



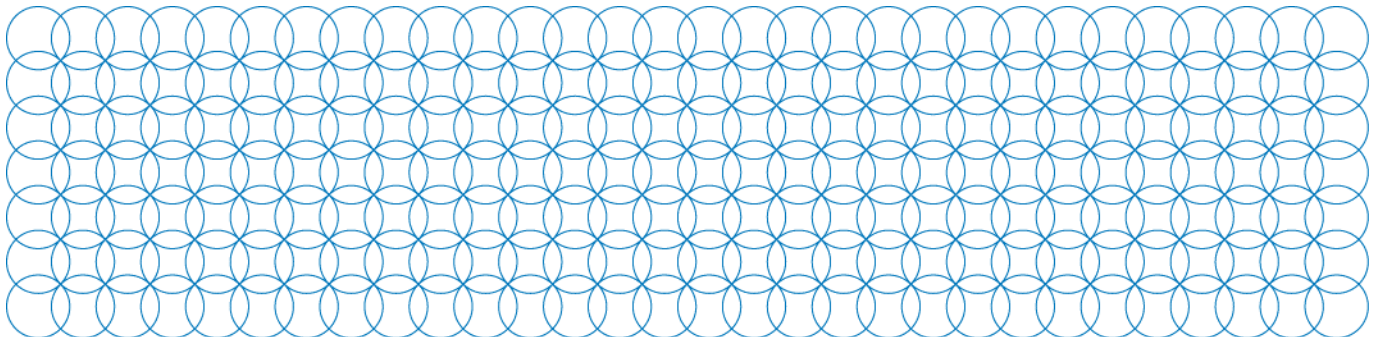
The Attorney General's Office

Extending the Powers of the Crown Court to Prevent Fraud and Compensate Victims: a Consultation

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The Attorney General's Office

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FOREWORD BY THE ATTORNEY GENERAL

In October 2005 the then Attorney General and Chief Secretary of the Treasury announced a review of the arrangements for dealing with fraud, with the aim of reducing the amount of fraud and the damage that it causes. The Fraud Review was completed in July 2006 with the publication of a final report which made 62 recommendations encompassing the prevention, reporting, measurement, investigation and prosecution of fraud.

Following a period of public consultation the Government published its response to the report in March 2007. We welcomed the report and selected key recommendations to take forward as part of an integrated strategy to tackle fraud. Since then, we have been working up detailed plans to establish a National Fraud Strategic Authority, a National Fraud Reporting Centre and a National Lead Force for fraud. Funding for these measures was allocated in the 2009-11 Comprehensive Spending Review. Recently we launched a public consultation on a proposed framework for early plea negotiation between the prosecution and defence. Work is going on to examine the impact of fraud cases on the courts and to consider whether or not a new Financial Court jurisdiction would assist in co-ordinating civil and criminal fraud cases. We also intend to review the regime for the disclosure to the defence of material that does not form part of the prosecution case.

As part of this package of measures, we are also keen to ensure that the Crown Court has the powers that it needs to deal with fraud offenders. The Fraud Review final report recommended that the court's preventative powers should be extended to include some of those available to the High Court and regulatory or professional disciplinary bodies. This would reduce the need for different proceedings to be taken in relation to the same fraudulent activity, for example to wind up a company used in a fraud or to prevent an offender from continuing to abuse his professional status. The Fraud Review also identified limitations on the Crown Court's powers to compensate fraud victims whose losses are not reflected in the indictment, and to enforce compensation orders once they are made. We wish to make good these limitations.

We see these powers as being complementary to the other work that we are doing. We envisage that ancillary orders in relation to company winding up, professional disqualification and compensation of victims could be included in a negotiated plea agreement under the framework that we are consulting on separately. These proposals would make a valuable contribution to our goals of deterring fraudsters, making the court process more efficient, and increasing the emphasis on the needs of the victim. I welcome your views on them.

The Rt Hon The Baroness Scotland QC

Introduction

This paper sets out for consultation the Government's proposals in response to the recommendation of the Fraud Review that the range of non-custodial sentences available to the Crown Court on conviction for a fraud offence should be extended. The relevant recommendation in the Fraud Review final report is set out in full as an **Annex**.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 30, have been followed.

An initial Impact Assessment has been undertaken and does not indicate that the proposals are likely to lead to significant additional costs or savings for businesses, charities or the voluntary sector. In the public sector there will be some additional costs in the criminal justice system which will be counterbalanced to an extent by savings in the administration of civil justice. Consequently, this paper does not contain a final Impact Assessment although one is being completed during the consultation period. We are working on the costs, and obviously will want to be satisfied that overall the package represents good value for public money. If you disagree with this conclusion, you are invited to send your reasons as part of your overall response to this paper.

Copies of the consultation paper are being sent to:

Association of Chartered Certified Accountants	Department for Business, Enterprise and Regulatory Reform
Association of Independent Financial Advisors	Equality and Human Rights Commission
Association of Chief Police Officers	Financial Services Authority
Bar Standards Board	Financial Services Consumer Panel
British Bankers Association	Fraud Advisory Panel
Council for Licensed Conveyancers	The General Council of the Bar of England and Wales
Council of HM Circuit Judges	Insolvency Lawyers Association
Criminal Bar Association	Insolvency Practitioners Association
Criminal Procedure Rules Committee	Insolvency Service
Crown Prosecution Service	Institute of Actuaries

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Institute of Chartered Accountants in England and Wales	Office of Fair Trading
Institute of Financial Planning	President of the Queen's Bench Division
Investment Management Association	Revenue and Customs Prosecutions Office
Justice	Royal Institution of Chartered Surveyors
The Law Society of England and Wales	Securities & Investment Institute
Legal Services Commission	Serious Fraud Office
Liberty	Solicitors Regulation Authority
Lord Chief Justice of England and Wales	Victim Support
National Association of Estate Agents	Whitehall Prosecutors Group

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Additional copies can be obtained from:

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Executive summary

Criminal proceedings play a vital part in the wider strategy to tackle fraud. The Crown Court requires a comprehensive set of powers in order to ensure, first, that a wide spectrum of fraud cases can be dealt with proportionately and effectively, and second, that the greatest possible emphasis can be given to the prevention of further offending and reparation for victims.

The Fraud Review final report identified certain powers which are effective in preventing further fraud and compensating victims, but which are only available to civil courts and regulatory or disciplinary authorities. Equipping the Crown Court with similar powers would reduce the need for parallel proceedings in respect of the same fraudulent activity.

In particular, the report recommended that the Crown Court should have the power to restrict the activities of fraudsters, in order to limit their opportunities to commit further fraud. It is proposed to give the Crown Court the same powers as professional disciplinary bodies to prevent offenders from practising as solicitors, estate agents and financial services providers.

It is also proposed that the Crown Court should be given the power to wind up a company which has been used for fraud. The procedure would be based on that used in the High Court, and in particular there would be a power to appoint a provisional liquidator to control the company pending the final determination of the criminal proceedings.

On detailed consideration, it is not proposed to take forward the recommendation to give the Crown Court the power to make an offender bankrupt.

It is proposed to extend the Crown Court's power to award compensation to the victims of crime. Compensation would become payable to victims of any offence which the court is satisfied that the offender has committed and which could have been included in the indictment, and would no longer be limited to the victims of offences which were actually included in the indictment or the list of offences taken into consideration.

It is also proposed to strengthen the mechanism for securing payment of compensation orders by giving the Crown Court powers to restrain an offender's assets and appoint a receiver to control them, modelled on the regime already in existence for the confiscation of the proceeds of crime.

The Proposals

The role of the Crown Court in preventing fraud, and its existing powers

Some cases of fraud can properly be dealt with in the civil courts, or by the imposition of an administrative penalty by a regulatory authority. In many instances, however, a prosecution will be in the public interest because of its deterrent and punitive effect. Of the fraud cases that result in criminal proceedings, those of any gravity or complexity are tried in the Crown Court, either because the offence is triable only on indictment, because the magistrates decline jurisdiction or because the defendant elects Crown Court trial. Even where a defendant is convicted by a magistrates' court, he may be committed to the Crown Court for sentence.

The purposes of sentencing are set out in section 142 of the Criminal Justice Act 2003 and include the reduction of crime, the protection of the public and the making of reparation to those affected by the offence. An immediate custodial sentence has a deterrent and preventative effect, but many fraud offences are not regarded as being serious enough to justify a custodial sentence, or at least one of any great length. Other options are necessary in order to restrict an offender's ability to engage in further fraud after he has been released from custody, or in cases where a custodial sentence is not imposed.

At present the Crown Court has four means of preventing further fraud, other than imprisonment. These are the serious crime prevention order under sections 1 and 19 of the Serious Crime Act 2007, the prohibited activity requirement under section 203 of the Criminal Justice Act 2003, the director's disqualification order under sections 1 and 2 of the Company Directors Disqualification Act 1986, and the financial reporting order under section 79 of the Serious Organised Crime and Police Act 2005.

Serious crime prevention orders

A serious crime prevention order is a civil order containing such prohibitions, restrictions, requirements or other terms as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the offender in serious crime. The prohibitions, restrictions or requirements may be imposed in relation to the offender's financial, property or business dealings or holdings. It is possible for orders to be made against partnerships and incorporated or unincorporated bodies that have been involved in serious crime, as well as against individuals.

The order is available to the Crown Court when sentencing an offender for a serious offence, which is defined so as to include the offences under the Fraud Act 2006, the common law offence of conspiracy to defraud, false accounting, money laundering offences and the main offences used to prosecute Revenue fraud. It may only be made on the application of the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director

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of the Serious Fraud Office. The court may make an order where it is satisfied that the offender has been involved in serious crime in the past, and has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the offender in serious crime in the future. If the court considers that the making of the order would have a significant adverse effect on another person, and that other person wishes to make representations about the order, the court must give the person the opportunity to do so. Breach of the order is a criminal offence punishable on indictment with up to 5 years' imprisonment.

Prohibited activity requirements

A prohibited activity requirement can be imposed where the court passes a suspended sentence of imprisonment or makes a community order. A sentence of imprisonment (suspended or otherwise) can only be passed where the offence is serious enough to justify it, and only sentences of between 14 days and 12 months can be suspended. A community order can only be made where the offence is serious enough to justify it, but not so serious that a custodial sentence is required.

The prohibited activity requirement is a requirement that the offender must refrain from participating in activities specified in the order. Any commercial or professional activity could be specified in this way. Such a requirement can be imposed for up to two years in the case of a suspended sentence of imprisonment, and up to three years in the case of a community order. It can only be imposed after consultation with a probation officer or, in the case of an offender under the age of 18, a member of a youth offending team. Breach of the requirement can result in the court re-sentencing the offender to an immediate custodial sentence in the case of a community order, or activating the custodial period in the case of a suspended sentence.

Director's disqualification orders

A director's disqualification order provides that the offender shall not be a director of a company, act as a receiver of a company's property, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, and shall not act as an insolvency practitioner. It can be made on conviction for an indictable offence connected with the promotion, formation, management, liquidation or receivership of a company, a building society, an incorporated friendly society or an NHS trust. The order may last for up to 15 years. It may be combined with any other sentence, but the Court of Appeal has indicated¹ that it is not appropriate to combine it with a conditional discharge.

¹ In the case of *R v Young (SK)* 12 Cr App R (S) 262

Financial reporting orders

A financial reporting order does not restrict the activities of an offender, but it requires him to provide information about his financial affairs to a specified person for a specified period from the date when the order is made. The order can be made on conviction for a wide range of offences, including the main fraud offences. The condition for making an order is that the court is satisfied that the risk of the person committing a further offence is sufficiently high to justify making it. The order can be made for a maximum period of 15 years, or 20 years if the offender is imprisoned for life.

The case for extending the preventative powers of the Crown Court

The civil courts, regulatory authorities and professional disciplinary bodies have other powerful preventative powers which the Crown Court lacks, such as the power to wind up a company or bar an individual from practising in a particular profession. The problem identified in the Fraud Review final report is that parallel proceedings must be undertaken in different courts or tribunals in order to obtain these remedies. Often this involves a second investigation and a separate hearing of the facts, resulting in delay, inconvenience to witnesses, further trauma to victims, duplication of effort and additional costs. Parallel civil proceedings may also have a negative impact on the linked criminal case. Concessions may be made in the civil proceedings, or the civil court may make a finding of fact, which is damaging to the prosecution case, as in the Serious Fraud Office Balfron prosecution stayed in 2004. If the civil case is adjourned pending the resolution of the criminal case then there can be a lengthy delay before all matters are resolved.

These difficulties would be reduced if some of the remedies that are available to other bodies or tribunals were made available to the Crown Court. The advantages of doing so have been noted previously, for example by Lord Justice Auld in his Review of the Criminal Courts of England and Wales in 2001. The benefits of this approach are now potentially even greater, as it would complement the Government's separate proposal for a fair and transparent framework for plea and sentence negotiation. A wider range of sentencing options may encourage defendants to negotiate in the knowledge that a plea agreement could dispose of all aspects of the case at once. There would also be a positive impact on public confidence in the criminal justice system if the Crown Court was seen to address directly the mechanism of the offending – be it the offender's abuse of his professional position, or his use of sham companies to deceive victims – and prevent a repetition.

Of course, it will not be possible to remove the need for parallel proceedings altogether. The earliest stage at which the Crown Court can have any jurisdiction in respect of a fraud is the point when a criminal investigation is commenced. There will always be cases where urgent action has to be taken in the civil courts or before a regulatory or disciplinary body before this. Also, there will always be cases where another tribunal or body is better equipped than the Crown Court to deal with particular aspects of a fraud case. It would not be appropriate for the Crown Court to be required to deal with complex secondary litigation which is of limited relevance to its role as a criminal court. Several initiatives have been

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undertaken in recent years to improve the efficiency of the Crown Court, with particular reference to fraud proceedings, and it would be unfortunate if progress made in this regard was undermined by the imposition of additional burdens on the court. It is expected that the additional powers would be exercised only in straightforward cases, like the existing power to award compensation.

This should limit the need for numerous or lengthy additional hearings. However, it must be appreciated that any extension of the Crown Court's powers creates the potential for greater cost within the criminal justice system, incurred by prosecutors, the legal aid budget and the courts administration. It is hoped that this cost will be balanced to an extent by reduced pressure on the civil courts. Better value for money will also be obtained from criminal proceedings in terms of serving the interests of victims of fraud. At present there is no detailed and reliable data available as to the number and cost of fraud cases in the civil and criminal courts, so it is impossible to predict the likely costs and savings. Some further work on potential costs and benefits will be done during the consultation period.

Proposed additional preventative powers

It is proposed to give the Crown Court the power to prevent a defendant from practising in the financial services sector, as a solicitor or as an estate agent, and also to wind up a company or partnership used in fraud. The detail of these proposals is set out below. As a preliminary point, it is proposed that these powers should be available to the Crown Court as an interim measure pending determination of the criminal charge, and in the event of an acquittal as well as a conviction. It is not considered that this approach would infringe the rights of defendants under the European Convention on Human Rights. These measures are preventative, not punitive. In the event of an acquittal, the judge would base his decision to invoke the powers on the evidence that he had heard in the trial, and he would hear representations on behalf of the defendant. There is a precedent for legislation being enacted (although not yet brought into force) to create a preventative power to be used in the event of an acquittal, in the form of section 5A of the Protection of Harassment Act 1997, as inserted by the Domestic Violence, Crime and Victims Act 2004. This gives the Crown Court the power to make a restraining order against an acquitted defendant if the court considers it necessary to do so to protect a person from harassment by him.

Q.1: Do consultees agree that the proposed preventative powers should be available pending determination of a criminal charge and in the event of an acquittal, as well as on conviction?

Barring individuals from professional practice

In relation to the continued involvement of a defendant in professional or commercial activities which could give rise to further fraud, the Fraud Review final report drew a distinction between those activities which are regulated by statute and those which are not. Examples of the latter type of activity mentioned in the report are the promotion of timeshare deals or the operation of premium rate telephone numbers. There is already scope for the Crown Court to control this kind of conduct by imposing a prohibited activity requirement or a serious crime prevention order, worded so as to prohibit the offender from engaging in the activity. Such an order could also be used to prevent an offender practising as an accountant. It is proposed to monitor the effectiveness of the serious crime prevention order in combating fraud, before deciding whether the Crown Court needs any further powers to control activities not regulated by statute.

In the case of activities which require a statutory authorisation, there is sense in giving the Crown Court the same powers as the relevant regulatory body to withdraw that authorisation. The proposal is to give the Crown Court regulatory powers in three areas which were identified by the Fraud Review as offering particular scope for fraud on the part of the dishonest practitioner, namely the provision of financial, estate agency and legal services. In relation to legal practitioners, it is the solicitors' profession rather than the Bar which is most at risk of fraud because it is solicitors who handle client funds and are more intimately involved in commercial transactions which are open to abuse. Instances of barristers committing fraud in the course of their professional practice are effectively unknown, but this could change in the future as they are allowed to enter into alternative business structures with solicitors bringing them into a more direct relationship with lay clients. For now, there does not appear to be justification for giving the Crown Court regulatory powers in respect of the Bar.

Q.2: Do consultees agree that the proposal for a power to bar an individual from professional practice targets the right sectors?

Under the Solicitors Act 1974 no person is qualified to act as a solicitor unless he has been admitted to the roll of solicitors of the Supreme Court kept by the Solicitors Regulation Authority (SRA), and he holds a practising certificate issued by the SRA. To practise as a solicitor without being qualified is a criminal offence. If the SRA receives an allegation of professional misconduct against solicitors, it can take disciplinary action itself or refer the matter to the Solicitors Disciplinary Tribunal (SDT). Any application to strike a solicitor off the roll must be made to the SDT. However, this does not deprive the Master of the Rolls and judges of the High Court of their disciplinary jurisdiction over solicitors as officers of the Supreme Court, by virtue of section 50 of the 1974 Act. There is longstanding authority that this disciplinary jurisdiction includes the power to strike a solicitor off the roll or suspend him². The jurisdiction under section 50 is available equally

² *Myers v Elman* [1939] 4 All ER 484

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to Crown Court judges, but it appears that only the Master of the Rolls or a judge of the High Court can hear an application to strike a solicitor off. The 1974 Act sets out the procedure to be followed by the courts in dealing with an application to strike off. In fact, the power has rarely if ever been exercised by the courts in recent times – a judge would usually refer a matter of professional misconduct to the SRA. The Legal Services Act 2007 introduces a new regulatory regime for providers of legal services, but it does not alter the role of the SRA in authorising individuals to practise as solicitors, or alter the court's disciplinary powers under section 50 of the 1974 Act.

In relation to the provision of financial services, the relevant legislation is the Financial Services and Markets Act 2000. Under the Act, various activities are designated as regulated activities, and there is a general prohibition on carrying on a regulated activity, or purporting to do so, without authorisation. Authorisation is granted by the Financial Services Authority (FSA) in the form of a Part IV permission. Contravention of the general prohibition is a criminal offence. Where it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity, it may make a prohibition order under section 56 of the Act barring him from performing such functions. Breach of a prohibition order is also a criminal offence. A warning notice must be given to the individual before a prohibition order can be made, and a decision notice must be given to the individual when a prohibition order is made. The individual concerned may then refer the matter to the Financial Services and Markets Tribunal for reconsideration. He may also ask the FSA to vary or revoke the prohibition order.

In relation to estate agents, the Estate Agents Act 1979, as amended by the Enterprise Act 2002, gives the Office of Fair Trading (OFT) the power to prohibit a person from doing estate agency work. A prohibition order may be made if the OFT is satisfied that the person has been convicted of an offence involving fraud, and is unfit to carry on estate agency work. The OFT must give the person at least 21 days' notice of its intention to make a prohibition order, and must allow the person to make written or oral representations as he wishes. There is a right of appeal to the Secretary of State for Business, Enterprise and Regulatory Reform against a decision by the OFT to make a prohibition order. When the relevant provisions of the Consumers, Estate Agents and Redress Act 2007 come into force in October 2008, the OFT will be able to make a prohibition order if it is satisfied that the person has committed a fraud offence, regardless of whether he has been convicted.

It is proposed to amend the legislation governing the legal, financial services and estate agency professions in order to give the Crown Court the same powers as the relevant regulatory body to prevent individuals from practising in these fields. The detail of the statutory regulator's powers varies in each case, but the proposal is to enact legislation with these common features:

- The power would be exercised on an application by the prosecutor.
- An application could be made at any time after a criminal investigation has been started with regard to a fraud offence, where the alleged offender is authorised to carry on a regulated activity.

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- Notice of the application would be given to the defendant and to the relevant regulatory body, as well as to the court.
- The court would be able to make an interim order pending determination of the criminal charge.
- On determination of the charge, the court would be able to make a final order whether the defendant was convicted or acquitted.
- The grounds for making an order would be that the court was of the opinion that the defendant was unfit to practise.
- The proceedings would be civil in nature and the civil standard of proof would apply.
- The regulatory body would be entitled to be represented at the hearing when the final order is to be made.
- The final order would be for a maximum period of 15 years.
- The defendant would be able to apply to the court to vary the order.
- The regulatory body would be notified of an interim or final order so that the details could be included in its register, or so that the name of the solicitor could be removed from the roll.
- There would be an avenue of appeal to the Court of Appeal Criminal Division against a decision to make an interim or final order.
- Any decision taken by the Crown Court or Court of Appeal would be without prejudice to the powers of the relevant regulatory body to take its own action.

Q.3: Do consultees agree with the proposed scope of the power to bar individuals from professional practice?

Q.4: Do consultees agree with the proposed process for exercising the power to bar individuals from professional practice?

Winding up companies and partnerships

The powers of the civil courts to wind up registered and unregistered companies are contained in sections 117 and 221 of the Insolvency Act 1986 respectively. Unregistered companies include companies incorporated overseas but carrying on business in Great Britain. The powers can be exercised on the grounds that the company cannot pay its debts, following the presentation of a petition by one of its creditors. Alternatively they may be exercised where the court is of the opinion that it is just and equitable to do so, following the presentation of a petition by the Secretary of State for Business, Enterprise and Regulatory

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Reform. The Secretary of State may present such a petition if he decides that it is expedient in the public interest for the company to be wound up. In many cases of fraud involving companies, one or other of these situations will have arisen and a petition will have been presented before the criminal investigation is commenced. At any time after a petition is presented, the court may appoint a provisional liquidator to preserve the company's assets in anticipation of the making of a winding up order. The effect of appointing a provisional liquidator or winding up the company is to bar any party from commencing or proceeding with a claim against the company except with the leave of the court. The petition serves to give other creditors notice of the winding up, so that they are not denied the opportunity of redress.

Once a company is wound up, the Official Receiver becomes the liquidator, with provision for a different person to be appointed in due course as appropriate. The functions of the liquidator are to gather in and realise the company's assets and distribute them to its creditors. The difficult decisions as to the competing interests of different creditors fall to be decided not by the court which orders the winding up but by the liquidator who must put the order into effect. In relation to partnerships, there is no power to wind up in the public interest. Partnerships can be wound up on grounds of insolvency. Under section 27 of the Serious Crime Act 2007, the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions have the power to present a winding up petition to the High Court where a company or partnership has been convicted of an offence of failing to comply with a serious crime prevention order and it is in the public interest to do so.

In order to provide for the winding up of companies involved in criminal proceedings without recourse to the High Court, it is proposed to enact legislation amending the 1986 Act in the following terms:

- Giving the Crown Court jurisdiction to wind up companies and partnerships, based on sections 117 and 221 of the 1986 Act.
- Allowing the court to exercise this jurisdiction where it has determined a criminal charge relating to the company or partnership (even though it may not itself have been charged) and where it is of the opinion that the company has been used for any fraudulent purpose (the same phrase as is used to define the offence of fraudulent trading under section 993 of the Companies Act 2006).
- Making the exercise of the jurisdiction dependent upon notice being given by the prosecutor in the form of a petition at any time after a criminal investigation or criminal proceedings have been commenced.
- Allowing the court on hearing a petition to dismiss it, adjourn the hearing conditionally or unconditionally, make an interim order, or make any other order that it thinks fit, including an order transferring the proceedings to the High Court.
- Allowing the court to appoint a provisional liquidator.

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- Requiring that a company wound up by the Crown Court should be treated for all purposes as if it had been wound up by the High Court.
- Empowering the Secretary of State for Justice to provide, by order, for relevant provisions of the 1986 Act and the Insolvency Rules 1986 to apply to winding up proceedings in the Crown Court with such modification as he considers appropriate.

If the Crown Court is given a winding up jurisdiction in this way, it would automatically have all the powers of the High Court for the purposes of that jurisdiction by virtue of section 117(5) of the 1986 Act. The powers would also apply to limited liability partnerships incorporated under the Limited Liability Partnership Act 2000.

It is anticipated that the prosecutor would present a petition at an early stage in the criminal investigation (at the same stage as he would consider applying for a restraint order), and that the court would then appoint a provisional liquidator pending the determination of the criminal charge. The court would then have the power to wind up the company whether or not the defendant was convicted. The only issue for the judge to consider would be whether or not the company had been used for any fraudulent purpose, based on the evidence that he had heard in the trial. The civil standard of proof would apply.

It is not anticipated that the power would be used in any but the most straightforward cases, where it is clear that the only or predominant purpose of the company is fraud, and the petition is not resisted. There would be an avenue of appeal to the Court of Appeal Criminal Division against an order made by the Crown Court.

Q.5: Do consultees agree with the proposed scope of the power to wind up companies and partnerships?

Q.6: Do consultees agree with the proposed process for exercising the power to wind up companies and partnerships?

The existing power of the Crown Court to award compensation and enforce orders

The Crown Court has the power to make an order requiring an offender to pay compensation for any loss resulting from the offence or offences of which he was convicted, or any other offence which he has asked the court to take into consideration. It is not necessary for the offender to have profited from the offence, so long as the offence caused loss to the victim. The compensation will be of such amount as the court considers appropriate having regard to any evidence or representations on behalf of the offender or the prosecutor. An order cannot be made unless there is evidence from the prosecution as to the loss, or an admission from the defendant. Judges have been discouraged by the Court of Appeal from embarking on complex investigations. In deciding the level of the order, the court must also take into account the means of the offender.

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A victim who does not receive compensation from the Crown Court, or who is dissatisfied with the level of compensation awarded, can pursue a civil action in respect of the loss. Should the recipient of compensation make a civil claim in respect of the same loss, the damages that he can recover in the civil action will be reduced to reflect the amount recovered under the compensation order.

A compensation order made by the Crown Court is enforced as though it was a sum adjudged to be paid on conviction by a magistrates' court. In other words, an enforcing magistrates' court is named in the order and if the order is not paid that court can issue a warrant of distress against the offender's goods, or commit the offender to prison for a period decided by reference to the amount owing.

The case for extending the Crown Court's compensation powers

The problems identified in the Fraud Review final report are twofold. First, the range of victims who are eligible for compensation is restricted. Where, for example, the prosecution chooses to proceed on specimen counts representative of a wider course of conduct, compensation can only be awarded in respect of the offending alleged in the specimen counts. Second, the court has no means to prevent the dissipation of an offender's assets, before or after the order is made, and the court's powers to enforce the order are limited.

Recent developments in the law are likely to assist with the problem of specimen counts. Sections 17 to 19 of the Domestic Violence Crime and Victims Act 2004, which came into force on 7th January 2007, create a new two-stage procedure by which selected sample counts can be tried by a jury, and in the event of a conviction further counts reflecting the full offending are tried by a judge alone. Also, amendments to Part 14 of the Criminal Procedure Rules 2005, which came into force on 2nd April 2007, make it clear that more than one incident of the commission of an offence can be included in a count in an indictment, where the incidents amount to a single course of conduct. If prosecutors take full advantage of these measures, there should be fewer occasions where a victim is denied compensation because offences are not prosecuted in order to make the case manageable.

However, there will still be cases where the sheer number of victims will make an indictment reflecting all of their losses unmanageable even under the two-stage process. Victims unable to receive redress from the Crown Court will have to take separate civil proceedings, increasing the amount of litigation and the costs arising from the fraud. Victim dissatisfaction with the compensation available in the criminal courts was a significant feature in the Fraud Review. The Government is determined that the criminal justice system should better reflect the interests of victims, and that public confidence should be enhanced by demonstrating that crime does not pay. For these reasons there are advantages in increasing the power of the Crown Court to make compensation orders, even if the number of additional orders made is not great.

In relation to the enforcement of compensation orders, the recommendation in the final report is that the Crown Court should be given the power to appoint a receiver. The fees payable in these circumstances to receivers in private practice are likely to be considerable, and will invariably be paid from the assets that the

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receiver manages or realises. This will diminish the sums available to compensate victims. The appointment of a receiver will not be cost-effective unless the assets and the compensation are substantial.

Further, there is a significant relationship between compensation and confiscation. Part 2 of the Proceeds of Crime Act 2002 has created wide and draconian powers to confiscate an offender's property to the extent that he has benefited from his crime. Benefit is widely defined and includes all criminal property which passes through the offender's hands. It is not necessary for the offender to retain the criminal property – it will still be classed as a benefit if he obtains it and then re-invests it in the fraud. In most cases an offence which causes loss to a victim, and therefore entitles him to compensation, will bring a corresponding benefit to the offender, and therefore make him liable to confiscation.

From the point when a criminal investigation commences, the court has the power to make a restraint order and appoint a receiver to manage the offender's assets, with a view to securing the payment of a confiscation order in the event of a conviction. This is intended to prevent the dissipation of assets which may later be used to pay a compensation order. A court making a confiscation and a compensation order together, in circumstances where it appears that the offender will be unable to pay both, must order that the amount of compensation which the offender will be unable to pay will be paid from the sums recovered under the confiscation order. Once a confiscation order is made, it is open to the court to appoint an enforcement receiver to realise the offender's assets in order to pay the order. If compensation is to be paid from the sums raised under the confiscation order, the enforcement receiver is effectively working to enforce the compensation order.

The Crown Court's existing powers appear to be adequate for the enforcement of compensation orders in most cases. Indeed, the practice of making compensation and confiscation orders together represents optimum use of resources, because compensation is already payable out of confiscated funds as a legal priority. However, there is still merit in strengthening the enforcement regime for compensation orders in order to cater for the rare situation where loss to a victim does not coincide with benefit to the offender.

Proposals to enhance the effectiveness of the compensation order

Extending the range of victims who can be compensated

It is proposed to give a court dealing with a fraud offence the power to award compensation for losses resulting from any offence which the court is satisfied that the offender has committed and which could have been included in the indictment containing the offence for which he was convicted. The latter condition will be satisfied if the offence is founded on the same facts as the offence resulting in the conviction, or is part of a series of offences of the same or a similar character. We propose to achieve this by amending section 130(1) of the Powers of Criminal Courts (Sentencing) Act 2000 in these terms.

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The standard of proof to be applied by the court in deciding whether or not an offence had been committed should be the civil standard of the balance of probabilities. However, like the civil courts when considering a claim of fraud rather than negligence, the Crown Court would require strong evidence. In order to maintain the efficiency of criminal proceedings and to guard against unfairness to defendants, it is not proposed to disturb the central principles that have always governed the making of compensation orders – namely that they should only be made in clear and straightforward cases, and where the amount of the loss is agreed by the defence or proved by evidence.

In May 2007 the Home Office published the Government's Asset Recovery Action Plan. Action 20 of the Plan provides that the Home Office will "work with the Fraud Review's programme board, prosecutors and other practitioners to identify the best way forward in expanding the range of victims receiving compensation". These proposals do not prevent consideration being given in the future to further reform of the system for compensating the victims of crime. They would complement the overall strategy for asset recovery, which aims to take the profit out of crime and to deny criminals the benefit of their illicit proceeds.

Q.7: Do consultees agree with the proposed extension of the power to award compensation?

Strengthening the enforcement regime

It is proposed to introduce powers to restrain assets and appoint receivers solely for the purposes of compensation by enacting new legislation replicating the restraint and receivership regime under Part 2 of the Proceeds of Crime Act 2002, with the following modifications:

- The Crown Court would have the power to make a restraint order if a criminal investigation or criminal proceedings had been started in England and Wales in respect of an offence, and there was reasonable cause to believe that personal injury, loss or damage have resulted from the alleged offence.
- The court would have the power to appoint an enforcement receiver if a compensation order had been made, had not been satisfied and was not subject to appeal.
- The enforcement receiver would be required to apply the sums realised (a) in payment of any expenses incurred by an insolvency practitioner, if appointed, then (b) in payment of the receiver's own fees and expenses, and then (c) in satisfaction of the compensation order, with any remaining sums to be distributed as the court ordered.
- Powers in relation to restraint and receivership would be exercised with a view to preserving assets in order to satisfy a compensation order.

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Q.8: Do consultees agree with the proposed scope of the powers for the enforcement of compensation orders?

The National Fraud Programme

The principal recommendation of the Fraud Review was the formulation of a Government-led national fraud strategy, to co-ordinate public and private sector efforts to reduce fraud and the harm it does to the economy and society as a whole. During 2008 and 2009, the Government will be establishing the key architecture to deliver a national anti-fraud programme across the entire spectrum of counter fraud activity, from deterrence, prevention, detection, investigation, prosecution and sanctioning, to redress for victims. The National Fraud Strategic Authority will lead and co-ordinate this work, the National Fraud Reporting Centre will manage our fraud intelligence and the National Lead Force for fraud will provide assistance and support to police forces investigating fraud cases.

The change of approach heralded by the National Fraud Programme brings a greater emphasis on prevention and deterrence. This strategic shift of effort needs to be supported by the justice system as well as by the precautionary efforts of the State, businesses and the public. Just as taking the profit out of crime weakens criminal motives, so removing the offender from the commercial or professional arena of his fraudulent activity reduces his opportunity and incentive to offend again.

The Criminal Justice System has a vital part to play in a national strategy, and this is the second Consultation Paper in a series of initiatives designed to complement the work of the National Fraud Strategic Authority. The first consultation, on a Framework for Plea Negotiations in England and Wales, closed on 3rd July 2008 and we are now considering the responses. These linked proposals both empower a Crown Court to impose a package of sentencing orders that satisfies the needs of victims and defendants for comprehensive justice; and create a fair and transparent framework to encourage prosecution and defence to agree on an equally comprehensive basis, well in advance of a trial.

Swifter, less fragmented justice for all those concerned in a fraud case would make a major contribution to public confidence as well as to the national strategy. Fraud is the ultimate acquisitive crime. At its worst, it displays all the attributes of a commercial undertaking. A successful, modern anti-fraud strategy depends on effective sanctions. A multi-pronged approach, combining removal of profit and prevention of further offence opportunities to strengthen the deterrent effects of conventional detection, investigation, prosecution and punishment, is an essential element of the holistic solution to fraud that is at the heart of the National Fraud Programme.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Q.1: Do consultees agree that the proposed preventative powers should be available pending determination of a criminal charge and in the event of an acquittal, as well as on conviction?

Q.2: Do consultees agree that the proposal for a power to bar an individual from professional practice targets the right sectors?

Q.3: Do consultees agree with the proposed scope of the power to bar individuals from professional practice?

Q.4: Do consultees agree with the proposed process for exercising the power to bar individuals from professional practice?

Q.5: Do consultees agree with the proposed scope of the power to wind up companies and partnerships?

Q.6: Do consultees agree with the proposed process for exercising the power to wind up companies and partnerships?

Q.7: Do consultees agree with the proposed extension of the power to award compensation?

Q.8: Do consultees agree with the proposed scope of the powers for the enforcement of compensation orders?

Thank you for participating in this consultation exercise.

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About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

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How to respond

Please send your response by 10th October 2008 to:

**Fraud Programme
Attorney General's Office
20 Victoria Street
London SW1H 0NF
Tel: 020 7271 2448
Fax: 020 7271 2430
Email: fraudreview@attorneygeneral.gsi.gov.uk**

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at www.attorneygeneral.gov.uk.

Alternative format versions of this publication can be requested from:

**Fraud Programme
Attorney General's Office
20 Victoria Street
London SW1H 0NF
Tel: 020 7271 2448
Fax: 020 7271 2430
Email: fraudreview@attorneygeneral.gsi.gov.uk**

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at www.attorneygeneral.gov.uk.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

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If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

An initial Impact Assessment has been undertaken and does not indicate that the proposals are likely to lead to significant additional costs or savings for businesses, charities or the voluntary sector. In the public sector there will be some additional costs in the criminal justice system which will be counterbalanced to an extent by savings in the administration of civil justice. Consequently, this paper does not contain a final Impact Assessment although one is being completed during the consultation period. We are working on the costs, and obviously will want to be satisfied that overall the package represents good value for public money. If you disagree with this conclusion, you are invited to send your reasons as part of your overall response to this paper.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should write to the address below:

**Director, Policy and Administration
Attorney General's Office
20 Victoria Street
London SW1H 0NF**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 27.

Annex

The recommendation of the Fraud Review final report in full:

47) The range of non custodial sentences available to the Crown Court following conviction for a fraud offence, should be extended by adding:

- a) Power to wind up companies and dissolve partnerships used in the fraud;*
- b) Power to award compensation to all victims of fraud offences (whether their loss is the subject of a specific charge or not);*
- c) Power to appoint a Receiver to recover property and distribute compensation awards;*
- d) Power to disqualify, prohibit or restrict an offender engaging in particular professional, or commercial activities;*
- e) Power to make orders dealing with consequential insolvency.³*

Produced by the Attorney General's Office

³ Page 319 of the final report. For the discussion leading to making of the recommendation see chapter 8 of the report and in particular paragraphs 8.29 to 8.56.

