

## PART 3

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# Case Studies and Experience from Selected Countries

### 3.1 Investigation and prosecution of high-level corruption: A hypothetical case for training

**By Eva Joly - Special Counsellor to the Norwegian Government**

In February 1998 the Government of Uurdistan decided to equip its air-defense army with nine new MAC 2 fighters. It called for bids mainly from two companies and chose the Rapace model from the Nerodonna Company in Oustland. The total amount of this public procurement was \$9 billion.

In January 2000, the Swiss investigating magistrate Pol Hardy, when working on an international letter rogatory from the Mexican authorities, investigated the accounts of a high-ranking public official, Mr. Green, who had an account in the Union des Banques Suisses in Geneva. In the course of this investigation he found, among a list of credits, the amount of \$1.8 billion of which had been paid by "a client of the bank". After establishing that the money had been paid through the account of Mr. Nelson, a well-known intermediary from Vaduz (Liechtenstein), Pol Hardy followed the money trail and found that on 24 December 1998, the very same day the account "Rosita" had been credited, the amount had been split into \$1.2 billion and \$600 million and credited to two other accounts in the bank, "Anita" and "Josephine." This amount was very unusual in the profile of Mr. Green's account. Pol Hardy, who had been asked by the Mexican judge to "ask all relevant questions," questioned Mr. Green and asked him to explain the movements in his accounts.

Mr. Green told the judge that he had personally known Mr. Nelson for 20 years and had agreed to lend him the use of his account, which bore the name of his dog, as a favor, since Mr. Nelson had told him that this was a very secret, but to him very honorable, operation. Mr.

Green said the operation had nothing to do with his Mexican client, but that he had been told that Mr. Nelson sometimes worked as an intermediary for the Nerodonna Company. He did not know who owned the "Anita" and "Josephine" accounts.

On seeing the new evidence from Pol Hardy, the Geneva prosecution service decided to initiate a criminal investigation into money laundering in Switzerland. After a long investigation, it turned out that the "Anita" account belonged to the wife of the president of Uurustad, and "Josephine" to the mother of the chief executive of Nerodonna.

In May 1999, Igor Hansen, a brilliant young army captain of Uurdistan, was found killed in an office in the army headquarters. During the criminal proceedings, it was established that Igor had had close links with the Ministry of Defense and, according to rumors, was called "Mr. Five Percent."

A search was made in Mr. Hansen's house. It was obvious from the luxury furniture and valuable oeuvres d'art that all this did not come only from his salary. Correspondence with Mr. Nelson and Vaduz was found among his papers. The preliminary investigations also established that Mr. Hansen had participated in the Rapace transaction. A doctor of laws law fluent in six languages, he had translated all the contracts that the Minister of Defense had entered into on behalf of the Uurdistan Government and had been present during all the negotiations.

Igor Hansen, when found, wore a Cartier watch that bore the serial number 492555061693 on its underside. One piece of evidence that particularly intrigued the investigators was a suitcase containing many gold bars, which turned up during the search of the house. Uurdistan newspapers published the news of Mr. Hansen's death and its very special circumstances.

### ***Questions for Training:***

1. How should the death of Mr. Hansen be investigated?
2. Which are the next steps to be taken in Switzerland and in Uurdistan?
3. What difficulties will a prosecutor/investigating magistrate probably meet in the course of investigation and prosecution, both in Switzerland and in Uurdistan?

### **3.2 Bribery and international mutual legal assistance: A hypothetical case for training**

**By Bernard Bertossa, Former Attorney General of  
Geneva**

In 1995, the Ministry for Economic Affairs of Briberyland decided to replace all of its information technology equipment, which had become obsolete. After receiving bids from a number of foreign companies, the ministry's administrator awarded the contract to the American firm Smith Corp. for \$75 million. The new information technology environment was installed in March 1996, and the ministry paid Smith Corp. the agreed amount.

In April 1996, the public prosecutor of Briberyland received a letter from the Indian company Delhi Corp., which had also submitted a bid for the contract. Delhi Corp. informed the public prosecutor that Smith Corp. had been awarded the contract because it had paid commissions. It said that "John," an employee in the ministry, had received these payments.

The public prosecutor initiated an investigation of John, which showed that he enjoyed a lifestyle beyond what his government salary could possibly provide. However, there were no suspicious funds in the only bank account that John held in Briberyland. But during a search of John's house, the police did discover the business card of a representative of the BSA Bank in Zurich, Switzerland.

After sending letters rogatory to the Swiss authorities, the public prosecutor learned that John did not, in fact, have an account at the bank. However, his name did appear as having signatory authority over an account opened by a registered company, Fraud Ltd., headquartered in Nassau, Bahamas, with the BSA's subsidiary in Geneva, Switzerland. The beneficial owner of this account was an individual known as "Pablo," an independent foreign exchange broker operating in Briberyland. This account had been opened in January 1996. In March of that year, it had been credited with \$7.5 million from a New York law firm. A few days later, \$4 million had been transferred to a bank in London and \$3 million to a bank in Luxembourg.

Informed of these facts, the public prosecutor of Briberyland sent letters rogatory to London and Luxembourg. The replies to these letters brought to light the following:

- The recipient account in London belonged to Oxy Inc., headquartered in the British Virgin Islands. Pablo was the beneficial owner of this account. Since the account had been opened in 1990, large cash amounts, from different origins, had been deposited and had later been transferred abroad. The account currently contained \$10 million.
- The recipient account in Luxembourg had been opened in the name of John's wife. A sum of \$3 million had been the only deposit made to this account. This sum had not yet been touched.

The public prosecutor of Briberyland decided to question Pablo, who admitted that accounts had been opened in Geneva and London and said that he had made these accounts available to some of his customers in Briberyland to enable them to avoid domestic taxes.

The public prosecutor then asked John and his wife to come in for questioning. However, the prosecutor then received news that the justice ministry had promoted him to the position of chief judge in another city, effective immediately. A colleague known to be close to those in power, and to have no interest in prosecuting bribery-related offenses replaced the prosecutor. In fact, the new public prosecutor closed the case without further investigation.

Before leaving his post, however, the former public prosecutor of Briberyland had contacted his Swiss, British, and Luxembourg colleagues whom he had dealt with regarding the letters rogatory connected with his investigation, to inform them of the situation.

In the meantime, John and Pablo had hired lawyers in Geneva, London, and Luxembourg. Arguing that the case had been closed in Briberyland, the lawyers contacted the banks to request that the balance of the accounts be transferred to two separate accounts opened in two different banks in Singapore. Before making the transfers, BSA Bank in Geneva contacted the local prosecutor, who decided to initiate his own criminal proceedings for the crime of money laundering.

The prosecutor of Geneva ordered the seizure of the account of Fraud Ltd. in the BSA's Geneva branch. He then sent mutual assistance requests to authorities in London and Luxembourg, in which he asked that the accounts of Oxy Inc. and of John's wife be frozen, and that all documentation concerning these accounts be handed over to him. He also sent letters rogatory to Briberyland to obtain a copy of the closed investigation file.

The authorities in London and Luxembourg met these requests, but the new public prosecutor of Briberyland took no action whatsoever on the case.

After analyzing the bank documents received from London, the prosecutor of Geneva observed that a significant portion of the amounts transferred from the account of OXY Inc. had been transferred to an account with the FRITZ Bank in Vaduz, Liechtenstein. After sending letters rogatory, he found out that this account had been opened in the name of a private company, BRIBY S.A., headquartered in Cyprus. The documents completed when the account was opened had been signed by a lawyer in Vaduz and by the administrator from the Ministry for Economic Affairs of Briberyland.

The prosecutor of Geneva again sent letters rogatory to Briberyland, confirming his initial request and explaining what had been discovered in Vaduz. He asked for permission to question the administrator. The new public prosecutor of Briberyland merely replied that the account of BRIBY S.A. had been opened at the request of the state and that the funds belonged to Briberyland. The prosecutor of Geneva was asked to stop investigating these funds.

Through unknown sources, the press of Briberyland had been informed of the Swiss request. Published articles raised questions about the decision to stop the criminal proceedings initiated in Briberyland.

**Question for Training:**

What further steps do you think might be taken in this hypothetical case in each of the countries concerned?

### **3.3 India: Prosecuting corrupt public officials – The role of communications and referrals from public administrations**

**By S. K. Sharma, Director of Prosecution, CBI, India**

Public sector corruption is rampant not only in Asian Pacific countries but also worldwide. It embraces almost all spheres of everyday life in countless countries. In a strictly limited definition, the word "corruption" implies allowing the decisions and actions of public servants to be influenced not primarily by the perceived pros and cons of a particular circumstance, but rather by the prospect of personal gain or other such entirely selfish considerations.

Today, there is a vast and concerted international effort to deal with corruption in the public sphere and to develop a universally workable system to defeat it. Lord Macaulay, president of the First Indian Law Commission and author of the Indian Penal Code Act (XLIV, 1960) was well aware of the corruption and bribery then widespread in the country. As such, chapter IX of the act was incorporated into the Indian Penal Code, consisting of sections 161 to 165A IPC (*vide*). These sections deal with the acceptance of any form of gratification other than legal remuneration in respect to an official act by a public servant. Under the act, obtaining valuable assets without consideration by a public servant was made a punishable offense.

However, the provisions of the Indian Penal code proved inadequate in the prosecution of allegedly corrupt public servants. The Indian Parliament, with a view to curbing corruption, enacted the Prevention of Corruption Act of 1947. (This was amended in 1964, on the basis of the recommendations of the Sanathanam Committee.) The Anti-Corruption Laws (Amendment) Act (1964), the Criminal Law (Amendment) Act (1952); the Criminal Law (Amendment) Ordinance (1944), the Delhi Special Police Establishment Act (1946), the Criminal Law (Amendment) Act (1966), and the Anti-Corruption Laws (Amendment) Act (1967) were all passed with a view to making anti-corruption legislation more effective, and to helping ensure timely trials for anti-corruption cases.

The Provision Regarding Attachment of Ill-Gotten Wealth Obtained Through Corrupt Means was incorporated into the Criminal Law (Amendment) Ordinance in 1944. The Prevention of Corruption Act (1947) was later repealed with the passage of the Prevention of

Corruption Act (1988) (*vide*). Since the provisions of sections 161 to 165A of the Indian Penal Code are already part of the aforementioned Prevention of Corruption Act (1988), they were struck from the code.

The Delhi Special Police Establishment Act (1946) was also enacted to create the infrastructure needed to investigate possible cases of corruption among officials of the national and state government, with the consent of these administrations.

### ***Establishment of the CBI***

The Central Bureau of Investigation (CBI) was established as a branch of the national Government's Ministry of Home Affairs by Resolution 4/31/61-T (1963). Investigation work is done through the Special Police Establishment (SPE) wing of the CBI, which derives its police powers from the Delhi Special Police Establishment Act. The act permits the CBI to probe into specified offenses or classes of offenses pertaining to corruption or other forms of malpractice involving public servants, with a view to prosecution. The Special Police Establishment, a CBI division, functions under the administrative control of the Cabinet Secretariat.

Considering the legislation and law enforcement bodies described above, India can claim a reasonably sound infrastructure for tackling public sector corruption. However, this bureaucratic network would be of no use if there were no communications and referrals from the state's public administration. As the second most populous nation on earth, public servants are part of a vast network of ministries, departments, and directorates spread throughout the country. For this reason, communications and referrals from public administrators are vital in identifying corrupt public officials, so that alleged incidents involving corruption among them can be noted and scrutinized.

With the need to make the prosecution system function in a timely manner in mind, the Central Vigilance Commission was created in 1964 in accordance with recommendations from the Committee on the Prevention of Corruption under Ministry of Home Affairs Resolution 27/4/64-Avd. The commission has jurisdiction and other powers in respect to matters to which the executive powers of the union extend. The commission has also been given the responsibility of overseeing general supervisory work in federal government ministries and departments.

The commission also advises on any cases pertaining to:

- Gazetted officers of the national Government;

- Senior officers on the Delhi police force;
- Board-level appointees in the public sector;
- Officers of port trusts or dock-level boards;
- Insurance firms;
- Cooperative societies; and
- Any other societies receiving grants from the national Government.

### ***Chief vigilance officers***

Chief vigilance officers are assigned to federal ministries and departments, public sector bodies, banks, etc. These officers are entrusted with the task of keeping an eye out for any serious irregularities and offenses, or for any abuses of office by public servants for personal gain. Their reports are sent to the Chief Technical Examiners Organization, which functions under the administrative control of the Central Vigilance Commission.

On the basis of the officers' recommendations, criminal cases are registered by the CBI for investigation. Cases in which only departmental irregularities are observed are passed on to the respective departments or public sector bodies. The latter may then decide on the necessity for taking action at their end. If, during departmental inquiries, cases of misconduct are proven, minor or major penalties can be imposed on the concerned officers or public servants, including dismissal from service. If it is found that an offense under the Prevention of Corruption Act has occurred, the cases are then referred directly to the CBI.

### ***Apathy and education***

But in spite of the aforesaid bureaucratic infrastructure, the struggle against sleaze would be impossible if a sense of duty to report any corrupt actions taken by civil servants cannot be instilled among law-abiding members of the public and public officials alike. In India, it has been remarked that it has proven very difficult to encourage either group to report suspicions to the police or to magistrates. The criminal procedure system in India is such that people hardly take any interest in reporting corruption cases to the police, much less in offering to cooperate during any investigations of such cases concerning civil servants. The major problem remains the question of how to educate the public and encourage such reporting. Public

workers and regular citizens need assurance that their time will not be wasted, and that they will not be subjected to any form of harassment either during or after any investigation.

Apart from this, there should be a reporting obligation for civil servants. Public servants are the most valuable sources for uncovering corruption in this sector, since they are obviously the first to be aware of possibly corrupt activities by their colleagues. Unless public servants take active interest and consider it their duty to report corrupt acts, the fight against public sleaze will prove ultimately futile. But there remains a general tendency among public sector colleagues not to report illicit acts committed by co-workers. It is possible that such tendencies develop because they do not want to become targets of contempt or retribution from their colleagues. Nevertheless, I am of the opinion that unless this sense of initiative is instilled in the minds of civil servants, the fight against public sector corruption is difficult to win.

In India, the law regarding reporting obligations for public servants is codified in section 39 of the Code of Criminal Procedure (1973), which provides the following:

Sec. 39 – The Public to Give Information of Certain offences –  
(1). Every person aware of commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of Indian Penal Code 45 (1860), namely:

- Sections 121 to 126, inclusive, and Section 130 (viz., offences against the state specified in Chapter VIII of the Code);
- Sections 143, 144, 145, 147 and 148 (viz., offences against public order also specified in Chapter VIII);
- Sections 161 to 165A, (viz., offences relating to illegal gratification);
- Sections 272 to 278, inclusive, (viz., offences relating to the adulteration of food and drugs, etc.);
- Sections 302, 303 and 304, (viz., offences affecting life);
- Section 364-A, (viz., offences relating to kidnapping for ransom, etc.);
- Section 383, (viz., offences of theft resulting in death, wounding or restraint);
- Sections 392 to 399, inclusive, and Section 402, (viz., offences of robbery and decoity);
- Section 409, (viz., offences relating to criminal breach of trust by a public servant, etc.);

- Sections 431 to 439, inclusive, (viz., offences or acts of mischief against property);
- Sections 449 and 450, (viz., offences involving trespassing on private property);
- Sections 456 to 460, inclusive, (viz., offences of lurking house trespass); and
- Sections 489-A to 489-E, inclusive, (viz., offences relating to currencies)

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie on the person so aware, forthwith give information to the nearest Magistrate or Police Officer of such commission or intention.

This section, therefore, makes it obligatory for every person including public servants to give information to the authorities regarding the commission of the offenses mentioned. Subclause (iii) of subsection (1) of section 39 of the Code of Criminal Procedure (1973) makes it obligatory for every person to report to the nearest magistrate or police station the commission of offenses relating to demand for illegal gratification from a public servant.

Subsection (2) of section 39 of the aforementioned code makes it clear that, for the purposes of this section, the term "offense" includes any act committed abroad that would constitute a criminal offense on Indian soil. As such, even offenses committed outside the country are also included in this section.

Not only does section 39 make it obligatory for any person to report the commission of a crime relating to corrupt activities of public servants, the failure to give information required by the section may also constitute an offense under sections 118, 176, or 202 of the Indian Penal Code. Section 118 provides the following:

#### Sec. 118 – Concealing Design to Commit Offence Punishable by Death or Life Imprisonment

Whoever intending to facilitate, or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or imprisonment for life,

Voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

If offence be committed shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years,

If offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to a fine.

Similarly, section 176 of the Indian Penal Code provides the following:

Sec. 176 – Omission to Give Notice to Public Servant by Person Legally Bound to Give It:

Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice, or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with a fine which may extend to five hundred rupees, or with both;

Or, of the information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to one thousand rupees, or with both;

Or, if the notice of information be required to be given is required by an order passed under Subsection (1) of Section 565 of the Code of Criminal Procedure (1898), with imprisonment of either description for a term which may extend to six months, or with a fine which may extend to one thousand rupees, or with both."

In the same way, section 202 of the Indian Penal Code provides the following:

Section 202 – Intentional Omission to Give Information of Offence by Person Bound to Inform

Whoever knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which

may extend to six months, or with a fine which may extend to one thousand rupees, or with both.

Section 125 of the Indian Evidence Act (1872) also covers aspects of the interest and integrity of the information given with regard to offenses under the provisions of this section. Official communication with regard to the crime is privileged, and a police officer or a magistrate cannot be compelled to disclose the source of information received by him with regard to the commission of the offense.

The above provisions show that, even in that era, lawmakers were aware of how important it is to encourage the public to report crimes. They were also aware that the security of the informer was a critical factor in such matters. However, it must be stated that current provisions relating to reporting obligations in India remain inadequate. Other countries have dealt with such matters by enacting whistleblower protection laws. Such provisions now exist in Great Britain, Australia, New Zealand, and the United States, and in other countries.

Whistleblowers can play a very important role in providing information about corruption and abuse of office. Public servants working in the same department know which individuals may be acting unethically or illegally in their department. But unfortunately, as already mentioned, they are rarely bold enough to convey such information to higher authorities for fear of reprisals. If adequate statutory protection is granted, there can be no doubt that the government will be able to get more information regarding corruption and abuse of office.

Whistleblowers acting on good faith represent the highest ideals of public service while challenging abuses of power. There is a close connection between whistleblowers' protection and the right of employees to expose corruption or abuse of office. The protection of whistleblowers vindicates important interests supporting the overall enforceability of criminal and civil laws. This aspect may be called the "rule of law" concept when applied to whistleblowers. Again, blowing the whistle on corruption can be seen as supporting the public good by encouraging disclosure of certain types of information. This aspect—namely, the "public information" or "public interest" concept—is employed in cases of whistle blowing.

The Law Commission of India has also studied the issue of whistleblower protection at the request of the Chief Vigilance Commissioner. The commission recently conducted an in-depth study of this matter, taking into consideration similar legislation in other countries. In 2002, it then recommended a bill titled "The Public Interest Disclosure and Protection of Informers Bill (2002)."

### **3.4 United Kingdom: Cooperation between police and prosecution services in England**

**By John Dempsey-Brench, Detective Chief Inspector, UK**

The challenge of corruption in the British police forces

Corruption has the ability to exist in varying degrees of seriousness at all levels and ranks within any police system. In the United Kingdom, there has always been concern about the conduct of police officers, particularly in respect to tampering with evidence or abusing power for gain. The discovery of corruption within British police forces, unfortunately, is not a new phenomenon. There were several high-profile corruption scandals during the 1960s and 1970s, many of which were concerned with the vice industry in and around the London region. These included officers accepting bribes and protection money, as well as fabricating evidence.

The then commissioner of the Metropolitan Police Service (MPS), Sir Robert Mark, sanctioned an operation to rid the MPS of corrupt officers. The result was that, between 1972 and 1977, more than 500 officers were either forced to resign or took early retirement.

From 1977 to 1993, there were new priorities for British police forces. Terrorism, drugs, and an increase in street violence meant that the issue of corruption was not constantly targeted and was soon no longer seen as a priority. But in the early 1990s, corruption started to reemerge in a new format. Major proactive investigations were being compromised, trials and prosecutions were collapsing, and information was being leaked to newspapers. It was clear that corruption had reemerged as a serious problem. While successful in identifying corrupt and unethical practices, the early investigations failed to get to the root of the problem. In 1995, the push to drive out corruption was reawakened with a number of high-profile cases arising once again from within the MPS.

The overall response, while well intentioned, was flawed. Investigative teams consisted mainly of uniformed officers who lacked the expertise and experience of veteran detectives. There was no formal liaison between the investigators and the Crown Prosecution Service (CPS), and there was no ability to respond immediately to serious allegations.

## ***Making investigation and prosecution more efficient: Form investigation and prosecution teams***

By the late 1990s, crucial lessons had been learnt. It was decided that so-called "Specialist Investigator Teams" needed to work with "Specialist Prosecution Teams" if the fight against corruption was to be successful. The professional relationship between the Specialist Investigator Teams and the Specialist Prosecution Teams needed, however, to be nurtured carefully. Room could not be left to allow defendants to accuse the CPS of overstepping its authority as independent prosecutors and be branded as "investigation prosecutors." The need for and the benefits of early consultation between the police and the CPS were duly recognized.

The following draft protocol is currently widely regarded as the being the most appropriate and significant way forward in establishing a constructive framework on which successful investigations and prosecutions of corrupt police officers may be conducted.

### ***Draft Protocol on Early Consultation with and the Referral of Cases to the Crown Prosecution Service Casework Directorate for Advise***

#### *1. Introduction*

This draft protocol seeks to identify those cases that would benefit from early consultation or formal submission to the Crown Prosecution Service's Casework Directorate for advice prior to the commencement of proceedings. It also provides guidance on the types of cases and circumstances where the early involvement of the Casework Directorate in offering advice and consultation could assist investigating officers in bringing focus to investigations, and help to ensure that appropriate offenses are charged at the commencement of proceedings.

The involvement of a crown prosecutor in the early stages of investigations can eliminate unnecessary work, ensure that the evidence necessary to support a prosecution is obtained, and assist in accurately formulating the charges that are to proceed. Crown prosecutors, however, cannot advise on operational decisions. Guidance should always be sought from supervising officers.

A list of the offenses which must be referred to the Casework Directorate is in the annex at the end of this section. In addition, cases of the type described in point 5 below should also be referred.

## 2. *Consultation and advice*

Consultation and advice is likely to be of particular benefit in cases that are serious, complex, or sensitive. This advice has the potential to lead to

- The early establishment of a prosecution team, therefore hopefully helping to ensure that the ongoing investigation is focused toward the case and charges are likely to proceed to trial.
- Helping to ensure that charges in indictable cases are appropriate, and that such cases are ready to proceed to the Crown Courts swiftly through the expedited provisions within the Crime and Disorder Act (1998).
- Early identification of evidential difficulties, and the means of resolving them.
- Early identification of possible lines of defense, and lines of inquiry that may be directed to rebut them.
- Reduced post-charge consultation and investigation, and fewer adjournments at court.
- Early identification of appropriate CPS resources required, including the allocation of lawyers and caseworkers, and, in appropriate cases, the early involvement of suitably experienced counsel.
- Improved presentation of evidence within case file preparation.
- A reduction in attrition, discontinuance, and late alterations to charges. This includes early identification of cases that cannot pass the requirements of the Code for Crown Prosecutors, either evidentially or on the public interest criterion, and therefore save police investigation time.

## 3. *Involvement of crown prosecutors during covert investigations and before charges are laid*

The early involvement of the Casework Directorate may be sought at any stage in the course of an investigation or in the preparation of a file. (Such requests need not be delayed pending the submission of a file.) The early involvement of a Casework Directorate lawyer should always be sought in the types of cases listed in point 5 below.

Investigating officers wishing to seek consultation or advice from a Casework Directorate lawyer should first seek advice from their supervisory officer in order to ensure that the issues are clearly

identified, and that advice is not sought on operational matters. Investigating officers should also inform their supervisors of any advice given in due course.

Early consultation may take place at any stage during the course of an investigation, and does not require the submission of formal statements or reports. This serves as an early opportunity for investigators to discuss the proposed investigation with a Casework Directorate lawyer, so that likely issues may be identified, potential charges may be discussed, and emerging evidential difficulties may be advised upon. Such consultation may take place via a face-to-face or a telephone conference. Casework Directorate lawyers may attend incident rooms, where they will facilitate the assimilation of the evidence and material available, and any discussion of the case. The lawyer will make a brief record of the issues identified and any guidance given.

Early consultation will also allow a Casework Directorate lawyer to provide general guidance in relation to lines of enquiry, and on the legal elements required for a successful prosecution. (Such guidance may ordinarily have to be provided orally in conference, and may not require the submission of case papers.) Early consideration can also be given to disclosure issues. Such consultations will also allow the lawyers and Casework Directorate managers the opportunity to identify the resources required to be applied to more complex investigations, including, in appropriate cases, the early involvement of suitably experienced counsel.

The Casework Directorate managers should be notified of any covert operations that might result in criminal proceedings. This will facilitate early advice on the admissibility of evidence from such operations, as well as potential European Convention of Human Rights and/or other abuse arguments relevant to the proposed operations.

#### *4. Contact points and locations*

The Casework Directorate has three offices in England located in London, York, and Birmingham. Each office has lawyers who have experience in handling cases involving police corruption.

Occasions do arise when cases of exceptional sensitivity develop, perhaps due to the suspected involvement of a member of CPS staff, police officers, or court staff with strong local connections, or due to particularly sensitive covert (i.e., reactive and proactive) operational activities. To accommodate such circumstances, the London bureau

has special office facilities, with high levels of additional security. These are staffed by lawyers and caseworkers with specialist knowledge of this type of work built up over a number of years. While this specialist unit presently undertakes work from all over England and Wales, it is hoped to devolve the non-London-based work to other branches in the Casework Directorate in 2003.

##### 5. *Requests for formal advice*

Files submitted for advice must contain all relevant information, statements, copy documents, videos, and transcripts of interviews (including video interviews) to enable a full assessment of the case to be made. The files should be accompanied by a report containing police observations as to the strength of the evidence, the reliability and quality of witnesses, and any other comments that may be pertinent. The investigating officer's view of the issues in the case should be set out, and the points upon which advice is sought should be identified. The identity of the investigating officer and supervisor should be clearly indicated.

- Where a file is submitted for advice on a limited evidential issue, the statements submitted can be directed to that issue only.
- Where, exceptionally, a file is submitted for advice on an overriding public interest factor, that file can be limited in content to material sufficient to decide on that individual aspect of the case.

The views of the investigating officer and supervisors will be of considerable assistance to the Casework Directorate lawyer in reaching a decision in the case. In appropriate cases, an early conference may be arranged prior to or following the submission of the formal file.

Where it is likely that an investigation will be ongoing before a final conclusion can be reached, a copy file should be submitted to be retained by the Casework Directorate while the investigation continues. The directorate is then alerted to the security implications of handling and storing such material. All staff members are then security clearanced and material is stored in secure cabinets.

Where an offender has a duty to return to a police station on bail under section 47 (3) of the Police and Criminal Evidence Act (1984), that return date should be clearly marked on the file. Any other factors requiring the advice to be provided within a certain time period should also be clearly identified. In complex and sensitive investigations,

supervisory officers should contact Casework Directorate management to agree an appropriate time frame for the consideration of the case and the provision of the required advice.

There may be cases in which the police conclude that the evidence does not justify any consideration of the commencement of proceedings. Where the evidence in a case is manifestly insufficient to proceed, the investigating officer or a supervisory officer may decide to take no further action. However, where the insufficiency of the evidence is less obvious, early consultation with a Casework Directorate lawyer may enable further lines of inquiry to be identified and any evidential or legal difficulties to be resolved, thereby allowing the case to go forward for prosecution.

*6. Cases in which early consultation and referral for advice will always be considered*

Early consultation and the obtaining of advice prior to the commencement of proceedings will always be considered in complex and sensitive cases. Indicators of such cases are:

- Serious offenses of perverting the course of justice, perjury, or misfeasance in public office.
- Cases involving surveillance or covert human intelligence sources, especially cases where public interest immunity applications may have to be made.
- Cases involving integrity testing or test purchases, undercover officers, or any other sensitive technique, including those covered by the Regulation of Investigatory Powers Act.
- Cases involving a number of defendants, or a number or series of offenses.
- Cases involving difficult questions of evidence such as corroboration, similar fact evidence, or the evidence of accomplices.
- Cases involving significant breaches of PACE codes or difficult or disputed identification issues.
- Cases potentially involving complex disclosure issues, especially where there is significant unused material, some of which may be in the possession of third parties.
- Cases involving organized crime or drug trafficking.
- Cases involving allegations of sexual offenses (involving children or adults) where there is little or no corroboration.
- Cases of exceptional difficulty, sensitivity, or other public

concern; cases potentially involving contested points under the European Convention on Human Rights (Human Rights Act).

- Allegations of incitement to racial hatred or conduct likely to stir up racial hatred.

#### 7. *Consultation and advice on investigative issues*

Consultation helps to ensure that a separation of the functions of investigation and prosecution is maintained. It is the role of police officers to investigate offenses, and of the CPS to prosecute. Casework Directorate lawyers will not direct the course of an investigation or become involved in operational decision making. They will, however, advise on lines of inquiry, the legal elements requiring proof in each offense, and the nature and extent of evidence required.

Crown Prosecutors may provide the police with advice and guidance in respect of any matter bearing on the need for, and/or the quality, reliability, and admissibility of, evidence in any possible prosecution, including the manner in which that evidence may be presented.

#### 8. *Areas and issues upon which advice can and should be sought*

A Crown Prosecutor may advise the police about the potential legal and evidential consequences of any possible prosecution of any act or admission at the investigative stage. However, it is for investigators to make decisions about the appropriateness of any police operational matter. For example, a lawyer will provide advice upon integrity tests and undercover operations to avoid possible claims of agent provocateur activity, and to safeguard the admissibility of evidence obtained by such means.

Advice should *not* be requested or given if its nature may necessitate the calling of a Crown Prosecutor, CPS caseworker, or counsel as a witness in a prosecution.

The Casework Directorate should be consulted in any case involving a participating informant, a potential accomplice witness, or a resident informant/protected witness. The Casework Directorate lawyer should be consulted regarding any decision as to whether an individual should be treated as a defendant or a witness, and in regard to the conduct of any debriefing procedure.

A Crown Prosecutor may advise investigators and represent the prosecution in any pretrial applications (such as warrants of further

detention), to ensure that the proper legal steps are taken and that an investigation may continue without prejudice to a possible prosecution.

## 9. *Disclosure*

Casework Directorate lawyers can also advise investigating officers as to the retention, recording, and revealing of unused material, including, where appropriate, the arrangements for disclosure to the defense.

Early consultation will help in ensuring continuity in the management of unused material. It will also help in early identification of potential Public Interest Immunity (PII) issues, and to ensure that the prosecution team, including counsel, has a comprehensive knowledge of any unused material both disclosed by and subject to PII.

Early contact should include decisions regarding the future disclosure of the identity of any confidential source, as well as of any intercepted material that may undermine the prosecution case and thereby require disclosure.

### *Annex: Police Complaint Cases which must be referred to the Casework Directorate*

The following police complaint cases must be referred to the Casework Directorate, to be handled there in accordance with an agreement between the CPS and the PCA:

- Allegations against officers of or above the rank of superintendent (except allegations relating to the use of motor vehicles other than where death was the cause in the execution, or purported execution, of duty);
- Allegations against police officers of any rank
  - Which were referred to another force for investigation;
  - Which involve interference with the administration of justice;
  - Which pervert the course of justice (or attempt/conspire to do likewise);
  - Which contravene the Perjury Act (1911), s1 (i.e., perjury in a judicial proceeding);
  - Which constitute offenses akin to perjury (e.g., false witness statements tendered in criminal proceedings under the Criminal Justice Act (1967, s89) or the Magistrates Courts Act (1980, s106);

- Subornation of perjury;
- Assist an offender under the Criminal Law Act (1967, s5);
- Conceal an arrestable offense under the same Law);
- Permitting escape from custody, assisting escape and harboring an escapee;
- Wasting police time under the Criminal Law Act (1967, s5);
- Any other offense that is intended or likely to interfere with the administration of justice (e.g., forgery of witness statement, theft of exhibit in pending trial);
- Corruption;
- Misconduct in a public office;
- Offenses committed in the execution, or purported execution, of duty which result in:
  - Death;
  - Serious injury, other than offenses relating to the use of a motor vehicle. (Serious injury is defined by s87(4) PACE 1984 as a fracture, damage to an internal organ, impairment of bodily function, a deep cut, or deep laceration.)
- Offenses involving the use or discharge of a firearm in the execution, or purported execution, of duty;
- Concerning death(s) in police custody;
- Serious offenses facilitated by the use of the officer's position of authority, for example:
  - Serious assault on a prisoner, potential witness or vulnerable victim; and
  - Blackmail
- Offenses that should, in any event, be referred to the Casework Directorate, whether or not police officers were the subject of the allegation;
- Offenses under the Data Protection Act (1998) and Computer Misuse Act (1990); and
- Offenses in one of the forces specified in S1 1985/1986 other than those whose duties lie within a single CPS area. (See the footnote to "s3(3) Prosecution of Offences Act (1985)" in Stone's *Justices' Manual*.)

For the full list of offenses, see Stone's *Justices' Manual* 1-2901.

### **3.5 Investigation and prosecution of police corruption: Operation Othona**

**By John Dempsey-Brench, Detective Chief Inspector, UK**

The first major wave of corruption scandals involving British police occurred in the 1960s and 1970s, primarily in and around London. These primarily centered on officers accepting bribes or demanding protection money from those involved in prostitution, illegal gambling, or other vice-related activities. A series of inquiries resulted in the forced resignation or early retirement of more than 500 officers in London's Metropolitan Police Service (MPS) alone.

By the early 1990s, it was becoming apparent that very serious and harmful corruption had made a return within many branches of the British law enforcement establishment, including the Crown Prosecution Service (CPS). Technical surveillance equipment, as well as intelligence- and evidence-gathering methodology, had progressed since the 1970s. But too many investigations were being compromised in their early stages. Some prosecutions and court cases were also collapsing, often in their very early stages. In some cases, suspicions of jury and evidence tampering were evident. Unfortunately, internal efforts by police forces to tackle corruption were often questioned by the media, who felt sure that the problems were even more serious than the police were actually saying.

The actual extent of corruption in several institutions eventually became clearer, because of anecdotal evidence and intelligence operations. One of the most serious cases in the 1990s involved Mark Herbert, a CPS administrator. Herbert had been placed in a very sensitive administrative post, giving him access to most of the records of cases being conducted by CPS, including the names and addresses of all individuals under scrutiny, all the names and addresses of informants, and of all police officers involved in ongoing investigations.

It eventually came to light that Herbert had tight links with one of London's most powerful organized crime families, and was selling to it highly confidential data relating to some major investigations. Apart from the damage the Herbert case did to the CPS's reputation, the scandal seriously affected the MPS's and the National Crime Squad's (NCS) desired initiative to start working much more closely and thoroughly with the CPS in major investigations.

At this time, the MPS and NCS began to realize just how extensively some operations were being compromised at the investigative or prosecution stages. Also, it was consistently receiving clear and reliable evidence that both cash and drugs were being routinely stolen in the course of police searches. (Drugs were often then resold, with some officers even becoming traffickers and importers.)

Equally serious was evidence that police officers were also involved in committing armed robberies, blackmailing people who could testify or were actually testifying in cases in court, using their own standing with judges to alter court proceedings, providing bail for co-opted individuals charged with crimes, etc.

### **Operation Othona**

Operation Othona ran from 1993 to 1997. It was launched by the order of MPS Commissioner Sir Paul Condon to tackle corruption within the MPS. It was also intended to address the problem of the disorganized intelligence gathering and handling procedures then being used. Another priority was to stop the systematic leaking of highly sensitive information from within the MPS itself.

Othona's primary objective was to penetrate the operational strata of the network (or networks) of corrupt MPS officers. The most sophisticated and proactive intelligence gathering methods available to the MPS were used. It was hoped that, once the true dimensions of the corrupt network of officers had been verified, an effective strategic analysis of the threat could be formed.

Determined to keep knowledge of Othona's existence as confidential as possible, the MPS's Anti-Corruption Unit secured a safe, covert location to serve as its operational headquarters. (This location had never been used in any previous police operations.) Then, the unit gave selected, well-experienced officers plausible operational "covers" by granting individual sick leave permission, early retirement, geographical relocation, etc. Even the surveillance equipment used was sourced from outside the MPS.

Over the four years in which Othona ran, the following illicit activities on the part of MPS police officers were revealed:

- Stealing of drugs and cash during police searches;
- Sharing of rewards between officers and informants;
- Fabrication of applications for informant rewards;
- Sale of intelligence relating to operations;

- Drug trafficking; and
- Collusion with informants for crimes to be committed, then sharing of the proceeds.

### *Mistakes*

Unfortunately, major mistakes were made in the course of Othona. Originally, 150 experienced detectives were selected. But uniformed officers were later also recruited to add extra manpower. Most of these officers were much less experienced than the original team members. Many lacked the skills and background needed in such sensitive and often wide-ranging probes. Also, the uniformed officers had a distinct lack of technical knowledge of sophisticated surveillance devices, or even of more standard surveillance procedures.

After concluding that initial investigative results were quite poor, Othona's directors came up with a new organizational structure. The most crucial features of the new model were the ways in which the core "internal" team would interact with other units. Although this new structure was not particularly elaborate, it proved demanding in man-hours and involved over 1% of the entire MPS's staff strength.

### *Operation Othona: Integrated police team structure*

- *Internal Team*: This essentially consisted of an intelligence cell and management provision.
- *Prevention Strategy Team*: This team held the unique role, of shutting down any loopholes that emerged during operations in which police officers may have been able to act in a corrupt manner (i.e., being much more attentive to circumstances surrounding bail provisions regarding evidence being offered). The team was generally allowed to operate at their own discretion regarding actions to pursue in specific cases.
- *Source Unit*: This was felt necessary to provide integrity for the overall surveillance, in accordance with the fact that corruption had penetrated senior levels of many departments of the Metropolitan Police Service. It was hoped that having a source unit would enable the entire team to pinpoint where and when any eventual problems first arose.
- *Witness Protection Unit*: This was considered particularly important in helping ensure the protection of informants. In the course of events, this unit was responsible for handling

exposed corrupt police officers, who then decided after being charged to provide information to investigators about other officers' illicit behavior. Before this investigation, trying to persuade officers to testify against colleagues had been almost completely ineffective. But since Operation Othona had proven so successful in prosecuting corrupt officers, they were willing to negotiate for reduced sentences by providing information on co-conspirators. (Witness protection in the UK now averages £30,000 per person. Othona's budget eventually ran into millions of pounds. But this was considered money well spent in the cause of exposing such profound and high-reaching corruption in the nation's largest police force.)

- *Integrity Unit*: This unit's duties required close cooperation with the CPS.
- *Other Units*: It was considered absolutely essential to enlist the collaboration of several other police agencies in many joint operations. These included the Ministry of Defense Police, the National Criminal Intelligence Service, NCS, foreign police forces, and various other undercover police operatives.
- *External Development Team*: This team was made up of skilled surveillance officers accustomed to using sophisticated equipment. Since most of the targets of the investigation were themselves skilled and experienced officers who had served on major crime squads, the targets themselves had the highest technical knowledge of the latest devices.
- *Ghost Squad*: The ghost squad should probably be considered this investigation's biggest success. A ghost squad essentially consists of officers whose activities and whereabouts were concealed from other units. This was very important for monitoring the actions of the other units that were part of the operation. This proved to be an expensive, but ultimately very effective factor in the overall operation.

### *Interacting with the CPS*

It was obvious from the early stages of Othona that the investigation was entering many unexplored areas, especially in terms of the methods being used. It was felt certain that defense attorneys would present many challenges to some of the methods employed, once individual cases were brought to court. The CPS's cooperation was felt to be vital in the interests of being able eventually to secure successful prosecutions.

The CPS's initial response to MPS requests for assistance was very positive. The CPS realized that it had its own reputation to consider in the overall environment of battling corruption. It provided a dedicated team that

- Could provide early advice, both before and during investigations;
- Could understand intelligence-led operations against allegedly corrupt officers; and
- Was staffed by lawyers and caseworkers skilled in handling cases involving informants and covert policing techniques, as well as being experienced in conducting sensitive and intensive inquiries.

The CPS, however, was soon to experience its own problems. Secure office space was unavailable. But an even more serious problem was a group mentality within the British public.

This overall mentality seemed to hold that the types of activities being investigated were barely possible. The vast majority of British police were honest and law-abiding public servants. Therefore, how could it be possible for corruption to be as common and as serious as the MPS Anti-Corruption Unit thought was possible?

This mindset provided a huge advantage to corrupt officers, who often succeeded in breaching some of the most impregnable security systems. Specialist government security advisors were contacted to help the investigators prevent any hacking by such officers while Othona was an active operation. The MPS also deliberately avoided advising the CPS on how to proceed with any disciplinary action against any corrupt officers that CPS itself had identified. Such advice could easily reveal that breaches in CPS security systems had occurred, leading other corrupt agents to alter their behavior.

### *Operational liabilities*

Othona soon became a very expensive operation. The CPS chose to appoint a barrister from the government's Treasury Council at the beginning of virtually every Othona-related investigation to probe subjects such as disclosure of information. Some inquiries lasted up to 18 months, with legal counsel normally charging very large fees.

The selection and vetting process for CPS operatives was also problematic. Any person that the CPS considered for the operational team needed to disclose any professional contacts they had previously

had with any police force. All potential prosecutors also had virtually every aspect of their lives closely scrutinized.

There was also the issue of finding the right balance between the prosecution/investigative teams and the various police forces. This created the paradoxical situation of seeking advice from the CPS, while also insisting that such advice not be interpreted as altering the direction of any investigations.

### *Mistakes*

There was a tendency from the outset of Othona for the MPS to think that it knew best how to conduct thorough investigations. Standard operational procedure was to

- Conduct an investigation;
- Bring all case papers together; then
- Bring charges against suspects, but before case papers had been submitted to the CPS.

The CPS was then forced to rely too heavily on the results of any MPS-led investigation. This led to an unintended result: any mistakes made by the MPS meant that the CPS would then be caught up in legal arguments when cases were eventually brought to trial. Dealing with such legal challenges then became a very lengthy and expensive process for the CPS.

This led the prosecution/investigative teams to contact the CPS earlier in subsequent investigations, to ensure that any gathered evidence would help to provide the strongest possible legal arguments for any and all future indictments.

Because of these experiences, the MPS soon realized that, for practical purposes relating to Othona, any relevant advice offered at the outset of investigations had to be ongoing advice.

### *MPS/CPS Cooperation in gathering legally admissible evidence in Operation Othona*

- *Technical surveillance*: The MPS chose to consult the CPS every time any form of technical surveillance was to be employed. The MPS made sure that specialists were able to obtain the authority for the use of such equipment. Then, it shared all information gathered through surveillance with the CPS.
- *Use of undercover operatives*: The MPS employed the same principles. Seeking CPS advice was seen as essential because

it might have been too easy for an undercover operative to overstep the mark and become an agent provocateur. This would probably guarantee future legal challenges in a court case. (This later proved to be a wise precaution when, in the course of one investigation, a piece of technical equipment was compromised. The CPS was able to prevent the full details of the compromise from being exposed.)

- *Use of informants*: This is a highly sensitive area regarding gathering admissible evidence and avoiding difficult court challenges. The MPS sought information and advice from the CPS at every stage of Othona in which informants were involved.
- *Standards of evidence*: British juries in general are quite reluctant to convict allegedly corrupt police officers, regardless of the evidence presented to them. The MPS was well aware that all evidence they gathered had to be of the highest possible standard. When prosecuting an ordinary member of the public, the evidence standard from the CPS's perspective is 51% (i.e., that should be the realistic assessment of chances of successful prosecution). In dealing with cases involving police officers, the CPS calculated an evidence standard of 90%.

### *Problems encountered during Othona*

It proved to be very difficult to persuade honest police officers to testify against their colleagues. (The Anti-Corruption Unit eventually managed to overcome this, once it had managed to secure prosecutions.)

Resident informants in the UK are obliged to admit all prior criminal convictions before they can even be considered for resident informant status. Such informants can find themselves under great pressure in weighing how much "self-incriminating" information to offer to police. They quite often run the serious risk of being charged with offenses on the basis of what they might choose to disclose about their own illicit acts that prosecutors otherwise probably would never know about. (It is extremely rare for resident informants to be offered leniency when providing any information.)

### *Difficulties involved in prosecuting police officers*

Because of their own often extensive experience with such matters, police defendants in Othona-related prosecutions were often

well aware of some of the weak spots in the cases against them. These tended to revolve around the following:

- *The Regulation of Investigatory Powers Act (2000)*: This was new legislation at the time of most Othona-styled prosecutions. The act was therefore untested in British courts, or by active operations. The act amended the list of authorities that were legally permitted to approve what types of surveillance operations (i.e., involving private dwellings, hotel rooms, etc). The act also redefined the number of authorities that were likely to be needed for certain operations.
- *The Human Rights Act (1998)*: This was most often used as a defensive legal challenge concerning questions regarding the legality, proportionality, and necessity of investigative tactics used during Othona. The MPS felt that most such challenges were fundamentally unfounded in the cases of police officers. It was felt that the police should rightly be held to higher ethical standards of professional conduct than the average citizen should. To date, most defensive legal challenges involving prosecutions of police officers under the act have been successfully countered.
- *Public Interest Immunity*: This is often a particularly sensitive area in relation to the use of informants. Naturally, informants can only be recruited with the understanding that they can and will be protected. Frequently, court cases reach the stage where prosecutors are faced with the dilemma of choosing to continue with a course of action that could strengthen their legal case, or risk exposing an informant. Generally, the reluctant choice is made to drop a case in such circumstances.
- *Integrity tests*: The use of such tests was a very new step for the investigators involved in Othona. Both random tests (i.e., presenting officers with the opportunity to commit petty theft) and directed tests (i.e., those based on intelligence gathered against an officer suspected of already being corrupt) were used. This was also an area where advice was sought consistently from the CPS, since it would have been too easy to provide integrity tests that might have been ruled unlawful in subsequent court cases.

All such tests need to be

- Intelligence-led (i.e., based on actual intelligence supporting suspicions of illicit activity, as opposed to just “fishing” for proof of some wrongdoing);

- Essentially passive (i.e., not acting in ways that could be interpreted as agent provocateur behavior); and
- Proportionate (an officer suspected of involvement in cannabis trafficking, for example, should not be tempted with integrity tests involving heroin or other more dangerous drugs.)

### *Police record keeping*

The Anti-Corruption Unit found, in the earlier cases relating to Othona, that senior investigating officers were unable to refer to any detailed records of policy decisions that had been made by other investigating officers. When senior investigating officers were cross-examined in court, they often had a good recollection of why certain decisions had been made. But they were often left without clear details as to *why* these decisions had been taken. Defense counsels often jumped on this and, in some cases, created enough doubt in the minds of juries to gain acquittals.

As a result, MPS detectives now keep a very complex and systematic set of detailed records for each investigation. These are kept from the day an inquiry is launched, and are shared in full with the CPS.

### *Disclosure*

In major criminal investigations, the MPS now always appoints a single disclosure officer to work with the CPS. The CPS now also appoints its own disclosure officers. This helps greatly in the early detection of potential public interest immunity issues. This also helps minimize the ability of police defendants to exploit their own knowledge of details relevant to the case to embarrass or discredit the prosecution.