

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Sentencing for Fraud Offences



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FOREWORD BY THE CHAIRMAN

This advice to the Sentencing Guidelines Council makes proposals in relation to the sentencing of a range of fraud offences.

The new offence of Fraud, introduced by the Fraud Act 2006, replaces certain deception offences under the Theft Acts 1968-78. However, a number of disparate fraud offences under other statutory provisions remain and they may continue to be used by prosecutors alongside the new offence. In view of the fact that it might be possible to prosecute some types of fraudulent activity under more than one legislative provision, the Panel has decided to link its sentencing proposals to the nature of the fraudulent activity rather than to individual offences.

As a further aid to consistency, the Panel has grouped together similar types of offending behaviour and has proposed just three guidelines. Offences involving the public purse have been grouped with offences against banks and insurance companies as the nature of the offending behaviour (against institutions) is similar and their impact extends beyond direct victims to the general public and the wider economy. For other offences, the vulnerability of individual victims and the degree to which an offence has impacted on their lives will be key considerations when assessing offence seriousness. Using another person's identity to commit a fraud offence (whether that identity belongs to a living or deceased person) will always make an offence more serious.

After much deliberation, the Panel has concluded that a fine should be imposed in conjunction with a custodial sentence only in exceptional circumstances; these are outlined in the advice.

Professor Andrew Ashworth

Chairman of the Sentencing Advisory Panel

SENTENCING FOR FRAUD OFFENCES

THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

INTRODUCTION

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced advice on a range of issues related to the sentencing of personal fraud offences. This is the third advice from the Panel covering dishonesty offences, advice on sentencing for *Theft from a Shop* and *Theft and Dishonesty Offences* both having been published in March 2008. The Panel intends to consult on sentencing for company fraud and forgery offences on a future occasion.
2. Fraud offences involve offenders dishonestly intending to make a gain by exposing someone else to a risk of loss; the gain may be financial and/or involve other property.¹ Due to the 'inexhaustible ingenuity of fraudsters',² fraud offences are very diverse and there is an ever-increasing number of ways in which they can be committed.
3. There is evidence that many victims do not report offences of fraud and forgery to the police.³ In addition, although recorded crime figures for 2006/07 report 199,778 offences of fraud and forgery,⁴ this does not reflect the full scale of offending because many benefit frauds and frauds against HM Revenue and Customs are prosecuted by the relevant government departments and are not reported
4. to the police. Of the 23,117 fraud offences that were prosecuted through the criminal courts in 2005, 18,454 (79%) resulted in a conviction;⁵ thus, approximately 12% of recorded offences of fraud and forgery result in a prosecution and 9% of such offences result in a conviction.
4. Although there may be low reporting and detection rates for fraud offences and only a small proportion of offenders come before the courts for sentence, fraud is not a victimless crime. It is asserted that fraud affects each and every person and the costs are passed on by private companies and the state to consumers and taxpayers;⁶ widespread fraud against insurance companies triggers increased premiums; large-scale fraud can have a substantial impact on commercial markets; substantial losses may have to be absorbed by the Treasury, damaging the economy; and every taxpayer has to 'pick up the bill' for fraud against state organisations.
5. It has been estimated that the cost of fraud to the United Kingdom (including the costs of detection and prosecution) is approximately £20 billion per year, which equates to around £330 for every man, woman and child living in this country.⁷ Fraud offences also cause considerable social and economic harm beyond their immediate financial impact. Fraud can be used to fund organised crime that may target vulnerable victims (drug and people trafficking, for example) and fraud offences that target individuals can ruin

¹ Archbold Criminal Pleading, Evidence and Practice 2008, para. 21-370

² Law Commission, *Fraud* (Law Com No. 276), 2002, para. 7.1

³ Office of Fair Trading, *Research on impact of mass marketed scams*, 2006, p. 35; Fraud Review, Final Report, para. 4.18

⁴ S. Nicholas, C. Kershaw and A. Walker, *Crime in England and Wales 2006/07*, 2007, Home Office Statistical Bulletin 11/07, p. 86. Statistics specifically relating to the offences within this consultation paper are not available as the Fraud Act 2006 has only been fully in force since 15 January 2007. The category of fraud and forgery offences covers many offences that are not within the scope of this consultation paper.

⁵ Home Office, *Criminal Statistics 2005*, Home Office Statistical Bulletin 19/06, Appendix 5

⁶ Norwich Union, *The Fraud Report*, 2005, p. 5

⁷ Association of Chief Police Officers, *The Nature Extent and Economic Impact of Fraud in the UK*, 2007, p. iii

people's lives, closing their businesses or taking all of their life savings.

6. The new generic fraud offence introduced by section 1 of the Fraud Act 2006 (see paragraph 44) was designed to capture all forms of fraudulent activity committed by individual offenders, but other offences will continue to be prosecuted. Thus the Panel's advice includes proposed guidelines for a number of offences, the statutory definitions and maximum penalties for which are set out in Annex A. As many of the offences are defined broadly in order to encapsulate a wide range of behaviour, some fraudulent activity is captured by more than one offence and it is important that sentencing guidelines acknowledge the interrelationship of the offences and establish appropriate relative sentence levels. The Panel's aim has been to produce a coherent and consistent approach to sentencing all forms of fraudulent behaviour and the sentencing proposals in the advice focus on the type of fraud,⁸ rather than the specific conviction offence.
7. The Panel's proposals apply to adult offenders only; separate legislative provisions and sentencing principles apply to young offenders and the Panel plans to consult on a wide range of issues relating to the sentencing of youths in the near future.

8. The Attorney General has published guidance for prosecutors on charging the common law offence of *conspiracy to defraud*.⁹ The Panel understands that the government plans to review this offence sometime in the next two years with a view to repealing it and it is not, therefore, included in the Panel's advice.
9. The advice is structured as follows:

⁸ The types of fraud are based on those used in *Current Sentencing Practice*. However, the category 'mortgage fraud' has been expanded to include obtaining other forms of credit and is labelled 'obtaining credit through fraud'. Similarly, the category 'cheque fraud' has been expanded to include other forms of bank account and payment method fraud and is labelled 'payment card and bank account fraud'.

⁹ Indictable only, with a maximum penalty of 10 years

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SECTION 1: THE SENTENCING FRAMEWORK

Seriousness

10. As always, the primary consideration when sentencing fraud offences is the seriousness of the offending behaviour. When assessing offence seriousness, the court must consider the offender's culpability in committing the offence and any harm that the offence caused, was intended to cause, or might foreseeably have caused.¹⁰

Culpability

11. The Council guideline *Overarching Principles: Seriousness*¹¹ sets out four levels of culpability, the highest of which is an intention to cause harm. It is a general feature of fraud offences (with one exception)¹² that an offender intended to bring about a gain (whether for the offender or for another person) or to cause a loss, or risk of loss, to another. Generally, therefore, fraud offences involve the highest level of culpability. Even so, the Council guideline states that the precise level of culpability will vary according to factors such as the offender's motivation, whether the offence was planned or spontaneous and whether the offender was in a position of trust.¹³ Aggravating and mitigating factors are discussed more fully in paragraphs 18 onwards, below.

¹⁰ Criminal Justice Act 2003, s.143(1)

¹¹ at para.1.7, published December 2004, www.sentencing-guidelines.gov.uk

¹² VAT fraud can be committed by recklessly making a statement that contains a false detail (Value Added Tax Act 1994, s. 72(3) (b)).

¹³ Council guideline *Overarching Principles: Seriousness*, para.1.17, December 2004, www.sentencing-guidelines.gov.uk

Harm

12. Fraud offences are economic crimes. The harm caused is of a very different nature from that caused by violent or sexual offences and, as a result, fraud offences are commonly perceived to be less serious than those crimes.¹⁴ However, as discussed in the Introduction, the impact of fraud offences, which can spread beyond the immediate victims, should not be underestimated.
13. In assessing the harm caused by fraud offences, the Panel considers that the primary consideration should be the loss to the victim. In general terms, the greater the loss, the more serious will be the offence, although the sentimental value to the victim of defrauded items must be taken into account in addition to the actual monetary value.
14. However, the value of the loss may not reflect the full extent of the harm caused by the offence. The court should also take into account:
 - (a) the impact of the offence on the victim¹⁵

An offender who obtains £1,000 will benefit to the same extent regardless of the circumstances of the victim. However, obtaining £1,000 from an individual with few resources may cause more harm than defrauding the state or a business of the same amount. Similarly, obtaining £1,000 from an individual or small business could result in equal or greater harm to the victim than obtaining a much larger sum from a large company or the state.

¹⁴ See, for example, *Kefford* [2002] 2 Cr App R (S) 495 at [7] and [10]; S. Karstedt and S. Farrall, *Law-abiding majority? The everyday crimes of the middle classes*, Centre for Crime and Justice Studies Briefing 3, 2007

¹⁵ See fn.13 *supra*, para.10

(b) harm to persons other than the direct victim

Some fraud offences will have a varying impact on different victims. For example, fraudulently using the credit or debit card details of another person will have a direct financial impact on the card issuer, who normally will be expected to absorb the loss, but it will also impact on the cardholder. It has been said that 'the aggravation and stress of unscrambling the consequences of the [offender's] criminal activities'¹⁶ often far outweighs the impact of the financial loss suffered by the card issuer.

(c) erosion of public confidence

It has been noted, for example, that frauds using credit and debit cards undermine the integrity of those payment methods.¹⁷

(d) any physical harm or risk of physical harm to the direct victim or another person

For example, induced motor accidents (where the offender deliberately causes an innocent driver to crash into his or her vehicle) pose a risk of physical harm to innocent motorists and other road users.

15. In some fraud cases, the harm that results from an offence may be greater than the harm intended by the offender (see, for example, paragraph 14(b) above). In others, the offender may have intended more harm than actually results. In these situations, the harm caused by the offence should be judged in light of the offender's culpability.¹⁸

¹⁶ *Odevale and others* [2004] 2 Cr App R (S) 47, per Scott Baker LJ at [15]

¹⁷ *Attorney General's Reference No. 73 of 2003 (Rangathanan)* [2004] 2 Cr App R (S) 62, per Latham LJ at [9]

¹⁸ See fn.15 supra, para. 1.17

Purposes of sentencing

16. Sentencers must also have regard to the five purposes of sentencing set out in section 142(1) of the Criminal Justice Act 2003:

the punishment of offenders;

the reduction of crime (including its reduction by deterrence);

the reform and rehabilitation of offenders;

the protection of the public; and

the making of reparation by offenders to persons affected by their offence.

It has been noted that:

*'Section 142 does not clarify how sentencers should balance the differing priorities. This may lead to inconsistency and inequity in fraud sentencing since there is evidence to suggest that 'white collar crime' and, for example, benefit fraud are treated very differently.'*¹⁹

17. As a general principle, the Panel takes the view that the approach to sentencing all types of fraud offence should be the same, regardless of the context within which the offence was committed.

Aggravating Factors

18. The Council guideline *Overarching Principles: Seriousness* sets out a number of factors that indicate a higher than usual level of culpability on the part of the offender or a greater than usual degree of harm to the victim.²⁰ The complete list is set out in Annex C. In addition to the factors from this list that are most likely

¹⁹ Fraud Review, Final Report, para. 10.10

²⁰ See fn.13 supra, paras.1.22 and 1.23

to be present in fraud offences and which are identified in paragraph 24 below, the Panel has identified three other factors that are specific to this type of offending behaviour:

Use of another person's identity

19. It is estimated that frauds involving the use of another person's identity cost the UK economy £1.72 billion per year.²¹ In 2006 there were over 80,000 cases of identity fraud reported to CIFAS (the UK's Fraud Prevention Service) by its members.²²
20. The Court of Appeal has recognised that using another person's identity is an aggravating feature in fraud cases.²³ One aspect of aggravation is that it increases the harm caused as there is likely to be more than one victim (see paragraph 14(b) above). The nature of the harm caused will vary depending on the origins of the stolen identity. Using the identity of a living person will cause emotional distress for that individual, who will also have the practical and stressful problem of untangling the financial consequences of the fraud. Using the identity of a deceased person is likely to cause considerable distress to the relatives of the deceased, especially if that person has only recently died. Using the identity of a deceased person may, however, indicate a higher level of planning, as it can be an attempt to make the fraud more difficult to uncover.

²¹ Home Office, *Updated Estimate of the Cost of Identity Fraud to the UK Economy*, 2 February 2006, www.identity-theft.org.uk/ID%20fraud%20table.pdf

²² CIFAS, *2006 – FRAUD TRENDS*, www.cifas.org.uk/press_20070130.a Starting point

²³ *Odewale and others* [2004] 2 Cr App R (S) 47, per Scott Baker LJ at [16]; *Crossdale* [2006] EWCA Crim 2541, per Henriques J at [10]

21. The Panel has concluded that using the identity of another person should aggravate an offence but that whether the identity belongs to a living or deceased person should be neutral for sentencing purposes. The factors that are relevant to the degree to which this factor should aggravate an offence are the extent of planning and the impact that the offence has had on the living victim or the relatives of the deceased.

Recommendation 1

Using the identity of another person makes a fraud offence more serious; whether the identity belongs to a living victim or a deceased person is not relevant to the assessment of offence seriousness. The important considerations are the degree of planning involved and the consequential impact on the victim or relatives of the deceased.

Offending carried out over a significant period of time

22. In some cases, a fraud may be committed by obtaining money or property on several occasions over a long period.²⁴ This is a common feature of benefit frauds, where each payment is relatively low. Where property or money is obtained on several occasions, the offender's culpability will not be assessed solely on the amount of money or property involved, but also the period of time over which it was obtained. The Court of Appeal has

²⁴ Due to changes in the rules governing indictments, frauds undertaken over a significant period of time may now be charged in one count where previously multiple counts were required: Criminal Procedure Rules 2005, r. 14.2(2), inserted by the Criminal Procedure (Amendment) Rules 2007. However, where multiple counts are charged and a trial of all those counts by jury would be impractical, a representative sample of counts can be tried by a jury with the remaining counts tried, if the defendant is convicted of the sample counts, by a judge sitting alone: Domestic Violence, Crime and Victims Act 2004, s.17

already recognised that it is an aggravating factor for a fraud to be committed over a significant period of time²⁵ and the Panel has adopted this approach in its advice.

Offence has a lasting effect on the victim

23. The lives of individual victims may be blighted as a result of fraud offences. As was mentioned in paragraph 5, victims may lose most or all of their savings, which will impact significantly on their lifestyle. They may be unable to make mortgage and loan repayments, they may have to work beyond retirement age and they may have to live much more frugally than their years of prudent saving should have allowed. Also, where the fraud was perpetrated by someone entrusted with the victim's financial affairs, the victim's ability to trust future advice may be permanently damaged.

Summary

24. The factors likely to aggravate a fraud offence are:

Factors indicating higher culpability

- Planning of an offence*
- An intention to commit more serious harm than actually resulted from the offence (including any physical harm or risk of physical harm)*
- Offenders operating in groups or gangs*
- 'Professional offending'*
- High level of profit from the offence*

- Deliberate targeting of vulnerable victim(s)*
- Abuse of a position of trust*
- Offending carried out over a significant period of time

Factors indicating a more than usually serious degree of harm

- Multiple victims*
- Use of another person's identity
- Victim is particularly vulnerable*
- Offence has a lasting effect on the victim
- High value (including sentimental value) of property to the victim, or substantial consequential loss*

(* the asterisked factors are taken from the generic list in the Council guideline)

Mitigating Factors

25. The Council guideline *Overarching Principles: Seriousness* sets out four factors which indicate that an offender's culpability is unusually low or that the harm caused by an offence is less than usually serious.²⁶ These are set out in Annex C and those deemed particularly relevant to fraud offences are reproduced in paragraph 30 below.

Behaviour not fraudulent from the outset

26. An additional mitigating factor specific to fraud offences may arise in situations where an offender originally has a legitimate entitlement to financial benefits but continues to claim them following a change in circumstances that significantly impacts on entitlement. In such circumstances, the initial intention is not dishonest but it becomes so

²⁵ *Stewart and others* [1987] 9 Cr App R (S) 135, per Lord Lane CJ at p. 139; *Attorney General's Reference Nos. 87 and 86 of 1999 (Webb and Simpson)* [2001] 1 Cr App R (S) 505, per Kennedy LJ at [21]

²⁶ See fn.13 supra, para. 1.25

at the point when the changed circumstances are not disclosed to the financial authority and the offender makes the decision to continue to claim.

27. The Panel considers that, in principle, continuing to claim monies to which one is no longer entitled is slightly less blameworthy than claiming monies to which one has never had a legitimate entitlement and takes the view that, generally, this should influence the assessment of offence seriousness. However, the degree to which this should impact on sentence will very much depend on the circumstances that led to the failure to disclose, the effort that was involved in commencing or perpetuating the fraud, the length of time over which the sums were defrauded and the amount of money defrauded.
28. The sentencing proposals that appear later in this advice are based on an offence where the offender's initial intention is dishonest; the fact that the behaviour was not fraudulent from the outset is treated as a mitigating factor. The degree of mitigation will be greater where there is evidence that the customer service of the financial authority was inadequate and it proved difficult for the offender to understand the rules or to properly explain his or her position.

Misleading or incomplete advice

29. Even where the behaviour was fraudulent from the outset, the fact that an offender can demonstrate that he or she was given misleading or incomplete advice by the financial authority concerned also should be treated as a mitigating factor.

Summary

30. The factors likely to mitigate a fraud offence are:

Factors indicating significantly lower culpability:

- Mental illness or disability*
- Youth or age, where it affects the responsibility of the individual defendant*
- The fact that the offender played only a minor role in the offence*
- Behaviour not fraudulent from the outset
- The offender was given misleading or incomplete advice

(* the asterisked factors are taken from the generic list in the Council guideline)

Exaggerated claims

31. The Panel's consultation paper sought views on the relative seriousness of, on the one hand, exaggerated claims (as distinct from situations where an offender continues to claim monies for which the entitlement has ceased) and, on the other hand, entirely fraudulent claims. The overwhelming response was that, although an exaggerated claim may be more opportunistic and involve less planning than an entirely fraudulent claim, this is not directly related to the level of dishonest intent; once a claim has been exaggerated it becomes as culpable as an entirely fraudulent claim and it often will be aggravated by the fact that it involves an abuse of trust.

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32. Respondents to the consultation pointed to the fact that exaggerated claims account for the largest volume of insurance frauds and are responsible for driving up premiums. They are often seen as an attractive means of offending because exaggerated claims are harder to detect, which brings into question any suggestion that this type of offending is less serious. Further, the fact that a claim is exaggerated does not necessarily mean that it will involve less money than an entirely fraudulent claim and in some cases the genuine part of the claim may be dwarfed by the exaggeration.
33. The Panel has concluded that the key considerations are the degree of planning and determination and the amount of money defrauded; whether the claim was exaggerated or entirely fraudulent is not relevant to the assessment of offence seriousness.

Recommendation 2

For sentencing purposes, whether the claim that formed the basis of an offence was, on the one hand, exaggerated or, on the other hand, wholly fraudulent, is not relevant.

Offender Mitigation

34. Three factors that relate to the personal circumstances of an offender and may be taken into account as offender mitigation are identified in the Council guideline *Overarching Principles: Seriousness*²⁷ (see the list at Annex C) and these are included in the summary at paragraph 42 below. The Panel has identified a number of other factors that may be present in relation to fraud offences and which may influence the choice or severity of sentence in an individual case.

²⁷ See fn.13 supra paras. 1.26 and 1.27

Voluntary cessation of offending

35. In some cases, particularly those where a fraud has been carried out over a significant period of time, offenders may stop offending (or claim to have stopped offending) before they are apprehended. Where there is objective evidence to support such a claim, particularly where it is accompanied by a genuine expression of remorse,²⁸ this usually should be treated as offender mitigation. However, the time that has elapsed since the commission of the last offence will be an important factor in determining whether the cessation of offending is genuine and likely to last. In addition, the court will want to consider the reasons why an offender stopped offending; where an offender ceased offending because of a heightened fear of discovery or the fact that the additional funds were no longer needed, a court may conclude that the degree of mitigation is negligible or that this factor should not be taken into account as mitigation at all.

Complete and unprompted disclosure of the extent of the fraud

36. Some offenders voluntarily disclose offences of which the authorities were previously unaware. Others, when apprehended, make a complete and unprompted disclosure to the authorities of the extent of the fraud:
- a) In some cases, the offender admits to fraudulently obtaining a greater sum than that known to the authorities. This information assists the authorities in two ways: first, it increases the likelihood that victims will be able to recover some of the money; and, secondly, it ensures that the

²⁸ *ibid*, para. 1.27

offender is sentenced for the complete extent of the fraud, rather than according to the court's assessment of it.²⁹ This amounts to ready co-operation with the authorities, which the Council has already recognised as offender mitigation.³⁰

- b) In other cases, the offender provides information about other individuals who were involved in committing the fraud. The practice of reducing the sentence in such cases is now permitted by statute,³¹ having previously been developed by the Court of Appeal.³²
37. In order to promote complete disclosure at the earliest possible time, the Panel proposes that the point at which the disclosure is made, and the degree of assistance given to the authorities, should determine the amount of mitigation: in general, the earlier the disclosure is given and the higher the degree of assistance, the greater the allowance for mitigation the offender should receive.

Voluntary restitution

38. Some offenders voluntarily return property or money obtained through fraud; this should be regarded as a mitigating factor as it reduces both the harm to the victim and the gain to the offender. A further pragmatic reason for accepting this act in mitigation is that it may create an incentive for offenders to return property or money; this is particularly

important as it may be difficult for a victim to recover his or her losses in any other way.³³ The point at which the goods are returned may be an indicator of the degree to which it reflects genuine remorse and a desire to right a wrong or is merely a calculated step designed to reduce the severity of the sentence that is likely to be imposed.

39. The degree to which voluntary restitution should mitigate the seriousness of an offence has been considered already by the Council in its guideline on sentencing offences of robbery:

*'The point at which the property is returned will be important and, in general, the earlier the property [or money] is returned the greater the degree of mitigation the offender should receive'*³⁴

40. The Panel considers that, in general terms, this principle can be applied to fraud offences. If an offender has been temporarily or permanently prevented by circumstances beyond his or her control from returning defrauded items, the degree of mitigation should depend on the point in time at which, and the determination with which, the offender tried to return the items.

²⁹ See, for example, *Aziz* [1996] 1 Cr App R (S) 265, per Kay J at p. 266

³⁰ See fn.13 *supra*, para. 1.29

³¹ Where the offender enters into a written agreement with a specified prosecutor: Serious Organised Crime and Police Act 2005, s. 73.

³² *Lowe* [1977] 66 Cr App R 122; *X* [1994] 15 Cr App R (S) 750; *A and B* [1999] 1 Cr App R (S) 52; *X* [1999] 2 Cr App R (S) 294

³³ This is because the scope of restitution orders under the Powers of Criminal Courts (Sentencing) Act 2000 is tightly circumscribed and the courts traditionally have been reluctant to impose compensation orders in conjunction with custodial sentences

³⁴ Sentencing Guidelines Council definitive guideline *Robbery*, published 25 July 2006, <http://www.sentencing-guidelines.gov.uk/docs/robbery-guidelines.pdf>, p.7

Financial pressure

41. The motivations of those who commit fraud offences vary significantly. Many are motivated by greed or a desire to live beyond their means; others may be motivated by financial pressure. This is an issue that has been considered by the Panel and Council already.³⁵ In principle, financial pressure is a factor that neither increases nor diminishes an offender's culpability in relation to any type of dishonesty offence, including fraud. However, where financial pressure is exceptional and not of the offender's own making, it may constitute offender mitigation.

Summary

42. The offender mitigation factors likely to be present in fraud offences are:

- Voluntary cessation of offending
- Complete and unprompted disclosure of the extent of the fraud
- Voluntary restitution
- Exceptional pressure that is not of the offender's own making
- Genuine remorse*
- Admissions to police in interview*
- Ready co-operation with the authorities*

(*the asterisked factors are taken from the generic list in the Council guideline)

³⁵ *Theft and Burglary (non-dwelling)*, consultation guideline, p.5, 10 March 2008, www.sentencing-guidelines.gov.uk

SECTION 2: THE OFFENCES

43. The offences covered in this advice are numerous and overlapping; some old and some new. The legislative provisions are set out in Annex A, but the range and content of the offences is summarised briefly below:

The Offence in Section 1 of the Fraud Act 2006

44. There are three ways to commit the offence of fraud, contrary to section 1 of the Fraud Act 2006:

- (i) by dishonestly making a false representation; **or**
- (ii) by dishonestly failing to disclose information whilst under a legal duty to disclose; **or**
- (iii) by dishonestly abusing a position that involves safeguarding (or not acting against) the financial interests of another person; **and**

intending, by doing so, to make a gain for oneself or another person or to cause loss to another person or expose another person to a risk of loss. It is immaterial whether the gain or loss is intended to be temporary or permanent.

False representation

45. A representation:

- (i) includes a statement as to the state of mind of the offender or any other person;
- (ii) can be made expressly or implied from the offender's behaviour; and

(iii) can be made to a machine (it need not be made to a person).

Failure to disclose information

46. Fraud by failing to disclose information includes some forms of benefit fraud, fraud against HM Revenue and Customs, insurance fraud and obtaining credit through fraud. The offence covers some behaviour that, but for the duty to disclose, would not give rise to criminal liability.³⁶ It is the Panel's view that the existence of a legal duty to disclose information is inherent in the offence and therefore does not indicate a higher level of culpability on the part of the offender.

Abuse of position

47. Offenders may abuse a position of trust (for example as an employee of a financial institution) in the course of committing a fraud or may falsely claim to occupy a position of trust by, for example, falsely claiming to be an accountant or financial adviser³⁷ seeking clients to invest money, while keeping the money for themselves. In such cases it is not only the victim who suffers harm; the reputation of a profession is damaged by people using its name to commit frauds (whether or not the offenders are, in fact, members of the profession).

Obtaining Services Dishonestly

48. A person obtains services dishonestly, contrary to section 11 of the Fraud Act 2006, by obtaining services for any person by a dishonest act where:

³⁶ Even though there may be civil liability.

³⁷ As occurred in *Duggan* [1999] 2 Cr App R (S) 65

- (i) the services are made available on the basis that payment has been, is being or will be made; and
- (ii) the person obtains the services without any payment having been made, or without payment having been made in full, knowing that they are, or might be, being made available on the basis that payment will be made; and
- (iii) he or she intends that payment will not be made or will not be made in full.

49. Unlike many of the offences in this advice, services must actually be obtained and the offence of obtaining services dishonestly cannot be committed by an omission (there must be an action). In addition, as the offence requires an intention not to pay in full for the services, the offender will have the highest level of culpability.³⁸
50. The Explanatory Notes to the Fraud Act 2006 give examples of situations in which the offence may be committed:³⁹

'... data or software may be made available on the Internet to a certain category of person who has paid for access rights to that service. A person dishonestly using false credit card details or other false personal information to obtain the service would be committing [this] offence⁴⁰ The section would also cover a situation where a person climbs over a wall and watches a football match without paying the entrance fee – such a person is not deceiving the provider of the service directly, but is

obtaining a service which is provided on the basis that people will pay for it.

Section 11 also covers the situation where a person attaches a decoder to her television to enable viewing access to cable/satellite channels for which she has no intention of paying.'

False Accounting

51. False accounting, contrary to section 17 of the Theft Act 1968, is committed by dishonestly:
- (i) destroying, defacing, concealing or falsifying any account, record or document made or required for any accounting purpose; or
 - (ii) when providing information for any purpose, producing or using any account, record or document made or required for any accounting purpose, knowing it is misleading, false or deceptive; and
 - (iii) doing so with a view to creating a gain for oneself or another person or with intent to cause loss to another person. It is immaterial whether the gain or loss is intended to be temporary or permanent.
52. Examples of documents 'made or required for any accounting purpose' include loan application forms, benefit claim forms, tax returns and insurance claim forms.

Possessing Articles for use in Fraud

53. The offence of possessing articles for use in frauds, contrary to section 6 of the Fraud Act 2006, is committed by possessing or having under one's control any article for use in the course of, or in connection with, any fraud.

³⁸ See fn.13 supra, para. 1.7

³⁹ Fraud Act 2006 Explanatory Notes, paras. 35 and 36

⁴⁰ This behaviour could alternatively be charged as the offence in section 1 of the Fraud Act 2006

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54. Mere possession of the article is unlikely to be sufficient for the offence to be committed. The Explanatory Notes to the Fraud Act 2006⁴¹ state that section 6 has been drafted so as to attract the case law relating to the offence of going equipped for theft or burglary.⁴² Thus:

*"... the prosecution must prove that the defendant was in possession of the article, and intended the article to be used in the course of or in connection with some future [fraud]. But it is not necessary to prove that he intended it to be used in the course of or in connection with any specific [fraud]; it is enough to prove a general intention to use it for some [fraud]; we think that this view is supported by the use of the word 'any' in section [6]. Nor, in our view, is it necessary to prove that the defendant intended to use it himself; it will be enough to prove that he had it with him with the intention that it should be used by someone else."*⁴³

Making or Supplying Articles for use in Fraud

55. The offence of making or supplying articles for use in frauds, contrary to section 7 of the Fraud Act 2006, is committed where an offender makes, adapts, supplies or offers to supply any article, knowing that it is designed or adapted for use in the course of, or in connection with, any fraud or intending it to be used to commit or assist in the commission of fraud.

Fraudulent Evasion of Value Added Tax (VAT)

56. There are three offences of VAT evasion, contrary to section 72 of the Value Added Tax Act 1994:
- (i) being knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by any person (section 72(1));
 - (ii) producing, furnishing or sending or otherwise making use of a document which is false in a material particular for VAT purposes with intent to deceive, or in furnishing any information for VAT purposes making a statement knowing or being reckless as to whether it is false in a material particular (section 72(3)); and
 - (iii) where a person's conduct during a specified period involved the commission of one or more offences under section 72(1) or (3) (section 72(8)).
57. For each of the above offences it is immaterial whether any VAT is actually evaded and, if so, whether it is evaded by the offender or by any other person.

Fraudulent Evasion of Income Tax

58. A person is guilty of fraudulent evasion of income tax, contrary to section 144 of the Finance Act 2000, if he or she is knowingly concerned in the fraudulent evasion of income tax by any person.

⁴¹ para. 25

⁴² Theft Act 1968, s. 25

⁴³ *Ellames* [1974] 60 Cr App R 7

59. Like the VAT evasion offences, an offender can be guilty of fraudulent evasion of income tax regardless of whether the tax is evaded by the offender or by another person. However, unlike the VAT evasion offences, some tax must actually be evaded.

Fraudulent Evasion of Excise Duty

60. There are four offences of excise duty evasion contrary to the Customs and Excise Management Act 1979:
- (i) knowingly acquiring possession of goods which have been unlawfully removed from a warehouse or Queen's warehouse or goods on which duty has not been paid or being knowingly concerned in the carrying, removing, depositing, harbouring, keeping or concealing or dealing in any manner with any such goods with intent to defraud Her Majesty of any duty (section 170(1)(a)(i), (ii), (b));
 - (ii) being knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable on goods (section 170(2)(a));
 - (iii) being knowingly concerned in the taking of any steps with a view to the fraudulent evasion of any duty on goods by any person (section 170B); and
 - (iv) unshipping, landing, unloading, or removing from the place of importation, an approved wharf, examination station, transit shed or customs and excise station any goods on which duty has not been paid or assisting or being concerned in such activities, with intent to defraud Her Majesty of any duty (section 50(1)(a), (2)).

61. Like the VAT evasion offences, it is immaterial whether any duty is actually evaded and, if so, whether it is evaded by the offender or by any other person.

Social Security Benefit Fraud Offences

62. Section 111A of the Social Security Administration Act 1992 creates two types of offence:
- (i) making a dishonest representation with a view to obtaining any benefit, payment or advantage for any person (section 111A (1)); and
 - (ii) dishonestly failing to give a prompt notification of a change of circumstances affecting entitlement to benefit, a payment or advantage under Social Security legislation (section 111A(1A), (1B), (1D) and (1E)).
63. The offender need not personally obtain a financial advantage from either type of offence: both are committed regardless of whether any benefits are actually paid and, if payments are made, regardless of whether they are paid to the offender or to any other person.

Tax Credit Fraud

64. A person is guilty of tax credit fraud, contrary to section 35 of the Tax Credits Act 2002, if he or she is knowingly concerned in any fraudulent activity undertaken with a view to obtaining payments of a tax credit by any person.

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65. Like the social security benefit fraud offences, tax credit fraud is committed regardless of whether tax credits are obtained by the offender or by any other person and regardless of whether any tax credits are actually obtained.

Conclusion

66. It is clear from the descriptions above that each of the offences covered in this advice encapsulates a wide range of offending behaviour; the overlap between the offences is also such that an offence may fall within a number of categories. As mentioned in paragraph 6, the Panel concluded that its proposals should relate to the nature of the offending behaviour rather than the specific offences under which it might be charged.

SECTION 3: SENTENCING FRAUDS

Sentencing Trends

67. Whilst separate statistics are not available for each type of criminal activity covered in the advice, there is composite data.⁴⁴ Statistics provided by the Home Office show a decrease in the number of offenders sentenced for these offences in recent years. Table 1 shows the number of offenders sentenced for fraud offences since 1999:

Table 1: Number of offenders aged 18 and over sentenced for offences covered in this paper 1999–2006, by gender and year

	Male		Female		Total
	Number	%	Number	%	Number
1999	11306	71	4718	29	16024
2000	10501	70	4576	30	15077
2001	9250	68	4344	32	13594
2002	8833	67	4403	33	13236
2003	8290	67	4124	33	12414
2004	7978	66	4135	34	12113
2005	7733	64	4379	36	12112
2006	7438	61	4739	39	12177

68. The number of male sentenced offenders has decreased fairly steadily since 1999. The number of female sentenced offenders also decreased generally until 2004, but at a slower rate, resulting in a significant increase

in the ratio of female to male offenders. The main reason for this appears to have been a general shift away from prosecution in favour of civil penalty regimes at a number of government departments, except in relation to benefit fraud (for which a significant number of women are prosecuted), where there is a public expectation that defrauded sums should be recovered. In particular, there was a decrease in the number of offenders sentenced for offences against HM Revenue and Customs (from 1,212 in 1999 to 570 in 2006), of whom around 81% are men, and an increase in the number sentenced for certain benefit fraud offences⁴⁵ (from 710 in 1999 to 4,939 in 2006), of whom approximately 56% are women. The figures for 2005 and 2006 show that the number of women sentenced for these offences has increased; this is consistent with the general trend reported in the Panel's consultation *Overarching Principles of Sentencing* and the fact that the largest proportion of offences committed by women are acquisitive crimes.⁴⁶

⁴⁴ This data covers all of the offences listed in Annex A, except for possession of articles for use in frauds and making or supplying articles for use in frauds, and also includes the offences of fraudulent evasion of stamp duty, exportation of restricted goods and offences under the Commissioners for Revenue and Customs Act 2005. As only a low volume of these additional offences is sentenced each year this is unlikely to distort the data.

⁴⁵ Offences under the Social Security Administration Act 1992, s. 111A (see paragraphs 116 to 120 below).

⁴⁶ 8 July 2008, pages 97 and 98, www.sentencing-guidelines.gov.uk

69. Tables 2, 3 and 4 show the sentences imposed for offences covered by this advice since 1999:

Table 2: Percentage of all offenders aged 18 and over receiving each type of sentence for offences covered in this paper, all courts, 1999–2006

	1999	2000	2001	2002	2003	2004	2005	2006
Absolute Discharge	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	1
Conditional Discharge	16	16	16	17	19	18	18	19
Fine	15	14	13	13	14	13	12	11
Community sentences	43	43	45	47	44	46	45	40
Suspended sentence	2	3	3	2	2	2	4	11
Immediate imprisonment	22	22	22	20	19	19	19	16
Other	1	1	1	1	2	1	1	2

Table 3: Percentage of offenders aged 18 and over receiving each type of sentence for offences covered in this paper in a magistrates' court, 1999–2006

	1999	2000	2001	2002	2003	2004	2005	2006
Absolute Discharge	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	1
Conditional Discharge	20	20	20	20	23	21	22	23
Fine	19	17	16	15	16	16	15	14
Community sentences	46	47	47	49	45	47	47	44
Suspended sentence	1	1	1	1	1	1	2	7
Immediate imprisonment	13	13	14	14	13	13	11	8
Other	2	2	2	2	2	2	2	2

Table 4: Percentage of offenders aged 18 and over receiving each type of sentence for offences covered in this paper in the Crown Court, 1999–2006

	1999	2000	2001	2002	2003	2004	2005	2006
Absolute Discharge	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	< 0.5	<0.5
Conditional Discharge	4	4	4	4	5	4	4	5
Fine	3	2	2	3	3	3	2	2
Community sentences	31	30	34	40	40	40	37	30
Suspended sentence	8	10	10	7	7	8	9	21
Immediate imprisonment	54	54	50	45	45	44	47	41
Other	1	< 0.5	< 0.5	1	1	< 0.5	1	1

70. Overall there has been a significant decrease in the use of immediate custodial sentences for these offences; until 2004, this was offset in the Crown Court by a corresponding increase in the use of community sentences. In 2006 there was a decrease in the use of both immediate custodial sentences and community sentences in all courts and an increase in suspended sentence orders; this is in keeping with current general sentencing trends.

71. The most significant change in the Crown Court occurred between 2001 and 2002, following the judgments of the Court of Appeal in *Mills*⁴⁷ and *Kefford*.⁴⁸ In *Mills*, Lord Woolf CJ stated that courts have to take three aspects of sentencing policy into account when sentencing offences of dishonesty: firstly that, other than the 'clang of the prison door' effect, the prison service cannot achieve much in a very short custodial sentence; secondly, where the offender is a sole carer for children, the impact on the children of imposing a prison sentence; and thirdly, the current increase in the prison population.

72. Further, in *Kefford*, it was stated:

"In the case of economic crimes, for example obtaining undue credit by fraud, prison is not necessarily the only appropriate form of punishment. Particularly in the case of those who have no record of previous offending, the very fact of having to appear before a court can be a significant punishment. Certainly, having to perform a form of community punishment can be a very salutary way of making it clear that crime does not pay... In the appropriate cases, it can be better that an offender repays

his debt to society by performing some useful task for the public than spending a short time in prison."

73. The responses to our consultation paper indicate that this approach has majority support and we have adhered to it when producing our sentencing proposals. The justifications for, and relative merits of, community sentences and suspended sentence orders, as highlighted recently by the Court of Appeal,⁴⁹ are discussed in detail in the Panel's consultation paper *Overarching Principles of Sentencing*.⁵⁰

Recommendation 3

For a first offender convicted of fraud, a non-custodial sentence is likely to be more appropriate than a short custodial sentence.

Combining Custody and Fines

74. A key issue discussed in the Panel's consultation was whether imposing a fine alongside a custodial sentence for a fraud offence is appropriate and, if so, whether there should be a relationship between the size of the fine and the length of the custodial sentence.

75. The guideline judgments on tax fraud⁵¹ indicate that courts should impose a fine alongside a custodial sentence. It used to be common practice to impose a fine as a means of confiscation as well as imposing a prison sentence.⁵² This is no longer the case as courts

⁴⁷ [2002] 2 Cr App R (S) 229, decided on 14 January 2002

⁴⁸ [2002] 2 Cr App R (S) 495, decided on 5 March 2002

⁴⁹ *R v Phipps* [2007] EWCA Crim 2923

⁵⁰ p.76, published 8 July 2008, www.sentencing-guidelines.gov.uk

⁵¹ *Ford* [1981] 3 Cr App R (S) 15; *Attorney General's Reference Nos. 87 and 86 of 1999 (Webb and Simpson)* [2001] 1 Cr App R (S) 505

⁵² See, for example, *Garner and others* [1985] 7 Cr App R (S) 285, per Hodgson J at p. 291

now have the power to make a confiscation order.

76. The majority of respondents agreed with the Panel's provisional conclusion that a court normally should not impose a fine alongside a custodial sentence, the most overwhelming argument being that the principles enshrined in *Ford* have been superseded by the legislative provisions relating to compensation⁵³ and confiscation.
77. However, the Panel considers that there are some circumstances in which, exceptionally, it might be appropriate to impose a fine alongside custody. These are where:
- (i) a confiscation order is not being contemplated; **and**
 - (ii) there is no obvious victim to whom compensation can be awarded; **and**
 - (iii) the offender has, or will have, resources from which a fine can be paid.
78. Where a fine is imposed alongside a custodial sentence, the court must ensure that the overall sentence remains commensurate with the seriousness of the offence and that the size of the fine does not enable wealthier offenders to 'buy themselves out of custody'.

Recommendation 4

A fine normally should not be imposed alongside a custodial sentence for a fraud offence. Exceptions may arise where neither a confiscation order nor a compensation order is being made and the offender has, or will have, resources from which the fine can be paid. The court must ensure that the overall sentence remains commensurate with

the seriousness of the offence and that the size of the fine does not enable wealthier offenders to 'buy themselves out of custody'.

Ancillary Orders

79. The ancillary orders most commonly imposed in relation to fraud offences are restitution, compensation, confiscation, deprivation and financial reporting orders; disqualification from acting as a company director; and disqualification from driving.
80. Ancillary orders fall into three categories: those imposed to minimise the harm caused by the offender (either to the victim or, through the risk of re-offending, to society), those designed to achieve reparation and those imposed to punish the offender. In its consultation paper, the Panel proposed that orders imposed to punish the offender should be taken into account when determining whether a sentence is commensurate with the seriousness of an offence and that those imposed to minimise the harm caused or to achieve reparation by the offender generally should not. This met with the overwhelming support of respondents.
81. In its most recent consultation paper – *Overarching Principles of Sentencing*⁵⁴ – the Panel has included a comprehensive list of ancillary orders and has clearly indicated which will have an impact on choice or severity of sentence. Once approved within a definitive guideline, these principles will apply to all offences. The Panel has, therefore, concluded that it is not necessary or helpful to produce advice on ancillary orders in relation to fraud offences in isolation.

⁵³ Powers of Criminal Courts (Sentencing) Act 2000, s.130

⁵⁴ published 8 July 2008, www.sentencing-guidelines.gov.uk

SECTION 4: THE PANEL'S PROPOSALS

82. The Panel's proposals are presented by reference to types of conduct, such as 'confidence frauds', bank account fraud and benefit fraud, rather than types of offence, and the groupings in the proposed guidelines are designed to reflect common types of fraudulent behaviour.⁵⁵ Each grouping includes examples of fraudulent activity and suggests the statutory offences under which they might be charged; the legislative provisions are also cited in the proposed guidelines.

Abuse of trust

83. Where the fraudulent behaviour falls within one of the guidelines proposed in this advice and abuse of trust is not an inherent element of the offence, the abuse of a position of trust (whether real or purported⁵⁶) should be treated as an aggravating factor.

Obtaining services dishonestly

84. As noted in paragraph 48, the offence of obtaining services dishonestly may be committed in circumstances that otherwise could be charged as an offence contrary to section 1 of the Fraud Act 2006, such as obtaining credit through fraud or payment card fraud. Where an offender has been convicted of obtaining services dishonestly and the offending behaviour can be characterised as a fraud offence, the court should apply the guideline for the relevant type of fraud.

85. Where the conduct is more akin to the offence of *making off without payment* (where an offender, knowing that payment on the spot for any goods supplied or service done is required or expected, dishonestly makes off without having paid and with intent to avoid payment),⁵⁷ the guideline for that offence⁵⁸ should be used.

Confidence frauds

86. This type of offending involves a victim transferring money and/or property as a result of being deceived or misled by the offender. An example of a simple confidence fraud is a person claiming to be collecting money for charity when, in fact, he or she intends to keep the money.⁵⁹

87. Examples of common confidence frauds are:

(a) Advance fee frauds

Common advance fee frauds include:

- *Lottery/prize draw scams*, in which victims are informed that they have won a prize, but must pay a processing or administration fee (or a customs levy in foreign lottery scams) in order to obtain it. If the fee is paid, the prize never materialises.
- *Foreign money-making frauds*, in which victims are contacted by someone who claims to need assistance in transferring money overseas and offered a share of the money if they help. Typically, victims will be asked to provide personal or

⁵⁵ See para.6 above.

⁵⁶ See para. 47above

⁵⁷ Theft Act 1978, s.3

⁵⁸ Magistrates' Court Sentencing Guidelines, page 79, www.sentencing-guidelines.gov.uk.

⁵⁹ See, for example, *Pippard and Harris* [2002] 2 Cr App R (S) 40 and *Day and O'Leary* [2002] 2 Cr App R (S) 92

banking details so that their accounts can be used in the money transfer. A variant involves victims sending money to cover customs levies, bribes and/ or other fees (instead of or as well as providing their personal and banking details). Victims never receive any money and any personal or banking details provided are used to obtain credit fraudulently and/or commit bank account fraud.

(b) Fraudulent sales of goods and services

These include goods that are never received by the purchaser or are worth less than the seller represents; services that are unnecessary, overpriced or not performed; and investments that are never obtained for the investor or are worth less than the seller represents.

The offences

88. The principal offences likely to be used to prosecute confidence frauds are:

Fraud, contrary to section 1 of the Fraud Act 2006; or

False accounting, contrary to section 17 of the Theft Act 1968.

The extent of confidence frauds

89. Confidence frauds are perpetrated in large numbers. For example, the Office of Fair Trading has estimated there are 520,000 victims of lottery and prize draw scams each year, losing a total of £320 million.⁶⁰ It also estimates that each year there are 70,000

victims of foreign money-making scams, losing £340 million.⁶¹

Factors in sentencing

The vulnerability of the victim

90. In many confidence frauds, the offender targets a vulnerable victim. The Council has stated that an offender is more culpable if he or she deliberately targets a victim who is vulnerable as a result of old age, youth or disability and that there is a more than usually serious degree of harm where the victim is particularly vulnerable.⁶²
91. It has been argued that many victims of advance fee frauds have personalities which make them 'vulnerable in a way and to a degree not typical of the general population'⁶³ because they fall for scams many times. Indeed, it is a feature of some advance fee frauds that victims are targeted using 'sucker lists' of people who have previously fallen victim to scams. An offender who uses a 'sucker list' will have planned the offence and deliberately targeted vulnerable victims; therefore he or she has a higher level of culpability.⁶⁴

Prevalence and deterrence

92. The Court of Appeal⁶⁵ has commented that advance fee frauds are prevalent and that, accordingly, a deterrent element may need to be incorporated into sentences.

⁶¹ *ibid*, p.55

⁶² See fn.13 *supra*, paras. 1.17, 1.22 and 1.23

⁶³ M. Levi, *Sentencing Frauds: A Review*, p. 58

⁶⁴ See fn.13 *supra*, para.1.22

⁶⁵ *Dekson* [2004] EWCA Crim 3205

⁶⁰ Office of Fair Trading, *Research on impact of mass marketed scams: A summary of research into the impact of scams on UK consumers* (OFT883), December 2006, pp. 44 and 46

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93. The Council guideline *Overarching Principles: Seriousness* provides guidance on dealing with issues of local prevalence.⁶⁶ National prevalence has been taken into account in the Panel's proposals.

The Panel's proposals

94. The Panel's proposals for sentencing confidence frauds are set out below. The proposed starting points and ranges are intended to reflect the re-evaluation of the seriousness of fraud offences set out in *Mills* and *Kefford* (see paragraphs 71 to 73 above). They have been guided by the maximum 10 year penalty for the offence of fraud but sentencers must be alive to the fact that a minority of offences will continue to be prosecuted as *false accounting* which has a lower, 7 year, maximum penalty.
95. The definitions of 'starting point', 'sentencing range' and 'first time offender' are set out in Annex D. Common aggravating and mitigating factors are set out in Annexes B and C. In all cases sentencers should consider whether to make ancillary orders, particularly compensation and/or confiscation.

⁶⁶ See fn.13, supra, paras.1.38 and 1.39

Confidence Frauds

Fraud (Fraud Act 2006, section 1): dishonestly making a false representation, failing to disclose information or abusing a position with the intent to bring about a gain for any person or to cause loss or a risk of loss to another.

False accounting (Theft Act 1968, section 17): dishonestly, with a view to gain for any person or with intent to cause loss to another, destroying, defacing, concealing or falsifying any record or document made or required for an accounting purpose or in furnishing information for any purpose produces such a record or document knowing it to be misleading, false or deceptive.

Both offences are triable **either way**.

Maximum penalty for fraud: **10 years**.

Maximum penalty for false accounting: **7 years**.

Nature of offence	Nature of harm	
	High value of property (over £20k or of high sentimental value to the victim) or substantial consequential loss	Neither high value of property nor substantial consequential loss
Large scale advance fee fraud or confidence fraud involving the deliberate targeting of a large number of vulnerable victims	Starting point: 5 years Range: 4 to 7 years	Starting point: 3 years Range: 2 to 5 years
Lower scale advance fee fraud characterised by a degree of planning	Starting point: 3 years Range: 12 months to 5 years	Starting point: 18 months Range: 18 weeks to 3 years
Single confidence fraud involving targeting of a vulnerable victim	Starting point: 26 weeks Range: Community order (HIGH) to 18 months	Starting point: 6 weeks Range: Community order (MEDIUM) to 26 weeks
Single confidence fraud, no or limited planning, no targeting of a vulnerable victim	Starting point: Community order (HIGH) Range: Community order (LOW) to 26 weeks	Starting point: Fine (Band B) Range: Fine (Band A) to Community order (MEDIUM)

Common aggravating and mitigating factors are set out in Annexes B and C.

Possessing, Making or Supplying Articles for use in Fraud

The offences

96. The principal offences likely to be used to prosecute possessing, making or supplying articles for use in fraud are:
- (i) Possessing articles for use in fraud, contrary to section 6 of the Fraud Act 2006;
 - (ii) Making or supplying articles for use in fraud, contrary to section 7 of the Fraud Act 2006; and
 - (iii) Fraud, contrary to section 1 of the Fraud Act 2006.
97. There are many ways in which offenders may commit this group of offences but, with the constant improvements in technology, computers have become a common and increasingly effective tool for both creating and disseminating articles for use in fraud.

'Articles'

98. Thus, 'articles' will include any electronic programs or data stored electronically.⁶⁷ Examples of articles for use in frauds include false fronts for cash machines, computer programs for generating credit card numbers, lists of credit card or bank account details and draft letters or emails for use in advance fee frauds.
99. As lists of credit card and bank account details constitute 'articles', the making of such lists through certain electronic programmes, which contravenes section 1 of the Fraud Act 2006,

is also criminalised by section 7 of the same Act. The Panel proposes that carrying out the following activities should be treated as making articles for use in fraud, regardless of whether the offence is charged under section 1 or section 7:

phishing: where an offender sends an email purporting to come from a financial institution, which asks victims to follow a hyperlink to a (false) website and induces them to enter their card or account details (which may include their PIN);

vishing: where an offender uses an automated telephone system, purporting to be the telephone system of a financial institution, to induce victims to disclose their card or account details (which may include their PIN);

pharming: where victims intend to visit a financial institution's website but are redirected to the offender's website (which purports to be the financial institution's website) and induced to enter their card or account details (which may include their PIN); and

use of a 'Trojan': where an offender installs a virus on victims' computers (often a 'keystroke logger', which captures all of the keystrokes entered into a computer keyboard) in order to gain access to their card or account details. Often the offender will send an email inducing victims to visit a website, where the virus is automatically downloaded onto their computers.

100. Making, adapting, supplying or offering to supply computer programmes, emails or websites for the above activities amounts to an offence under section 7 of the Fraud Act 2006.

⁶⁷ Fraud Act 2006, s. 8

Factors in sentencing

Culpability and harm

101. Offenders who possess, make or supply articles for use in fraud intend their actions to lead to a fraud. Such offenders therefore have the highest level of culpability.⁶⁸ Whilst in many cases no financial harm will have been caused, in some cases, particularly where the 'article' is a list of credit card or bank account details, the victim(s) may have been inconvenienced despite not suffering any financial loss.⁶⁹ In all cases, the Council guideline states that harm must be judged in light of the offender's culpability.⁷⁰
102. There are three types of activity relating to articles for use in fraud: making or adapting, supplying or offering to supply and possession. The Panel's proposed guideline does not distinguish between the first two categories; they carry the same maximum penalty and, depending on the sophistication and planning involved and the harm resulting from an offence, they may be equally serious.
103. The Court of Appeal has held that the offence of going equipped for burglary is a "short step" away from attempted burglary, and that sentencing for going equipped may therefore be influenced by the sentence that would have been passed had the burglary actually occurred.⁷¹ The Panel has applied the same principle to this group of offences, although in many cases it will be difficult to ascertain the precise level of harm intended by the offender. Where the court can identify the level of harm

intended, the sentence should be slightly reduced from that which would have been imposed if the fraud had actually taken place. Where the level of harm cannot be established, the court should use the harm that was likely to be achieved as the appropriate measure.

Planning of an offence

104. The three offences in this group all involve an element of planning (whether by the offender or by another person); the planning of an offence has been identified by the Council as a factor indicating a higher level of culpability⁷² and the Panel's proposed starting points incorporate this aggravating factor.

The Panel's proposals

105. The Panel's proposals for sentencing possession, making or supply of articles for use in frauds are set out below. The proposed starting points and ranges are intended to reflect the re-evaluation of the seriousness of fraud offences set out in *Mills* and *Kefford* (see paragraphs 71 to 73 above). The sentencing range for the most serious category of offences is deliberately wide; most offences will be at the lower end of the range but there are likely to be some offences, possibly but not exclusively those with an international dimension, that will justify a sentence at the top end of the suggested range or even higher.
106. The definitions of 'starting point', 'sentencing range' and 'first time offender' are set out in Annex D. Common aggravating and mitigating factors are set out in Annexes B and C. In all cases sentencers should consider whether to make ancillary orders, particularly compensation, confiscation and/or deprivation.

⁶⁸ See fn.13 supra, para.1.7

⁶⁹ Where the article is a list of credit card or bank account details, the victims will need to cancel their cards and obtain new ones and/or change their bank accounts.

⁷⁰ See fn.13 supra, para.1.17

⁷¹ *Sang* [2003] EWCA Crim 2411, per HHJ Crowther at [12]

⁷² See fn.13 supra, para.1.22

Possessing, Making or Supplying Articles for use in Fraud

Possession of articles for use in frauds (Fraud Act 2006, section 6): possessing or having under one's control any article for use in the course of or in connection with any fraud.

Making or supplying articles for use in frauds (Fraud Act 2006, section 7): making, adapting, supplying or offering to supply any article knowing that it is designed for use in the course of or in connection with any fraud or intending it to be used to commit or assist in the commission of fraud.

Fraud (Fraud Act 2006, section 1): dishonestly making a false representation, failing to disclose information or abusing a position with the intent to bring about a gain for any person or to cause loss or a risk of loss to another.

All offences are triable **either way**.

Maximum penalty for possession of articles for use in frauds: **5 years**.

Maximum penalty for both other offences: **10 years**.

Category of offence	Type of offence	
	Making or adapting (ss. 1 or 7) or Supplying or offering to supply (s. 7)	Possessing (s. 6)
Article(s) intended for use in an extensive and skilfully planned fraud	Starting point: 4 years Range: 2 to 7 years	Starting point: 36 weeks Range: 6 weeks to 2 years
Article(s) intended for use in a less extensive and less skilfully planned fraud	Starting point: 26 weeks Range: Community order (HIGH) to 2 years	Starting point: Community order (MEDIUM) Range: Community order (LOW) to 26 weeks

Common aggravating and mitigating factors are set out in Annexes B and C.

Fraud against HM Revenue and Customs

The offences

107. This type of offending may take many forms, including:

(i) Fraudulent evasion of VAT

VAT evasion includes situations where a trader does not charge VAT to the customer, situations where a customer pays VAT to the trader but the trader does not pay it to HM Revenue and Customs (HMRC) and so-called 'Missing Trader Intra-Community Frauds' (MTIC Frauds) or 'Carousel Frauds'. MTIC Frauds involve traders importing goods from the European Union free from VAT, charging VAT when they sell the goods and then keeping the money rather than paying it to HMRC. 'Carousel Frauds' are MTIC Frauds where the trader sells the goods to another trader who re-exports them and claims back the VAT paid to the first trader from HMRC.

(ii) Fraudulent evasion of income tax

This may be committed by failing to declare earnings in a tax return or by an employer keeping the tax collected from employees rather than paying it to HMRC.

(iii) Fraudulent evasion of excise duty

This includes alcohol and tobacco smuggling and the laundering of 'red diesel' into diesel engine road fuel.

108. The principal offences likely to be used to prosecute these frauds are:

- Fraud, contrary to section 1 of the Fraud Act 2006;

- False accounting, contrary to section 17 of the Theft Act 1968;
- An offence of VAT evasion contrary to section 72 of the Value Added Tax Act 1994 ("the VAT Act");
- Fraudulent evasion of income tax, contrary to section 144 of the Finance Act 2000;
- An offence contrary to section 170 of the Customs and Excise Management Act 1979 ("the 1979 Act");
- Fraudulent evasion of duty, contrary to section 170B of the 1979 Act;
- Improper importation of goods, contrary to section 50 of the 1979 Act; or
- Cheating the public revenue, contrary to common law.

109. The maximum penalty for the offence of cheating the public revenue is 'at large', which means that there is no maximum penalty.⁷³ The charge of cheating the public revenue is "reserved for the serious and unusual cases rather than the run of the mill ... fraud",⁷⁴ which have been described as being "where many millions, not merely one million has been lost to the public revenues" and where a sentence 'in excess of the statutory maximum for other offences...would be...proper.'⁷⁵

110. As such cases are unusual, the Panel is not making any proposals for sentencing offenders convicted of this offence. It would be open to a court to have regard to a Council guideline on fraud against HMRC when sentencing an offender convicted of cheating the public revenue but it should be used only as a point

⁷³ The maximum penalty is therefore currently life imprisonment

⁷⁴ *Mavji* [1987] 84 Cr App R 34, per Michael Davies J at p. 37

⁷⁵ *Ward* [2005] EWCA Crim 1926, per Latham LJ at [16]

of reference from which higher starting points could be calculated as necessary.

The extent of fraud against HM Revenue and Customs

111. It has been estimated that the total loss to HMRC from fraud and non-compliance on VAT in 2005–2006 was £12.4 billion.⁷⁶ As for MTIC Frauds, it is estimated that in 2005–2006 attempts were made to defraud HM Revenue and Customs of between £3.5 billion and £4.75 billion, of which between £2 billion and £3.5 billion was actually lost.⁷⁷ Further, it has been estimated that the HMRC lost £4.2 billion in 2004–2005 due to fraudulent evasion of excise duty.⁷⁸ These losses result in higher taxes and lower funding for public services.

Fraudulent evasion of VAT

112. In most VAT frauds the offender intends to evade VAT. However, it is possible to commit the offence in section 72(3) of the VAT Act (and accordingly also the offence in section 72(8) of the same Act) by recklessly making a false statement for the purposes of VAT.⁷⁹ The Council guideline *Overarching Principles: Seriousness*⁸⁰ states that an offender who acts recklessly is less culpable than an offender who acts intentionally. The Panel's proposals for the sentencing of frauds against HM Revenue and Customs take as a starting point an offender who acts intentionally. Where the

offender has acted recklessly, courts should adjust the assessment of seriousness to take account of this lower level of culpability.

Fraudulent evasion of income tax

113. The current guideline case on tax evasion is *Attorney General's Reference Nos. 87 and 86 of 1999 (Webb and Simpson)*,⁸¹ in which the offenders were convicted of cheating the public revenue and false accounting. The Court of Appeal held that, even where the defrauded sums are recovered, offenders who organise sophisticated frauds which result in the evasion of around £2 million in tax over several years should be sentenced to imprisonment for around four and a half years as well as receiving a fine. For offenders who, whilst not the organisers, have a significant role in such frauds, the Court stated that a sentence of imprisonment in the region of eighteen months to two years, as well as a financial penalty, was appropriate. The Panel's proposals for sentencing frauds against HMRC depart from these guidelines; Recommendation 4 above explains the circumstances in which a fine might, exceptionally, be imposed alongside a custodial sentence.

Fraudulent evasion of excise duty

114. In *Czyzewski*,⁸² the Court of Appeal set guidelines for alcohol and tobacco smuggling following advice received from the Panel.⁸³ In addition to some of the factors set out in Annexes B and C, the Court identified the following aggravating factors:

⁷⁶ HM Revenue and Customs, *Measuring Indirect Tax Losses – 2006*, December 2006, p. 5

⁷⁷ *ibid*, p. 7

⁷⁸ Wilson et al, *Fraud and technology crimes: Findings from the 2003/04 British Crime Survey and the 2004 Offending, Crime and Justice Survey and administrative sources*, Home Office Online Report 09/06, 2006, p. 13

⁷⁹ See paragraphs 56 and 57 above

⁸⁰ See fn.15 *supra*, para.1.7

⁸¹ [2001] 1 Cr App R (S) 505

⁸² [2004] 1 Cr App R (S) 49

⁸³ Sentencing Advisory Panel, *Advice to the Court of Appeal – 12: Alcohol and Tobacco Smuggling*, 2003, www.sentencing-guidelines.gov.uk. See also Magistrates' Courts Sentencing Guidelines, May 2008, pp20–21

- making repeated importations, particularly in the face of warnings from the authorities;
- dealing in goods with an additional health risk because of possible contamination; and
- disposing of goods to under-aged purchasers.

It also set out a number of starting points linked to the sums involved and the offender's role in the offence.

115. Since this judgment, the number of convictions for excise duty evasion offences has dropped significantly; largely, it seems, because of the policy of HMRC to use administrative penalties or civil proceedings, rather than criminal proceedings, to deal with many offenders. The policy of HMRC Prosecutions Office indicates that criminal (as opposed to civil) proceedings will be instituted in cases of fraud committed by gangs, where the offender holds a position of trust, where threats have been made to Customs officers or where an individual repeatedly offends.⁸⁴ Accordingly, most offences of this type now fall to be sentenced in the Crown Court.

Benefit Fraud

The offences

116. The principal offences likely to be used to prosecute benefit frauds are:
- Fraud, contrary to section 1 of the Fraud Act 2006;
 - False accounting, contrary to section 17 of the Theft Act 1968;
 - An offence contrary to section 111A of the Social Security Administration Act 1992 ("the 1992 Act"); or
 - Tax credit fraud, contrary to section 35 of the Tax Credits Act 2002 (see paragraphs 64 and 65 above).

The extent of benefit fraud

117. The Department for Work and Pensions (DWP) overpays significant sums due to social security benefit fraud. Table 6 shows the amount of these overpayments and the percentage of benefit payments that are fraudulent:

⁸⁴ HM Revenue and Customs Prosecutions Office, *HMRC Criminal Investigation Policy*, www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm

Table 6: Overpayments of social security benefits due to fraud, by type of benefit and year⁸⁵

Type of benefit/fraud	April 2004 to March 2005	April 2005 to March 2006
Income Support	£230 million (2.3%)	£200 million (2.1%)
Jobseeker's Allowance	£50 million (2.2%)	£40 million (1.9%)
Pension Credit	£60 million (1.0%)	£60 million (0.9%)
Housing Benefit	£170 million (1.3%)	£140 million (1.0%)
Disability Living Allowance	£40 million (0.5%)	£40 million (0.5%)
State Pension	£30 million (0.1%)	£0 million (0.0%)
Carer's Allowance	£40 million (3.9%)	£40 million (3.9%)
Incapacity Benefit	£10 million (0.1%)	£10 million (0.1%)
Council Tax Benefit	£50 million (1.3%)	£40 million (1.0%)
Instrument of payment fraud ⁸⁶	£40 million	£20 million
Other losses	£100 million (0.9%)	£110 million (0.9%)
Total	£820 million (0.8%)	£700 million (0.6%)

118. In addition, HMRC estimates that in 2004-2005 it overpaid £40 million due to tax credit fraud.⁸⁷

119. The Panel has been informed by the DWP that, following a policy change in November 2006, it will be seeking summary trial for appropriate benefit fraud cases involving sums up to £35,000; the Panel does not consider that the starting points it is proposing would interfere with that practice. The guideline for these offences in the current edition of the Magistrates' Court Sentencing Guidelines⁸⁸ will

be updated to reflect the Council's definitive guideline.

120. The Panel also understands that, generally, those who commit benefit fraud are asked to repay the sums defrauded, although the process of recovery may be spread over a significant period and may not be possible in every case. As recovery of defrauded benefits is not guaranteed and operates quite separately from civil or criminal sanctions, this has not been taken into account in the Panel's proposals. The fact that defrauded sums may have been recovered is not relevant to the choice of the type of sentence to be imposed.

⁸⁵ Source: DWP Information Directorate, *Fraud and Error in the Benefit System April 2005 to March 2006*, 2007, pp. 24 and 25

⁸⁶ No percentage figures are provided by the Department for Work and Pensions. In any event, instrument of payment fraud is more akin to payment card and bank account fraud than to benefit fraud.

⁸⁷ HM Revenue and Customs Analysis Team, *Child and Working Tax Credits: Error and Fraud Statistics 2004-2005*, 2007, Table 3

⁸⁸ p.96, published May 2008, effective from 4 August 2008, www.sentencing-guidelines.gov.uk

Payment Card and Bank Account Fraud

121. Frauds involving the use of payment cards and bank accounts include:

- use of another person's card;
- cloning another person's card;
- taking over or sending instructions relating to another person's bank or card account; and
- use of another person's cheque.

The offences

122. The principal offences likely to be used to prosecute payment card and bank account frauds are:

Fraud, contrary to section 1 of the Fraud Act 2006; or

False accounting, contrary to section 17 of the Theft Act 1968.

The extent of payment card and bank account fraud

123. Table 8 sets out some of the many ways in which payment card or bank account fraud can be committed and the amounts lost as a result:

Table 8: Payment card and bank account fraud losses by type of fraud and year⁸⁹

Type of fraud	1996	2001	2006	2007
Card not present (internet, telephone and mail order card use)	£6.5m	£95.7m	£212.6m	£290.5m
Use of a counterfeit card	£13.3m	£160.4m	£99.6m	£144.3m
Use of a lost or stolen card	£60.0m	£114.0m	£68.4m	£56.2m
Use of a new card that was not received by the account holder	£10.0m	£26.8m	£15.4m	£10.2m
Account takeover	£7.2m	£14.6m	£20.0m	£22.4m
Application fraud (this is covered by the proposals on obtaining credit through fraud)			£11.9m	£11.7m
Total	£97.1m	£411.5m	£428.0m	£532.5m

⁸⁹ Sources: APACS, *Fraud the Facts* 2008, pp. 6 and 17; APACS, *Fraud the Facts* 2007, pp. 5 and 16; APACS, *Fraud the Facts* 2006, pp. 5 and 16. The Panel acknowledges that the totals in the first and third columns do not equal the sum of the preceding rows. However, these are the figures published.

124. Following year on year reductions in 2005 and 2006, cheque fraud losses increased in 2007 to £33.5 million⁹⁰ (from £30.6 million in 2006 and £40.3 million in 2005⁹¹). Of the 2007 total, £20.5 million was lost to forged cheque fraud (where a genuine cheque drawn on the victim's account is completed by the offender) and £9.2 million was lost to altered cheque fraud (where a cheque completed by the victim is altered by the offender).⁹² The highest increase (81%) was seen in relation to counterfeit cheque fraud (where cheques are printed on non-bank paper to look exactly like genuine cheques and are drawn by a fraudster on genuine bank accounts).⁹³ Nonetheless, the level of cheque fraud remains relatively low when compared with other fraud types.

Insurance Fraud

125. It has been estimated that insurance companies lose over £1.5 billion per year as a result of fraudulent insurance claims.⁹⁴ This loss is passed on to the consumer: it is estimated that fraud adds at least 5% to the cost of insurance premiums.⁹⁵

The offences

126. The principal offences likely to be used to prosecute insurance frauds are:

Fraud, contrary to section 1 of the Fraud Act 2006; or

False accounting, contrary to section 17 of the Theft Act 1968.

⁹⁰ APACS, *Fraud the Facts 2008*, p. 37

⁹¹ APACS, *Fraud the Facts 2007*, p. 36

⁹² APACS, *Fraud the Facts 2007*, p. 36

⁹³ See fn.92 *supra*

⁹⁴ Insurance Fraud Bureau, *Fighting Organised Insurance Fraud: Protecting Honest Customers*, 2006, p. 3

⁹⁵ *ibid*, p. 3

Types of offending behaviour

Fraudulent claims by or against the insured

127. This includes claims that are entirely fraudulent and those that are exaggerated through either claiming for injury, loss or damage that did not occur or increasing the value of a genuine claim for injury, loss or damage. Examples of more extreme behaviour include:

- induced motor accidents, where offenders deliberately cause innocent drivers to crash into their vehicles, or contrived motor accidents, where damaged vehicles are taken to a likely accident site and arranged as though an accident had occurred. Claims are then made for damage to the vehicles and for (fictitious) injuries to drivers and passengers.
- staged motor accidents, where two offenders crash vehicles into each other and make claims for damage to the vehicles and for (fictitious) injuries to the drivers and passengers.
- fraudulent arson, where offenders burn down their premises in order to claim on insurance policies.

Supplier fraud

128. Builders, motor repairers and other trades-people are engaged by insurers to repair insured property. Supplier fraud involves such trades-people charging an insurance company for work that they have not done or inflating the cost of their work.

Obtaining Credit through Fraud

129. Obtaining credit through fraud includes the fraudulent obtaining of:

- mortgages;
- loans;
- interest free credit;
- in-store credit;
- goods or services on a 'buy now pay later' basis;
- car finance;
- credit cards;
- store cards; and
- bank accounts (with overdrafts).

The offences

130. The principal offences likely to be used to prosecute obtaining credit through fraud are:

Fraud, contrary to section 1 of the Fraud Act 2006; or

False accounting, contrary to section 17 of the Theft Act 1968.

The Panel's proposals

131. The Panel has produced one guideline to cover fraud against HMRC, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud to ensure that there is consistency regardless of the type of fraud being sentenced.

132. Whilst the Panel has compiled one table for these frauds, not all of the starting points and ranges will be applicable to each type of fraud:

- it is unlikely that more than £20,000 could be obtained in a single fraud against HMRC in circumstances where the offender's intention was not fraudulent from the outset or where the claim was exaggerated;
- it is unlikely that more than £100,000 could be obtained in a fraud against HMRC in circumstances where the offender's intention was not fraudulent from the outset
- it is unlikely that more than £100,000 could be obtained in a benefit fraud unless the offence was professionally planned and either carried out over a significant period of time or through multiple frauds;
- it is unlikely that more than £20,000 could be obtained in a single benefit fraud; and
- a payment card or bank account fraud is unlikely to be committed in circumstances where the offender's intention was not fraudulent from the outset.

133. The Panel considers that there will be few cases where £100,000 or more is obtained in a single fraud. Similarly, it is likely that there will be few cases where less than £20,000 is obtained in a professionally planned fraud carried out over a significant period of time or multiple professionally planned frauds. Accordingly, the Panel has not proposed starting points and ranges for such frauds.

134. The Panel's proposed starting points are based on both the nature of the fraud and the amount that the offender intended to obtain. Further, the proposed starting points and ranges are intended to reflect the re-evaluation of the seriousness of fraud offences set out in *Mills and Kefford* (see paragraphs 71 to 73 above).

Recommendation 5

In order to ensure consistency when sentencing frauds of a similar nature, there should be a single guideline to cover fraud against HMRC, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud.

Factors in sentencing

Mismatch between culpability and harm

135. In many fraud cases the harm that results from an offence is greater than that intended by the offender or the offender intends more harm than actually results. As noted in paragraph 10 above, in all such cases harm should be judged in light of the offender's culpability.⁹⁶ As the Panel's proposals are based on the amount of money obtained, the sentencing court should take the starting point corresponding to the amount that the offender dishonestly intended to obtain and adjust the assessment of seriousness to reflect the degree of loss actually caused by the offence. Common situations include:

- *no loss intended*: in many cases of obtaining credit through fraud, the offender does not intend to cause any loss: he or she intends to repay any sums advanced or to keep the bank account in credit. An example of this is *Hussain*,⁹⁷ in which the offender attempted to obtain a mortgage by fraudulently claiming not to have another mortgage. Later events showed that had he made an honest application, the mortgage would have been granted. Whilst, in such a case, the offender does not intend to cause any harm, it may be a matter

of fortune whether or not the lender suffers financial loss. Accordingly, the sentencing court should take the starting point corresponding to no financial loss and, where such loss occurs, adjust the assessment of seriousness to reflect the degree of loss.

- *no actual loss*: in some insurance fraud cases,⁹⁸ an offender may present a fraudulent claim to an insurer but the insurer, suspecting fraud, does not pay out any money. In these cases, although the insurer suffers no financial loss, it is possible to calculate the amount of money which the offender dishonestly intended to obtain. Accordingly, in such cases a sentencing court should take the starting point corresponding to the amount which the offender intended to obtain and adjust the assessment of seriousness to reflect the fact that no loss has been caused.
- *legitimate entitlement to part or all of the amount obtained*: in some cases an offender may be entitled honestly to all or part of the money that is fraudulently obtained. This is a feature of all exaggerated claims (see paragraph above) but may arise in other cases. For example, in *Parmer*⁹⁹ the offender dishonestly obtained £36,179.14 in benefits but was unaware that, had she been honest, she could have legitimately claimed approximately £19,000 in tax credits. In such cases, the harm actually caused by the offence is the amount to which the offender was not legitimately entitled.

⁹⁶ See fn.13, supra, para.1.17

⁹⁷ [2002] EWCA Crim 829

⁹⁸ This is not limited to insurance frauds: it covers any situation in which an unsuccessful fraudulent claim is made.

⁹⁹ [2006] EWCA Crim 979; see also *Leaf* [2007] EWCA Crim 802 at [21]

Prevalence and deterrence

136. The Court of Appeal has commented that benefit frauds¹⁰⁰ and payment card or bank account frauds¹⁰¹ are prevalent and that accordingly a deterrent element may need to be incorporated into sentences. However, as noted at paragraph 93 above, caution is needed when considering issues of prevalence.

Use of another person's identity

137. The Panel has indicated (at paragraphs 19 to 21 above) that it believes use of another person's identity is an aggravating factor. Whilst this factor may be present in any fraud, it is a feature of nearly all payment card and bank account frauds.¹⁰² Courts should therefore depart from the suggested starting points in all cases of payment card and bank account fraud (and any other case in which it arises) to reflect the presence of this aggravating factor.

The Panel's proposals

138. The Panel's proposed guideline for sentencing fraud against HMRC, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud is set out below. Common aggravating and mitigating features are set out in Annexes B and C. For these categories of fraud, confiscation is an important part of the sentencing response and a confiscation order should be imposed wherever possible. Similarly, if appropriate, a compensation order should be made in all cases where there is an identifiable victim or victims.

139. The definitions of 'starting point', 'sentencing range' and 'first time offender' are set out in Annex D. As the Panel's proposals for these offences are governed by bands based on amounts of money, the Panel has defined the starting point at the top of each column as relating to the midpoint of each financial band.

140. The guideline includes starting points for a single fraud; this is **not** intended to cover situations where one false declaration or a failure to disclose a change in circumstances results in multiple payments – cases of this nature should be regarded as multiple offending.

141. One of the determinants of offence seriousness in the proposed guideline is *the amount obtained or intended to be obtained* as a result of the offence. Where the amount the offender intended to obtain cannot be established, the appropriate measure will be the amount that was likely to be achieved in all the circumstances.

142. The maximum penalty for most of the offences covered by this guideline is 7 years imprisonment. Where fraud under the 2006 Act is charged and the maximum penalty is 10 years, the proposed sentencing ranges leave headroom for offences involving multi-million pound frauds to be sentenced outside the range and up to the maximum.

¹⁰⁰ *Graham and Whatley* [2005] 1 Cr App R (S) 115; *Bendris* [2000] 2 Cr App R (S) 382

¹⁰¹ *Chirila* [2005] 1 Cr App R (S) 93

¹⁰² In most cases the offender claims to be the account holder or a person authorised to deal with the account.

Fraud against HM Revenue and Customs, Benefit Fraud, Payment Card and Bank Account Fraud, Insurance Fraud and Obtaining Credit through Fraud

Fraud (Fraud Act 2006, section 1): dishonestly making a false representation, failing to disclose information or abusing a position with the intent to bring about a gain for any person or to cause loss or a risk of loss to another.

False accounting (Theft Act 1968, section 17): dishonestly, with a view to gain for any person or with intent to cause loss to another, destroying, defacing, concealing or falsifying any record or document made or required for an accounting purpose or in furnishing information for any purpose produces such a record or document knowing it to be misleading, false or deceptive.

Fraudulent evasion of VAT (Value Added Tax Act 1994, section 72(1)): being knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by any person.

False statement for VAT purposes (Value Added Tax Act 1994, section 72(3)): producing, furnishing or sending or otherwise making use of a document which is false in a material particular for VAT purposes with intent to deceive, or in furnishing any information for VAT purposes making a statement knowing or being reckless as to whether it is false in a material particular.

Conduct amounting to an offence (Value Added Tax Act 1994, section 72(8)): where a person's conduct during a specified period must have involved the commission of one or more offences under section 72(1) or (3).

Fraudulent evasion of income tax (Finance Act 2000, section 144): being knowingly concerned in the fraudulent evasion of income tax by any person.

Evasion of excise duty (Customs and Excise Management Act 1979, section 170(1) (a) (i), (ii), (b)): knowingly acquiring possession of goods which have been unlawfully removed from a warehouse or Queen's warehouse or goods on which duty has not been paid or being knowingly concerned in the carrying, removing, depositing, harbouring, keeping or concealing or dealing in any manner with any such goods, with intent to defraud Her Majesty of any duty.

Fraudulent evasion of excise duty (Customs and Excise Management Act 1979, section 170(2) (a)): being knowingly concerned in the fraudulent evasion or attempt at evasion of any duty chargeable on goods.

Fraudulent evasion of excise duty (Customs and Excise Management Act 1979, section 170B): being knowingly concerned in the taking of any steps with a view to the fraudulent evasion of any duty on any goods by any person.

Improper importation of goods (Customs and Excise Management Act 1979, section 50(1) (a), (2)): unshipping, landing, unloading, or removing from the place of importation, an approved wharf, examination station, transit shed or customs and excise station any goods on which duty has not been paid or assisting or being concerned in such activities, with intent to defraud Her Majesty of any duty.

False representation to obtain benefit (Social Security Administration Act 1992, section 111A(1)): dishonestly making a false statement or representation or producing or furnishing (or allowing to be produced or furnished) any document which is false in a material particular, with a view to obtaining any social security benefit for any person.

Failing to disclose a change in circumstances (Social Security Administration Act 1992, section 111A (1A)): dishonestly failing to give a prompt notification of a relevant change in circumstances which affects one's entitlement to a social security benefit, knowing that the change affects the entitlement.

Maximum penalty for fraud (prosecuted under the Fraud Act 2006): **10 years**. Maximum penalty for all other offences: **7 years**.

Failing to disclose a change in circumstances (Social Security Administration Act 1992, section 111A (1B)): dishonestly causing or allowing another person to fail to give a prompt notification of a relevant change in circumstances which affects that person's entitlement to a social security benefit, knowing that the change affects the other person's entitlement.

Failing to disclose a change in circumstances (Social Security Administration Act 1992, section 111A (1D)): being the recipient of another person's social security benefit, dishonestly failing to give a prompt notification of a relevant change in the other person's circumstances, knowing that the change affects the other person's entitlement to the benefit.

Failing to disclose a change in circumstances (Social Security Administration Act 1992, section 111A (1E)): being the recipient of another person's social security benefit, dishonestly causing or allowing the other person to fail to give a prompt notification of a relevant change in circumstances, knowing that the change affects the other person's entitlement to the benefit.

Tax credit fraud (Tax Credits Act 2002, section 35): being knowingly concerned in any fraudulent activity undertaken with a view to obtaining payment of a tax credit by any person.

All offences are triable **either way**.

Fraud against HM Revenue and Customs, Benefit Fraud, Payment Card and Bank Account Fraud, Insurance Fraud and Obtaining Credit through Fraud

Nature of offence	Amount obtained or intended to be obtained				
	£750,000 £500,000 or more	£300,000 £100,000 or more and less than £500,000	£60,000 £20,000 or more and less than £100,000	£12,500 £5,000 or more and less than £20,000	£2,500 Less than £5,000
Fraudulent from the outset, professionally planned and either fraud carried out over a significant period of time or multiple frauds	Starting point: 5 years Range: 4 to 7 years	Starting point: 4 years Range: 3 to 5 years	Starting point: 2 years Range: 18 months to 3 years		
Fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds	Starting point: 4 years Range: 3 to 7 years	Starting point: 3 years Range: 2 to 4 years	Starting point: 15 months Range: 18 weeks to 30 months	Starting point: 12 weeks Range: Community order (HIGH) to 12 months	Starting point: Community order (HIGH) Range: Community order (LOW) to 6 weeks
Not fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds	Starting point: 3 years Range: 2 to 6 years	Starting point: 2 years Range: 12 months to 3 years	Starting point: 36 weeks Range: 12 weeks to 18 months	Starting point: 6 weeks Range: Community order (MEDIUM) to 26 weeks	Starting point: Community order (MEDIUM) Range: Fine (Band C) to Community order (HIGH)
Single fraud, fraudulent from the outset			Starting point: 26 weeks Range: 6 weeks to 12 months	Starting point: Community order (HIGH) Range: Fine (Band C) to 18 weeks	Starting point: Community order (LOW) Range: Fine (Band B) to Community order (MEDIUM)
Single fraud, not fraudulent from the outset			Starting point: 12 weeks Range: Community order (MEDIUM) to 36 weeks	Starting point: Community order (MEDIUM) Range: Fine (Band B) to 6 weeks	Starting point: Fine (Band C) Range: Fine (Band A) to Community order (LOW)

Common aggravating and mitigating factors are set out in Annexes B and C.

Additional aggravating factors (duty evasion):

Making repeated importations, particularly in the face of warnings from the authorities
Dealing in goods with an additional health risk because of possible contamination
Disposing of goods to under-aged purchasers

SUMMARY OF RECOMMENDATIONS

Recommendation 1

Using the identity of another person makes a fraud offence more serious; whether the identity belongs to a living victim or a deceased person is not relevant to the assessment of offence seriousness. The important considerations are the degree of planning involved and the consequential impact on the victim or relatives of the deceased.

Recommendation 2

For sentencing purposes, whether the claim that formed the basis of an offence was, on the one hand, exaggerated or, on the other hand, wholly fraudulent, is not relevant.

Recommendation 3

For a first offender convicted of fraud, a non-custodial sentence is likely to be more appropriate than a short custodial sentence.

Recommendation 4

A fine normally should not be imposed alongside a custodial sentence for a fraud offence. Exceptions may arise where neither a confiscation order nor a compensation order is being made and the offender has, or will have, resources from which the fine can be paid. The court must ensure that the overall sentence remains commensurate with the seriousness of the offence and that the size of the fine does not enable wealthier offenders to buy themselves 'out of custody'.

Recommendation 5

In order to ensure consistency when sentencing frauds of a similar nature, there should be a single guideline to cover fraud against HMRC, benefit fraud, payment card and bank account fraud, insurance fraud and obtaining credit through fraud.

STATUTORY DEFINITIONS AND MAXIMUM PENALTIES FOR FRAUD OFFENCES INCLUDED IN THIS ADVICE

Offence	Statutory provision	Definition	Maximum custodial term in the Crown Court	Maximum custodial term in a Magistrates' Court	Financial reporting order available?
Fraud	Fraud Act 2006, s. 1	Dishonestly: making a false representation; failing to disclose information; or abusing a position, intending to make a gain for any person or cause a loss, or risk of loss, to another person.	10 years	6 months	Yes
Obtaining services dishonestly	Fraud Act 2006, s. 11	Dishonestly obtaining a service for any person by a dishonest act: where the services are available on the basis that payment is made before, during or after receiving them, knowing that the services are or might be being made available on that basis, not paying in full, and intending not to pay in full	5 years	6 months	Yes
False accounting	Theft Act 1968, s. 17	Dishonestly: destroying, defacing, concealing or falsifying any account, record or document made or required for any accounting purpose; or when providing information for any purpose, producing or using any account, record or document made or required for any accounting purpose, knowing it is misleading, false or deceptive, with a view to creating a gain for oneself or another person or with intent to cause loss to another person.	7 years	6 months	Yes
Possession of articles for use in fraud	Fraud Act 2006, s. 6	Possessing or having under one's control any article for use in the course of or in connection with any fraud.	5 years	6 months	No

Offence	Statutory provision	Definition	Maximum custodial term in the Crown Court	Maximum custodial term in a Magistrates' Court	Financial reporting order available?
Making or supplying articles for use in frauds	Fraud Act 2006, s. 7	Making, adapting, supplying or offering to supply any article: knowing that it is designed or adapted for use in the course of or in connection with any fraud; or intending it to be used to commit, or assist in the commission of, fraud.	10 years	6 months	No
VAT evasion	Value Added Tax Act 1994, s. 72	Being knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of VAT by any person. OR Producing, furnishing, sending or otherwise making use of any document which is false in a material particular for VAT purposes, or In furnishing any information for VAT purposes making any statement knowing it to be false in a material particular or making a statement that is false in a material particular. OR Where a person's conduct during any specified period must have involved the commission by him of one or more offences under this section.	7 years	6 months	Yes
Income tax evasion	Finance Act 2000, s. 144	Being knowingly concerned in the fraudulent evasion of income tax by any person.	7 years	6 months	Yes

Offence	Statutory provision	Definition	Maximum custodial term in the Crown Court	Maximum custodial term in a Magistrates' Court	Financial reporting order available?
Excise duty evasion	Customs and Excise Management Act 1979, s. 170	Knowingly acquiring possession of goods which have been unlawfully removed from a warehouse or Queen's warehouse or goods which are chargeable with a duty which has not been paid, or being in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods with intent to defraud Her Majesty of any duty payable on the goods. OR Being knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable on any goods.	7 years	6 months	Yes
Taking preparatory steps for evasion of excise duty	Customs and Excise Management Act 1979, s. 170B	Being knowingly concerned in the taking of any steps with a view to the fraudulent evasion, by any person, of any duty of excise on any goods.	7 years	6 months	No
Improper importation of goods	Customs and Excise Management Act 1979, s. 50	With intent to defraud Her Majesty of any duty: unshipping or landing in any port or unloading from any aircraft in the United Kingdom or from any vehicle in Northern Ireland any goods chargeable with a duty which has not been paid, or assisting or being otherwise concerned in such unshipping, landing or unloading; or removing from their place of importation or from any approved wharf, examination station, transit shed or customs and excise station any goods chargeable with a duty which has not been paid, or assisting or being otherwise concerned in such removal.	7 years	6 months	No

Offence	Statutory provision	Definition	Maximum custodial term in the Crown Court	Maximum custodial term in a Magistrates' Court	Financial reporting order available?
Benefit fraud offences	Social Security Administration Act 1992, s. 111A	<p>Dishonestly making a false statement or representation or producing or furnishing or allowing to be produced or furnished any document or information which is false in a material particular with a view to obtaining any benefit or other payment or advantage for any person.</p> <p>OR</p> <p>Dishonestly failing to give a prompt notification or causing or allowing another person to fail to give a prompt notification of a change in circumstances affecting the entitlement of any person to any benefit or other payment or advantage, knowing that the change affects an entitlement to such a benefit or other payment or advantage.</p> <p>OR</p> <p>Where there has been a change of circumstances affecting any person's claim to any benefit or other payment or advantage under which the 'recipient' has a right to receive payments:</p> <p>the recipient dishonestly fails to give prompt notification of the change in circumstances; or</p> <p>causing or allowing the recipient to fail to give a prompt notification of the change in circumstances.</p>	7 years	6 months	No
Tax credit fraud	Tax Credits Act 2002, s. 35	Being knowingly concerned in any fraudulent activity undertaken with a view to obtaining payment of a tax credit by any person.	7 years	6 months	Yes

AGGRAVATING AND MITIGATING FACTORS MOST LIKELY TO BE PRESENT IN FRAUD OFFENCES

Aggravating Factors

Factors indicating higher culpability

- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence (including any physical harm or risk of physical harm)
- Offenders operating in groups or gangs
- 'Professional offending'
- High level of profit from the offence
- Deliberate targeting of vulnerable victim(s)
- Abuse of a position of trust
- Offending carried out over a significant period of time

Factors indicating a more than usually serious degree of harm

- Multiple victims
- Use of another person's identity
- Victim is particularly vulnerable
- Offence has lasting effect on the victim
- High value (including sentimental value) of property to the victim, or substantial consequential loss

Mitigating Factors

Factors indicating significantly lower culpability:

- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence
- Behaviour not fraudulent from the outset
- The offender was given misleading or incomplete advice

Offender Mitigation

- Voluntary cessation of offending
- Complete and unprompted disclosure of the extent of the fraud
- Voluntary restitution
- Exceptional pressure that is not of the offender's own making

AGGRAVATING AND MITIGATING FACTORS IDENTIFIED IN THE SENTENCING GUIDELINES COUNCIL GUIDELINE 'OVERARCHING PRINCIPLES: SERIOUSNESS'

Aggravating factors

Factors indicating higher culpability:

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences
- Offence was racially or religiously aggravated
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- 'Professional' offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it
- Deliberate targeting of vulnerable victim(s)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Abuse of power
- Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim
- Victim is particularly vulnerable

-
- Location of the offence (for example, in an isolated place)
 - Offence is committed against those working in the public sector or providing a service to the public
 - Presence of others e.g. relatives, especially children or partner of the victim
 - Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
 - In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Mitigating factors

Factors indicating significantly lower culpability:

- A greater degree of provocation than normally expected
- Mental illness or disability
- Youth or age, where it affects the responsibility of the individual defendant
- The fact that the offender played only a minor role in the offence

Personal mitigation

- Genuine remorse
- Admissions to police in interview
- Ready co-operation with authorities

MEANING OF "RANGE", "STARTING POINT" AND "FIRST TIME OFFENDER" WITHIN SENTENCING GUIDELINES COUNCIL GUIDELINES

A Council guideline is generally for a *first time offender* convicted after a trial. It commonly provides a *Starting point* based on an assessment of the seriousness of the offence and a *range* within which sentence will normally fall.

A clear, consistent understanding of each of these terms is essential and the Council and the Sentencing Advisory Panel have agreed the following definitions.

They are set out in a format that follows the structure of a sentencing decision which identifies first those aspects that affect the assessment of the seriousness of the offence, then those aspects that form part of personal mitigation and, finally, any reduction for a guilty plea.

In practice, the boundaries between these stages will not always be as clear cut but the underlying principles will remain the same.

In accordance with section 174 of the Criminal Justice Act 2003, a court is obliged to "*state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed*".

In particular, "*where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate and the sentence is of a different kind, or is outside that range*" the court must give its reasons for imposing a sentence of a different kind or outside the range.

Assessing the seriousness of the offence

A typical Council guideline will apply to an offence that can be committed in a variety of circumstances with different levels of seriousness. It will apply to a **first time offender** who has been convicted after a trial. Within the guidelines, a **first time offender** is a person who does not have a conviction which, by virtue of section 143(2) of the Criminal Justice Act 2003, must be treated as an aggravating factor.

As an aid to consistency of approach, a guideline will describe a number of types of activity falling within the broad definition of the offence. These will be set out in a column generally headed "type/nature of activity".

The expected approach is for a court to identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed. This will identify a **starting point** from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the *offence* (beyond those contained in the description itself) to reach a **provisional sentence**.

The range is the bracket into which the **provisional sentence** will normally fall after having regard to factors which aggravate or mitigate the seriousness of the offence. The particular circumstances may, however, make it appropriate that the **provisional sentence** falls outside the **range**.

Where the offender has previous convictions which aggravate the seriousness of the current offence, that

may take the **provisional sentence** beyond the **range** given particularly where there are significant other aggravating factors present.

Personal Mitigation

Once the **provisional sentence** has been identified (by reference to the factors affecting the seriousness of the **offence**), the court will take into account any relevant factors of **personal** mitigation. Again, this may take the provisional sentence outside the range.

Reduction for guilty plea

Where there has been a guilty plea, any reduction attributable to that plea will be applied to the sentence at this stage. This reduction may take the sentence below the **range** provided.

Sentencing Guidelines Council
Sentencing Advisory Panel
May 2007

THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 16 August 2007. The Panel's provisional view on sentencing guidelines for fraud offences were set out.

Copies of the consultation paper were sent to 211 individuals and organisations including the Panel's 33 regular consultees and Resident Judges at each Crown Court Centre in England and Wales. It was also published on the Panel's website and in the Justice of the Peace journal. 28 responses were received.

Responses were received from the following:

APACS
Association of British Insurers
Association of Chief Police Officers
CIFAS
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Department for Work and Pensions, Fraud Error Strategy Division
Fraud Advisory Panel
HM Revenue and Customs Prosecutions Office
Justices' Clerks' Society
Law Society
Magistrates' Association
Police Federation of England and Wales
Serious Fraud Office
Serious Organised Crime Agency

Responses were also received from:

Dennis A. Clarke (private individual)
Neil Corré (barrister)
Dyfed-Powys Police
Anthony Edwards (defence solicitor and member of the Sentencing Guidelines Council)
Government Fraud Review Team
Identity Fraud Steering Committee
London Criminal Courts Solicitors' Association
Manchester Crown Court Bench
NHS Counter Fraud and Security Management Service
Annewen Rowe (in her capacity as a private individual and member of the Sentencing Guidelines Council focus group)
George Tranter (solicitor and former Justices' Clerk)

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of Appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Andrew Ashworth (Chairman)

His Honour Judge Anthony Ansell

His Honour Judge Philip Clegg

John Crawford OBE

Ms Joanna Wallace

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joan Webster QPM

Christopher Woolley

The Sentencing Advisory Panel can be contacted at: 4th floor, 8-10 Great George Street, London SW1P 3AE
(Telephone: 020 7084 8130; Fax: 020 7084 8114; e-mail: info@sentencing-guidelines.gsi.gov.uk)

Head of Sentencing Guidelines Secretariat: Kevin McCormac OBE
Secretary to the Panel: Mrs Lesley Dix

