

THE ACCREDITED
COUNTER FRAUD SPECIALIST
HANDBOOK

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WILEY



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CHAPTER ONE

How the counter fraud profession developed and what the counter fraud professional should be

CHAPTER SUMMARY

This chapter will consider the professionalisation of counter fraud investigation, including how the Accredited Counter Fraud Specialist has evolved. The development of a professional infrastructure and the essence of the counter fraud professional will then be outlined. Finally, the chapter will redefine the counter fraud professional and the lexicon of countering fraud.

INTRODUCTION

This chapter will consider the importance for an organisation – whatever the size – of employing a counter fraud professional and developments over the last

15 years to establish a new Counter Fraud Specialist profession. This may seem like an extravagant expense, but there are a variety of economical models which can be used to achieve this aim. For example small organisations can contract in the services of a professional for a selected number of days depending upon their needs or they can train a member of staff to take on these responsibilities. For medium to larger organisations the risks of fraud are likely to warrant much more investment in the resource, ultimately culminating in a full-time position or multiple positions. There is no one size fits all and clearly the size, complexity and nature of fraud risks vary significantly between organisations. This chapter will consider what counter fraud professionals look like; it will also examine the professional infrastructure and consider some of the changes required to enhance this. It will also analyse what the skill-set of the counter fraud professional should be.

COUNTER FRAUD PROFESSIONAL INFRASTRUCTURE

A wide range of strategies have been advocated to create the best solutions to counter fraud and lead ultimately to competitive advantage for the organisation. Underpinning all of this is having (whether employed direct or via a contract) an appropriate counter fraud professional (or professionals – depending upon the size of the organisation) to lead the fight against fraud. In most organisations the focus of counter fraud activity usually centres on reactive investigations and developing controls. These are only part of what is required, as the chapters of this book will show. Most commonly counter fraud responsibilities are allocated to one or more of the following depending upon the size and nature of the organisation: auditors, investigators or security managers. In the more enlightened organisations these more general staff develop a fraud expertise and secure specialist fraud qualifications. In some organisations, such is the size and/or the fraud risk that they employ specialist staff dedicated to combating fraud such as Counter Fraud Specialists or fraud examiners.

Whichever model an organisation uses, what is important is for the person responsible to be a 'counter fraud professional'. 'Professional' has many connotations in both mainstream and academic debate. Central to the definition is the idea of a profession. Avoiding some of the extensive academic debates on what constitutes a profession the central traits are:

- standards and a code of ethics;
- a body of knowledge disseminated by professional journals, conferences etc.;

- a recognised association covering all aspects of the industry;
- institutions capable of training and evaluating personnel and awarding certification of competence;
- an educational discipline that is able to prepare students in the specific functions and philosophies (Larson, 1977; Manunta, 1996; Simonsen, 1996).

Elements of these in relation to fraud professionals exist to varying degrees in different countries. For example in the USA there is the Association of Certified Fraud Examiners (ACFE) which has a standard of ethics, a knowledge base with dissemination structures (but no academic journal), a recognised training programme (Certified Fraud Examiner) and some degree-level programmes at universities. In the UK ACFE also has a presence, but there is in addition to the Institute of Counter Fraud Specialists (ICFS), recognised certification by the Counter Fraud Professional Accreditation Board (CFPAB) through the Accredited Counter Fraud Specialist award (ACFS) and degree programmes. However, even amongst those who have achieved ACFS, surveys of these professionals in the UK revealed substantial gaps in a professional infrastructure:

- Only around a quarter are educated to at least graduate level (only around 13% going on to achieve one of the higher awards of the CFPAB, such as CCFS);
- Low levels of additional accredited training are undertaken;
- Around three-quarters are not a member of any professional association (Button et al, 2007).

THE HISTORY OF THE COUNTER FRAUD PROFESSION

It is now more than 16 years since the UK Government Minister, the Right Honourable Frank Field MP's ground-breaking Government Green Paper 'Beating Fraud is Everyone's Business' (Department of Social Security, 1998). Field, then Minister of State for Welfare Reform, gave the very first UK Government commitment to creating a counter fraud profession. Jim Gee (one of the authors of this Handbook) was the Minister's Fraud Advisor, having previously performed the same role when Field was Chair of the House of Commons Social Security Select Committee. He was also Head of the London Borough of Lambeth Corporate Anti-Fraud Team, brought in by its Chief Executive Heather Rabbatts, in

1996, shortly after Lambeth was described as ‘the most corrupt local authority’ in the UK.

Geer remembers working with Field on the Green Paper and being asked to read and comment on the passage about a counter fraud profession. He remembers suggesting that the phrase ‘the creation of a counter fraud profession’ be inserted as a commitment, and providing background information about the need for ‘specialist professional training and education’.

These comments were drawn from the experience of establishing professional training and education in London. As early as 1997, work had been commenced involving the Association of London Government, the London Boroughs Fraud Investigators Group, the University of Portsmouth and Thames Valley Police Force’s Training Department, to create a professional training course for Counter Fraud Specialists, along with a Professional Accreditation Board to accredit those who successfully completed the training. These developments were consciously modelled on the arrangements to be found in other areas of work where professional skills are predominant. Avoiding unhelpful pretensions, the initial analogies were the social work and teaching professions.

In these areas, you typically find:

- Prescribed professional training which develops technical skills;
- A common ethical framework for the deployment of those skills
- A Professional Accreditation Board to regulate those who are accredited as a result of successfully completing the professional training;
- A Centre of Excellence to innovate and to highlight emerging best practice.

The particular experience of the London Borough of Lambeth highlighted the need for new standards of professionalism. In the early 1990s work to counter fraud and corruption was very weak, with a deficiency of both skills and resources. The new Chief Executive, Heather Rabbatts, liberated Lambeth from the tyranny of historic poor performance and brought with her a real understanding of the importance of protecting public funds and maintaining the trust and confidence of those living in the area. Having little worthwhile to defend, Lambeth could start afresh, designing counter fraud arrangements fit for the time.

So the commitment in Frank Field’s Green Paper naturally followed this initial work – a model had been set up which had been shown to work. There followed a period during which Department of Work and Pensions (DWP) officials such as Janet Bestwick, Peter Darby and Lillian Buchanan worked with Jim

Gee and other local authority representatives to establish a professional training course for Counter Fraud Specialists in the benefits fraud area. This training subsequently became known as Professionalism IN Security (PINS) training and the process was overseen by a DWP/Local Authority Accreditation Board administered by the University of Portsmouth.

In 1998 Alan Milburn, then Minister of State at the Department of Health, decided, with very helpful advice from his advisor on governance, John Flook (then Chair of the Healthcare Financial Management Association), to radically upgrade the NHS's work to protect itself against fraud. A new position of Director of Counter Fraud Services was advertised and Jim Gee was appointed to fill it. This led to the creation of a Directorate of Counter Fraud Services and then the NHS Counter Fraud Service (NHS CFS), as well as an obligation being placed on all NHS organisations (in secondary legislation) to appoint a Local Counter Fraud Specialist.

This was followed, in December 1998, by a commitment from the Department of Health, on behalf of the NHS, in the strategy document 'Countering Fraud in the NHS', to ensure that professionally accredited counter fraud officers were in place in every part of the NHS.

Recognising the need to provide professional training to the (now) hundreds of people appointed to undertake this work, the NHS CFS established a strong, well-resourced training department under the leadership of David Snell (formerly a trainer with Thames Valley Police), Jenny Davidson and Andy Whittaker (one of the authors of this book) who had been involved in the original Association of London Government training.

A Foundation Level Accredited Counter Fraud Specialist training syllabus was designed, focusing on providing much needed technical skills in how to detect, investigate and seek to apply sanctions in respect of fraud. The training also contained an ethical module designed to make sure that Counter Fraud Specialists understood the meaning of key concepts such as fairness, objectivity, professionalism, propriety, vision and expertise. There was a requirement to successfully complete the ethical module before being accredited.

The related NHS Professional Accreditation Board was, again, administered by the University of Portsmouth and its then Reader, now Professor Mark Button (one of the authors of this Handbook). It also had representatives from NHS organisations, the Department of Health and other stakeholders.

Between 1999 and 2001, the Department of Work and Pensions (DWP) and the NHS had separate professional accreditation boards, but these were brought together with the encouragement of Professor Steve Savage at the University of

Portsmouth. A single Counter Fraud Professional Accreditation Board (CFPAB) was launched by Malcolm Wicks, then Minister at the DWP, and Lord Phillip Hunt, a Minister at the Department of Health, in October 2001.

The new CFPAB had six sectors representing Counter Fraud Specialists from across the economy – the Department of Health, the Department of Work and Pensions, the Inland Revenue, Local Government, Consignia (formerly the Post Office) and the Abbey National – and by the date of the launch 2821 Accredited Counter Fraud Specialists had already completed the first level of their professional training.

Since then the counter fraud profession has grown very substantially, with around 14,000 Counter Fraud Specialists accredited at Foundation, Advanced, Degree and MSc levels at the end of 2013. The board itself now has members drawn from the police, Department for Work and Pensions, NHS, local authorities, HM Passport Office, HM Revenue and Customs, KPMG and Questgates.

There are further weaknesses in professional infrastructures which will now be explored. The next section will also set out a route map to the creation of a professional infrastructure, drawing upon the transformation of personnel management to Human Resource Management (HRM) in the UK.

DEVELOPING A PROFESSIONAL INFRASTRUCTURE

This section offers a ‘route map’ to how a profession was created for those working in counter fraud. The first and easiest step is for there to be one dominant professional association in a country. In the UK the picture is very fragmented, with a number of bodies which could emerge into this role. In the USA ACFE is in the prime place to achieve this position.

The dominant association then needs to create a suite of memberships which are linked to higher study and/or the equivalent. ACFE has the entry level CFE, but no higher awards. In the UK the Counter Fraud Professional Accreditation Board, which is not a professional association, but does accredit and recognise training, has a learning route linked to higher education. This route is set out in Table 1.1.

Any professional infrastructure should build upon the experience of the CFPAB and other professional bodies and have a structure such as the following:

- Entry Award – Equivalent to first year of bachelor’s degree.
- Established award achieved after at least three years’ study/experience – Equivalent to bachelor’s degree.
- Higher award based upon higher study or outstanding contribution to profession – Equivalent to master’s level study.

TABLE 1.1 CFPAB progression of awards

CFPAB Award	Level
Accredited Counter Fraud Technician	Various training providers provide and must be accredited by a higher education establishment to the equivalent of one twelfth of a first year of a bachelor's degree.
Accredited Counter Fraud Specialist, Accredited Counter Fraud Manager, Accredited Counter Fraud Intelligence Specialist	Various training providers provide and must be accredited by a higher education establishment to the equivalent of a third of a first year of a bachelor's degree.
Certified Counter Fraud Specialist	Completion of first year of recognised bachelor's degree.
Graduate Counter Fraud Specialist	Completion of recognised bachelor's or master's degree.

In the UK context many professional associations link the above to categories of membership such as Student, Graduate, Member, Fellow etc. Such categories encourage increased professionalism because ultimately most people want to progress up the ladder to enhance their own status and financial rewards.

It is not enough, however, to create such a framework. The next step is to market and enforce it. All counter fraud professionals should be encouraged to join and those in positions of power recruiting new counter fraud staff should specify the appropriate level of membership as an essential requirement.

The new merged body should also learn from other representative associations and offer a range of services that further enhance professionalism. Assessing different bodies some of the functions that should be provided are listed below:

- Hold an annual conference
- Hold seminars on appropriate subjects
- Provide training
- Create a branch structure for knowledge transfer/networking
- Provide accreditation of training and academic courses
- Publish a professional magazine
- Publish a professional journal
- Conduct, commission and disseminate research
- Develop online resources

- Develop best practice and guides to specific security functions
- Sell publications at discount
- Publicise job opportunities
- Provide e-mail alerts on latest information.

Many of these already exist and they could be provided to members as part of membership packages. For example the *Journal of Financial Crime*, which is the closest the fraud world has to a professional academic journal, could be supplied as part of membership (as many medical professional associations supply academic journals as part of their fees). A clear priority will be the need for an annual conference of counter fraud professionals which provides opportunities to share knowledge on the latest developments in countering fraud. Again there are already many fraud related conferences that do this, but it is important for all to attend one dedicated conference.

There is another area where such an association could have a very important role to play in enhancing the fight against fraud and that is to create structures where counter fraud professionals can safely discuss their experience – including their failures. Learning from experience (or isomorphic learning) is central to enhancing the fight against fraud. Counter fraud staff should be able to openly discuss fraud, ‘behind the wire’, amongst their peers under so-called ‘Chatham House Rules’ (what is discussed is not discussed outside the room). The development of such networks will greatly enhance isomorphic learning and overall the improvement of the fight against fraud.

It is important to link such developments to codes of ethics and enforce the ‘Chatham House Rules’ in relation to the Code of Conduct. This, however, is just one aspect of what the Code should cover. Other aspects should include: exercising functions with honesty and integrity; adhering to appropriate laws and regulations; abiding by the rules of the association; commitments to develop professionally; respecting the rights of minority groups and emphasising the importance of human rights, to name but some. The new association should set out such a code, publicise it to members and actively enforce it.

Most established professions have Centres of Excellence in some form which conduct research, identify best practice and have established networks for disseminating that best practice. The counter fraud world is lacking in this. The Centre for Counter Fraud Studies is one of the few dedicated centres in academia focused upon fraud. It also hosts the Fraud and Corruption Hub which is a resource with links to the most significant research and publications on fraud. More of these need to be created around the world.



THE ESSENCE OF THE COUNTER FRAUD PROFESSIONAL

This chapter has set out much of the professional infrastructure required. Ultimately professionalism boils down to the operative who is employed to deal with fraud. As has previously been mentioned, the focus of counter fraud staff is often on reactive investigations. There needs to be more than this. The holistic approach, as set out throughout this book, means focusing upon proactive measures too. Therefore the counter fraud professional should focus upon:

- Monitoring fraud metrics and tailoring the strategy accordingly
- Preventative measures
- Developing an anti-fraud culture
- Detecting fraud as quickly as possible
- Investigating fraud
- Pursuing sanctions against those who have been caught
- Pursuing redress where possible.

In some organisations such is the size of a counter fraud department that there may be staff focused specifically upon some of these. Nevertheless it is important for the counter fraud professional to have a grounding in all of these areas. The above list comprises the broad set of knowledge required. There are other important traits which are also required and will now be examined.

The Enlightened Professional

Central to the expertise of a counter fraud professional is the need to be appropriately trained, educated and informed in the latest research and thinking relating to fraud. This can involve undertaking short training courses or enrolling upon a counter fraud related degree or master's programme. It can also mean attending conferences and seminars as well as reading professional magazines and journals. It is also important that these activities are pursued on a regular basis, or what is more commonly known as continuing professional development (CPD). Underpinning this is the need – where there is evidence – to pursue evidence based solutions to the problems faced by the organisation. This chapter now outlines some of the key sources of knowledge and training/education to support CPD.

Information on Latest Research

The Fraud and Corruption Hub – <http://www.port.ac.uk/ccfs>

Wiley – <http://eu.wiley.com/WileyCDA/>

Gower – <http://www.ashgate.com/>

Journal of Financial Crime – <http://www.emeraldinsight.com/products/journals/journals.htm?id=jfc>

Fraud News

ACFE Fraud Magazine – <http://www.fraud-magazine.com/>

Fraud Intelligence – http://www.informaprofessional.com/publications/newsletter/fraud_intelligence

Fraud Courses

ACFE – <http://www.acfe.com/>

Centre for Counter Fraud Studies – <http://www.port.ac.uk/ccfs>

Fraud degrees and higher training courses – http://www.larry-adams.com/university_fraud_courses.htm

Professional Associations

ACFE – <http://www.acfe.com/>

ICFS – <http://www.icfs.org.uk/>

The 'Reflective' Professional

Based upon the original ideas of Schön (1983) who advocated 'reflective practice' where professionals are expected to regularly reflect on their work and learning, there is much of use for the counter fraud professional. Schön argues that professionals face two sets of problems at the high and low ground. On the high ground, it is argued, problems are well defined as are the strategies to deal with them, frequently based upon extensive research. Take for example the principles of building a bridge; there are many factors to bear in mind with guidance based upon much research. On the 'swampy lowlands', however, there are also many problems which are messy with no simple solutions and it is here where the most significant threats exist according to Schön. To use

the bridge analogy again, however, when the decision about whether to build a bridge or what type of bridge to build is considered the technological knowledge is lost in the political, financial, environmental and various other factors that confuse the issue. It is here that reflective practice (and the related action research) can help solve these problems. This approach has gained favour amongst some healthcare professions. Nurses, clinical educators, physiotherapists, occupational therapists, radiographers as well as managers are some of the occupations that have been encouraged to combine the theory aspects of their course with reflection on their professional practice (Palfrey et al, 2004). By its very nature it is difficult to specify an approach to pursuing 'reflective practice', but Palfrey et al, drawing upon the work of Kember et al (2001), set out the following:

- The need to reflect critically on what one does as a practitioner (as a counter fraud professional) and on what happens as a result of one's practice.
- A regular re-examination of one's experience, beliefs, and conceptual knowledge.
- The generation of new perspectives and knowledge arising from reflections on action (reflecting after one's actions) and reflection in action (reflecting during one's actions).
- The welcoming of challenges to one's standard way of thinking about and acting on problems.

(Palfrey et al, 2004: 37)

Given the unique challenges faced by counter fraud professionals which are often in the 'swampy lowlands' the 'Reflective Practice' model would seem well suited to the counter fraud professional. Nevertheless in an organisation dominated by practice based upon evidence from research the difficulty of applying reflective approaches does pose problems.

The Counter Fraud Leader

Not all counter fraud professionals will need to be leaders, but many will. Leadership is to be distinguished from management. Sperry (2003) argues that typically management is distinguished by the functioning of individuals under conditions of stability focused upon tasks such as meeting objectives, assessing compliance and co-ordinating staff and work patterns. By contrast leadership is aligned to more unstable conditions and times of change and focused upon inspiring and/or galvanising the commitment of staff. However he goes on to

argue that this distinction does not reflect the research and that 'effective management and leadership cannot be separated' (Sperry, 2003: 2). The contrasting aspects of management and leadership are required for success and the theme of his book is that they are complementary. Underpinning this debate is the basic problem that there has been much research on leadership but little agreement on what leadership and management are (Bryman, 1986). Nevertheless the distinction above, if accepted, does raise scenarios where the two sets of skills conflict. As Villiers and Adlam (2003: xii) argue:

The cautious, artful, consensus-seeking manager – who knows the cost of everything and upsets no-one, and whose quota is always fulfilled – may be quite incapable of swift and dynamic leadership when the situation requires it.

Before we begin to discuss what makes an effective manager/leader it would be useful to clarify some of the terms used in such debates:

Skills: How to's of a function which are transferable from person to person

Knowledge: what a person knows

Talents: Natural abilities in a person

Competencies: expected behaviours.

Let us use an analogy faced by some counter fraud professionals, such as dealing with a potentially violent situation when a fraudster has just been identified. The knowledge component would be to recognise certain non-verbal behaviours in a person, skills would be the appropriate strategies applied to the person to calm them down. There may, however, be certain people who have a natural talent for coping with an aggressive person because of their character. The competency is to be able to calm an aggressive person without using force – for some this might be based upon skills and knowledge learnt while in others it might be down to talent.

However, when competencies are examined they often reveal conflicts. A skill may be identified which is actually a talent. For example being able to make effective decisions in a pressured situation might be a talent rather than a skill that can be learned. And if competencies are based on talents the expected behaviour might be very difficult to achieve. Sperry (2003) argues that competencies should be purely skill based and the most effective leaders are those who can identify the people with the appropriate talents and who then develop the missing skills and knowledge in them. These leadership and

management skills are the most important determinant of an organisation's success, '... more important than industry, environment, competition and economic factors combined' according to Whetten and Cameron (2002: 5). Sperry (2003) goes on to outline 12 essential skills that underpin the effective leader. These are:

Operational

1. Galvanising commitment and motivation
2. Maximising team performance
3. Delegating to maximise team performance
4. Managing stress and time effectively

Relational

5. Communicating effectively and strategically
6. Negotiating and managing conflict and difficult people
7. Coaching for maximum performance and development
8. Counselling and interviews for maximum performance and development

Analytic

9. Thinking and deciding strategically
10. Mastering the budget process
11. Mastering and monitoring financial and human resources
12. Assessing corporate and personal resources.

Source: Adapted from Sperry (2003: 7–8).

REDEFINING THE COUNTER FRAUD PROFESSIONAL

How counter fraud work can deliver real, positive financial benefits is central to the redefinition of the counter fraud professional. They must speak the language of business such that what they advocate will produce a reward to the organisation in reduced fraud losses, which mean either increased profitability or, in the public sector context, reduced taxation or more resources to spend on essential services. The counter fraud professional needs to influence a change from the perception that countering fraud is an additional cost on the bottom line to it being a benefit to the bottom line. The following are central to achieving this: accurate measurement of fraud losses, a strategy tailored to the risks, appropriate investment in prevention and the development of an anti-fraud culture, quick detection of fraud, professional investigation of fraud, the pursuit

of the full range of sanctions and redress and the development of appropriate metrics.

REDEFINING THE LEXICON OF COUNTERING FRAUD

The counter fraud professional also needs to use the appropriate lexicon of the modern business world and deliverers of public services. This is increasingly preoccupied with reducing costs, increasing efficiency, improving profitability etc. The counter fraud professional needs to know what fraud and the response to it are costing the organisation and what can be done to reduce this. Knowledge of metrics, return-on-investment and financial costing models are all central. It is also important to be attuned to the objectives of the organisation and how countering fraud can enhance it. The contrast between the old and new lexicons is set out below:

Old: limited knowledge of impact of fraud (detected at best), a service for the organisation that is a cost, focus upon detection and investigation.

New: accurate knowledge of costs of fraud, financial benefit to the organisation, integrated, holistic approach.

Communicating the Rewards of Successfully Countering Fraud to the Wider Organisation and Particularly the Leaders

It is also important for the counter fraud professional to evangelise the benefits of the modern approach across the organisation. This, as well as adding to the effort to create an anti-fraud culture, makes clear the positive impact countering fraud is having on the organisation. Not to do so risks questions arising over what is the benefit of spending large sums of money on countering fraud. This invariably makes counter fraud resources more vulnerable when the organisation faces financial difficulties as it is often seen as an easy area to cut. Therefore communicating to all levels of the organisation the work of counter fraud professionals is very important.

Securing Positions of Influence within the Organisation

Linked to effective communication is the importance of securing positions in the most influential committees, forums etc. of an organisation and if this is not possible, direct reports to those who are. In the related field of security

management there has been much written on the lack of influence in the boardroom. This is also the case for many counter fraud professionals. In most organisations a place on the board is unlikely for a counter fraud professional, but a direct report to someone who is should be achievable. The board itself should periodically be exposed to reports on fraud and the progress in dealing with it. Other influential forums within the organisation should also where possible have a counter fraud presence. This ensures that decisions are not made which might unintentionally increase the level of fraud.

REVIEW

This chapter has explored the person of central importance in an organisation in countering fraud: the counter fraud professional. It began by examining who are the counter fraud professionals before highlighting some of the weaknesses in a professional approach. The broader professional infrastructure was then examined and this showed a number of weaknesses. A number of potential reforms were then examined. The chapter then ended with a consideration of the counter fraud professional at an individual level and some of the traits and orientations that are required for them to become professionals.

This book aims to play its part in ensuring that counter fraud professionals are effective, by strengthening the knowledge base of those involved.

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2

The Fraud Act 2006 and fraud related legislation

CHAPTER SUMMARY

This chapter will explore legislation relating to fraud and associated offences that an ACFS needs to be aware of. The statutes discussed in detail include the Fraud Act 2006, Criminal Law Act 1977, Theft Acts of 1968 and 1978, Theft Amendment Act 1996, Bribery Act 2010 and Computer Misuse Act 1990 (including the relevant sections of the Police and Justice Act 2006). Where applicable, the chapter will include relevant case law that is applicable to the ACFS role and offences under investigation. The chapter will conclude with an inventory of additional legislation that an ACFS needs to be aware of depending upon their organisation's primary function.

INTRODUCTION

Prior to the Fraud Act 2006 there was no criminal offence of fraud within English legislation. When attempting to prosecute what we now refer to as

fraud, an array of deception offences were utilised, including 'obtaining property by deception', 'obtaining a money transfer by deception', 'obtaining a pecuniary advantage by deception', 'procuring the execution of a valuable security by deception', 'obtaining services by deception' and 'evasion of liability by deception', all of which have been repealed following the enactment of the Fraud Act 2006. This range of highly specific offences resulted in a number of difficulties when attempting to apply the law, principally because behaviour which could be regarded as dishonest or fraudulent did not always fit neatly into these categories. The Fraud Act 2006 was therefore enacted to simplify the law and increase the prospect of securing a successful prosecution. What the Act actually does therefore, is enshrine in law the ways in which fraud can be committed. This chapter will outline the relevant sections of this statute, before moving on to discuss other legislation relating to fraud and associated offences that an ACFS needs to be aware of.

THE FRAUD ACT 2006

The stated objective of the Fraud Act 'is to make the law of fraud more simple and readily understandable' (Farrell, Yeo, and Ladenberg, 2007: 11). Accordingly, this statute 'makes a number of fundamental alterations to the general understanding of fraud' (Johnson and Rogers, 2007: 296). The legislation offers a clear definition of how fraud is committed, although it does not offer a definition of what actually constitutes fraud. The legislation came into effect on 15 January 2007 and replaced many of the existing offences relating to deception. However, the Act cannot be applied retrospectively; therefore any offences committed prior to the aforementioned date must be dealt with by way of one of the Theft Acts or other relevant legislation. When it is uncertain when the offence may actually have occurred, and it may have happened prior to, on or after 15 January 2007 the ACFS should try and obtain as much information as possible to assist in establishing the exact date on which any relevant activity occurred to assist the prosecuting team.

The significant change brought about by the Act is that it removes the element of deception from the offence, and focuses more on the behaviour of the suspect rather than their intention. Accordingly, an offence under this Act is based upon fraudulent behaviour combined with dishonesty. That is to say, an assessment of the suspect's fraudulent intent based upon the intended outcome as a result of their behaviour.

The main advantages of this legislation are therefore:

- It is easier for jurors to understand the principles of the case and related offences.
- It provides an effective framework for the Crown Prosecution Service to prosecute fraud offences.
- It provides the public with a clear understanding of the ways in which fraud can be committed, thus improving fraud awareness and the likelihood of offences being reported.
- New technologies are included in the single offence of fraud, thus removing the anomalies within previous legislation relating to devices such as cashpoint machines.
- The single offence also removes the requirement to create additional legislation.

Offences Repealed

Schedule 3 of the Fraud Act 2006 lists the offences which were repealed by this statute:

Theft Act 1968:

- Obtaining property by deception (s. 15)
- Obtaining a money transfer by deception (s. 15A)
- Obtaining a pecuniary advantage by deception (s. 16)
- Procuring the execution of a valuable security by deception (s. 20(2)).

Theft Act 1978:

- Obtaining services by deception (s.1)
- Evasion of liability by deception (s.1).

Overview

The Fraud Act introduces provision for a general offence of fraud. This is broken into three key sections:

- s. 2 Fraud by false representation
- s. 3 Fraud by failing to disclose information
- s. 4 Fraud by abuse of position.

A person will be guilty of fraud if they are in breach of any of these sections. The Act also creates new offences of:

- s. 6 Possession of articles for use in frauds
- s. 7 Making or supplying articles for use in frauds
- s. 9 Participating in fraudulent trading
- s. 11 Obtaining services dishonestly.

Each of the above will now be considered individually.

Section 2 – Fraud by false representation

- (1) A person is in breach of this section if he—
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if—
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) ‘Representation’ means any representation as to fact or law, including a representation as to the state of mind of—
 - (a) the person making the representation, or
 - (b) any other person.
- (4) A representation may be express or implied.
- (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).

This section sets out the offence of committing fraud by false representation. It makes it clear that the representation must be made dishonestly and that it is made with the intention of making a gain, or causing a loss, or risk of loss to another. Examples of fraud by false representation would include a person selling goods claiming they were genuine items whilst knowing them to be cheap replicas. It would also apply to someone who sends an e-mail falsely representing that the message has been sent by a legitimate financial institution and thereby extracting banking information from the recipient (known as ‘phishing’). We will now explore the key elements of fraud by false representation.

Dishonestly

The current definition of dishonesty is set in case law *R v Ghosh* [1982]. A two-stage test to determine dishonesty was established by the Court of Appeal in the judgment for this case. The first consideration is to question whether a defendant's behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people. If the answer is 'no', then the accused must be acquitted. If the answer is 'yes' the second consideration must then be applied. This is whether the defendant was aware that their conduct would be regarded as dishonest by reasonable and honest people.

False representation

A representation is considered to be false if it is either untrue or misleading, and the person making such a representation knows that it is, or might be, untrue or misleading. The phrase *might be* is broad and allows an ACFS to adopt a style of questioning that should establish guilty knowledge or belief.

Representation

A representation can be made by words or communicated by conduct. There is nothing which specifically indicates the format the words must take, therefore they could be written, spoken or be by electronic means, for example something posted on a website.

Representation by conduct

If a person dishonestly misuses a credit card or bank card by using it to pay for goods, knowing they have no authorisation to use the card, a representation by conduct has been made. The representation they are making to the cashier is that they are authorised to use the card. This definition is not restricted to payment cards; for example, someone holding a charity collecting tin but intending to use the money collected for their own purposes is making a false representation by conduct.

Gain or loss

The terms apply to the gain or loss of money or other property. Actual gain or loss does not have to occur, it only requires that the individual intends this to happen, and it can be either temporary or permanent.

Gain is defined as *keeping what one has as well as getting what one does not have* (s. 5(3)).

Loss includes a loss by not getting what one might get, as well as a loss by parting with what one has (s. 5(4)).

Property

Property is defined as all types of property, real or personal and includes intellectual property.

It also includes things in action and tangible property (Farrell, Yeo and Ladenburg, 2003: 17–18).

Examples of things in action are things which have a value but are of no physical substance, for example a copyright.

Basingstoke drug cheat prosecuted

A patient prosecuted following an investigation by the Local Counter Fraud Specialist.

On two separate occasions Mr X altered a number of prescriptions which he had obtained from the Health Centre. These were taken to the local Pharmacy, where he obtained additional drugs that he was not entitled to. On the first occasion the forgeries were successful and extra drugs were obtained, including controlled drugs. On the second occasion the pharmacy checked with his doctor and the deception was uncovered. Upon his arrest Mr X was also found to be in possession of heroin and cannabis. On 19th August he pleaded guilty in the Magistrates Court to four charges of fraud by false representation and one charge of possession of class A and B drugs. He was sentenced to a six months' supervision order and was ordered to forfeit the drugs which were destroyed.

(Hampshire and Isle of Wight Counter Fraud Service, 2010: 1)

Section 3 – Fraud by failing to disclose information

A person is in breach of this section if he—

- (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
- (b) intends, by failing to disclose the information—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

Similar to fraud by false representation, there is a requirement that the defendant acts dishonestly and intends to make a gain for him or herself, or to cause a loss to another, or to expose another to a risk of loss.