IEA Discussion Paper No.120

FRAUD FOCUS

Is the Serious Fraud Office fit for purpose?

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March 2023

Foreword by
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Contents

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Foreword

The maintenance of criminal investigative and prosecutorial processes that are wholly independent of Government lies at the very heart of the rule of law in England and Wales. Nowhere is this more vital than in the field of the prosecution of serious and complex fraud. Very often, agencies of Government will be directly or indirectly involved in the facts of a particular case. Sometimes, the national interest in maintaining friendly or strategic relations with a foreign state comes into conflict with the need for investigators and prosecutors to follow the evidence, wherever it leads. This requires an approach that must be both robust and delicate in equal measure.

From 2014 to 2019, I held the joint responsibility of superintending the work of the Serious Fraud Office of England and Wales. The advent of Deferred Prosecution Agreements resulted in the payment of large financial awards to the taxpayer that dwarfed the annual revenue spent by the SFO. The benefits brought by the "Roskill model", which embeds investigators together with prosecutors in an efficient and effective way, were and remain clear. There was no doubt in my mind that the SFO had made some impressive strides since the difficulties of more than ten years ago.

More recently, however, the role of the SFO has come under significant scrutiny and a deal of criticism. This is why James Forder's report, which pulls no punches as to the problems and shortcomings of the SFO, is a timely contribution to the debate. As much-needed reforms to the criminal law of corporate and individual economic crime are imminent, then the need for a law enforcement framework that effectively policies the boundaries of a lively free market economy is more pressing than ever. Speaking personally, I have not yet come to a firm conclusion as to what the future architecture of that framework should be but I am strongly of

the view that both House of Parliament should take an urgent and thorough examination of this issue in order to make sure that we stop repeating the mistakes of the past.

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Summary

- The Serious Fraud Office (SFO) performs the important tasks of investigating and prosecuting serious and complex fraud in England and Wales.
- Since its creation in 1988 its record of successful prosecutions has been unsatisfactory.
- It has been markedly mistake-prone and there have been too many instances of inappropriate or unprofessional behaviour.
- The appropriateness of its use of 'deferred prosecution agreements' (DPAs) as an alternative to prosecution needs careful scrutiny.
- Part of the explanation of the SFO's poor performance lies in the unavoidable complexity of the cases it has to handle, and various reforms to law or procedure should be considered.
- The inappropriate behaviour that has occurred is unacceptable and appears to require a change of culture, and therefore, perhaps, a broad institutional reorganisation.

Introduction

> [S]ince it is necessary that there should be a perpetual intercourse of buying and selling, and dealing upon credit, where fraud is permitted and connived at, or has no law to punish it, the honest dealer is always undone, and the knave gets the advantage.
>
> Swift (1726, part 1, ch. 6)

It can hardly be doubted that the control of fraud is an essential of economic prosperity and development. That must be particularly true for a country like the United Kingdom which aspires to maintain a position as a global financial centre.

The United Kingdom's record in this, however, is far from satisfactory, and much of the reason arises from the failures of the Serious Fraud Office. It was created in 1988 to investigate and prosecute 'serious and complex' fraud. Since then it has never been able to establish a convincing record of good performance. Throughout its history, its activities have been marked by spectacular prosecutorial failures. A variety of causes contributed to this record. In part, investigation and prosecution of the kind of cases for which it is responsible can be very difficult. Aspects of the existing legal framework probably exacerbate these difficulties and there is a powerful case for serious consideration being given to legal and procedural reform. However, it is beyond doubt that many of the SFO's failures have occurred because of failures by the organisation itself, whether they be poor prosecutorial decisions, ineffective case management, procedural non-compliance, or administrative blunder. In addition to this, and also contributing to some of the most noted failures of the organisation, there have been specific and sometimes very serious, failings in the behaviour of individuals. These range from someone apparently playing a practical joke in connection with court proceedings, to inappropriate relationships between senior SFO staff

and agents of parties under investigation; and include specific and judicially-established failure of duty. Such failings in themselves are very serious matters, though individual instances might be treated as failings merely of individual people. But the SFO's long record of generally poor handling of its cases, combined with the collection of instances of reprehensible behaviour, point to much deeper cultural failings.

In what follows, I describe the wholly unsatisfactory performance of this agency over a long period of time, drawing attention to some aspects of the continuity in its failures. It is not possible here to reach definitive conclusions about what reforms are appropriate. The legal and other issues are very complex and require full expert consideration. The outlines of some approaches to consider are, however, described. Just as important, though, is that it be recognised that the failings of the SFO have gone well beyond what can be remedied by such things as the modernisation of aspects of the law. Too many of the failings described have been in its own behaviour. There seem to be deep cultural problems in the SFO which need to be addressed separately from any questions of legal reform.

All in all, there is a clear need for a thoroughgoing rethink of the legal and institutional aspects of the investigation and prosecution of serious fraud. One clear possibility is that this may result in the abolition of the SFO and the adoption of alternative institutional arrangements.

The Serious Fraud Office – an outline of its history, responsibilities and approaches

In the 1970s and 1980s, the prosecution of serious fraud was felt to be unsatisfactory. As a result the Fraud Trials Committee was established in 1983 under the Chairmanship of Lord Roskill. Its report ('The Roskill Report') was published in 1986.[1] The report made more than 100 proposals for the reform of the law and its enforcement and many of them were adopted in the Criminal Justice Act (CJA) 1987 which created the SFO. It began operating the following year. Many of Roskill's recommendations concerned matters which, though important, are deeply technical, concerning the role of committal proceedings, questions of the admissibility of evidence, for example, from abroad, procedures for pre-trial review and the extent to which the accused should be expected to reveal their defence, etc.[2] Two of its proposals, being perhaps less technical, have attracted wide attention. One was that the roles of investigator and prosecutor should be combined. This was accepted, so that in contrast to the normal approach whereby, for example, the police investigate, and the CPS undertakes prosecution, the SFO does both. The second was that provision be created for particularly complex frauds to be tried without a jury, but rather with an expert panel. This proposal was not accepted.

The CJA 1987 s2 also gave the SFO the unusual power to require those under investigation to answer its questions. So, when these powers are

1 Roskill (1986).
2 These and others are summarized by Zander (1986).

being used, it is an offence for an individual to give a 'no comment' response. Unsurprisingly, this is much valued as an investigative tool.[3] Since 2008, and to a greater extent after the Bribery Act 2010, the SFO has had similar powers in relation to certain offences committed overseas, and in these cases is also allowed to use them before an investigation has formally commenced.[4] Legislation before Parliament at the end of 2022 would extend these pre-investigative powers to all SFO cases.[5] Since 2017 the SFO has had the power to investigate and prosecute the corporate offences of failure to prevent the facilitation of tax evasion in the UK or overseas, under the Criminal Finances Act 2017.

The Crime and Courts Act 2013 introduced Deferred Prosecution Agreements (DPAs). These allow a commercial entity to cooperate with the SFO (or certain other bodies), and reach an agreement with it to avoid a trial when it is suspected of economic crime. The SFO will conditionally suspend proceedings against the commercial entity for as long as it complies with the terms of the agreement. These terms may include payment of financial penalties, costs and compensation to victims and reparative measures to remedy compliance failings in the business. The agreement must be sanctioned by the court as being in the interests of justice and fair, reasonable and proportionate. Its terms are made public. DPAs cannot be entered into with individuals. The business concerned does not necessarily admit to wrongdoing, and the SFO may, and does, still seek to prosecute individuals concerned in the alleged fraud or corrupt practices.

3 Its primary use is in discovering information rather than collecting admissible evidence. The traditional 'right to silence' is obviously abrogated, but since the information gathered cannot usually be presented as evidence, s2 does not create an obligation to self-incriminate.

4 By the CJA 1987 s1(3), there would formally be an investigation only if the director of the SFO had reasonable grounds to suspect a relevant crime had been committed.

5 Home Office (2022). Accessed 12 November 2022. The legislation in question is the Economic Crime and Corporate Transparency Bill.

A record of dissatisfaction: cases

There have of course been many effective prosecutions by the SFO. The conviction in 1990 of Ernest Saunders and others in connection with the manipulation of the share price of Guinness is seen as an early success. However, from an early stage, the effectiveness of the SFO, as well as sometimes the appropriateness of its behaviour, has been questioned. Even in the Guinness case, there were three other trials arising from the same issues, none of which ended in conviction, and one threw up an issue that was a foretaste of more to come for the SFO.

The issue was that in one of these trials it became apparent that the SFO had failed to disclose potentially exculpatory evidence in its possession.[6] The trial in question was itself abandoned, but those convicted in the first trial based an appeal in part on the argument that this same evidence should have been disclosed to them. The appeals failed because, even had the evidence been disclosed, there would have been sufficient basis for a guilty verdict. But it was clearly also held that the SFO should have disclosed these materials.[7] The point that the prosecution had made a serious error was retrospectively recognised by Kiernan (2004: 111), then deputy director of the SFO, who noted that a lesson of the case was that 'the disclosure of unused material must be considered very carefully'.

A different problem arose in a case concerning County NatWest's role in the takeover of Manpower by the much smaller Blue Arrow. County (and UBS Philips and Drew) were alleged to have concealed the failure of a rights offer to Blue Arrow shareholders in 1987. After a trial lasting more

6 In broad terms, the prosecution is required to disclose to the defence information it has which undermines its own case or which might aid the defence.

7 The facts of the emergence of the materials are described by Killick (1998: 49–50), and the verdict in the appeal by the Financial Times, 28 November 1995, p. 12.

than a year,[8] four executives were initially convicted, but in 1992 all were acquitted on appeal with Lord Justice Mann commenting that the trial was 'a costly disaster'.[9] Notably, a key point of the acquittal was that the case had been so complex that the jury could not have reached a fair verdict. In due course, David Green, who was by then the director of the SFO, accepted that this outcome may have for a time led to the SFO holding back from prosecuting complex cases, and the BBC was led to speculate that this hesitancy was one of the explanations of the frequency of financial scandals in the City of London.[10] Naturally, a lesson suggested by the Blue Arrow case was that the SFO needed to keep its cases simple. An approach, and one that was adopted in subsequent cases, was to prosecute only certain charges, so that attention could be focused on them, and the case kept within reasonable bounds.[11]

Perhaps the most controversial of cases, as concerns the SFO's handling, is that of Asil Nadir, and his company Polly Peck. An SFO investigation began in 1990 with a much-reported raid on a related company, which appears to have been the trigger for a collapse in the share price of Polly Peck. Although it was officially denied, it is alleged by Widlake (1995) that the SFO notified the press of the raid (p. 125), and that the deputy director of the SFO admitted in a private meeting that the SFO had nothing to go on and was on a fishing expedition in its investigation (p. 127).[12] In due course Nadir was charged with various crimes arising from his transfer of Polly Peck funds out of the UK, although nothing that was the original basis of the investigation. In 1993, he flew to Northern Cyprus where he was out of reach of the British authorities, but returned voluntarily to face trial in 2010. He was then convicted on a number of charges and sentenced to ten years in prison. In itself, that outcome can be counted a success for the SFO. There have been, however, a number of further questions raised about the SFO's conduct.

8 https://www.independent.co.uk/news/business/blue-arrow-trial-labelled-pounds-40m-disaster-1536262.html

9 https://www.independent.co.uk/news/business/blue-arrow-trial-labelled-pounds-40m-disaster-1536262.html

10 David Green, SFO Director 2012–18, as reported by the BBC on 14 April 2014 (https://www.bbc.co.uk/news/uk-politics-26178868). He also commented that at the time he spoke there was no such hesitancy.

11 That this lesson was actually drawn by the SFO is asserted by Kiernan (2004).

12 Indeed, when Nadir was charged on 76 counts in October 1991, none of them arose from the original basis of the investigation (Killick 1998: 132).

One point is that the case was marked by a bizarre hoax-allegation that in 1993 the trial judge was involved in or was to be brought into a conspiracy to aid Nadir's escape from justice. The nature and extent of the SFO's involvement in the matter has never become clear, and Killick (1998: 136) substantially acquits it of blame. However, the SFO was certainly less than clear with the judge about the nature of the allegation. Its QC first told the judge that an allegation had been made and it was likely the police would want to interview him. This information from the SFO seems to have been incorrect, as the police had no such intention.[13] However, it was also incomplete, since only later did the QC reveal that the allegation was against the judge himself.[14] There is also some question as to whether the SFO was involved in the investigation of the supposed conspiracy. Killick (1998: 136) reports a senior police officer saying that a search warrant used in the investigation was executed 'on behalf of the SFO'. Widlake (1995: 131–40) made a number of claims suggesting some SFO involvement, whilst also noting that this was firmly denied. All in all, it is not clear what role the SFO had, but it evidently was closely enough involved to end up apologising to the judge for making him subject to a 'spurious and groundless allegation'.[15] Furthermore, in 2013, three crates of documents, apparently relating to the allegation, were found at the SFO during an office move.[16] It is not immediately clear why the SFO should have been in possession of these if it was not investigating the matter.

The losing of those documents, however, and indeed the whole incident are not the only issues to raise serious questions. On two occasions the SFO seized documents from Polly Peck or Nadir which defence lawyers said were legally privileged. Such documents should have been sealed awaiting adjudication of whether they were in fact privileged. However, on two separate occasions they were copied and circulated, including to prosecutors. That mistake was recognised by the SFO in January 1991 but no attempt was made by it to retrieve the documents until December of that year.[17] The case caused the *Financial Times* to opine that there was doubt about the SFO's 'managerial and administrative competence'.[18]

13 Killick (1998: 135) and Widlake (1995).
14 Killick (1998: 137).
15 *The Times*, 28 February 2013 (https://www.thetimes.co.uk/article/polly-peck-tycoons-fraud-conviction-to-be-reviewed-fx8qwskbn).
16 *The Times*, 28 February 2013 (https://www.thetimes.co.uk/article/polly-peck-tycoons-fraud-conviction-to-be-reviewed-fx8qwskbn).
17 The facts were admitted in a written statement to the House of Commons by the Attorney General on 3 December 1993. *Hansard*, column 745.
18 *Financial Times*, 4 December 1993.

The case of Bank of Credit and Commerce International proved to be one of the SFO's great successes,[19] but the associated case of Nazmudin Virani, of Control Systems, threw up another bizarre incident. Someone at the SFO forged a letter purporting to be from the former leader of the Liberal Party, Sir David Steel, saying that the MP intended to attend Virani's bail hearing on his behalf. This was presented by the SFO to Virani's lawyers just before the hearing. What purpose this was intended to serve is not clear, though Sir David had been questioning the SFO's approach to the Virani case. The SFO itself said it was an April Fool joke. The Attorney General described the incident in Parliament as arising from 'a grave error of misjudgment', but denied that there had been 'a matter of dishonesty or anything of that nature',[20] although he did not dispute that the letter was a forgery. It was in this case that a dawn raid by the SFO also led to comic farce when apparently its vans were wheel-clamped.[21]

The trial of Roger Levitt in 1993 resulted in criticism of the SFO for making a series of blunders in the prosecution. The SFO alleged that the company was 'riddled with fraud, forgery, deception and down-right dishonesty',[22] but in the end, pursued only one charge. The intention appears to have been to keep the trial simple, perhaps in response to the outcome in County NatWest/Blue Arrow. In the astonishing account of Killick (1998: 100–1), that one charge turned out not to be applicable to many of the accusations against Levitt, and they therefore fell out of the picture. Then, that one charge was itself resolved by what amounted to a plea bargain which resulted in a sentence of community service rather than any custody.[23] Questions were asked in Parliament and the Attorney General initially denied that the SFO had suggested any plea bargain, later choosing to equivocate on the issue.[24] The then-director of the SFO, however, more clearly changed his account, first saying he had not met the defence counsel, then remembering that he had and that he had said he would be 'minded' to accept what became the final plea.[25] Whether the SFO then realised Levitt was likely to receive a non-custodial sentence is also disputed. If it did not, that might in itself raise questions about its handling of the case, but court records appear to show that it did.[26] In any case, even

19 It is described, for example, by Killick (1998, ch. 10).
20 *Hansard*, 30 June 1993, column 978.
21 *The Times*, 20 July 1999, p. 33.
22 *Financial Times*, 12 November 1993, p. 7.
23 The succession of poor decisions is described in Killick (1998, ch. 6).
24 *Hansard*, 17 July 1995, column 1304.
25 *The Times*, 12 July 1995, p. 8.
26 *The Times*, 31 May 1995, p. 2.

though the trial judge was pushing the SFO to simplify the case, it clearly should not have whittled down the charges in such a way as to make the alleged criminality of much of Levitt's behaviour irrelevant to the case.

A different kind of difficulty arose in the trial of Ian and Kevin Maxwell, accused of defrauding the Maxwell pension funds, which ended in 1996. In this case, the SFO initially brought only two charges, apparently expecting to be able to bring others later. It was another immensely complicated trial in which Kevin Maxwell personally gave evidence for 21 days. After the acquittals, a judge refused the SFO permission to bring further charges partly on the basis that it would be an onerous burden on the defendants.[27]

In the Brent Walker trial of 1994, some of the lesser players were convicted, but Walker himself was acquitted, with the result, amongst other things, that speculation began about the possibility of abolishing the SFO altogether.[28] In the event, there followed a period of much more successful prosecution. But then, the case of Deutsche Morgan Grenfell ended with no convictions in 2002. There, the defendant at the centre of the case was found unfit to stand trial, and it had been suggested that the case against other defendants should have been abandoned at that point. This case led the *Financial Times* to comment that if two other trials went badly for the SFO – those of Andrew Regan and the accused in a case concerning building supplies company Wickes – it would be back to the mid-1990s, as far as the reputation of the SFO was concerned.[29]

Sure enough, of five defendants in the Wickes case, one had charges dismissed, and three were acquitted in November 2002 after a trial of 180 days, by a jury that took less than eight hours to reach its conclusions. The last was acquitted in June 2003.[30] In this case, the defendants – all senior executives – accepted that there had been a fraud against the company, but denied knowing anything about it. Then Regan was acquitted in August 2003, with costs awarded to him.[31]

The two Tchenguiz brothers – Vincent and Robert – were arrested in 2011 in connection with the collapse of Icelandic bank Kaupthing. Both cases had to be abandoned and, in the case of Vincent, the *Financial Times*

27 Killick (1998 p. 185-6).
28 *The Times*, 25 October 1994, p. 25.
29 *Financial Times*, 26 January 2002, p. 2.
30 *Financial Times*, 26 November 2002, p. 1.
31 *The Observer*, 10 August 2003.

described the outcome as 'ending an error-strewn inquiry that has dented the reputation of the UK fraud agency'.[32] The SFO used flawed search warrants – later declared unlawful – to seize documents. Lord Justice Thomas said the SFO's inability to explain its errors was attributable to 'sheer incompetence'.[33] If anything, the then-director of the SFO, Richard Alderman, went further when he admitted the 'utmost seriousness' of the mistakes and said that they 'involve a wholesale challenge to the SFO's competence and the good faith of its staff'.[34] Lord Justice Thomas also commented that his sympathy with the SFO's requests for more time to prepare its explanation was diminished by the fact that the warrants had been issued 'in a blaze of publicity', and he asked: 'Why should I now show sympathy to the SFO?'.[35] Afterwards, the SFO ended up agreeing to pay £3 million plus costs to Victor Tchenguiz in compensation for the damage done to his business.[36] It was truly a costly collection of mistakes.

More examples can easily be found that exhibit the same sort of failings as these. The case against Victor Dahdaleh collapsed because the SFO 'delegated' part of its investigation to a law firm which was acting for the party Dahdeleh was alleged to have bribed, and who then, in addition, declined to travel from the US to give evidence.[37] In Olympus/Gyrus, the SFO offered no evidence because of a string of procedural errors.[38] It was required to pay several million pounds in costs after what a judge called 'improper and unreasonable' prosecution of Celtic Energy, and that the SFO's legal analysis 'throughout this case was inadequate'.[39] The SFO sent many thousands of pages of documents relating to its investigation of BAe Systems to the wrong person, lost them and was fined £180,000 by the Information Commissioner for a data breach.[40] The case against

32 *Financial Times*, 19 June 2012, p. 1.
33 https://www.theguardian.com/business/2012/apr/29/serious-fraud-office-humiliation-battle-vincent-tchenguiz
34 https://www.theguardian.com/business/2012/apr/29/serious-fraud-office-humiliation-battle-vincent-tchenguiz
35 https://www.telegraph.co.uk/finance/financial-crime/9187096/Judge-blasts-SFOs-sheer-incompetence-in-Vincent-Tchenguiz-probe.html
36 https://www.sfo.gov.uk/2014/07/25/serious-fraud-office-vincent-tchenguiz-announce-settlement-civil-claims/
37 *Financial Times*, 22–23 March 2014.
38 *Financial Times*, 11 November 2015
39 *The Times*, 12 February 2015 (https://www.thetimes.co.uk/article/sfo-told-to-pay-pound7m-over-failed-mining-fraud-case-kzw0ttdq073).
40 https://www.bbc.co.uk/news/health-32108610. The case against BAE was also abandoned, amid much controversy, though in this case for the reason that pursuing it was not in the public interest, rather than because the case was flawed or had been mishandled.

Tesco executives was dismissed by the judge.[41] The cases involving individuals at Rolls Royce and GlaxoSmithKline were dropped by the SFO in February 2019, with the explanation being given that there was either insufficient evidence or it was not in the public interest to pursue them, although very large amounts of money had been spent investigating them up to that point.[42]

The case of Eurasian Natural Resources Company (ENRC) is distinguished from these by the fact that although the SFO has been investigating since 2010, no charges have been brought. However, it emerged that the SFO had been in improper communication with ENRC's lawyer who disclosed confidential and privileged information to it. ENRC took action against the SFO, which was then found to have breached its duties and induced ENRC's lawyers to breach their contract with their client. The case is complicated by the fact that ENRC's own lawyer acted grossly improperly by in effect leaking information to the SFO (apparently to increase the amounts he could bill his client), and in some respects colluding with the SFO in facilitating their investigation.

Extraordinary as that is, the more notable point for current purposes is that the SFO went along with this, and improperly colluded with the lawyer. In technical terms, they committed the civil wrong of inducing him to breach his contract with his client. The whole debacle was so remarkable that when ENRC sued their lawyer and the SFO, the trial judge was led to reflect on the tenure of the SFO director (Richard Alderman), including citing judgments from earlier cases.[43] His remarks contained criticisms for over-generous settlements, an agreement that was 'loosely and perhaps hastily drafted' (para 290); inadequate, unfair and unlawful behaviour in the Tchenguiz cases (para 294), which the ENRC judge said betrayed a 'serious lack of propriety' on the part of the director (para 297). The judge said he had made improper severance payments (totalling nearly £1 million). He had breached Civil Service rules on consultancy fees (para 302). He arranged for the ghostwriting and printing of a self-glorifying brochure about the SFO which then had to be pulped (para 303); there were 'exotic' working arrangements (para 307) and 'jobs for the boys and girls' (para 307). It was noted that 'under Mr Alderman's watch, the SFO,

41 https://www.sfo.gov.uk/2018/12/06/no-case-to-answer-ruling-in-case-against-former-tesco-executives/

42 https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/

43 [2022] EWHC 1138 (Comm).

which was located on Elm St, SW1X, had lost its way and was known colloquially as 'Nightmare on Elm Street' and the 'Serious Farce Office' (para 304). All that is an extraordinary catalogue.

In respect of ENRC, the SFO was found to have encouraged the lawyer to pass them information they knew or should have known he was not authorised to give them. At one point the senior figures at the SFO arranged to send ENRC a letter intended, as the judge put it, to 'put the wind up' the company. This letter, however, was sent at the behest of ENRC's lawyer. It was he who wanted to raise the company's anxiety, but it was the SFO that co-operated with him in this and engaged with this request. That was improper behaviour by the SFO.[44]

The judge did not find that the information the SFO improperly obtained was wanted for any specific purpose, but was merely believed to be potentially useful in future action. In acquiring it, the perpetrators had been motivated by what he called 'bad faith opportunism' (para 893). In reaching his conclusions, the judge rejected the evidence of two senior staff (not Alderman) of the SFO saying 'I consider that they were lying' (para 496). Alderman was found to have committed a 'gross and deliberate breach of his Independence Duty' in taking unauthorised information from ENRC's solicitor (para 485). And the judge noted – a point which is in any case apparent – that the matter was particularly serious because Alderman was in a senior position as an agent of law enforcement.

All in all this is an astonishing case. The improper behaviour of ENRC's lawyer may be the most remarkable aspect. But the terrible failings of the SFO in its dealings with him are very serious indeed, and wholly unacceptable in a public body – most of all in a public body which exists for the purpose of preventing dishonest conduct.

A case against Barclays arose from the bank's attempt to raise capital from sovereign wealth funds and wealthy individuals in Qatar and Abu Dhabi after the financial crisis of 2007/8. Investigation began in 2012; charges were brought against the bank itself and four individuals in 2017. The charges against the bank were dismissed, first in the Crown Court, then in the High Court. Although perhaps having the appearance of another failure by the SFO, this case highlighted a particular difficulty with corporate prosecutions. That is, that the law requires the prosecution to satisfy the

44 These points are summarised from paras 737 to 742

'identification principle' by identifying a 'directing mind and will' of the corporation.[45] The definition of that directing mind is itself a complex legal matter, but the sense of it is that the prosecution must identify a person or persons who is or are autonomous in the company in respect of the activities in question, and show the conduct and state of mind of that person brought about the illegality.[46] This could not be done in the Barclays case because the individuals who acted for the company in allegedly taking the unlawful actions were not autonomous in the relevant sense (and those who were autonomous did not take the actions).[47] In due course the case against the individuals also failed, with the SFO again being accused of mishandling the case.[48]

The case against two Serco executives was another that collapsed as a result of the SFO failing to make proper disclosure. The company had already agreed a DPA in 2019, in which it accepted that it had defrauded the Ministry of Justice, and paid over £19 million as a fine and millions more in costs. But when the SFO came to prosecute two individuals in 2021 – which was nine years after the alleged crime, and seven after the investigation began – it recognised its disclosure failings and offered no evidence, with the result that the defendants were acquitted.[49] The judge refused an adjournment because it would have been unfair to the defendants to drag the case out any longer. At this point there had been nine DPAs, and the SFO had failed successfully to prosecute any individuals arising from the same facts as the DPA.[50] This case is notable because it resulted in the SFO organising the 'Altman Report' (Altman and Chalkley 2022).

Similarly in the case of Unaoil, there were significant disclosure failures by the SFO, but in this case, there was a much more serious concern about the relationship between the SFO, and particularly its director, Lisa Osofsky, with David Tinsley, who was an adviser to the owners of Unaoil. On the question of disclosure, the court said that the refusal to provide certain documents which had been requested at the original trial was 'a

45 There can of course be other routes to corporate prosecution, but this is the one that was relevant to the Barclays case.
46 The rule is described by the CPS at https://www.cps.gov.uk/legal-guidance/corporate-prosecutions
47 The application of the law to the Barclays case is described, for example, by Rappo and Bullock (2020).
48 *Financial Times*, 28 February 2020.
49 https://www.sfo.gov.uk/2021/04/26/sfo-offers-no-evidence-against-nicholas-woods-and-simon-marshall/
50 The facts of the case are described by Herbert Smith Freehills (2021).

serious failure by the SFO to comply with their duty',[51] and '[t]hat failure was particularly regrettable given that some of the documents had a clear potential to embarrass the SFO in the prosecution of this case'.[52] The principal aspect of embarrassment would have been the improper relationship of Osofsky with Tinsley. She had communicated with Tinsley using her personal phone and failed to keep proper records, later agreeing that this had been foolish.[53] Tinsley claimed to be able to secure guilty pleas from some of the accused. He initially contacted Osofsky and asked to see her in private. She replied that she was 'super honoured that you're coming my way'.[54] Contact between Tinsley and various people at the SFO followed and the Court of Appeal found it to be wholly improper. It said: 'We simply do not understand' how anyone there 'could have thought it appropriate' to have dealings with him.[55] In fact, SFO staff had helped and perhaps encouraged him to convey messages from the SFO to one of the accused.[56] The crucial point as far as the trial was concerned, however, was that the SFO had failed to disclose its involvement with Tinsley to the defence, and this prevented the defence from making their best case.[57] It is difficult to see how SFO discussions with a representative of some possible defendants concerning their possible pleas was not seen as a matter that should be disclosed to other defendants.

The point was also made that at one stage in arguing about disclosure, the SFO relied on the fact that one of the parties was legally represented when he took certain decisions, though once the relevant documents were disclosed it was apparent that it knew that Tinsley was operating behind the backs of that legal representation.[58] One result of this debacle was that eventually three convictions were overturned on appeal,[59] but after the first two, a review of the performance of the SFO by Sir David Calvert-Smith was ordered by the Attorney General. He found numerous failures in the behaviour of the SFO and some of its senior staff, and made recommendations accordingly.

51 *R v Akle and Bond* [2021] EWCA 1879, para 96.
52 *R v Akle and Bond* [2021] EWCA 1879, para 97.
53 House of Commons Justice Committee (2022).
54 *R v Akle and Bond* [2021] EWCA 1879, para 69.
55 *R v Akle and Bond* [2021] EWCA 1879, para 99.
56 *R v Akle and Bond* [2021] EWCA 1879, para 101.
57 *R v Akle and Bond* [2021] EWCA 1879, para 102–4.
58 *R v Akle and Bond* [2021] EWCA 1879, para 105.
59 The facts are widely reported, for example, https://www.reuters.com/world/uk/third-unaoil-conviction-quashed-london-2022-07-21/.

There is, of course, no difficulty in citing cases with outcomes much more successful than these – there are many. It might be said that the 'success rate' statistics are generally not impressive, but that is data of doubtful value. It is malleable, for example, according to whether it is taken to be the proportion of defendants who are prosecuted and convicted, or the proportion of cases in which someone is convicted. But in any case, it can be affected simply by the selection of cases chosen to prosecute, and cannot give any picture of the quality of decision-taking about which to investigate, and of how long to investigate if the case does not end with a prosecution. It should also be noted, of course, that the prosecutor's role in the judicial system is to present the prosecution case, not to achieve a conviction at all costs. So, although it is often done, an attempt to judge the SFO by conviction rates would be questionable.

Perhaps more notable than any view about the overall success rate, however, is the character of the cases considered above. They are not all cases where a conviction was not achieved. But they are all cases in which there is some form of serious failing on the part of the SFO. In some cases, this is misjudgment as to what is appropriate, or a serious mistake of some kind, or else a definite failing in some aspect of the presentation of the case. Or it is that they acted illegally in some way or other. There is evidently a large number of such cases – and even the list above is not complete. That catalogue of failure must clearly be recognised as such.

A record of dissatisfaction: commentary, reviews and reports

The SFO has been the subject of a great deal of commentary. A sample of what has been said in the press has already been considered. Two books – Widlake (1995) and Killick (1998) – have also been noted.[60] Neither was intended as a great scholarly study, and both recognised successes of the SFO. But even at those early dates, as will have been apparent, they found plenty about which to complain.

In addition, there have been a number of reports produced by (what was then) Her Majesty's Crown Prosecution Service Inspectorate. It often seeks to strike an optimistic tone, pointing to something well done, or limited progress being made. In the foreword to its 2012 report, for example, it was said that,

> At present, the SFO carries out some of its casework to a high standard, but there is clear room for improvement. This is borne out not only through our inspection findings, but also in the views of the many stakeholders we have consulted … Therefore, much needs to be addressed if the SFO is to become a respected crime fighting organisation which is the envy of the world.

60 Note should also be made of the scholarly and incisive Levi (1993), written for the Royal Commission on Criminal Justice. It is much more institutionally detailed and legally aware than the more popular books, but it is primarily concerned with exploring the problem of balancing the civil liberties and other rights of the accused against the efficiency of justice, rather than assessing the SFO per se.

> The new Director recognises this and is fully committed to driving improvement.[61]

Then, in 2014, the positive attitude of the managers was praised as it was noted that considerable work had been done, and the Inspectorate looked forward to being able to see a clear impact of continuing efforts by 2015 (p. 35). The report of 2016 noted that the director had been appointed in the difficult year of 2012 on the departure of Richard Alderman and had implemented some organisational improvements. However, it also found the Board to be too big, insufficiently strategic and inefficient; that the director had too many responsibilities, etc. It also found there was 'an inconsistent mix of information about values, purpose and strategic objectives' (p. 2), and various other failings in such matters as oversight of casework, and the achievement of value for money.

In 2019, noting that there had been criticism of the time it takes the SFO to deal with cases, there was a report on case progression, making a number of recommendations, but noting amongst other things that compliance with processes was inconsistent. That point received some elaboration when Deputy Chief Inspector Anthony Rogers gave oral evidence to the House of Commons Justice Committee (2022). Commenting on the report, and noting that when it was published, Lisa Osofsky had been in post only a matter of weeks, he said it had found that there was 'a culture of non-compliance – people who thought they knew better'.[62] It is striking of course that 'non-compliance' could be a gentle way of describing the relationship with Tinsley during the Unaoil case or, stretching the point further, the conduct of aspects of the ENRC investigation. These matters are to be followed up with a further report from HMCPSI in April 2023 and their 'scoping paper' again emphasises the prevalence of inconsistent application of procedure and frequency with which individuals see fit to ignore established procedure.[63]

Another report in the same year on leadership found that because of a focus on casework delivery, there had been a neglect of management and some tolerance of unacceptable behaviour. In 2020 a report specifically on handling

61 Her Majesty's Crown Prosecution Service Inspectorate (2012), Foreword by Michael Fuller.
62 House of Commons Justice Committee (2022).
63 'Follow-up inspection of the Serious Fraud Office Case Progression. Scoping Paper & Inspection Framework. Available from https://www.justiceinspectorates.gov.uk/hmcpsi/ as of 8 January 2023.

the covid crisis found the SFO to have managed working from home well. In 2021 a report found various limitations of the SFO's complaints procedure.

Three other reports stand out from these for their weight, thoughtfulness and power. The first is de Grazia (2008) – a report commissioned by the Attorney General and the director of the SFO.[64] The other two are the reports arising from disastrous cases: Altman and Chalkley (2022), arising from Serco, and Calvert-Smith (2022), arising from Unaoil, together with the government's response to it – Attorney General's Office (2022).

The de Grazia report was written by former senior New York City prosecutor Julia de Grazia, and specifically sought to compare the operation and performance of the SFO with its two main New York counterparts: the office of the US Attorney for the Southern District of New York and the New York County District Attorney. The review concluded that the US prosecutors attained higher conviction rates in less time with fewer resources. Although it was not exceptional, one particular comparison concerned Allied Deals, which had recently been prosecuted in both the US and the UK for a financially massive fraud against banks. The comparison was 'startling', as de Grazia noted,

> SDNY used a total team of eight to convict 14 defendants in a third of the time that it took for an SFO team totalling 31 to prosecute four defendants three of whom were convicted after an eight-month trial.[65]

She made a number of observations and recommendations as to how to improve the situation, some of which were beyond the exclusive control of the SFO. She noted, for example, the advantages of an effective plea-bargaining system (para 28), though also that the SFO would only achieve the maximum benefit if its conviction rate was high enough. It is certainty of conviction, rather than small differences in prison terms, that brings guilty pleas (para 29). She saw a need for easier processes of disclosure (paras 33–41), and advocated an approach to judicial management of cases that would simplify them for juries (paras 44–5).

64 *Hansard*, 10 June 2008, column 12WS (https://tinyurl.com/4kxjnv9t).
65 de Grazia (2008: para 7). That case, of course, counts as a 'success' in the SFO statistics.

However, she was also more specifically critical of the SFO itself. SFO investigations lacked focus in various ways, in some respects because of skills shortages and lack of leadership (paras 47–51). This deficiency of leadership, she said, created 'a "pass the buck", risk-averse, "complaint" culture', and also leads to a

> culture of delay, which is reinforced by inadequate performance management. Inadequate performance management has led to a situation where some staff abuse the complaint process by filing grievances against line managers when they provide frank assessments. (para 52)

She made 21 recommendations to deal with these issues.

Since the collapse of the Serco prosecution was a result of failure of disclosure, unsurprisingly, Altman and Chalkley (2022) concentrated on that issue. In relation to the particular case of Serco, they said of the person appointed as the disclosure officer that '[h]is inexperience should have disqualified him from appointment' (para 13). In evidence to the House of Commons Justice Committee (2022), Altman also said of one particular decision that it arose from 'reasons we will never understand', and was 'simply inexplicable'. (Question 24). But more broadly, Altman and Chalkley found the SFO to have very flawed arrangements, including in relation to the number and seniority of disclosure officers, their remuneration, training and assessment. Quality assurance review was 'unfit for such a large and complex disclosure process' (para 19). And concerning the internal guidance on disclosure, they said, there was an 'embarrassment' of documents intended to help disclosure officers, but they had 'far too much disparate, detailed and voluminous internal guidance documentation'; there was consequently a risk of 'loss of important messaging, particularly as regards focus on the real issues in the case'. And 'The Document Review Guidance' document (i.e. the guidance on disclosure) was of 'little practical utility and offered contradictory guidance' (para 12).

It is a shocking outcome, considering how many difficulties the SFO had already had over disclosure before Serco. Perhaps it should be said that it is to the credit of Ms Osofsky, the director, that she commissioned the Altman report, evidently recognising that the situation was serious. How it could be that such inadequate arrangements prevailed where there had already been so many alarms over disclosure is another matter.

The Calvert-Smith (2022) review was not commissioned by the SFO, but by the Attorney General as an investigation of the failure of the Unaoil case. Whether the Attorney General acted in this way because of the seriousness of the matters involved themselves or because of the accumulation of failures of process of one kind or another need not be considered. Some of the conclusions of the report mirror those of Altman and Chalkley (2022), and the matter of disclosure again featured – not, this time, with an emphasis on the experience of individuals or clarity of guidance, but on the matter of record-keeping. The SFO had simply not kept proper records, particularly of its contacts with Tinsley. Calvert-Smith (2022) said that the case team were led to believe that he had the approval of the director and this 'amplified the level of distrust between the case team and senior management' (p. 98) and the fact that there was only limited sharing of notes about contact with him impeded disclosure. He also said, elsewhere, that disclosure around Tinsley had become a very difficult matter because the 'feeling within the case team' was that they needed to ensure 'not to possibly embarrass the boss, who had facilitated the introduction of Mr Tinsley into the case'.[66]

Quite apart from matters of record-keeping, the relationship with Tinsley was as noted above, in the finding of the trial judge, an inappropriate one. Calvert-Smith considered at length how this relationship had become so important with no challenge being made to it. One point highlighted was a lack of trust between different parts of the SFO (p. 93). Another key finding was that 'There were no safeguards, and no one in the case team had the authority or seniority to "call this out"', and that since all of the senior team had been involved with Tinsley, there was no one to whom more junior staff to take a concern. (p. 96) All in all it is apparent that there were very serious failings of organisation, compliance and culture within the SFO.

66 House of Commons Justice Committee (2022).

A record of dissatisfaction: questions about DPAs

The questions of the value and appropriate use of DPAs have proven controversial. The SFO considers that its use of DPAs has been successful, and it has contributed to the significant financial recoveries that it has been able to achieve for victims and taxpayers. DPAs save the SFO significant costs, as against pursuing a prosecution, and can allow financial crime to be dealt with without destroying otherwise viable businesses. There have been other arguments, for example by Hock (2021), to the effect that they provide efficient means of bundling up various accusations against corporations in circumstances where it might be difficult to prosecute them all separately. He views that as a desirable development, although he supposes that the principal aim of the enforcement of criminal law against corporations is to reform, rather than punish them.

However, some concerns are legitimate. A number of these were raised by the Fraud Advisory Panel in connection with non-criminal sanctions generally.[67] These included that they were likely to result in a loss of certainty about the outcome of actions; there could be a loss of the moral opprobrium that comes with criminal penalties; the possibility that cases might not be fully investigated so that the extent of wrongdoing would not be discovered; and the development of a two-tier system of justice in which certain white-collar criminals escape custodial sentences by paying monetary penalties. The House of Lords Select Committee on the Bribery Act pointed to other possibly difficult issues in 2019. The one that most clearly concerned the matter of the desirability of the DPA system itself

67 Fraud Advisory Panel (2010, para 95). It was writing before the passage of the Crime and Courts Act 2013 and so was not considering DPAs superficially in the light of any British experience. The Panel is a membership association of those professionally interested in fraud law (https://www.fraudadvisorypanel.org/).

was that of whether it was likely to result, in practice, in DPAs being available to large, hard to prosecute companies, but being denied to smaller ones.[68] Such an outcome, it was implied, would be unjust. So it would, but the point must be related to that of the 'directing mind', since if the prosecution of large companies is infeasible, it would be more unjust to take no action at all.

Another issue having resonance in wider discussion of the SFO is that of the relationship between the creation of a DPA with a company and the prosecution of individual wrongdoing by its staff. The Select Committee said that DPAs should not be – and also averred that they were not – substitutes for the prosecution of individuals. However, in this context, it should be noted that one particular aspect of the performance of the SFO that has attracted attention is its very poor record in prosecuting individuals from companies which agree DPAs. As of November 2022, although there are cases pending, no such convictions had been achieved, there have been a number of acquittals where cases have been brought, and in many cases no prosecution has been attempted.

There is, perhaps, a related concern which is more marked than this. In the particular context of the SFO having the record and to a large extent the reputation that it does, DPAs might seem altogether too appealing to it. They do not require prosecution, they do not require disclosure and, although they must be approved by the court, they are not subject to being overturned on appeal. Kirk (1994) said of the effective plea bargain in the Levitt case, '[the SFO] is now acquiring a reputation for accepting almost any plea, on almost any terms, to avoid the rigours of a trial'. One must feel the availability of DPAs may create just that kind of temptation.

The impression that the SFO might welcome opportunities to report successes based on such things as DPAs can only be strengthened by what appears to be a loss of appetite for reporting conviction rates.[69] The SFO annual report of 2016–17 reported a rate of individual convictions of over 85 per cent. That rate fell year by year to 62 per cent in 2019–20

68 House of Lords Select Committee on the Bribery Act (2019, paras 276–83).

69 As noted above (p. 21) the maximisation of conviction rates is not a proper goal for a public prosecutor. The SFO also reports 'case conviction rates' but that is a statistic of dubious value since a single conviction in a case where there may be any number of defendants counts as a 'success'.

and, in 2021–22, no statistic was reported – there was merely the expression of hope that 60 per cent would be achieved.[70]

But an inappropriate use of DPAs threatens the development of a thoroughly degenerate form of justice. If the SFO lacks confidence in its ability to achieve appeal-proof convictions in full trials, it will inevitably be driven towards seeking DPAs as a way of achieving some form of success. That, admittedly, might prove difficult if its record of convictions was too poor, since the suspect-company's incentive to agree would be diminished. On the other hand, in this, the likely length and expense of a trial may actually work in the SFO's favour. Even a firm which is eventually acquitted suffers from a trial, and since DPAs allow them to avoid admitting to wrongdoing, such an agreement may seem the more attractive option. In a context where the cases in question are very complex and it may be hard for an accused firm to be sure whether it is guilty, agreeing to a DPA could become a very attractive option. Here, the occasional risk of a plausible investigation raising a danger of a trial, makes agreeing to a DPA very much like a cost of business. Clearly, down that road, lies a very serious impairment of the criminal justice system.

Concern over this point may be aggravated by the way in which the SFO has taken to reporting its financial successes. Impressive amounts which it raises from 'fines, penalties and cost awards' were presented to make large headlines in its 2022 annual report.[71] And the point that these monies are 'for the taxpayer' is emphasised. If one were going to assess the SFO in financial terms, then of course the funds it has been required to pay out in damages and costs to those who have been victims of its errors would need to be included. But in any case, although funds arising from DPAs, like those from other fines, do accrue to the public purse, this is not at all the reason these penalties exist. They are part of the system of justice, not of public finance. It is most unfortunate that a law-enforcement agency either sees fit, or feels the need to resort to, advertising its success in such terms. And the practice does suggest that the temptation to travel further down the road of eschewing prosecution whenever headline successes of this kind are available may be a strong one.

70 Four-year averages were also reported and show a broadly similar though less dramatic pattern.

71 Serious Fraud Office (2022: 12).

Some possible responses

It is of course plainly true that there are considerable difficulties in the way of effective prosecution of complex fraud. There is, first of all, simply the intrinsic complexity of the cases. In connection with this point, it should be noted that, naturally enough, the defence is likely to be well organised with large and capable teams of lawyers seeking to prevent the SFO achieving a conviction. There is, as there is always likely to be, the question of whether the prosecution of serious fraud is adequately resourced, and clearly that matter has to be kept under proper consideration.

One clear possibility is that there should be institutional reorganisation. A simple step, which might provide some reassurance, would be to appoint an independent chair of the SFO Board. Separating the chairing and the executive directing of the organisation might both bring benefits and reassure the public that lessons are being learned from past errors. At another extreme, it would be possible simply to abolish the separate SFO and incorporate its functions within a national crime agency. This was proposed in the Conservative Party manifesto of 2017.[72] The balance of advantage and disadvantage of such structural reorganisation can never be calculated precisely, but this would have the benefit of providing a clear fresh start after the various failings of the SFO.

Beyond such things as these, however, three particular problems stand out. One that featured in a number of the cases considered above is that of deciding what evidence the prosecutor should disclose to the defence. Second is the question of whether and how to simplify a case by bringing only a fraction of the charges for which there is evidence. The constellation

72 Conservative and Unionist Party (2017: 44).

of problems that can arise here is well illustrated by the combination of cases involving Blue Arrow, Roger Levitt and the Maxwells. Third, there is the problem, in the case of a corporate prosecution, of identifying the 'controlling mind', as illustrated by the Barclays case.

All three of these problems are ones that have become more difficult in recent years. The explosion of documentation arising from computerisation has clearly made the problem of sorting material for disclosure much greater. The volume of paperwork has been recognised for some time. Widlake (1995: 105–6) commented on it in relation to the case against Barlow Clowes. In shocked tones, he said: 'The documentation was awesome. There were 7,000 witness statements and 68,000 pages of documentary exhibits…'. But that was nothing, as Osofsky made clear much more recently, saying 'a standard SFO case's material, if printed, could fill up 22 London buses. The documents run into many millions, with complex digital data across many different devices.'[73] The change – and the increased difficulty – is palpable.

The increase in the volume of documentation is one thing. But the growing complexity of market integration and the increasing extent to which the operation of regulation makes business more complicated, probably also contribute to the opportunity for fraud. Certainly they add to the complexity of uncovering it and proving that it has occurred. Again, the task of the SFO will be harder than it once was.

And as to the problem of identifying the directing mind, it is probably an exaggeration to put it, as Osofsky did, in terms of the requirement being 'a standard from the 1800s, when Mom and Pop ran companies'.[74] But surely it is only an exaggeration, and the basic point is correct: large businesses have governance structures which may sometimes make it a practical impossibility to find a directing mind. Indeed, there could be a good argument that in a large organisation it is a condition of proper governance that there be no 'directing mind' in the legal sense. In any case, the impossibility of finding a directing mind would be bad enough. But it was suggested by Rappo and Bullock (2020) that if it became more or less impossible to prosecute a company with layers of responsibility, there would then be a danger that enforcement attention would be redirected to much smaller organisations and the very large ones would escape even investigation.

73 Lisa Osofsky speech at Jesus College, Cambridge, 5 September 2022 (https://tinyurl.com/4xjdatv9).
74 Quoted in the *Financial Times*, 28 February 2020.

In all three cases, there are possible reforms which might, at least, be explored. In the case of disclosure there are possibilities of reforming the rules in various ways that might ease the task of the prosecutor substantially. The principal relevant legislation is the Criminal Procedure and Investigations Act 1996, which has been the source of repeated criticism and a succession of codes of practice, guidelines and review. Many of the issues raise deeply technical legal issues and a broad consensus on them appears to be some way off.[75] A solution of a different kind would be to seek to use Artificial Intelligence in identifying documents for disclosure. The SFO has in fact taken that approach to identifying privileged documents.[76] If this is to be pursued, it might be appropriate to introduce law or guidance as to how it is to be done.

In considering this matter, it is to be remembered that the difficulties of the SFO – or any prosecutor – when a case fails because disclosure was mishandled is only one side of the problem. The other, perhaps larger, and probably partly invisible, is that of the miscarriage of justice when disclosure was inadequate but this was not detected in a timely manner. A case in point is that of the sub-postmasters who were accused and in some cases convicted of dishonesty offences because of what turned out to be the failure of the Horizon software the Post Office required them to use. Although the explanation of the failure to disclose evidence about errors produced by the software may be disputed, it was a failure to disclose which resulted in the initial giant miscarriage of justice.[77] (This was not an SFO case, of course – but there was a gross miscarriage.)

The problem of the complexity of cases is what led the Roskill Committee to the view that trial by jury was no longer appropriate for complex fraud cases, and that they should be heard by specialist panels. That approach was rejected in the CJA 1988 when the SFO was created, but later it did feature briefly. The CJA 2003 s43 created the possibility of the prosecution asking for certain trials to be conducted without a jury, but that section never came into effect before being repealed by the Protection of Freedoms Act 2012. The title of the latter Act perhaps suggests an objection to the proposal.

75 An account of some difficulties that have arisen and important cases can be found in Brader (2020).
76 https://tinyurl.com/49kd3cce
77 The case is Hamilton & Ors v Post Office Ltd [2021] EWCA Crim 577, and is described, for example, by Bergin (2021).

Still, the case for this proposal continues to be made. One point in its favour may be that there could be defendants who would prefer a professional and expert tribunal to a jury. The character of some of the serious fraud cases is that prominent individuals are sometimes held up to vilification before a trial begins. They may well feel there could be popular prejudice against them. Almost surely, a trial before an expert tribunal could progress more quickly, since much less of the substance of the case would need exegesis. Shorter trials would themselves be in the interests of justice. There would also be a cost saving to the prosecutor – the SFO, in this case – and consequently more cases could be brought.

An alternative approach was described in the de Grazia report, chapter 6. There, it was suggested that a better-supported and more specialist judiciary with – crucially – a mind to exercise firm trial management, could simplify matters sufficiently. English experience does not altogether suggest optimism about this view. The case of Blue Arrow stands out as a complex one – the convictions were quashed on appeal because the case had been too complicated for the jury to understand properly, and the Court of Appeal made the point that the trial judge could have acted sooner to reduce the material to be put to the jury. On the other hand, however, when Roger Levitt was prosecuted with a clear intention to keep the matter simple, the trial went awry for other reasons. And then the Maxwell case resulted in the non-prosecution of the defendants on some counts for another reason, arising from a further attempt at simplification. The case can also be made, of course, that rather than looking at juries, it might be questioned whether judges are typically expert enough for the complex cases. That they are not and there should be a specialist panel was argued by Cocks (1993), who had been the prosecuting counsel in the Levitt case, amongst others.

A few cases do not make a conclusive argument. Kiernan (2004: 113) construed the ruling in Maxwell as amounting to saying that the SFO could only have ‘one try at a defendant’. He clearly saw the difficulty in reconciling the lesson from Blue Arrow with that from Kevin Maxwell, but he also thought it an aberration in judicial decision-making. Perhaps he was right. In any case, the ideas of de Grazia went further than simply dropping some charges – they concerned very active trial management by judges. It might be possible to make that work in an English context, though it seems likely that it would require some thoroughgoing changes, in culture and probably law as well. A panel of specialist judges might well make this approach more successful, but it is hard to be sure.

It does therefore seem as if despite the failure of the CJA 2003 to bring change in this area, the question of limiting jury trials should be reconsidered.

On the third matter – that of identifying a 'directing mind' of a corporation, a consideration of possible reform is clearly in order, and indeed, under way, with the Law Commission publishing an options paper in June 2022.[78] Amongst options that might be considered would be a change in the definition of the controlling mind; to base corporate liability on the dishonesty of individuals seeking to benefit their employer; following the approach of the Bribery Act 2010 in creating a corporate offence of 'failure to prevent economic crime'; or handling more fraud-related issues as regulatory matters. As another possibility, for some wrongs it might be possible to create an evidential presumption of dishonesty on the part of a company, thereby shifting the evidential burden to the defence to prove their honesty.[79] Clearly this matter needs to be taken seriously.

One alternative response that has some substance but should not be accepted too quickly is that despite the difficulties in prosecuting cases such as those that have been considered, it is precisely the function of the SFO to develop and retain the necessary expertise. That is true, but if the problems have become too great, that needs to be accepted as well. These various reforms to the law should therefore be considered.

On the other hand, there is another point. This also goes to the question of the extent to which an overall assessment of the SFO would reflect conviction rates much more fully than this paper has. One must also beware of too much focus on apparently newsworthy failures. Indeed, one SFO director, Wright (2003: 10), seems to try to argue that attention focuses on failures because the SFO operates in the spotlight. But that is not an adequate response because the *manner* of the failure of so many cases is so remarkable. There have been a good number where there is at a minimum a clear suspicion of a definite failure by the prosecutor. Those turning on a failure to simplify a case sufficiently, or the making of poor judgments about how to pursue it are suggestive of such failing. Some such cases are clearer than others, though in the depth of treatment that can be offered here, none can be made wholly convincing. More clear-cut cases, however, are available from those that turn on failings in disclosure. Difficult as disclosure may be, it seems to be clear that the SFO has not consistently come up to an acceptable standard in meeting those difficulties.

78 https://www.lawcom.gov.uk/project/corporate-criminal-liability/
79 These and other options are discussed by Spector (2020).

It should have some, indeed, considerable expertise in this matter, and that should be evident in the handling of its cases. Failures here have of course been specifically confirmed by Altman and Chalkley (2022) and Calvert-Smith (2022).

A second group of cases, though, is formed by those where some clear impropriety or bizarre action was a central part of the story of the case. After an allegation against a judge; a forgery – albeit, arguably – a harmless one; collusion with a defence lawyer; personal communication between senior staff and a man who was working behind the backs of the defence lawyers, one can only be left wondering what might happen next. And beside these, there are fairly consistent reports of management or leadership failings, inadequate procedures and various symptoms of poor staff morale.

Whatever the fundamental difficulties the SFO may be facing, they do not excuse these sorts of failings. Nor since, ENRC, Serco and Unaoil are all relatively recent cases, can it reasonably be said that the problems lie far in the past. And furthermore, whilst these are at least suggestive of a dysfunction which could help to account for the poor performance in the various matters of case management already considered, limitations of management are also attested in the various reports which have been written.

Conclusion and recommendations

Fraud, it should be remembered, comes in many forms and, as was explicitly recognised in The Fraud Review of 2006,[80] everyone is a victim through, for example, having to make higher insurance payments. The highest-value cases amongst those investigated by the SFO are at one extreme of one dimension. There are very many much smaller fraud cases; and there are many whose victims are much less anonymous than those of, say, a large corporate bribe or an attempt to fix the LIBOR, and who may suffer very severely. There seem to be problems at all levels, if one judges by, for example, Button (2021). And the problems, all round, may be getting worse, with the complexities of corporate governance specifically identified by Toms (2019) as a cause.

Part – although only a part – of the official British response comes in the form of the activity of the SFO. But it is apparent that over a long period its performance has been unsatisfactory. Certainly, the celebrity of a few of those it has sought to prosecute has brought the spotlight on some notable failures, and certainly its task is a difficult one. The first of these is a fact of life about which nothing can be done. The second, though, is the reason it was set up. Its raison d'être is to bring expertise to these difficult matters. As has been suggested, old law and new circumstances may combine to make the difficulties too great. Even some of the presumptions of tradition may be inappropriate to the modern corporation and modern crime.

Evidently, change is required. Changes in three areas of law should be considered. These are the rules of disclosure; the issue of the criteria for

80 Attorney General's Office (2006).

establishing corporate liability in fraud and the problem of the 'directing mind'; and the question of whether there should be a means to substitute expert panels for juries in complex fraud cases, or alternatively or additionally, where there should be a specialist panel of expert judges for those cases. These are all complex matters, and indeed probably inter-related ones, so consideration of them is itself difficult. But it is clear that the current situation is not acceptable, so consideration of them is also important.

Institutional reform also needs serious consideration. There is in principle the question of whether it is helpful or desirable to have an agency responsible for specifically serious and complex fraud. There are a number of agencies – such as HMRC, the Department for Work and Pensions, or the Financial Conduct Authority – which prosecute fraud in particular areas. They presumably do develop expertise in their particular areas. How strong a case there is for an agency with a role defined in terms of the seriousness and complexity of cases might be questioned. It would certainly be difficult to say the SFO has been a success in developing a specialist skill in handling such cases. On the contrary, it seems to make similar or related mistakes again and again. The persistent failures of disclosure and the apparent inability to judge how complex to make a trial are two persistent problems.

The improper contacts between SFO officials and other parties in ENRC and Unaoil are suggestive of another pattern. They are clearly suggestive of a cultural failing. But there is an aspect of cultural failing in some of the concerns of the HMCPSI reports; there must be that aspect to the 'playing of practical jokes' on lawyers and probably the making of groundless accusations against judges. And specifically cultural weaknesses were identified in the de Grazia Report of 2008, in her discussion of the 'pass the buck', 'complaint' culture, and the lack of performance management and the like.

The specifics of the errors and breaches of Serco, Unaoil, and ENRC have been taken seriously in the sense that reports have been commissioned, recommendations made and largely accepted, and to a large extent acted upon (or are being acted upon). But the most striking aspect of the performance of the SFO is the long string of failures in performance. This is not a matter of there being some cases that go wrong, or of the fact that it would no doubt be excessively cautious if prosecutors never brought cases that might fail. It is that the *manner* of the failure of so many cases is so striking. Recurrent errors over some points, major blunders in trial management, and succession of issues of improper behaviour are not the

normal adverse rub of the green. Stretching as they do over such a period of time, they point to fundamental problems. Recommendations to improve procedures and the like can remedy problems as deep-set as those of the SFO appear to be.

The depth of the problems at the SFO and their recurrent occurrence in particular therefore suggest that serious consideration should be given to a more radical institutional change. It is not evidently the case that there needs to be a specialist agency for the investigation and prosecution of specifically serious fraud. One possibility would be the abandonment of the 'Roskill model', with the various functions of the SFO distributed to other agencies. More likely, the model might be retained but the organisation abolished with both its functions and special powers taken on elsewhere, such as in the Crown Prosecution Service. In any case, in the circumstances of such cultural difficulties as there appear to be, drastic change is needed.

Early in the Roskill Report the stage was set for its recommendations when it said,

> The public no longer believed that the legal system in England and Wales was capable of bringing perpetrators of serious frauds expeditiously and effectively to book. The weight of evidence suggests that the public is right.

Thirty-five years later, it can hardly be said that the public view is any more optimistic. On the contrary, on this basic measure, the SFO must be held to have failed. The reform of both law and institutions requires serious consideration and it is evident that decisive action is then needed.

References

Altman, B. and R. Chalkley (2022) *Report to the Serious Fraud Office: The Collapse of R v Woods & Marshall.*

Attorney General's Office (2006) *Fraud Review. Final Report.*

Attorney General's Office (2022) *Government Response to the Recommendations of Sir David Calvert-Smith's Independent Review into the SFO's Handling of the Unaoil Case.* Attorney General's Office.

Bergin, T. (2021) *Hamilton & Ors v Post Office Ltd*. https://www.4pumpcourt.com/hamilton-ors-v-post-office-ltd/

Brader, C. (2020) Disclosure of evidence in criminal proceedings. *House of Lords Library Briefing*.

Button, M. (2021) Hiding behind the veil of Action Fraud. *Policing: A Journal of Policy and Practice* 15(3): 1758–72.

Calvert-Smith, S. D. (2022) *Independent Review into the Serious Fraud Office's Handling of the Unaoil Case - R v Akle & Anor.* Attorney General's Office.

Cocks, D. (1993) Judges miss the mark. *The Times*, 7 December, p. 35.

Conservative and Unionist Party (2017) *Forward Together.* London: Alan Mabbutt.

de Grazia, J. (2008) *Review of the Serious Fraud Office. Final Report*.
Fraud Advisory Panel (2010) *Roskill Revisited: Is there a case for a unified fraud prosecution office?* https://www.fraudadvisorypanel.org/resource/

Her Majesty's Crown Prosecution Service Inspectorate (2012) *SFO.* Crown Copyright.

Herbert Smith Freehills (2021) The collapse of the SFO's prosecution of former Serco executives: Lessons for corporates. https://tinyurl.com/4jfdffb6

Hock, B. (2021) Policing corporate bribery: Negotiated settlements and bundling. *Policing and Society* 31(8): 950–66.

Home Office (2022) Factsheet: The extension of the Serious Fraud Office's pre-investigation powers. https://tinyurl.com/2r7re5ru

House of Commons Justice Committee (2022) *The work of the Serious Fraud Office*. Oral Evidence 19 October. https://tinyurl.com/mry7pjb8

House of Lords Select Committee on the Bribery Act (2019). https://tinyurl.com/zakcm268

Kiernan, P. (2004) Learning from the past: Practical lessons from UK cases. In *Economic Crime in a Globalizing Society - Its Impact on the Sound Development of the State*. Tokyo: United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders.

Killick, M. (1998) *Fraudbusters: The Inside Story of the Serious Fraud Office*. London: Gollancz.

Kirk, D. (1994) A serious case of injustice. *The Times*, 11 January, p. 35.

Levi, M. (1993) *The Investigation, Prosecution, and Trial of Serious Fraud.* London: HMSO.

Rappo, P. and L. Bullock (2020) Barclays SFO trial: Is corporate criminal liability dead? https://tinyurl.com/3zsbyert

Roskill, L. (1986) *Fraud Trials Committee Report.* London: HMSO.

Serious Fraud Office (2022) *Annual Report and Accounts.* Crown Copyright.

Spector, Helena (2020) *SFO v Barclays: Elusive corporate criminal liability in the UK*. Red Lion Chambers. https://tinyurl.com/4c5n4whj

Swift, J. (1726) *Gulliver's Travels.* London: Benjamin Motte.

Toms, S. (2019) Financial scandals: A historical overview. *Accounting and Business Research* 49(5): 477–99.

Widlake, B. (1995) *Serious Fraud Office.* London: Little Brown & Co.

Wright, R. (2003) Fraud after Roskill: A view from the Serious Fraud Office. *Journal of Financial Crime* 11(1): 10–16.

Zander, M. (1986) The report of the Roskill Committee on fraud trials. *Criminal Law Review* (July): 423–32.

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