Turning the tide on Corporate Fraud

Report and Recommendations from
The Shadow Attorney General's Office

September 2022

Labour

Foreword

Fraud is now the UK's most commonly-experienced crime. An already lucrative and low-risk source of ill-gotten gains, it exploded during the pandemic, from scam artists robbing online shoppers to fake companies ripping off the Treasury's support schemes. In the face of this escalating crisis, the response from the government has been frankly pathetic: no sense of prioritisation; no serious new strategy; and nothing like the required resources.

The government cannot even provide an official estimate of the total amount of fraud in the UK, or say how much of it is being perpetrated from overseas, with each minister telling us that it was someone else's job to answer those questions. The Royal United Services Institute rightly concluded last year that there was a *"responsibility vacuum"* on the issue, with *"fraud continuing to be everybody's problem but nobody's priority"*.

No wonder the government's own counter-fraud minister, Lord Agnew, resigned in January, criticising the *"arrogance, indolence and ignorance"* he saw from his colleagues on the issue, and saying the Treasury in particular had *"no knowledge, or little interest in, the consequences of fraud to our economy or society"*. And what has the new Prime Minister's response been? To appoint as Chancellor a man who said in February that fraud was not a *"crime that people experience in their day-to-day lives"*.

It is time for real change. We need a government that will get a grip on this epidemic of economic crime, and that must start at the top by tackling corporate fraud, where the most sophisticated methods are used to steal the largest sums. In 2013, in my first spell as Shadow Attorney General, I produced a comprehensive blueprint on how to tackle this problem, including wholesale reform of our laws on corporate criminal liability.

But the government refused to act. In the nine years since that paper, the Serious Fraud Office has convicted *just seven* companies. Mired in scandal, after a series of botched prosecutions, the SFO now routinely seeks to negotiate settlements with corporate fraudsters instead of prosecuting them, waving the white flag to white collar crime.

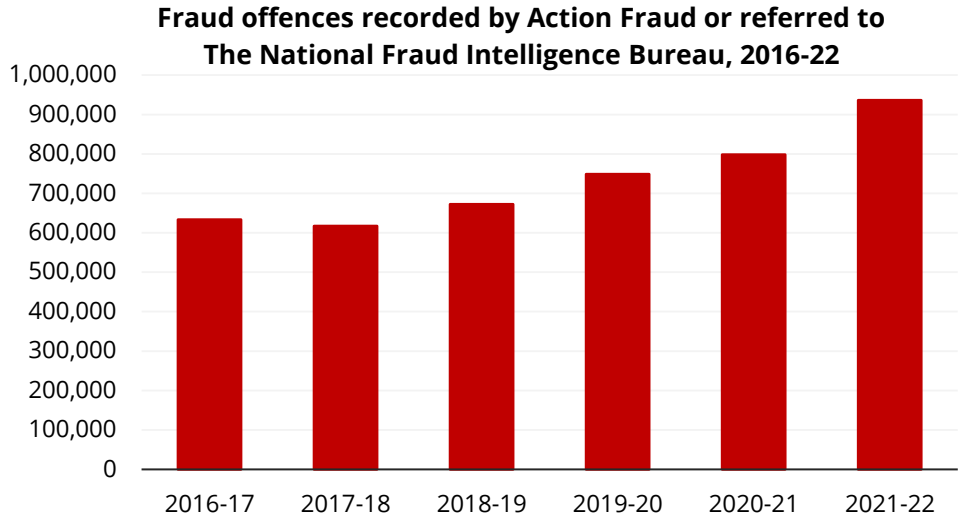
But as we set out in this new paper, it does not have to be this way. Many of the conclusions are similar to those I reached in 2013, but the scale and complexity of the problem is far greater, and the need for action more urgent than ever if we are to avoid losing another decade in the battle against corporate fraud.

The Rt Hon Emily Thornberry MP
Shadow Attorney General

Box 1: Fraud in the UK

According to the Cabinet Office, *"fraud is the most commonly experienced crime in the UK, accounting for around 40% of all crime."* Respondents to the latest Crime Survey for England and Wales said they had suffered a total of 4.5 million instances of fraud in the year ending March 2022, a 25% increase compared to the year ending March 2020.

While the number of fraud offences reported for action to the authorities is inevitably much lower, the same sharp increase is visible, which may have been exacerbated by the period of Covid-19 lockdowns, but has clearly been sustained beyond them.



Despite the extensive evidence of an increase in fraud offences in recent years, and an increase in the percentage of the population who are victims of fraud, there are – inexplicably and unforgivably – no official, comprehensive, up to date estimates of the total amount of money lost to fraudsters each year in the UK.

The government stopped producing such data after then Home Secretary Theresa May scrapped the National Fraud Authority in 2013. Since then, the best available estimates have come from the UK Fraud Costs Measurement Committee, a group of legal, academic and insurance experts from Crowe LLP, the University of Portsmouth, and Experian PLC.

The UKFCMC's most recent estimate, published in 2017 and relying on data from as far back as 2014, put the overall annual cost of fraud to the UK at £190 billion, with losses to the private sector at £140bn, the public sector at £40bn and individuals at £6.8bn.

A new estimate is due to be published by the UKFCMC later this year, which should start to reflect the steep increase in the rate of fraud in the UK seen since the start of the pandemic, particularly given the spike in thefts from ordinary consumers shopping online during lockdown, and the losses suffered by the Treasury's Covid support schemes.

Welcome as that new estimate will be, it remains unacceptable that the government is incapable of producing any official, comprehensive data of their own in this vital area.

1. Introduction

Throughout the 1970s and 1980s, a wave of corporate fraud cases hit the UK, casting real doubt on the reputation and reliability of the UK as a financial centre and location for investment. The scale of fraud in the City of London led then Lloyds executive Ian Hay Davis to say: *"it wasn't just a matter of a few rotten apples. The whole barrel was tainted"*.

A 1986 report by Lord Roskill made clear that a new body was needed to tackle this crisis, and that led directly to the establishment of the Serious Fraud Office (SFO) to manage the investigation and prosecution of major economic crimes. The creation of such a body was the right response to what had gone before, but it was beset by problems from the outset.

In 2013, the Shadow Attorney General's Office – led then, as now, by Emily Thornberry – produced a green paper reviewing the performance of the SFO, examining the underlying problems that were hampering its effectiveness, looking at how similar agencies abroad dealt with the same problems, and making recommendations for change.

Key conclusions from Labour's 2013 review

Labour's 2013 green paper catalogued a series of mishandled cases and botched prosecutions managed by the SFO over the previous two and a half decades, which had damaged the reputation of the organisation, wasted millions in taxpayers' money, and allowed too much corporate fraud to go unpunished.

But while acknowledging the failures of management and basic errors of judgement that had often littered these cases, Labour's review identified a much more fundamental problem, namely that the SFO had been given the responsibility to tackle corporate fraud, but had never been given adequate laws to enforce or sufficient resources to succeed.

In particular, the SFO had been hamstrung from the outset by the 'identification principle' that governed its ability to hold companies liable for the fraud committed by their employees. This principle – which remains in place today – stipulates that only the acts of the most senior executives, deemed to be the 'controlling mind and will' of a company, can be attributed to the companies themselves in cases of corporate fraud.

In an era of multinational corporations, with layers of management and devolved decision-making stretching across multiple business sectors and geographical locations, the idea that the most senior executives had direct control – or even direct knowledge – of all the activities going on beneath them belonged to a bygone age, as most notoriously seen within the world's major banks during the 2008 financial crisis.

Labour's paper reviewed best practice from overseas, ranging from US prosecutors in New York to corporate fraud investigators in Australia and the Netherlands, all resting on a combination of more stringent laws and better resourcing, and all of which appeared to produce better results in areas where the SFO was failing.

This led to a series of recommendations, including most notably proposals to ditch the outdated 'identification principle' in favour of a new tougher definition of corporate

criminal liability, and to pursue new methods of resourcing the SFO's future investigations by allowing it to keep a greater share of the proceeds of successful prosecutions.

Key developments since Labour's 2013 review

As we will explore in **Section 2** of this report, corporate fraud has grown even larger in scale and more difficult to investigate over the past decade, thanks to an increasingly transnational financial system, the rapid pace of technological developments, and the greater exposure of public funds to fraud as the contracting out of services has grown.

In **Section 3**, we will examine the ways the SFO and – by extension – the UK government has responded to these challenges over the past decade, almost consciously going in the opposite direction to that proposed in Labour's 2013 paper, with the effective decriminalisation of corporate fraud, and increased reliance on negotiated settlements.

In **Section 4**, we will look at the recent scandals that have engulfed the SFO over the Unaoil and Serco cases, and the external reviews that have taken place in response, all serving to highlight the fact that the failings that have beset the organisation from the outset, and the fundamental problems underlying those failings, are still as stark as ever.

And finally, in **Section 5**, we will look afresh at the analysis made in Labour's 2013 paper, and set out updated conclusions and recommendations as to how a future Labour government would set about fixing the fundamental problems that have affected the SFO for too long, and enable it finally to start turning the tide on corporate fraud.

Box 2: Why Corporate Fraud Matters

In its oversight of the Serious Fraud Office, and its lack of response to the serial problems facing the organisation, the current government has shown that it does not regard white collar crime as a priority, and has been content to see the effective decriminalisation of corporate fraud over the last decade.

As set out in this paper, a future Labour government would treat corporate fraud with the seriousness it deserves, and take concrete steps to toughen the investigation and punishment of those responsible. We would do so for five main reasons, as set out below.

1. Protecting the rule of law

It is not acceptable that wealthy companies and the senior executives who run them are able to get away with wilful acts of theft or misappropriation, for which others without the same resources would go to jail. As a matter of principle, it is simply wrong that – at present – the wealth of corporate fraudsters will all too often allow them to reach a financial settlement with the SFO, rather than facing the same justice as other criminals.

2. Protecting our national prosperity

Even in difficult economic times, one of our greatest strengths as a country is that the UK remains a reliable and reputable place for companies to do business and invest money, but that depends on the maintenance of a robust system of regulation and enforcement against financial crime. It is essential therefore that the majority of businesses who play by the rules are not undermined with impunity by the minority who break them.

3. Protecting our workers and jobs

Company employees are often the innocent victims of the corporate fraud being carried out by their bosses, from the embezzling of hard-earned pension funds to the jobs put at risk when companies whose finances are being mismanaged eventually and inevitably collapse. The current SFO investigation into the owners of Liberty Steel highlights the risks that alleged fraudulent activity can pose, even for good jobs in a key strategic industry.

4. Protecting the public finances

The more that public services have been contracted out in recent years, the greater the risk that public money will be stolen by the companies awarded those contracts, and that delivery of the services will be compromised. That risk has come to fruition in various ways in the past decade, from Serco defrauding the Ministry of Justice over electronic tagging contracts to the Skills Funding Agency paying millions for ghost apprenticeships.

5. Protecting our national security

One of the biggest drivers of fraudulent activity in recent years has been the attempts by rogue states, organised crime organisations and terrorist groups to avoid restrictions on their ability to transfer money around the world. From HSBC helping to launder money for Mexican drug cartels to Standard Chartered processing hundreds of millions of dollars for sanctioned regimes, white collar crime remains an important threat to global security.

2. The current scale and nature of the task

The scale of the task facing the Serious Fraud Office has grown even greater since the green paper published by Labour in 2013, for three key reasons as set out below. All are familiar problems that have dogged the SFO since its outset, but each one has grown significantly more challenging over the last decade.

Coping with increased globalisation

As was pointed out in Labour's 2013 paper, the complex multinational corporate structures and global flows of capital that are a feature of the modem economy have made it increasingly easy for white collar criminals to steal funds, launder money, hide profits, and avoid taxes without anyone knowing they are doing it, let alone how or where.

The nature of the problem was well described by the SFO's current director Lisa Osofsky in her speech to the Royal United Services Institute in April 2019, when she said the *"increasingly transnational nature of serious economic crime"* makes it *"harder to trace and harder to detect in our 'shrinking world'"*.

Despite Covid, the value of global trade reached a new high of $28.5 trillion in 2021, some 13 percent higher than pre-pandemic levels. Citing the *"increased international mobility of goods and services, capital and people"*, the Bank of England has predicted global cross-border payments will reach $250tn by 2027, $100tn greater than in 2017.

With the UK home to the fourth most multinational headquarters in the world, behind only the US, Japan and China, there has also been increasing pressure on the SFO in recent years when companies headquartered in the UK are accused of fraud, but other overseas agencies often appear to outpace our own investigations into them.

The recent review into the botched Unaoil prosecution, discussed in **Section 4**, laid bare the strained relationships between the SFO and US investigators, ranging from a lack of communication in relation to overlapping extradition requests to difficult interpersonal issues between senior staff, all contributing to the woeful mishandling of the case.

Keeping pace with modern technology

It is a common complaint that law enforcement has been too slow in recent years to react to developing technology, and that has been particularly true in relation to economic crime, with the SFO and other agencies struggling to keep pace with the ways that fraud is being both committed and hidden, and often lacking the basic tools to do so.

One of the biggest practical difficulties over the past decade has been the mismatch between the huge volume of digital records that investigators at the SFO may have to process to assemble a case and the disclosure requirements they are operating under when bringing that case to trial, which were designed in a pre-digital age.

As shown by the recent review into the botched Serco prosecution, again discussed in **Section 4**, human error – compounded by poor quality assurance processes – is an

inevitable hazard when managing such vast quantities of data, and can lead to the collapse of cases where not all the correct material has been disclosed to the defence.

The increased risks from contracting out

The ever-expanding global opportunities in recent years for the private sector to secure public procurement contracts, including for public services, infrastructure projects and the movement of bulk goods, has led to increased opportunities for fraud against the public sector, with significant potential losses of public funds in the process.

This is a particular problem in the UK due to the scale of, and lack of effective controls over, outsourcing undertaken by the current government. Even prior to Covid, as seen most notably in Serco and G4S's delivery of Ministry of Justice contracts, the risk of fraud was already high, but the pandemic took those risks to a different level.

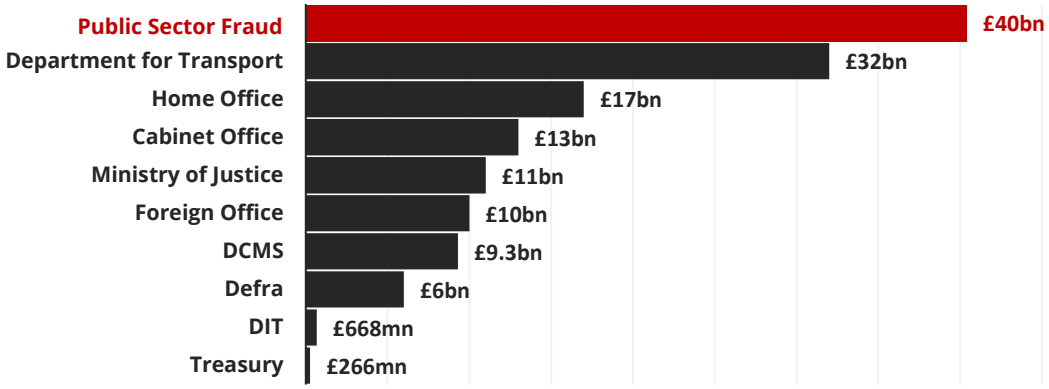
Box 3: Fraud against the public purse

Public sector fraud takes a wide variety of forms, from individuals submitting false benefits claims to large businesses skimming extra profit from government contracts.

Across the board, Covid-19 increased opportunities for public sector fraud, but there are worrying signs that the level of losses experienced during the pandemic have been sustained beyond it. For example, the Department of Work and Pensions has reported losses of £6.5bn to benefit fraud in 2021-22, up from £6.2bn in 2020-21.

As discussed in Box 1, there are no official, comprehensive, up to date estimates of the total levels of fraud in the UK, or any reliable breakdown of how much of it is committed against the public purse. But even looking at the UKFCMC's last report in 2017, and the pre-Covid estimate of £40bn for public sector fraud, we can see it is greater than the budget of nine major government departments as of mid-2021, as shown below.

UKFCMC Sector Fraud Estimates vs Departmental Budgets



Box 4: The government's failings on fraud

The government's lack of action in response to the problems gripping the Serious Fraud Office in recent years have been redolent of an attitude from ministers that treats fraud as a second-order issue, rather than as a serious threat to the nation's prosperity, security and public finances. That pattern has been seen in numerous ways as set out below.

Basic gaps in knowledge

Since the 2014 abolition of the National Fraud Authority, there has been no official, comprehensive estimate of the total amount of fraud being committed each year in the UK, let alone any accurate figures for how this cost is spread across different households and sectors. Neither is the government currently able to provide any estimate of the amount of fraud in the UK that is being perpetrated from overseas.

Ignoring the impact of fraud

In January, Boris Johnson told Parliament that crime had been cut by 14 percent, a figure which could only be accurate if fraud and computer misuse were excluded from the data. The head of the UK Statistics Authority wrote both to Johnson and Home Secretary Priti Patel criticising their *"misleading"* claims. Defending them, then-Business Secretary Kwasi Kwarteng said fraud was not a crime *"people experience in their day to day lives".*

Writing off billions

Also in January, it was confirmed that the Treasury was writing off £4.3bn of public money fraudulently claimed from emergency schemes during the pandemic. That triggered the resignation of the counter-fraud minister, Lord Agnew, who criticised the *"arrogance, indolence and ignorance"* of the government's approach to the issue, and said the Treasury had *"no knowledge, or little interest in, the consequences of fraud to our economy or society".*

Basic lack of resources

Even beyond the SFO, there has been a longstanding failure by the government to match the scale of fraud with the resources required to tackle it. In the first year of the pandemic, online fraud increased by one third, but the number of specialist fraud police officers rose by just six percent. Meanwhile, from 2015 to 2021, the number of CPS specialist fraud prosecutors fell by more than a quarter, from 224 to just 167.

Everybody's problem but nobody's priority

In all these areas, the government's response to the rising epidemic of fraud in the UK has simply confirmed the judgement reached last year by the Royal United Services Institute, which described *"a systemic 'responsibility vacuum'…with ownership of the problem fragmented across different departments and law enforcement and criminal justice agencies"*, and *"fraud continuing to be everybody's problem but nobody's priority."*

3. Waving the white flag on white collar crime

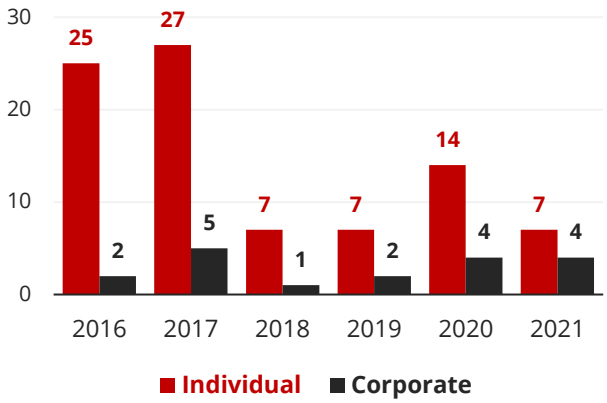
Faced with the increasing difficulty of prosecuting corporate fraud under the law as it stands, the government has not sought to change the law as Labour proposed in 2013, but has instead presided over the effective decriminalisation of corporate fraud.

Decline in prosecutions and convictions

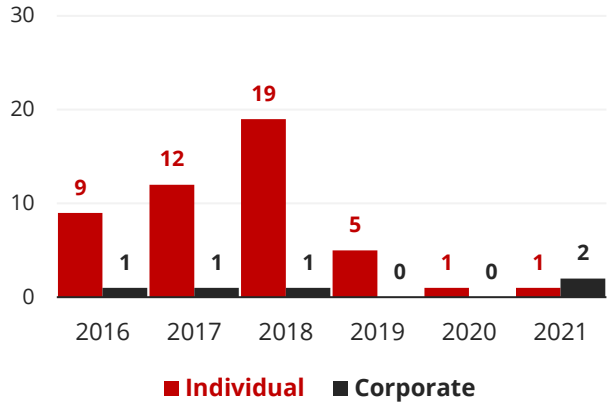
There is an element of chicken and egg in the SFO's record of prosecutions and convictions in recent years: are they obtaining fewer convictions because they are not bringing forward enough prosecutions, or are prosecutions declining because they have surrendered to the reality that convictions are too hard to obtain?

Either way, the statistics show a significant fall-off in the prosecution and conviction of individual fraudsters, and a total collapse in the prosecution and conviction of companies.

SFO Prosecutions, 2016-21



SFO Convictions, 2016-21



The disparity in prosecution and conviction numbers by year accounts for the delay between prosecution and conviction.

In the last six years, the number of convictions the SFO has obtained against companies can be counted on one hand, from 18 such prosecutions brought, and in two recent years, 2019 and 2020, the SFO failed to secure a single conviction against a rogue company.[1]

Rise in Deferred Prosecution Agreements

In 2014, the government introduced the use of Deferred Prosecution Agreements (DPAs), based in part on corporate law enforcement in the US, where DPAs are used alongside similar agreements such as plea bargains and Non-Prosecution Agreements as part of the suite of options available to enforcement agencies besides prosecution.

The intention behind the introduction of DPAs in the UK was that corporate fraudsters would admit their wrongdoing early, pay a fine, and agree to change their practices, in order to have their prosecution 'deferred'. In theory, if the company lapses on their side of the agreement, the SFO could then initiate a prosecution at a later date.

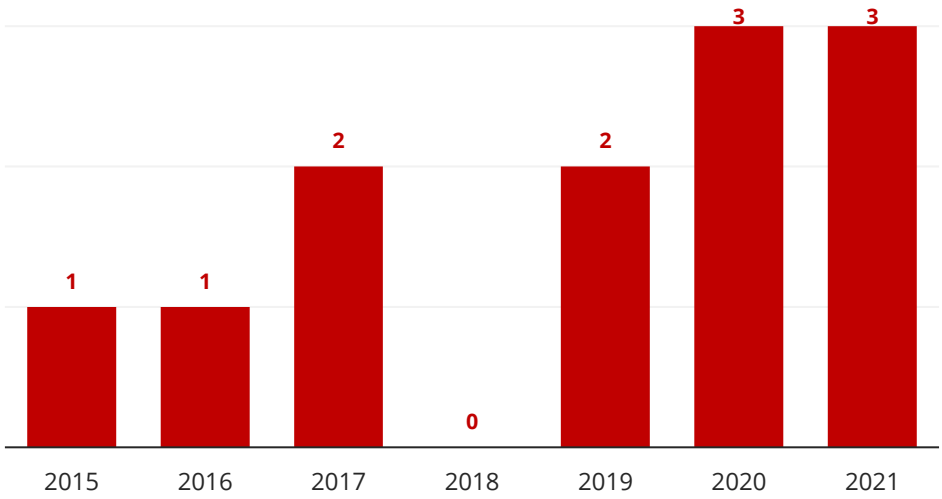
[1] Answers to Parliamentary Questions UINs 47336 and 47337, answered 20 September 2022.

The unspoken bargain at the heart of DPAs was that large companies could avoid the expense, upheaval, reputational damage and potential criminal penalties resulting from a full investigation and prosecution, and the SFO would avoid the risk of committing large amounts of staff resources, funds and time to a prosecution that might not succeed.

Nevertheless, when DPAs were introduced, the then-Solicitor General, Edward Garnier argued that they were *"not an alternative to prosecuting in serious cases"*, an argument that has been consistently echoed by ministers and the leadership of the SFO ever since.

Despite those assurances, the reality is that DPAs have become a crutch for the SFO as the rate of corporate convictions has collapsed. As can be seen in the chart below, the number of DPAs has outstripped the SFO's convictions of companies more than twofold in the last five years, with 11 signed between 2016 and 2021 alone.[2]

SFO Deferred Prosecution Agreements, 2015-2021



Ministers appear to have fundamentally misunderstood the way DPAs and other similar deals are used in the US justice system, where tough laws on liability give prosecutors a position of strength to negotiate meaningful agreements with companies, where appropriate. The UK has adopted the 'carrot' of DPAs without the 'stick' of strong laws.

It is also clear that, despite the assurances from ministers at the time, the shift to DPAs was inextricably linked with the lack of resources available to the SFO. Garnier, who led on the introduction of DPAs, later admitted in a 2015 interview with the Institute for Government that their introduction was a way to deal with the *"revenue hit"* taken by the SFO as a result spending cuts imposed by the post-2010 coalition government.

Punishments that rarely fit the crime

By international standards, the UK imposes weak financial penalties for corporate fraudsters, lagging behind the US in particular.

[2] Answer to Parliamentary Question UIN 127341, 2021-22. No DPAs were signed in 2014.

The largest criminal penalty obtained by the SFO to date was £47mn against Petrofac (see the box below), well short of the $1.2bn fine paid by Pfizer or the $957mn fine paid by GSK to the US Justice Department over respective charges of fraudulent marketing.

The record financial settlement secured by the SFO through a DPA resulted in a payment from Airbus in 2020 of up to €991mn, but France and the US split a €3.6bn sum between them as part of their settlement of the same case.

The DPA Code states that *"any financial penalty is to be broadly comparable to a fine that the court would have imposed…following a guilty plea"*. However, despite the guidelines recommending the same one-third reduction in the normal penalty in both instances, it is in fact common for DPAs to apply reductions of up to a half, meaning the Exchequer gains even less from a DPA settlement than from a prosecution with a guilty plea.

In some cases, including that of the Kazakh mining conglomerate ENRC, the SFO's mishandling of white collar crime has perversely led to successful civil lawsuits against the agency, with an as-yet undetermined payment from the SFO to ENRC that could reportedly run up to £70mn, almost 50 per cent larger than its biggest criminal fine.

Box 5: The Petrofac Case

From the Arms-to-Iraq Scandal to the Pergau Dam Affair, there is a long history in the UK of governments becoming embroiled in shady deals or turning a blind eye to law-breaking when trying to help British companies obtain contracts overseas, even when those companies are under investigation by their own enforcement agencies.

In 2021, the SFO convicted oil company Petrofac over a series of incidents between 2011 and 2017 when it had failed to prevent bribery in relation to attempts to win overseas contracts. Yet, throughout that period, numerous senior Tory politicians made their own efforts to try and help the company win lucrative contracts abroad.

In September 2017, *four months* after the SFO investigation was publicly announced, then Trade Secretary Liam Fox lobbied Bahrain's royal family in support of Petrofac's bid for a $5bn oil contract. At Fox's behest, then Prime Minister Theresa May had done the same two months before the SFO investigation was publicly announced, as had her predecessor David Cameron during a visit to Bahrain a month before that.

In April 2019, *a full two years* after the start of the investigation, UK Export Finance – the government's export credit agency, accountable at the time to Liam Fox – provided Petrofac with a £733mn loan guarantee for another oil project in Oman.

Petrofac's co-founder, Ayman Asfari, who was arrested, interviewed but not charged by the SFO in 2017 as part of the investigation, donated almost £800,000 to the Conservative Party between 2009-17, in personal donations made jointly with his wife.

Box 6: The loss of senior SFO staff to private law firms

One long-standing problem affecting the SFO's capacity to tackle corporate fraud has been the regularity with which senior investigators and prosecutors leave to work for private law firms. This has a doubly damaging impact, both robbing the SFO of experienced staff, and allowing their expertise to be used instead to advise corporate clients facing investigation for fraud and other economic crimes.

Major law firms where senior SFO staff have taken up posts since 2010 include Arnold & Porter, Covington & Burling, Freshfields Bruckhaus Deringer, Kingsley Napley, Kirkland & Ellis, McGuire Woods, Simmons & Simmons, Slaughter & May, Steptoe & Johnson and White & Case, all specialists in advising clients facing investigations into fraud.

Among those to take posts with such firms in that period have been former SFO Director, Sir David Green; two of the SFO's former General Counsel; four former heads or co-heads of its Bribery and Corruption divisions; two former heads of its Fraud Division; and the former heads of its Assurance Division and its International Assistance Division.

Labour research has identified at least 20 other SFO staff, mostly investigators and prosecutors, who have taken up posts with private law firms. Below are a small sample of the ways in which their services are advertised on their current employers' websites:

- *"Her significant experience as a prosecutor of financial crime at the SFO puts her in a unique position to assist those facing an investigation by the authorities."*
- *"He has significant experience of corporate self-reporting, was involved in the changes to the SFO's self-reporting processes, and helped introduce DPAs in the UK."*
- *"She brings a unique perspective of settling corporate resolutions from both positions, previously on behalf of the SFO, and now for corporate clients.*"
- *"Her prior experience at the SFO…enables her to provide insightful and strategic advice to both her corporate and high net worth clients at all stages of a case."*

From April 2015 to April 2022, Sir David Green was the only SFO employee whose new job was reviewed by the Advisory Committee on Business Appointments, which recommended a six-month delay before he took up post, and other restrictions on use of knowledge gained in his former role. Over the same period, there were 22 ACOBA referrals for staff leaving HM Revenue & Customs for corporate posts, including two General Counsel.

In response to a letter from Shadow Solicitor General Andy Slaughter raising concern about this issue, SFO Director Lisa Osofsky said the following in June 2022:

"We do not actively track the trajectory of our employees once they have left the organisation", but it is *"not necessarily problematic if people choose to come to the SFO for some of their career and then move…to other public or private organisations."*

"We proudly welcome professionals" from other sectors, she said, *"and benefit from a revolving door with the private sector.* […] *I am proud that the people we attract and the training and experience they get at the SFO are highly prized by other organisations."*

4. Recent Scandals and Reviews

The failings of the SFO when it comes to tackling corporate fraud, as highlighted in the previous section, have been compounded over the last decade by a serious of scandals the organisation has faced over failed prosecutions and unsafe convictions, laying bare serious shortcomings of culture and leadership at the organisation.

However, recent reviews into two of those scandals, and a separate study by the Law Commission into the issue of corporate criminal liability, have at least provided important recommendations for the future of the SFO, which – alongside this report – will form the basis for substantial reform of the organisation under a Labour government.

The Calvert-Smith Review

In 2015, evidence emerged that consultancy firm Unaoil had been paying bribes to secure contracts for clients around the world, notably in relation to the construction of oil pipelines in Iraq. When an international fraud investigation was launched, the company's owners – the Ahsani family – hired a 'fixer' named David Tinsley to get them off the hook.

Tinsley pressured more junior Unaoil employees to plead guilty to the emerging charges, amongst them an executive named Ziad Akle, and lobbied the SFO to let them take the fall. He entered into frequent – and undisclosed – contact with key SFO staff, including Director Lisa Osofsky and then Chief Prosecutor Kevin Davis, apparently negotiating over the treatment Akle, other defendants, and the Ahsanis would receive.

The resulting five-year jail sentence handed to Akle in July 2020 was quashed by the Court of Appeal in December 2021, with the judges criticising senior SFO staff for with-holding *"embarrassing"* evidence that would have detailed their *"wholly inappropriate"* dealings with Tinsley – including Davis 'accidentally' deleting phone data recording his calls with Tinsley – and thereby prejudicing Akle's right to a fair trial.

In response to the Appeal Court's criticism, the Attorney General announced an inquiry into the SFO's handling of the case, led by former Director of Public Prosecutions, Sir David Calvert-Smith. The review, published in July, raised serious questions over the organisation's culture and leadership, and exposed woeful handling of the Unaoil case, with investigators feeling undermined by the interventions of their managers.

Calvert-Smith identified a series of inexplicable misjudgements and errors that hampered the Unaoil investigation, a seemingly gullible attitude from senior managers towards their engagement with David Tinsley, failings of communication and trust that caused cooperation on the case with the US authorities to break down, and an apparent desire to get a quick win whatever the consequences to buck a long trend of failed prosecutions.

The report also exposed failings in the oversight of SFO casework by the Attorney General's Office (AGO), with the summaries of the Unaoil case provided by the SFO to the AGO remaining unchanged throughout the two years of the investigation, and communicating only *"anodyne details"* of the proceedings, which – in Calvert-Smith's view – were *"hardly helpful…for a meaningful degree of understanding and challenge."*

The report provided 11 recommendations, designed to prevent a repeat of the failings seen in the Unaoil case, including a call for the SFO and AGO to *"urgently develop a revised process to enable the superintendence of sensitive and high-risk cases".* In her response, the then Attorney General said she agreed with the 'tenor' of the proposal, but said any changes could wait until the regular review of her framework agreement with the SFO.

The Altman Review

In 2013, the SFO opened an investigation into private contractors Serco and G4S, arguing that they had defrauded the Ministry of Justice by hiding profits made between 2010 and 2013 through their delivery of electronic monitoring services. This was thought to have prevented the MoJ taking action to recover Serco's previous excess profits, limit their future profits, or seek improved terms during renegotiations of the relevant contracts.

The SFO struck a Deferred Prosecution Agreement with a Serco subsidiary in 2019, as well as with G4S in 2020, but continued prosecuting two Serco employees. In 2021, less than a month after the trial began, the case collapsed after the discovery of serious errors in the disclosure process, which meant the defence could not have had a fair trial.

The SFO announced a review led by Brian Altman QC, which also published its findings in July 2022. The report concluded that the collapse of the case had been caused by *"serious systemic failures"* in a number of areas, ranging from individuals being assigned to roles for which they clearly had too little experience, to inadequate processes for quality assurance which meant that the severe errors made by junior staff went unnoticed.

Altman identified *"additional systemic problems of real concern"*, which – while not factors in the collapse of the case – nevertheless demanded attention, including low morale, a lack of resources, failings of technology, and a previously *"ineffective, if not chaotic"* approach to monitoring staff performance. Altman provided 18 specific and practical recommendations to address each of the issues identified in the report.

Box 7: The Law Commission review of 'Corporate Criminal Liability'

In 2020, the government commissioned work from the Law Commission to assess how the 'identification principle', discussed in Section 1 above, was affecting the ability to hold companies to account for economic crimes and other corporate wrongdoing, and whether alternative approaches to corporate liability could produce better outcomes.

In June 2022, the Law Commission produced an extensive analysis of the problems with the current system, and set out options for reform, including the potential extension of the 'failure to prevent' model, which already governs bribery prosecutions, to cover fraud, one of the ideas also considered in detail in Labour's 2013 paper. Instead of investigators having to prove that executives were controlling the fraud committed by their company, the executives would have to prove they had adequate procedures in place to prevent it.

To date, there has been no substantive response from the Attorney General's Office either to the analysis or options set out by The Law Commission.

5. A new strategy under Labour

One thing is clear from the analysis set out in this report. The problems at the Serious Fraud Office identified in Labour's 2013 green paper on corporate fraud – from a lack of resources to the botched handling of cases – still hang heavily over the organisation, and cannot simply be blamed on its current leadership or culture.

Nevertheless, the SFO has recently found itself trapped in a vicious circle, making those problems substantially worse, with the mishandling of attempted prosecutions leading to a run of scandals, causing the SFO instead to rely ever more on Deferred Prosecution Agreements as a 'safer' alternative, in turn sending its conviction rates to new record lows.

But it is crucial to recognise, as Labour did in 2013 and the Law Commission did this year, that the reason for the persistence of these problems lies in something fundamental that it is not within the gift of the SFO to change: they are being asked to enforce a law that was never fit for use in the modern age, and grows harder to enforce each year.

The procedural recommendations set out in the Calvert-Smith and Altman reviews will make a significant difference to the way the SFO manages its cases and staff, and would be implemented without delay under a Labour government, but they are not sufficient in themselves to solve the problems the SFO has in mounting successful prosecutions.

The wider solutions identified by Labour almost 10 years ago are therefore more urgently needed than ever, not least as the alternative approach that has been pursued by the SFO and backed by the current government is patently not working. That new, updated strategy from Labour will be based on the seven key objectives set out below.

1. Giving the SFO a law it can enforce

The 'identification principle', which requires the SFO to prove that the executives who represent the 'controlling mind and will' of a company had direct knowledge of fraudulent activity before the company as a whole can be held accountable for that activity, has always been a very high bar to meet, and gets higher with each passing year.

As a result, the SFO has pursued increasingly desperate and unsound methods to secure results, and when that approach has predictably resulted in the collapse of cases, their response has been to stop pursuing prosecutions to the same extent, causing numbers of convictions to plummet, and allowing corporate fraudsters to act without fear of jail.

As recommended in Labour's 2013 paper, we would deal with this problem at source by scrapping the identification principle, and introducing an entirely new law to determine corporate criminal liability in cases of serious fraud. The only question – on which we would immediately consult on taking office – is what type of new law to adopt.

Our 2013 paper proposed a suite of options, from Australian-style laws which take into account corporate culture, to the 'failure to prevent' model, which requires executives to take reasonable steps to prevent fraudulent activity within their corporation, and which has recently been proposed as a lead option by the Law Commission.

Those options remain on the table, but given the current scale and complexity of corporate fraud, and the failed approach of the past decade, a Labour government would also consider introducing the most stringent possible laws on corporate liability, drawing from the 'respondeat superior' ('let the master answer') approach adopted in the US.

Under a bespoke UK version of 'respondeat superior' – tailored to our own regulatory and legal system, and within the constraints proposed by the Law Commission[3] – the SFO would have the option where appropriate to prosecute a fraudulent company for the criminal actions of their employees, regardless of whether it can be proved that the executives representing the company's supposed 'controlling mind' were complicit.

A future Labour government would consult with an open mind on the benefits of the 'respondeat superior' and 'failure to prevent' models, as well as other potential options of a similar nature, but whichever new, broader basis for corporate criminal liability is eventually adopted, we are determined to provide the SFO with a law it can properly enforce, and with the teeth it has needed for far too long.

2. Taking a 'convictions first' approach to corporate fraud

In concert with a new law on corporate criminal liability, a Labour government would publish new guidance for the SFO to make clear that – when evidence of corporate fraud is uncovered – its first response must be to consider the scope for a criminal prosecution and a successful conviction, not to negotiate a financial settlement.

Deferred Prosecution Agreements will remain an important weapon in the SFO's arsenal where senior managers decide that is the best and most appropriate outcome available for the circumstances of a particular case, but they should never be considered an equivalent result to achieving convictions, or the option that the SFO feels obliged to choose because it lacks the resources to pursue a full-scale investigation and prosecution.

The evidence from the United States demonstrates that the offer of a financial settlement is always most effectively deployed in corporate fraud cases when it is backed up by the realistic threat of prosecution, whereas by contrast, the SFO at present is all carrot and no stick. A Labour government would ensure the SFO has all the necessary laws, powers and weapons at its disposal to secure the optimal outcome in each case.

3. Simplifying disclosure rules in corporate fraud cases

It is clear that the current rules on disclosure in corporate fraud cases, coupled with the strained resourcing and capacity of the SFO, are unfit and unsustainable for the digital age, something that it is not surprising given that the existing requirements have not changed substantially since the Criminal Procedure and Investigations Act 1996.

[3] The Law Commission expressed concern in its recent review about the 'respondeat superior' option being used by the SFO in too blanket a fashion, rather than – as in the US – being used flexibly alongside other options such as DPAs. They also noted that there is *"guidance…which requires prosecutors to consider factors before commencing prosecution, for example, the 'collateral consequences' to employees, investors and the economy."*

It is also clear that corporate fraudsters – and the law firms that represent them – understand all too well that the current disclosure requirements can be used to deter the SFO from pursuing prosecutions, given the sheer scale of digital evidence investigators are obliged to analyse, and the exponential increase in the risk that disclosure errors will be made when handling such huge volumes of data.

In government, Labour would therefore launch an immediate review into how current disclosure rules affect corporate fraud cases, drawing on international best practice, and focusing in particular on the most efficient methods other jurisdictions have used to manage complex cases, relying on vast amounts of digital information.

Labour will always support, as a point of principle, a robust disclosure framework to ensure fair trials and safe convictions, but we must also ensure that complex disclosure processes are not used by wealthy companies with access to the best legal advice to avoid facing the same justice as other defendants without the same resources.

4. Stemming the loss of experienced SFO staff

Unlike the SFO Director, and apparently – given their lack of dissent – the ministers to whom she is accountable, a Labour government would not take pride in the fact that experienced SFO investigators and prosecutors are regularly being poached by corporate law firms, nor would we see the existence of that practice as a benefit for the SFO.

Instead, we would take immediate steps to stem those losses and their impact, first by requiring all senior staff intending to leave the SFO for private sector roles to have their moves vetted by the Advisory Committee on Business Appointments, with restrictions placed on them as appropriate on the length of time before they can take up their role, and the future use they can make of knowledge gained while working at the SFO.

We would also work with the SFO management to produce what appears to be a necessary change in mindset with respect to recruitment of staff, placing far greater emphasis on selecting individuals with a public service ethos and a belief in the mission of the organisation to tackle corporate fraud, as opposed to individuals who see working for the SFO as a way to broaden the experience they will take into their corporate careers.

5. Restoring pride in the prosecution of corporate fraud

In keeping with the change in recruitment practices, a Labour government would work to transform the reputation of the SFO from an organisation known best for botched prosecutions and embarrassing scandals, into a successful agency respected worldwide for leading the fight against corruption, corporate fraud and white collar crime.

As the SFO becomes more effective in its role, it will become a more attractive destination both for talented, ethically-driven lawyers and criminal investigators at the start of their careers in the law, and also for senior figures from the corporate world wishing to use their experience for a more public-service oriented purpose later in their careers.

A strengthened and successful SFO could ultimately provide the same status for its staff that prosecutors of corporate fraud and white collar crime enjoy in the United States, where it is often seen as a platform for a future in public service and elected office, rather than simply a stepping stone to a career as a corporate lawyer.

6. Reviewing options for resourcing the SFO

The prospect of prosecuting a larger number of fraudulent companies, which can be liable for much greater sums than individuals, presents new questions for the funding model of the under-resourced SFO.

In Labour's 2013 green paper, we examined international models for the funding of anti-fraud activity, most notably looking at agencies in other jurisdictions who are able to recycle a larger proportion of the revenues they gather from financial settlements and penalties into financing future investigations and prosecutions.

A future Labour government will look afresh at these options for resolving the long-standing resourcing problems affecting the SFO, and we will also explore the scope for applying a 'spend to save' model to corporate fraud, in the same way that the last Labour government invested resources in HM Revenue & Customs to reduce revenue lost to excise fraud and VAT fraud, and thereby produced a net gain for the Exchequer.

7. Preparing for the future of corporate fraud

Finally, it is clear that – for too long – the SFO has been behind the curve when it comes to anticipating and responding to the changes in global corporate structures, emerging technology, and international money flows that criminal fraudsters have – by contrast – been both ready and increasingly quick to exploit.

Around the world, we are also only starting to unravel the enormous scale of fraud, mis-selling and market manipulation that may have taken place over the past two years, during the boom in crypto-currencies and non-fungible tokens, and assess whether the authorities in the UK and elsewhere have been sufficiently attentive to those risks.

A Labour government would therefore conduct an immediate and comprehensive audit of fraud in the age of cybercrime, assessing the threats likely to emerge over the coming decade, and ensuring that the SFO has the capacity, powers and cutting-edge technology that it needs to keep pace with the ever-changing nature of modern fraud.

6. Conclusion

Lord Roskill, the author of the 1986 report which laid the groundwork for the Serious Fraud Office, described a reality in the 1970s and 80s where fraudsters used complex methods to steal vast sums of money without fear of retribution:

> *"The public no longer believes that the legal system in England and Wales is capable of bringing the perpetrators of serious frauds expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right.*
>
> *"The present legal system is archaic, cumbersome and unreliable. At every stage, during investigation, preparation, committal, pre-trail review and trial, the present arrangements offer an invitation to blatant delay and abuse."*

Roskill's words ring as true in 2022 as they did in 1986, with corporate fraud as prevalent as ever, the number of investigations and prosecutions in decline, and convictions so rare in recent years as to be counted on one hand.

In the last decade, the SFO has found it increasingly impossible to keep up with modern technology and global corporate structures, and has been undermined from within by a government willing to contract out public functions to companies with poor track records.

A series of high-profile errors and scandals have called the current leadership and culture of the SFO into question, undermining morale at the organisation, and increasing the likelihood that yet more of its experienced staff will be poached by corporate law firms.

In the face of these multiple crises, the SFO's increasing reliance on Deferred Prosecution Agreements as its sole weapon means that all corporate fraudsters need to weigh up when assessing the risk of getting caught is the likely cost of a financial settlement.

If the government had adopted Labour's blueprint for tackling corporate fraud in 2013, the picture might look very different now, but there is a second opportunity now. The updated plan set out in this paper will transform the prosecution of corporate fraud by:

- Scrapping the identification doctrine and introducing tough new corporate liability laws to hold corporations accountable for the fraud committed by their employees;
- Restoring a 'convictions first' approach to the SFO's investigations, removing the expectation on both sides that a financial settlement is the default outcome;
- Reviewing the disclosure requirements for corporate fraud cases, to see how they can be made fit for the digital age, rather than an obstacle to mounting prosecutions;
- Stemming the loss of senior SFO staff to corporate law firms, including asking the ACOBA committee to vet all such moves and place appropriate restrictions on them;
- Transforming the SFO recruitment model, to focus on the recruitment of investigators and prosecutors driven by a public service ethos to tackle economic crime;

- Exploring new funding models for the Serious Fraud Office, including allowing it to keep more of the proceeds from successful cases to fund future investigations; and

- Conducting a comprehensive audit of the current laws and powers available for tackling fraud in the age of cybercrime, to get ahead of the curve on emerging threats.

Implementing this package of measures is vital if the UK is to avoid another lost decade in the fight against corporate crime, where white collar fraudsters are allowed to steal from workers, investors and taxpayers without fear of ending up in jail.

Labour's plan will end that injustice, and ensure that anyone who commits fraud to enrich themselves or their companies will be 'brought expeditiously and effectively to book', finally delivering on the promise made to the British people 36 years ago.