

***Theft (Amendment) Bill***  
***Proposed Offence of “Fraud”***

Retention of Conspiracy to Defraud

The Administration is asked by the Bills Committee to justify the retention of the common law offence of *conspiracy to defraud*, along with the proposed statutory offence of *fraud*, an offence limited to fraud occasioning *economic or proprietary* loss or gain or the risk thereof.

View of D of J

2. The Department of Justice are firmly of the view that there is full justification to *retain* the common law offence of *conspiracy to defraud*.

The Statutory Offence - the element of 'deceit'

3. In the proposed section 16A(1) of the Bill, *fraud* is defined as follows : -

"(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 substantial risk of prejudice to any person other than the first-mentioned person, commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years." [emphasis added]

4. Accordingly, it is essential for the commission of the statutory offence for the act or omission of the person who has been deceived, to have been [*induced*] [*by deceit*], and that that act or omission *must result* in a benefit to some other person or prejudice or the risk of prejudice to some other person.

5. In order to prove the statutory offence, it is necessary for proof of *all* elements, and the need to prove a connection between those elements - in a given case there may be deceit and a benefit may be gained or prejudice or risk of prejudice occasioned, but one element may *not* have led to the other.

#### The Statutory Offence - Economic or Proprietary benefit or prejudice only

6. Under the proposed section 16A(3) the terms "*benefit*" and "*prejudice*" will be defined as follows : -

"*benefit*' means any financial or proprietary gain, whether temporary or permanent.

'*prejudice*' means any financial or proprietary loss whether temporary or permanent."

7. Despite having been prevailed upon to include fraud by which a person is caused to act contrary to his *public duty*, in the statutory offence, the Bills Committee is of the view that the statutory offence should follow the Law Reform Commission recommendation and be confined to fraud occasioning *economic* or *proprietary* loss or gain. (Quaere - how to deal with *public duty conspiracy* if common law offence of conspiracy to defraud were not to be retained ?)

#### Cases that would not have proceeded if the statutory offence applied

8. There have been a *considerable* number of cases, many of which have been high profile, which would *not* have proceeded if the statutory offence of fraud *alone*, was all that was available at that time; these would include:-

1. The Kevin HSU case - this was a cheque kiting offence, in which bank officials were *aware of* the true nature of HSU's conduct.

2. Ka Wah Bank Case - the LO brothers were directors of the bank and *approved* the sometimes fictitious loans.

3. Hang Lung Bank case - another cheque kiting case in which bank officials were *compromised* (it led to the collapse of the bank)

4. OTB Bank case - similar to 3.

5. Overseas Union Bank - a case of letter of credit fraud. The bank officials were *aware of* the fraud and *no* deceit was practised.

6. Conic Investments Cases - a case of falsification of company accounts. The company directors were all involved in it and there was *no* deceit.

7. BMFL Case (George Tan, Lorraine Osman etc) - Osman, Saniman and Shamsuddin were all directors of the parent bank. They were *not* deceived.

8. World Trade Centre Case - again there was deceit, but *no* economic loss or gain.

9. Chim Pui-chung - there was deceit but *not* economic loss or gain.

9. In each of the cases mentioned above, any substantive offence that may have been available, such as false accounting, would have been *wholly inadequate* properly to reflect the criminality involved. Moreover, it is not always possible to establish that each and every conspirator was involved in the activity which might constitute a substantive offence, whereas it is obvious that they were involved in a wider conspiracy to defraud in which the

commission of substantive offences may or may not have been contemplated by all. In this regard, the accused, *Mr George Tan*, would have walked completely if there had not been available to the prosecution a charge of conspiracy to defraud as there was no substantive offence for which he could have been charged.

### Extradition and MLA Treaties

10. The concept of '*double criminality*' is a pre-requisite that must be met under both the *Surrender of Fugitive Offenders Ordinance, Cap. 503*, and the *Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525*. This rule requires that before assistance can be rendered by Hong Kong to a foreign jurisdiction, the conduct underlying the offence for which the fugitive is wanted, or the offence under investigation or prosecution in respect of which mutual legal assistance is requested, must constitute an offence *under Hong Kong law* if the same underlying conduct had occurred in Hong Kong.

11. The effect of the Bill in its present form, and if conspiracy to defraud at common law is not retained, will mean that Hong Kong may *not* be able to provide assistance to many jurisdictions, including most other common law jurisdictions, which maintain a wider notion of fraud under their respective laws. In those cases where conspiracy to defraud is alleged by the requesting jurisdiction but the underlying conduct discloses *no* element of *deceit* or of *economic* loss or gain, Hong Kong will *not* be able to provide assistance under either Cap. 503 or Cap. 525, because double criminality will not be met. In such cases assistance could only be provided if the conduct disclosed an alternative offence under Hong Kong Law (e.g. false accounting).

12. Although such requests may not be common, as most of our international agreements, particularly for the surrender of fugitive offenders, specifically include conspiracy to defraud as a scheduled offence in Cap. 503, the failure of Hong Kong to comply with the request could lead to formal complaints from the requesting jurisdiction. One of the results is that Hong Kong will become a "heaven" for international fraudster.

### Why has England retained the common law offence?

13. In 1977 the Criminal Law Act was introduced in England, which had the effect of abolishing conspiracies at common law, and creating a statutory offence of conspiracy. However because the legislators recognised the value of the offence of conspiracy to defraud the new law specifically preserved this particular variant of common law conspiracy. Nevertheless because of the way the legislation was drafted, considerable difficulties were experienced in applying its provisions whenever conspiracy to defraud was charged, and a number of cases found their way to the House of Lords.

14. The House of Lords interpretation of the legislation was to the effect that the new legislation creating statutory conspiracies meant that a statutory conspiracy and a conspiracy to defraud were *mutually exclusive* and conduct which amounted to the former could *not* be charged as the latter. As a consequence the usefulness of conspiracy to defraud was severely limited.

15. The problems created by these House of Lords decisions were examined by *Lord Roskill* who was commissioned by the Government to prepare a report. As a consequence of comments made by him in his report and of concerns expressed by those involved in the administration of the criminal justice system, the Government amended the Criminal Justice Act in 1987 to restore the full usefulness of the offence of *conspiracy to defraud*.

16. For a long time now the English Law Commission has been reviewing all offences involving dishonesty and has deferred making a final recommendation on conspiracy to defraud until that review has been completed. Our fraud legislation, the Theft Ordinance, Cap. 210, is virtually identical to the English Act. The results of their review would be of great relevance to us and it would seem only sensible to, like the English, preserve the offence of conspiracy to defraud until such time as we have had a chance to examine the conclusions they reach in the review they are presently conducting.

17. Annexed hereto is a summary of fraud offences in other jurisdictions.

### Conclusions

18. To conclude :-

(a) it is most important to bear in mind the limitations of the proposed statutory offence of fraud brought about by the nature of the elements of this offence and of the need to prove the connection between those elements - *this could result in some offenders not being prosecuted;*

(b) in the international arena Hong Kong has legal responsibilities under various treaties, which it cannot compromise without endangering its own reputation - *Hong Kong must not become the refuge of the international fraudster;*

(c) the usefulness of conspiracy to defraud, has been proven over the years and this can be seen in (i) the case examples quoted (mostly major and high profile commercial crime cases); and (ii) the fact that many common law jurisdiction have retained it.

*Hong Kong should learn from the mistakes of others, not repeat them.*

Department of Justice.  
April 1999.

## **A Summary of Fraud Offences in Other Jurisdictions**

### Australia

The states and territories in Australia have separate criminal law legislation and the federal Government also has legislation to regulate fraud on the Commonwealth. The federal offence is quite simple. It does not contain any definition of fraud and the courts have simply ascribed to the word its ordinary meaning in everyday language. Dishonesty is an ingredient of the offence.

The states have a statutory offence of obtaining by false pretence and those states with criminal codes have a statutory versions of conspiracy to defraud. In Queensland there is now a provision criminalising eight forms of fraudulent conduct each of which must be committed dishonestly to amount to fraud and none of which require proof of deception. The Tasmanian Code is simpler and contains no form of words which might suggest a deceit element.

### Canada

The Canadian offence required that the defrauding be “by deceit, falsehood, or other fraudulent means, whether or not it is a false pretence within the meaning of this Act .....”. It has been held that dishonesty is an essential element of this offence. Another element is “deprivation” which does not require actual economic loss but merely “proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim”. The breadth of the term “other fraudulent means” is such that “there need not be some form of relationship or nexus between the accused and the victim.

The Canadian Law Reform Commission has recommended the replacement of the existing fraud offence with one that is narrower in scope.

### England and Wales

English law has no general offence of fraud. In 1987 the English Law Commission suggested an offence which did not contain an element of deceit; merely proof of gain or loss by dishonesty. The English Law Commission took as their starting point for the definition the existing offence of conspiracy to defraud but decided not to repeal the common law offence until such time as it had concluded a “comprehensive review of offences of dishonesty”.

### Jersey

There has been held to be a common law offence of fraud in Jersey. (Jersey's common law derives from Norman customary law.) The Jersey offence requires proof that a defendant deliberately made a false representation with the intention of causing thereby, and with the result in fact of causing-thereby, actual prejudice to someone and actual benefit to himself or somebody else.

### Malaysia and Singapore

The law of these two countries are based on the Indian Penal Code. The relevant fraud offences are cheating and criminal breach of trust. The offence of cheating is rather similar to our obtaining property by deception but it does also encompass intentionally inducing a person, by deception, "to do or omit to do something that causes or is likely to cause harm to that person in body, mind, reputation or property".

The criminal breach of trust offence is concerned with the dishonest misappropriation of property by persons to whom it is entrusted.

### New Zealand

New Zealand has a statutory version of conspiracy to defraud, the elements of which are:

- (i) an agreement or conspiracy between 2 or more persons;
- (ii) by deceit or falsehood or other fraudulent means;
- (iii) to defraud the public or any person, or to affect the price of anything publicly sold.

There is however a redraft of this offence proposed by their Crimes Consultative Committee which incorporates an element of deception.

### Scotland

The common law offence of fraud which exists in Scotland has 3 essential elements. They are:

- (i) a false pretence;

- (ii) a definite practical result; and
- (iii) a causal link between the pretence and the result.

For element (ii), the result does not have to be economic in nature.

### South Africa

The essential elements of the South African common law offence are :

- (i) unlawfully;
- (ii) making a representation;
- (iii) intent to defraud;
- (iv) causing;
- (v) actual or potential prejudice.

There are 2 aspects to intent to defraud : firstly there must be an intention to deceive and, secondly, there must be an intention to induce the victim to alter or abstain from altering his legal position.

### Zimbabwe

Fraud in Zimbabwe is a common law crime with its origins in Roman-Dutch law. The law on fraud is based on the jurisprudence developed in the South African courts and so the constituent elements are the same as those set out above for the South African offence.

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