suggestion that there are two, and no more, separate types of approach to discretionary decision making within the criminal justice system

The operation of the Legal Services (Prosecutions) section of the DTI did not support this assessment. The operation of this unit and the FSA may be viewed as supporting the conclusion that within the English justice system a model exists that combines both functions.

One of the main conclusions drawn in this study was the apparent lack of co-ordination of effort and approach between the police investigators and the CPS prosecutors. The impact of lack of a shared understanding as to what it was that both agencies dealt with was evident in the comments of those interviewed. The examination of the DTI suggested that this should not be attributed to divisions between the functions of investigators and prosecutors. Within the context of the DTI the two functions appeared to operate much more closer and with less perceived conflict or disagreement than was observed in the relationship between the police and CPS.

As detailed in chapter four, the comments of a number of the police officers interviewed suggested high levels of frustration as to the lack of understanding of their role and co-operation, as they perceived it, from some prosecutors. It was concluded that the approaches of both police and prosecutors were grounded in their organisational remits and practices that did not, in themselves, promote the sharing of objectives. Within the DTI there was an accepted distinction in function and role between the investigators and prosecutors but far less tension in the co-operation of their respective roles.

However, it is suggested that improvement of the conduct of investigations and subsequent prosecutions of complaints of fraud may require fundamental changes within the legal system. Whilst the procedural operation or even the creation of a creation of a single body on the model of the DTI, using a range of approaches, across regulation and prosecution may improve the situation, it is suggested that the lack of clarity as to what is being processed is fundamental to the current response.

The current response of the justice system to fraud makes no provision for a multi-agency approach. There are no focus groups or court user groups to influence the manner in which fraud matters are processed. Neither investigators nor prosecutors view the other as partners in dealing with fraud. As yet indication has still to be given as to the response of the government to the recommendations of the Auld Report (2001). In relation to the large volume of relatively minor criminal matters, some of the Glidewell Report recommendations, in respect of closer working between the police and CPS, are being put in place in most police and CPS areas. However, in relation to fraud, use of CJUs and access to locally based specialist prosecutors, has yet to occur.

Even in matters of a non-criminal nature, such as those involving anti social behaviour, the operation of the police, local authorities and the courts, possibly together with those affected and the subject, are routinely linked. In these contexts each agency has a framework of legislation within which it operates together with an appreciation that they act as partners, yet retaining organisational discretion and independence. In relation to fraud there is no comparable situation.

Underlying the possible improvement to the response to fraud is the suggestion that there should be a substantive offence of fraud. In his analysis of the Law Commission's response to the Government raising the issue of the need for a general offence of fraud, Ormerod does not place much emphasis upon the making of the question (1999 p 789). More emphasis is placed upon the opposition to general offences (p 796 and following). Since the 1998 Law Commission response and Ormerod's analysis of it, it is suggested that there has been a significant shift in executive and legislative perspectives.

Additionally, the operation of the criminal justice agencies has significantly altered with the introduction of the 1999 statutory requirements for "Best Value" (Local Government Act 1999). Unlike Compulsory Competitive Tendering (CCT) this system is statutory and increasingly affects the performance of all public agencies. Within the police and CPS this has resulted in increased inspection by the Audit Commission and greater attention being paid to the implementation and meeting of performance targets. At an administrative level, the introduction of a specific offence of fraud could assist these criminal justice agencies streamlining and co-ordinating their operations in keeping with the recommendations of the Glidewell Report.

Were there a common definition and expectation as to **what** it is that each would deal with, it may be expected that the prospects would be improved of achieving an allied commonality as to **how** it is that the agencies would deal with it. Given that the one agency is investigating the matters upon which the other will advise, review and eventually prosecute, there is a procedural logic in the two agencies operating complementary procedures as to the acceptance of fraud cases and these being known, understood and applied by staff of both agencies. This assessment appears to have been the basis applied to proposals to co-ordinate the operation of the police and CPS in relation to routine cases. Within the Auld Report (2001) these

suggestions have been specifically applied to the investigation and prosecution of fraud, however, they have yet to be put into procedural policy or practice.

Prior to any implementation of these recommendations, it is suggested that the DTI provides a model upon which such a system could operate. Use of this model would require alteration of the substantive and procedural laws so as to incorporate this agency's continuum of responses and operation in the context of responsibility for enforcement of specific offences.

A substantive offence

In his analysis of the Law Commission's 1998 work "Legislating the Criminal Code, Fraud and Deception: A Consultation Paper", Ormerod (1999) notes that the response of the legislature to developments in criminality within commercial activity have been "piecemeal" and criticises the Commission for continuing this approach in its,

apparent preference for a series of very specific reforms to the array of existing deception offences. (1999 p 789)

It is not the aim of this study specifically to analyse the various and, in part, competing, models of a general offence of fraud as discussed by Ormerod and others, including Sullivan (1989), Smith (1995), and Aldridge (1994), or to present any alternative framing of such offence. However, as noted by Hutter (1988) the impact of the substantive law upon the operation of those within the chosen agencies, in relation to policy and practice, can not be ignored. One of the primary conclusions drawn from the examination of the agencies is that, in practice, the need for a general offence, as discussed in theory by Ormerod, remains pressing; brief analysis of such an offence is required.

Ormerod's analysis of the theory of the law identifies that *Preddy* [1996] AC 815 created gaps in the present law. The present study concludes that the practical effect of these is considerable uncertainty within the police as to the nature of the criminality being investigated and the elements of the offence that require proving. Lack of certainty as to the nature and standard of communication between investigators and prosecutors aggravates this situation. The result can be considerable delays in investigation and decisions by the CPS to discontinue criminal proceedings on the ground of either insufficiency of evidence or likelihood of abuse of process arguments as a direct result of delay in processing complaints of fraud.

Ormerod identifies two models of a general offence; one based on dishonesty and the other on deception. The first model is grounded in the *mens rea* of the actor in that the offence would be committed where an individual acts dishonestly, causing another to suffer financial prejudice. This is correctly criticised as being, in effect, an *a priori* argument and, given that the “dishonesty” of any act can not be fully defined, other than by reference to its effects, the benefits of a general offence are lost. The second model, based on the *actus reus* of the actor, is criticised as being,

so broad that it will subsume the existing offences of deception (Ormerod 1999 p 810).

It is an unstated implication that this result is undesirable. Accepting that such an offence would be very broad, it is questioned as to whether this result is necessarily problematic. It is suggested that generality (or removal of a multiplicity of specific offences, many created in response to a particular type of behaviour) can provide clarity. This may benefit not only those working within the criminal justice system, but also those engaged in commercial activity, by providing certainty as to the parameters of the criminal law and protection of those conducting legal business, in whatever form, with others.

Ormerod’s suggestion (1999 p 802), that the offence of fraud as operates in South Africa (that is substantially similar to that operating in Zimbabwe) would provide a basis for consideration for the development of a general offence of fraud within the English criminal justice system, is supported. It is suggested that in such an offence there is sufficient requirement of *mens rea* as to satisfy the jurisprudence of the Human Rights Act, in that the act itself must be a mis-representation, together with flexibility of *actus reus* as to respond appropriately to ever developing forms of criminality in commercial activity. It is suggested that the creation of such an offence, together with reform of the practical operation of the main investigative and prosecutorial agencies, could produce significant improvements in the current response of the English criminal justice system to complaints of fraud.

Conclusion

This study began with an expectation that the English criminal justice system’s policies and practices in response to allegations of fraud would provide a template for development of an improved response to similar allegations occurring in countries such as Zimbabwe. It concludes with an assessment that, whilst there is much that can properly be praised within the operation of various agencies within the English criminal justice system, the response of that system to complaints of fraud is less

than perfect. The study reveals that discretionary decision making on the part of investigators and prosecutors is greatly influenced by individuals' perceptions of the nature of the alleged illegality and of their and others' roles within the criminal justice system. Communication between the police and CPS is largely determined, not by procedures, but by the personalities of those who happen to have responsibility for any particular case. Notwithstanding the recommendations of the Glidewell Report (1998), formal links between these two agencies, in relation to dealing with complaints of fraud, remain conducted at "arm's length". It is a matter for conjecture as to whether the recommendations of the Auld Report (2000) will see the adoption of other Glidewell recommendations being implemented in respect of the investigation and prosecution of fraud by the police and CPS. Similarly, it is open to debate as to whether, if the fraud-specific recommendations of the Glidewell and Auld Reports are implemented, fraud will assume a higher priority within the criminal justice system than is presently the case.

The findings of the present study suggest that the police do not view investigation of fraud as a high priority. This may be explained, in part, by the amount of time and resources occupied in investigations that do not fall within the Home Office lists of priorities and by the lack of certainty as to what it is that CPS would require as evidence. Delay was found to be commonplace in the processing of complaints of fraud within the police and CPS.

Examination of the practices operating within the chosen agencies leads to the conclusion that there was significant potential for complaints of fraud of a similar nature to be processed in very different ways, notwithstanding that the processing involved the same two agencies; the police and CPS. In addition, it was assessed that there is further potential for significant differences to occur in the processing of complaints of a similar nature as a result of the choice of agency to which complaint was made. The combination of these factors leads to the conclusion that the current response of the English criminal justice system to fraud is uncoordinated and hindered by a lack of clarity as to what it is that is the subject of examination. It is for these reasons that re-examination of the substantive law, together with that of the various agencies' operation, as may be achieved by implementation of the recommendations of the Auld Report (2000), are the main conclusions of this study. These conclusions accept that this will require changes in well-established criminological thought, in relation to a substantive offence and notions of separation of the investigative and prosecutorial functions and roles. Given the current political

and social climate, it is suggested that such changes are both desirable and possible and that the model of the DTI may be of assistance in achieving them.

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