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‘The iceberg beneath the sea’, fraudsters and their punishment through non-criminal justice in the ‘fraud justice network’ in England and Wales

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ABSTRACT

This paper illustrates the substantial role of non-criminal justice bodies in punishing persons for fraud related behaviours in England and Wales. It illustrates the substantial role of government regulators, delegated regulators, self-regulators, fraudster databases and the use of contempt of court in civil courts in dealing with fraudsters. Using data from the Ministry of Justice, the number of persons sanctioned for fraud offences are juxtaposed against data drawn from the regulatory bodies within the broader ‘fraud justice network’. The paper shows that over one million individuals are sanctioned for fraud offences each year and the great majority do not trouble the criminal justice system.

1. Introduction

In 2006 Karstedt and Farrall published an article exposing the widespread potential for the majority of ordinary citizens in England and Wales and Germany to engage in a variety of fraudulent behaviours they termed ‘crimes of everyday life’ (Karstedt and Farrall, 2006). This finding perhaps explains why annual fraud losses in the UK are estimated at £193 billion (Crowe Clark Whitehill, 2017) and the total number of fraud offences, including cyber and computer misuse offences is in excess of 4.5 million/year (ONS, 2017). Others have similarly concluded that ordinary citizens frequently engage in acts of dishonest, fraudulent behaviour (Basran and Webley, 2013; Hollinger and Clark, 1983; NHSCFSMS, 2006; Whiteley, n.d.). These disquieting results have been supported by a wide range of psychological experiments which have demonstrated the capacity for ordinary people to be dishonest for gain (Ariely, 2012; Mazar et al., 2008). The evidence is therefore strong to indicate the widespread potential and willingness of ordinary people to engage in fraud, yet the criminal justice system in England and Wales obtained just 13,070 convictions in 2015 (MoJ, 2015).

In addition to the traditional actors of the criminal justice system, i.e. the police, Crown Prosecution Service (CPS) and the courts, the justice network in the UK includes many regulatory bodies with policing and enforcement powers (see Lidstone et al., 1980; Loader, 2000; Hampton, 2005; Macrory, 2006). This justice system provides punishment and redress options for victims of fraud beyond the criminal justice system (Levi, 1987, 2010; Cook, 1989). Button, Tapley and Lewis (2013) described this as a ‘fraud justice network’ which includes ‘... multiple systems or what some would call nodes ... including the criminal justice system, civil system, as well as some statutory and private organisations which operate sometimes as a system, sometimes in parallel and sometimes completely separately.’

One of the reasons postulated for the development of the fraud justice network is the inability and unwillingness of the criminal justice network to take on fraud cases (Button et al., 2013; Doig and Levi, 2013). The investigation and prosecution of fraud is

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complex, fragmented, time consuming and absorbs a great deal of manpower (Attorney General, 2006; Smith *et al.*, 2010, p121). As a result, the police in England and Wales dedicate just 569 officers to fraud (Home Office, 2015), and a staff of 369 is only sufficient for the Serious Fraud Office (SFO) to secure 6 convictions (SFO, 2016). Fraud investigations very often require specialist contextual knowledge, for example in how businesses operate, how financial service companies function and tax regulations. A principal advantage of the fraud justice network is that specialist bodies are able to more efficiently investigate, adjudicate and prosecute fraud offences. Taking some obvious examples, Her Majesty's Revenue and Customs (HMRC) specialises in tax fraud, the Department for Work and Pensions (DWP) focuses on benefit fraud and the National Health Service (NHS) deals with health service fraud (Button *et al.*, 2015). Further examples in the regulation of the professions are the Solicitors Regulation Authority (SRA) and the Nursing and Midwifery Council (NMC). However, other than the statistics produced by the Ministry of Justice (MoJ), there has been no attempt to gauge the number of offenders processed by this broader fraud justice network.

This paper describes the research undertaken to answer this question. This paper is concerned with those regulators which have the capacity to impose criminal or administrative sanctions on the general public and on human members of regulated professions for fraud offences. The research avoids regulators which only deal with organisational practices, for example OFWAT, the water services regulator. Many regulators, such as the SRA, supervise individuals and organisations. The research excludes their interventions relating to organisations. The research has also not considered the motivations of the offenders involved in the different types of frauds or their profile, but clearly these are areas in need of further research.

A further area of the fraud justice network covered in the research is the 'fraudster database'. Commercial offender registers or databases are a commonly used but somewhat opaque form of regulation that has largely escaped the attention of criminologists. Whyte (2015) has noted the use of unlawful, secret anti-trade union blacklists in the UK construction industry. However, lawful data sharing services that capture the identities of fraudsters have been in operation for several decades. For a fee, these fraudster databases assist organisations with their due diligence processes by sharing intelligence on confirmed fraudsters.

The final area examined is contempt of court. Contempt proceedings are emerging as a counter-fraud tool used by insurance firms. In these cases the firm prosecutes individuals who persist in their pursuit of fraudulent insurance claims, for example *Liverpool Victoria Insurance v Yavuz & Ors* (2017) EWHC 3088 (QB). Contempt of court is a criminal offence punishable with imprisonment, but proceedings are held in civil courts without a jury.

2. Methods

As fraud covers a wide range of dishonest behaviours, the research first required a framework to set out the criteria for inclusion in the analysis. The framework was constructed by reference to two UK government fraud taxonomies, the Fraud Act 2006 (applicable in England and Wales) and the common law. The Home Office and the MoJ use a common offence based taxonomy to count the number of offenders in each crime type; it classifies over 1500 crimes (Home Office, 2016; MoJ, 2015). The fraud category includes 63 separate offences specified by 20 different statutes plus those in common law. It includes general offences under the Fraud Act 2006 and specific offences under, for example, the Companies Act 2006, the Computer Misuse Act 1990, the Company Directors Disqualification Act 1986 and the Social Security Act 1998. The government's National Fraud Authority (NFA) developed an alternative victim based taxonomy to quantify the losses suffered by different groups of victims (NFA, 2013). It includes offences which are not explicit in the Home Office taxonomy, for example BBC TV licence evasion, NHS prescription charge fraud and transport fare evasion. Offences which were explicitly covered by either taxonomy were included in the research. It needs to be emphasised at this point that this paper is focused on the regulator and not the offence. It does not analyse offending frequencies by specific fraud type. It will therefore include both cyber-enabled and offline schemes. The cyber offences are components of the criminal justice statistics and are likely to contribute to the database statistics.

The criteria derived from the Fraud Act 2006, conspiracy and the tort of deceit (McGrath, 2008, p11) were used to inform the inclusion of offences not explicitly stated in the above taxonomies. These criteria, as set out below, were particularly necessary for the profession regulator research:

- Dishonest misrepresentation, e.g. false expenses or invoices;
- Abuse of position, e.g. accountant diverts client funds into his personal account;
- Failure to disclose, e.g. solicitor fails to inform lender of fraud in mortgage application;
- Conspiracy, e.g. providing material assistance to a principal fraudster;
- Gain for self or others or to cause loss to others.

Data collection involved two methods. Aggregate statistics were efficiently obtained from the 6 government bodies that regulate the public either through published statistics (e.g. the HMRC) or by requesting the information (e.g. NHS). This was not possible with the profession regulators as they do not classify the cases they handle. The bulk of the research effort thus involved finding the profession regulators which deal with fraud and then carefully examining their catalogues of judgments to identify and quantify the number of relevant cases. A set of criteria was used to limit the scale of the task:

- A two year census period, 2014 and 2015;
- Bodies with jurisdiction in England and Wales, excluding bodies specific to Scotland and Northern Ireland;
- Local authorities in relation to non-criminal trading standards work;
- Bodies which have not pursued fraud cases over the census period;

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