

The work of the Serious Fraud Office

Briefing for the Justice Committee session on 19 October 2022

About us

Spotlight on Corruption is an anti-corruption charity that works to end corruption within the UK and wherever the UK has influence. We undertake forensic, evidence-based research on the implementation and enforcement of the UK's anti-corruption laws. Our vision is for a society where strong, transparent, and accountable institutions ensure that corruption and associated economic crime is not tolerated.

Summary

The SFO has come under intense scrutiny after a series of high-profile setbacks, with recent reviews by Brian Altman KC and Sir David Calvert-Smith KC providing forensic insight into the disclosure failures that caused the collapse of the Serco and Unaoil cases. The lack of resourcing, outdated technology and poor management has resulted in overstretched case teams, poor quality assurance and disclosure failures, leaving the SFO with exorbitant legal bills that could have been avoided if these challenges facing the SFO had been addressed sooner.¹

The recommendations arising from the two reviews must be implemented swiftly,² and attention turned to strengthening the capacity and confidence of the SFO. This will require:

- 1. Urgent reform and resourcing of disclosure;**
- 2. Stronger oversight, accountability and support of SFO senior management;**
- 3. Measures to boost and protect SFO resources;**
- 4. Reformed rules on corporate criminal liability; and**
- 5. Bolder ambition to tackle serious economic crime and corruption.**

1. Urgent reform and resourcing of disclosure

While the Calvert-Smith review raised troubling questions about leadership at the SFO which contributed to the serious disclosure failures in the Unaoil case, the Altman review more squarely addressed the systemic disclosure problems that led to the collapse of the Serco trial. Although the specific disclosure failures were different in each case, they share a common problem: an outdated disclosure regime that places an unsustainable burden on prosecutors like the SFO whose disclosure teams lack the level of staffing, resources and support required for this task.

To address this, the following is needed:

- A. An urgent review of the legal framework for disclosure:**

In our view, the Attorney General and Lord Chancellor should work in lockstep with the prosecutorial bodies to:

¹ Legal costs owed to 3 defendants whose convictions were quashed in the Unaoil case appear to have been settled between the parties and the SFO claims this information is exempt from release under the Freedom of Information Act. In its latest annual report the SFO estimates costs for one of these defendants will be £1.5m, see *SFO annual report 2021/22*, <https://www.sfo.gov.uk/download/sfo-annual-report-and-accounts-2021-2022/>. In another case, Kazakh mining company ENRC has sought £70 million in damages from the SFO. In May 2022, the High Court handed down a partial victory for the SFO, see *Eurasian Natural Resources Corporation Limited v Dechert LLP & Ors* [2022] EWHC 1138 (Comm). <https://www.judiciary.uk/wp-content/uploads/2022/05/ENRC-v-Dechert-judgment-160521.pdf>.

² We support all the recommendations arising from the two reviews, although we have reservations about the mechanism proposed by Sir David Calvert-Smith for strengthening oversight of SFO senior management. As detailed below, we consider that this oversight should be provided by an independent panel rather than the Attorney General, who is a political appointee.

- Update and streamline the disclosure process to account for the vast amounts of digital data that must be identified, preserved, collected, searched, filtered and reviewed;
- Refine the definition of “*relevance*” to ensure the scope of material subject to disclosure is more closely tied to the defence case;³
- Simplify the requirements for disclosure schedules which list relevant but unused material that will not form part of the prosecution case.

B. More robust and proactive judicial case management:

In our view, the government, Attorney General’s office and prosecuting bodies should work closely with the judiciary to ensure earlier and more robust judicial management which;

- Requires the defence to engage with the prosecution early in the disclosure process to ensure issues are narrowed and the disclosure burden on the prosecution made more realistic.
- Minimises the risk of delays caused by last-minute defence applications seeking further disclosure.⁴
- Ensures errors in the disclosure process are detected and corrected as early as possible, rather than left to be leveraged by the defence through late-stage procedural challenges.⁵
- Ensures a trial judge is allocated who is responsible for setting a disclosure timetable and overseeing any disclosure hearings to ensure that defence applications are made in a timely manner and that both parties work to the timetable.

C. Significant investment in the SFO’s internal disclosure capacity:⁶

In our view, the SFO must:

- Increase the size, resourcing and remuneration of disclosure teams to match the workload, as well as increase fees paid for junior barristers to ensure the SFO can offer competitive rates.⁷
- Incentivise, train and support staff to take up roles as disclosure officers,⁸ redefining the role to make it more appealing including through competitive salaries and increased sharing of risk to ensure disclosure officers are retained and build valuable experience.⁹

³ The Criminal Procedure and Investigations Act 1996 (CPIA) Code of Practice currently defines material that is “*relevant to an investigation*” exceptionally broadly as “*having some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case*”. <https://www.gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice>.

⁴ Calvert-Smith recommendation 8. An application for further disclosure under section 8 of the CPIA can be made if “*the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been*”. <https://www.legislation.gov.uk/ukpga/1996/25/contents>.

⁵ The discovery of non-disclosure took place two weeks into the Serco trial, with indications that a re-review of the evidence would take up to a year. Describing this as an “*unconscionable length of time in which to fix a problem of the prosecutor’s making*” (para 435), the Altman review found that “*the timing of the application to adjourn cannot be ignored*” as a factor that meant the Serco trial could not be salvaged (para 434). The disclosure failures in the Unaoil case were only discovered on appeal, rendering the convictions unsafe and a retrial against the interests of justice.

⁶ The SFO’s decision to outsource disclosure in the forthcoming G4S trial (which begins in January 2023) is a sensible short-term strategy, but ultimately the solutions lie in building up the SFO’s internal capacity as recommended by the Altman and Calvert-Smith reviews.

⁷ Altman recommendation 2. The Altman review found a dramatic mismatch between the volume of material to be reviewed, which was approximately 1.9 million documents (para 407), and the size of the team, which peaked at 9 members (para 408). The Calvert-Smith review similarly noted that resource limitations played a “*major issue in connexion with the management of disclosure and was partly responsible for the ‘drip feed’ of disclosure to the defence*” (page 97). The case team was overstretched, with staff working late into the night, on holiday and when ill (page 90).

⁸ The Altman review described the SFO’s approach of picking someone from the team to be the disclosure officer and training them on the job as “*wrong-headed*”, while one case controller described disclosure officers as “*a rare and sought after resource*” (para 15).

⁹ Altman recommendations 1, 4 and 5.

- Improve quality assurance controls¹⁰ to guarantee that the highest standards and a consistent approach to disclosure are being maintained and independently audited.¹¹
- Upgrade document review and case management systems as part of a system-wide investment in IT infrastructure that can optimise the SFO's disclosure capacity.¹²

2. Stronger oversight, accountability and support of SFO senior management

The Calvert-Smith review identified a number of factors concerning SFO senior management that contributed to the failures in the Unaoil case, including:

- A “*vacuum*” at the top of the organisation caused by gaps between outgoing and incoming Directors, and a similar gap in the position of General Counsel;¹³
- Inadequate support for an incoming Director of the SFO with limited direct experience of the civil service and the legal system in England and Wales;¹⁴
- Inappropriate contact with third parties, in particular the Ahsani’s “*fixer*”, David Tinsley;¹⁵
- Poor record-keeping and non-compliance with guidance;¹⁶
- A breakdown in communication and trust with the case team.¹⁷

The key recommendations in the Calvert-Smith review to address these issues include:

- A personalised programme of induction for incoming directors of the SFO to fill identifiable gaps in knowledge and experience;¹⁸
- A revised process for superintendence of sensitive and high-risk cases;¹⁹
- A clear route and independent process for case teams to raise concerns.²⁰

The Calvert-Smith review, and the evidence coming out of Court of Appeal judgements about serious failings at the very top of the SFO show that much stronger accountability is required. Currently the Director and those at the top of the organisation have almost unchecked power over decision-making which is neither healthy nor desirable.

We do not agree however with Calvert-Smith's recommendation that the Director should be more accountable to the Attorney General's office because this introduces a high-risk of increased political interference in SFO cases. These risks were played out during the BAE al-Yamamah scandal in ways that damaged the reputation of the SFO and the UK more generally.²¹ Additionally, it is not at all clear that the Attorney General's office would welcome such responsibility.

¹⁰ The Altman review found the SFO's quality assurance controls were a “*serious systemic failure*” (para 16), being “*inadequate and unfit for such a large and complex disclosure process*” (para 19).

¹¹ Altman recommendations 6, 7 and 8; Calvert-Smith recommendations 6 and 7.

¹² Altman recommendations 9 and 10; Calvert-Smith review page 97.

¹³ Calvert-Smith review page 99.

¹⁴ Calvert-Smith review pages 30-31 and 89. The Director's inexperience in the civil service and lack of support contributed to “*mistakes and misjudgements which, with the benefit of hindsight, she now accepts*” (page 31).

¹⁵ Calvert-Smith review pages 33-59.

¹⁶ Calvert-Smith review pages 91-92.

¹⁷ Calvert-Smith review pages 92-95.

¹⁸ Calvert-Smith recommendation 1.

¹⁹ Calvert-Smith recommendation 2.

²⁰ Calvert-Smith recommendation 10.

²¹ The Guardian. BAE admits guilt over corrupt arms deals. 2010. <https://www.theguardian.com/world/2010/feb/05/bae-systems-arms-deal-corruption>

In our view, rather than increased accountability to the Attorney General it would be much more desirable to introduce stronger support and accountability, much like that provided under David Green’s tenure through the appointment of a former Southwark judge as a special advisor.

Stronger support and accountability would be best achieved by an independent panel, composed of a former judge, a senior investigator, and a former senior lawyer that can:

- Perform a robust assurance and support function for the Director’s decisions;
- Offer ongoing support to the Director and senior management beyond an initial induction;
- Ensure continuity and long-term thinking over successive directorships;
- Secure greater oversight without impinging on the SFO’s operational independence;²²
- Receive complaints or concerns from staff about the handling and management of cases.

3. Measures to boost and protect SFO resources

The SFO plays a vital role as the only law enforcement agency with a single, specialised focus on fighting serious and complex economic crime. Yet as the reviews found, the SFO simply cannot do their job effectively if they are not properly resourced:

- The Calvert-Smith review found that, alongside serious management failures, *“inadequate resourcing of the case meant that priorities were not always dealt with as they should have been. This became a major issue in connexion with the management of disclosure.”*²³
- The Altman review expressed concern about *“the issues of understaffing and a lack of resources No recommendation from us will make any impact on the funding arrangements between government and the SFO, but we do wish to record that we consider the organisation’s IT systems, staffing and resources to be of fundamental importance if the SFO is to maintain its status as the premier agency for the prosecution of economic crime in England, Wales and Northern Ireland.”*²⁴

The nature of SFO cases means that the agency is frequently outgunned by those it is investigating. The SFO is currently defending itself against a £70 million claim brought by ENRC - a Kazakh mining multinational. 10 years after starting its corruption investigation the SFO has yet to bring any significant criminal charges against the company,²⁵ which has spent \$397 million on *“professional fees and other exceptional litigation costs”* since 2014, and \$86 million in the 2020/21 financial year alone. The fees for 2020/21 represent more than the SFO’s entire operational budget.²⁶

We propose that the government take the following measures to boost and protect SFO resources:

- A. Create a mechanism such as an economic crime fighting fund which reinvests significant sums of money generated from economic crime fines, settlements and civil recovery back into law enforcement bodies.

The SFO’s rates of return show that the agency brings in far more than it costs:

²² In its response to the Calvert-Smith review, the government *“accepts the tenor of the recommendation”* for the Attorney General and SFO to revise oversight processes, but cautions that it is *“imperative that the Law Officers’ superintendence of SFO cases does not impinge on their operational independence”*.

²³ Calvert-Smith review pages 97-98.

²⁴ Altman review para 419.

²⁵ <https://www.lawgazette.co.uk/news/dechert-agrees-20m-interim-payment-to-enrc/5113334.article>.

²⁶ <https://www.thebureauinvestigates.com/stories/2021-11-15/city-law-firms-make-millions-while-top-corruption-cases-tumble>.

- Between 2015/16 and 2020/21, the SFO delivered a 400% return on its budget;²⁷
 - The SFO's most recent annual report reveals a big uptick in confiscation orders from £7 million in 2020/21 to £45 million in 2021/22, an impressive increase of 543%.²⁸
 - These rates of return show that the more that is invested in enforcement the more assets are likely to be recovered both for the taxpayer and for victims.
 - A reinvestment mechanism such as an economic crime fighting fund should ensure that resources are reinvested as capital investments to law enforcement bodies such as the SFO and must not be a replacement for core budgets.
- B. Extend Costs Orders, established for Unexplained Wealth Orders under the Economic Crime Act 2022, to all civil recovery under Part 5 of the Proceeds of Crime Act involving economic crime.

The Economic Crime Act²⁹ establishes that costs will not be awarded against law enforcement agencies using Unexplained Wealth Orders unless the agency has acted unreasonably, improperly or dishonestly. Law enforcement bodies have asked for these orders to be extended to civil recovery clauses under Part 5 of POCA to enable them to increase their risk appetite on such cases. The extension of these orders to all of Part 5 has the potential to ensure that significantly more stolen assets can be recovered and returned to victims.

- C. Review salary structures, introduce financial incentives and broaden expertise to ensure top talent can be recruited and retained in the SFO rather than lost to the private sector.

SFO staff salaries are falling further behind the private sector in spite of increasing caseloads. The SFO's latest annual report reveals 43 new cases have been opened and 130 remain active.³⁰ Yet the SFO's caseload continues to be shared across a relatively unchanged number of overall staff. Between 2015/16 and 2020/21, the number of financial investigators, case progression officers, lawyers and case controllers grew by just 11 officials, from 228 to 239.³¹

Recently advertised vacancies reveal that core roles at the SFO are hopelessly under-funded, with a case progression officer earning less than £30,000 a year. Meanwhile law firm trainees are now earning £50,000-£60,000 and newly qualified solicitors up to £180,000 a year.³²

There is concern that the SFO is struggling to attract and retain valuable staff in order to build long-term experience and expertise. At least 20 individuals, mostly investigators and prosecutors, have taken up posts with corporate law firms in recent years.³³ It is essential that investigators and senior lawyers are paid at levels that are commensurate with the difficult professional work they are required to do, so that the SFO can attract the quality of person necessary to do it.

²⁷ This data is based on SFO annual reports as analysed in Spotlight on Corruption, "Closing the UK's economic crime enforcement gap: Proposals for boosting resources for UK law enforcement to fight economic crime" (January 2022): <https://drive.google.com/file/d/1UzYmaDZSvF8By1WYGtAhRN-gvBI2R-/view>.

²⁸ <https://www.sfo.gov.uk/download/sfo-annual-report-and-accounts-2021-2022/>.

²⁹ See section 52 of the Economic Crime (Transparency and Enforcement Act) 2022. <https://www.legislation.gov.uk/ukpga/2022/10/section/52>.

³⁰ <https://www.sfo.gov.uk/download/sfo-annual-report-and-accounts-2021-2022/>.

³¹ Spotlight on Corruption, "Closing the UK's economic crime enforcement gap: Proposals for boosting resources for UK law enforcement to fight economic crime" (January 2022): <https://drive.google.com/file/d/1UzYmaDZSvF8By1WYGtAhRN-gvBI2R-/view>.

³² https://www.legalcheek.com/the-firms-most-list/?metakey=cmb_newly_qualified_salary.

³³ This includes the SFO's former director, Sir David Green, two of its former general counsels, 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 and international assistance divisions. <https://www.theguardian.com/law/2022/aug/07/revolving-door-as-serious-fraud-office-are-poached-by-law-firms>.

Measures must be taken to ensure the SFO can recruit and retain top talent and should include:

- A review of salary structures and pay for core roles, such as disclosure reviewers and case controllers, to reflect their vital work in fighting economic crime;³⁴
- The introduction financial incentives such as salary top-ups and specialist pay-scales;
- Leverage structured secondments with government departments, other law enforcement agencies and the private sector to build a strong core of expertise and experience at the SFO.
- A review of compensation rates for external counsel, to ensure the best practitioners are willing and able to take on prosecution work, not just lucrative defence work.

4. Reform of the rules on corporate criminal liability

The current rules on corporate liability impose an impossibly high bar to conviction and were developed before the advent of multinational global business structures. Prosecutors have long argued that they are fighting corporate economic crime with one arm tied behind their backs.

The most ambitious options for corporate liability reform laid out in the Law Commission's June 2022 report³⁵ should be adopted to ensure the SFO and other law enforcement agencies can more effectively hold companies and senior executives to account for corporate wrongdoing.

This should include the introduction of:

- A. A new failure to prevent fraud offence for companies, with potential to also include failure to prevent false accounting and money laundering:
 - While the government has legislated offences for failure to prevent bribery and facilitation of tax evasion, these corporate offences should be standardised across economic crimes, such as fraud, money laundering and false accounting.
 - This would not impose additional requirements on the regulatory sector, but incentivise and strengthen accountability for companies to have strong preventative procedures in place.
 - Both Jersey and Guernsey are introducing failure to prevent money laundering offences in line with European and global trends to criminalise money laundering. There are good arguments for the UK to adopt this approach despite the Law Commission ruling it out.

- B. A new rule for holding companies criminally responsible should be introduced to address the current shortcomings of the 'identification doctrine':
 - The 'identification doctrine', which attributes to a company only the conduct of its 'directing minds', is outdated and incongruent with the way that multinational, multi-million dollar companies operate in the 21st century;
 - Additional to introducing new failure to prevent offences, the Law Commission recognised that the identification doctrine which governs substantive offending, also needs reforming. In particular, it recommended that companies can be held liable for substantive offending where there has been consent or connivance of a senior manager. While not as expansive as corporate liability rules in the US and the Netherlands, adoption of this recommendation would be a substantial improvement on the status quo.

- C. Consent and connivance provisions for directors for economic crime, and neglect provisions for strict liability offences:

³⁴ Altman recommendations 1, 4 and 5.

³⁵ Law Commission. *Corporate Criminal Liability: an options paper*. 2022. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf

- The SFO has obtained £1.57 billion through 12 Deferred Prosecution Agreements (DPAs) but has yet to secure a successful conviction of a company director for the corporate offending.³⁶
- Juries do not respond well when administrators or middle-men carrying out corrupt orders are put on trial, while those in charge of companies are let off the hook.
- Recommendations from the Law Commission would ensure that directors can be “*criminally liable where they have consented to or connived in corporate offending and - in some cases - where that is attributable to neglect.*”³⁷

5. Bolder ambition to investigate and prosecute economic crime

The new pre-investigative powers proposed in the Economic Crime and Corporate Transparency Bill are a welcome step to enable the SFO to open investigations and gather evidence more quickly.³⁸ But these expanded powers must be matched by an increased risk appetite and greater ambition for the SFO to take bold enforcement actions. It is crucial the SFO dispel any perception that recent setbacks have left it timid, defensive, slow or risk-averse in its approach to investigating and prosecuting economic crime.

In our view, in order to move forward with renewed resolve, the SFO needs to be:

- Assertive in opening new investigations and following the evidence where it leads, whether this means subsequently closing down an investigation or pursuing further action.
- Ambitious in pursuing complex corporate crime and corruption cases, rather than picking low-hanging fruit that might improve prosecution statistics but do little to deter corporate risk-takers from wrongdoing;
- Encouraged and supported by senior government through more public recognition of the importance and complexity of the SFO’s work, greater credit for the agency’s successes, and clearer affirmation of the government’s prioritisation of the fight against economic crime.

³⁶ Spotlight on Corruption, “Closing the UK’s economic crime enforcement gap: Proposals for boosting resources for UK law enforcement to fight economic crime” (January 2022): <https://drive.google.com/file/d/1UzYmaDZSvF8By1WYGtAhRN-gvBI2R-/view>.

³⁷ Law Commission. *Corporate Criminal Liability: an options paper*. 2022. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7g/uploads/2022/06/Corporate-Criminal-Liability-Options-Paper_LC.pdf, para 9.49.

³⁸ Clause 156 of the Economic Crime and Corporate Transparency Bill. <https://bills.parliament.uk/bills/3339>.