



# Evaluating the case for greater use of private prosecutions in England and Wales for fraud offences

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## Abstract

This paper considers the challenges and opportunities that exist in England and Wales for the use of private prosecutions for Fraud. It considers the need for sanctions against fraudsters: looks at the prosecution landscape as it has evolved, especially during the 21st century: considers the legal basis for private prosecution and gives a brief history of its extent. The advantages and disadvantages associated with private prosecution are considered and recommendations made on the changes needed before there could be significant developments in the use of private prosecutions.

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## 1. Introduction

This paper sets out to identify reforms to help fill the ‘sanctions gap’ in countering fraud. Special attention is paid to the role that private prosecutions could play in ‘punishing’ fraudsters. Results in this paper are taken from commissioned research (Button et al., 2012), involving a literature search from the UK and USA, 44 interviews in both public and private sectors and a questionnaire survey of around 400 members of the counter fraud community.

## 2. Fraud, sanctions and punishment

Fraud is an extremely diverse problem encompassing a very wide range of acts (Doig, 2006). What unites them all is that they involve crimes that ‘... use deception as a principal *modus*

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*operandi*' (Wells, 1997.) Fraud is a major problem to society (Levi et al., 2007), which the National Fraud Authority suggests cost the UK £73 billion during 2011 (National Fraud Authority, 2011). This has doubled from 2010 although this will not represent the totality of losses to fraud. The KPMG fraud barometer also shows a substantial increase in fraud losses from just under £1.5 billion in 2010 to over £3.5 billion in 2011 (KPMG, 2012) and research based upon fraud loss measurement exercises has further suggested fraud (and error) losses on average are 5.7% of measured expenditure in organisations (Gee et al., 2010, 2011). Therefore, fraud costs public bodies, private organisations and individuals and affects services and causes emotional distress (Button et al., 2009).

Like other criminals, fraudsters, are punished for different reasons (Newburn, 2007):

- to discourage the individual or others from offending again (individual/general deterrence)
- To ensure the offender does not profit from his crime (restitution, compensation, redress)
- To protect society from the person reoffending (incapacitation).
- To reinforce social values and bonds
- To punish the offender (retribution).

The importance of punishment and deterring fraudsters has recently increased with the passing of national legislation e.g., Fraud Act 2006 (Home Office, 2006) and Bribery Act, 2010 (Home Office, 2010). While the most important aspect of deterrence is the perception of the chances of getting caught (Farrington et al., 1986) the severity of the penalty is not as important (Newburn, 2007). The evidence base, however, is thin for fraudsters but studies confirm similar conclusions (Klepper and Nagin, 1979; Hollinger and Clark, 1983 Gill, 2007). This, we suggest, is largely because the public resources to investigate and then prosecute crime are currently insufficient.

When dealing with fraud there can be wider sanctions beyond the criminal justice system which can be very severe. Unfortunately such tools are not used to their full potential. The most significant research has argued that a wide range of sanctions should be used, extending beyond the criminal. The most effective means of ensuring compliance is to pursue a gradual escalation of sanctions beginning with persuasion and warnings and rising to licence revocation (Ayers and Braithwaite, 1995) (see Fig. 1 below). The most important lesson for fraud is that there should be a wide range of sanctions available to use, with a gradual escalation to the most serious sanction available. However, many organisations do not use the full range of the pyramid. This paper therefore identifies reforms to help fill the 'sanctions gap' in countering fraud.

### 3. Prosecution landscape: investigators, prosecutors and the state

#### 3.1. Fraud investigation

Fraud Investigations are carried out by a number of organisations/staff with varying skills and aims (Brooks et al., 2008). Since the 1980s the number of specialist fraud police officers has declined substantially (Doig et al., 2001; Doig, 2006; Button et al., 2007). The police are not the largest investigative body, but they are the most important. This is because of their gatekeeper role into the criminal justice system and powers of arrest, search and access to information. There are many consequences of the reduction of police resources put into investigating fraud: these include: a very small proportion of frauds are actually reported to the criminal justice system, even fewer result in a sanction being applied (our research estimates about 0.4%), delays and justice failure, the 'decriminalisation of fraud' where resources do not

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