

LEGISLATIVE COUNCIL BRIEF

THEFT (AMENDMENT) BILL 1998

INTRODUCTION

A At the meeting of the Executive Council on 10 November 1998, the Council ADVISED and the Chief Executive ORDERED that the Theft (Amendment) Bill 1998 (at Annex A) should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

The Existing Law

2. At present Hong Kong does not have a general offence of fraud. There are a number of fraud-related offences in the Theft Ordinance, such as obtaining property by deception (section 17). However, these existing offences do not cover all types of fraud. Where two or more persons are involved in fraudulent conduct, they may be charged with the common law offence of conspiracy to defraud. However, similar conduct committed by one person acting alone does not constitute an offence unless it falls within the confines of one of the existing offences under the Theft Ordinance.

The LRC Report

3. The Law Reform Commission (LRC) issued a consultation paper in May 1995, recommending the creation of a new offence of fraud and the abolition of the common law offence of conspiracy to defraud. The LRC specifically intended that the new offence of fraud should not be restricted to financial or proprietary gain or loss because they considered that such a restriction “unnecessarily limits the scope of the offence and, to some extent, confuses its ambit with that of theft”.

4. A substantial majority of those who responded to the consultation paper were in favour of the creation of a substantive offence of fraud. However, some of those who commented on the LRC’s proposals expressed concern about the ambit of such an offence and argued for a restriction to financial or proprietary prejudice.

Those concerns were reflected in the LRC's report on the *Creation of a Substantive Offence of Fraud* ("the LRC Report")(at Annex B), published in July 1996.

5. The LRC concluded in its final report that a new offence of fraud be created. Nevertheless, the LRC recommended that the offence should be restricted to circumstances in which there was financial or proprietary loss or gain. The LRC further recommended that the existing offence of conspiracy to defraud should be abolished and replaced with a statutory conspiracy to commit the new offence.

Concerns raised

6. Concerns have recently been raised that, if the recommendations in the LRC Report were fully implemented by enacting the new offence of fraud as recommended, and by repealing the common law offence of conspiracy to defraud, the law of fraud would be defective. This is because the proposed offence would not cover certain matters, which are now covered by conspiracy to defraud, namely:-

- (a) non-financial or non-proprietary prejudice or benefit e.g. a public officer acting in a way in which he would not have acted if he had known the true position; and
- (b) cases where no deception is involved e.g. directors of a company putting the company funds at risk by making a loan other than on a commercial basis.

The revised proposals

7. In order to address these concerns, it is proposed that the restriction to financial or proprietary loss or gain be removed and the existing common law offence of conspiracy to defraud be retained. By removing the restriction to financial or proprietary loss or gain, the new offence will protect not only the individual's proprietary interests, but also the public interest in the integrity of the administration of public affairs. That was the approach favoured by the LRC in its original formulation of the offence. To meet the concern that the new offence would not catch conduct which did not involve an element of deceit (currently

covered by the existing common law conspiracy to defraud), it is considered that the existing offence of conspiracy to defraud should be retained, in addition to the creation of a new substantive offence of fraud. This will ensure that there will be no areas left uncovered after the introduction of the new fraud offence.

8. Another reason for retaining the offence of conspiracy to defraud is that the offence is listed as an extraditable offence in most of Hong Kong's agreements on the surrender of fugitive offenders. Common law jurisdictions in particular were anxious to ensure that extradition would be available for the common law offence of conspiracy to defraud and were assured that such an offence existed in Hong Kong law. If the common law offence is abolished in Hong Kong and the new statutory offence does not comprehend all the conduct previously comprehended by the common law offence, some requests for extradition to Hong Kong could fail for want of double criminality. This could give rise to allegations of bad faith by Hong Kong's treaty partners.

9. The offence proposed by the Bill reflects the LRC's recommendation in its original consultation paper, but differs from the LRC's final recommendation in that the offence is not restricted to financial or proprietary loss or gain. Contrary to the LRC's final view, the common law offence of conspiracy to defraud is retained. In all other aspects, the Bill follows the recommendations of the LRC Report.

THE BILL

10. The Bill creates the offence of fraud, retains the offence at common law of conspiracy to defraud and provides for consequential amendments to relevant ordinances.

11. Clause 2 amends section 8 of the Theft Ordinance to provide for the inclusion of the offence of fraud in the Theft Ordinance. Clause 3 adds a new section 16A to the Theft ordinance to create the new offence of fraud. The offence is committed by any person who, by any deceit and with intent to defraud, induces another person to commit an act or make an omission which results in either -

- (a) benefit to the fraudster or another person other than the person induced; or

- (b) prejudice or a substantial risk of prejudice to someone other than the fraudster.

The proposed penalty after conviction upon indictment is imprisonment for 14 years. It also provides that the common law offence of conspiracy to defraud will not be affected or modified by the creation of the offence of fraud.

12. Clauses 5 to 11 amend various Ordinances as a consequence of the proposals in the Bill.

LEGISLATIVE TIMETABLE

13. The legislative timetable is as follows: -

Publication in the Gazette	20 November 1998
First Reading and Commencement of Second Reading debate	2 December 1998
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

14. The Department of Justice advises that the proposed legislation is consistent with the Basic Law.

HUMAN RIGHTS IMPLICATIONS

15. The Department of Justice advises that the proposed legislation has no human rights implications.

BINDING EFFECT

16. The amendments in this Bill do not affect the binding effect of the existing provisions of the various Ordinances covered by the Bill.

FINANCIAL AND STAFFING IMPLICATIONS

17. Implementation of the proposed Bill has no financial and staffing implications.

PUBLIC CONSULTATION

18. The overwhelming majority of those who responded to the LRC's consultation paper agreed with the recommendations that there should be a new substantive offence of fraud. The Bar Association and the Law Society were consulted on the final report of the LRC in July 1996. Both the Bar and the Law Society supported the recommendations of the LRC. The Bar Association and the Law Society were recently consulted again on the revised proposals.

19. The Bar continues to support the introduction of a new offence of fraud but has raised concern that it is uncertain whether the common law offence of conspiracy to defraud and the new offence of fraud are crimes of dishonesty and has suggested that it should be made clear by express provision. It is, however, considered not necessary to so provide by legislation since it is settled by case law that dishonesty is an ingredient of the common law offence of conspiracy to defraud and it is also clear, from the definition of "deceit" in the Bill and the inclusion of "intent to defraud" as one of its elements, that the new offence of fraud will necessarily involve dishonesty. The Law Society has raised concern that, under the revised proposals, the new offence of fraud will cover any untrue statement. It has suggested that the word "deceit" should be further defined so as to narrow the scope of the offence. It has also suggested that the common law offence of conspiracy to defraud should be repealed. It is, however, considered that the word "deceit" should be construed in accordance with its common usage and there does not appear to be any difficulty in interpreting the undefined word "deception" in the Theft

Ordinance. Moreover, it is considered necessary to retain the common law offence of conspiracy to defraud which covers cases in which no deceit is involved.

PUBLICITY

20. A press release will be issued when the Bill is gazetted. A spokesman will be made available to answer media enquiries.

Legal Policy Division

Department of Justice

November 1998

Ref : LP 452/00C

Subject Officer : Mr. Stephen Kai-yi Wong
Solicitor General (Ag)

A BILL

To

Amend the Theft Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Theft (Amendment) Ordinance 1998.

2. Other definitions

Section 8(2) of the Theft Ordinance (Cap. 210) is amended -

- (a) in the definition of “gain” and “loss”, by adding “, except in section 16A,” before “to be construed”;
- (b) in the definition of “獲益” and “損失”, in paragraph (b) -
 - (i) by repealing “能會”;
 - (ii) by repealing “放棄” and substituting “失去”.

3. Section added

The following is added before section 17 -

“16A. Fraud

(1) If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either -

- (a) in benefit to any person other than the second-mentioned person;
- or

- (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

(2) For the purposes of subsection (1), a person shall be treated as having an intent to defraud if, at the time when he practises the deceit, he intends that he will by the deceit (whether or not the deceit is the sole or main inducement) induce another person to commit an act or make an omission, which will result in either or both of the consequences referred to in paragraphs (a) and (b) of that subsection.

(3) For the purposes of this section -
“act” (作為) and “omission” (不作為) include respectively a series of acts and a series of omissions;

“benefit” (利益) includes any benefit or gain -

- (a) whether temporary or permanent;
- (b) whether financial or non-financial;
- (c) whether proprietary or non-proprietary;

“deceit” (欺騙) means any deceit (whether deliberate or reckless) by words or conduct

(whether by any act or omission) as to fact or as to law, including a deceit relating to the past, the present or the future and a deceit as to the intentions or opinions of the person practising the deceit or of any other person;

“gain” (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not;

“loss” (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has;

“prejudice” (不利) includes any prejudice or loss -

- (a) whether temporary or permanent;
- (b) whether financial or non-financial;
- (c) whether proprietary or non-proprietary.

(4) This section shall not affect or modify the offence at common law of conspiracy to defraud.”.

4. Obtaining property by deception

Section 17(4) is amended, in the definition of “deception”, by adding “語言” before “文字”.

Consequential Amendments

Independent Commission Against Corruption Ordinance

5. Power of arrest

Section 10(5) of the Independent Commission Against Corruption Ordinance (Cap. 204) is amended -

- (a) by adding -
 - “(ba) the offence of fraud under section 16A of the Theft Ordinance (Cap 210);”;
- (b) in paragraph (f), by adding “(ba),” after “(b),”;
- (c) in paragraph (g), by adding “(ba),” after “(b),”.

Organized and Serious Crimes Ordinance

6. Offences relevant to definitions of “organized crime” and “specified offence”

Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended, in paragraph 12, by adding before “section 17” -

“section 16A fraud”.

Criminal Jurisdiction Ordinance

7. Offences to which this Ordinance applies

Section 2(2) (a) of the Criminal Jurisdiction Ordinance (Cap. 461) is amended by adding before “section 17” -
“section 16A (fraud)”.

Merchant Shipping (Seafarers) Ordinance

8. Forgery, etc. of certificate

Section 128(3) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478) is amended by repealing “a conspiracy to commit such an offence” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) in relation to a certificate of competency, or of a conspiracy to commit any such offence,”.

Merchant Shipping (Seafarers) (Certification of Officers) Regulation

9. Offences and penalties

Section 17(3) of the Merchant Shipping (Seafarers) (Certification of Officers) Regulation (Cap. 478 sub. leg.) is amended by repealing “a conspiracy to commit such an offence” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) in relation to a certificate of competency or a certificate of service, or of a conspiracy to commit any such offence,”.

Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation

10. False pretences and supply of false information

Section 7(2) of the Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation (Cap. 478 sub. leg.) is amended by repealing “a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a document referred to in that subsection” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) in relation to a document referred to in subsection (1), or of a conspiracy to commit any such offence, or of a conspiracy to defraud in relation to a document referred to in subsection (1)”.

**Merchant Shipping (Seafarers) (Navigational
Watch Ratings) Regulation**

11. False pretences and supply of false information

Section 7(2) of the Merchant Shipping (Seafarers) (Navigational Watch Ratings) Regulation (Cap. 478 sub. leg.) is amended by repealing “a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a document referred to in that subsection” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) in relation to a document referred to in subsection (1), or of a conspiracy to commit any such offence, or of a conspiracy to defraud in relation to a document referred to in subsection (1)”.

Explanatory Memorandum

The main object of this Bill is to amend the Theft Ordinance (Cap. 210), so as to create the offence of fraud under the laws of Hong Kong, in the light of the recommendations of the Law Reform Commission of Hong Kong in its report entitled “Creation of a Substantive Offence of Fraud”.

2. Clause 2(a) amends section 8 of the principal Ordinance, to provide for the inclusion of the offence of fraud in the principal Ordinance.
3. Clause 3 adds new section 16A to the principal Ordinance. The new section provides for the offence of fraud and defines, among others, the key elements of “deceit” and “intent to defraud”, as well as “benefit” and “prejudice”. It also provides that the common law offence of conspiracy to defraud will not be affected or modified by the creation of the proposed offence of fraud.
4. Clauses 2(b) and 4 introduce miscellaneous amendments to the Chinese text of the principal Ordinance.
5. Clauses 5 to 11 deal with consequential amendments by adding references to the new offence of fraud in appropriate legislation.