

Information Note

on the Theft (Amendment) Bill 1998

1. At the meeting on 17 November 1998, the Legislative Council Panel on Administration of Justice and Legal Services requested that the following information be provided:-

- (a) an update of the position of the law of fraud in other jurisdictions;
- (b) a comparison table on provisions of the Bill and the recommendations of the Law Reform Commission (LRC);
- (c) comments on the submission from the Law Society; and
- (d) comments on the submission from the Bar Association.

Law of fraud in other jurisdictions

2. Chapter 4 of the LRC Report on Creation of a Substantive Offence of Fraud sets out the law of fraud in other jurisdictions. The existing offence of fraud in Scotland continues to work satisfactorily and there does not appear to be any proposal for change. The law in New Zealand remains as described in the LRC Report. We are not aware of any relevant changes to the law in Canada since the Report was published. In England, the Law Commission is continuing its comprehensive review of the offences of dishonesty, but we are advised by the Secretary to that Commission that there is no prospect of an early resolution of the study. In Australia, the Australian jurisdictions are working toward the development of uniform criminal codes but none of the governments have enacted any code provisions on fraud and conspiracy to defraud. The Australian law as described in the report remains largely accurate except

that section 429 of Queensland's Criminal Code (the offence of cheating) as set out in paragraph 4.5 of the LRC Report has been repealed. The relevant section is now section 408C, a copy of which is enclosed as Annex II.

Comparison of the Bill and the LRC's recommendations

3. To facilitate consideration of the Bill clause by clause, a comparison table is prepared as Annex I.

4. The legislative proposals as set out in the Bill seek to address the concerns that if the recommendations of the LRC were fully implemented, the law of fraud would be defective:-

- i) By removing the restriction to financial or proprietary loss or gain, the new offence will protect not only an individual's proprietary interest, but also the public interest in the integrity of the administration of public affairs. Indeed, that was the approach favoured by the LRC in its original formulation of the offence.
- ii) To meet the concern that the new offence would not catch conduct not involving 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. For example, a defendant who bribes cinema employees to lend him films for the purpose of making illegal copies and distributes them for profit can be charged, along with others, with conspiracy to defraud the film owners of the copyright and

distribution rights. 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. Most common law jurisdictions made the point that the offence of conspiracy to defraud was frequently charged in their jurisdictions and likely to be the subject of requests for surrender. They accordingly wished to know whether the offence was known to Hong Kong law and accordingly one for which surrender could be granted. 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.

- iii) While the proposed new offence of fraud will cover conduct which at present falls within the existing Theft Ordinance offences, it goes further and covers conduct which is not currently caught, such as:-
- (a) A person borrowing property from another person by deceit without the intention of permanently depriving the owner of it but with an intention to cause prejudice to another's rights;
 - (b) A person obtaining sponsorship for a charitable event did not ultimately pass on the funds raised to the charity in question; and

- (c) A public officer granting a permit to a person who, by deceit, had induced the officer to believe that he had the necessary qualifications.

Comments on the submission from the Law Society

5. The Law Society has raised concerns about the Bill in respect of:-
- (a) the express preservation of the common law offence of conspiracy to defraud;
 - (b) the lack of proper definitions of “deceit” and “benefit/prejudice”;
 - (c) the wide ambit of the statutory offence and its possible intrusion into the civil arena; and
 - (d) the possibility of overlap between the common law and statutory offences.
6. As to para 5(a), the Administration considers that it is necessary to retain the common law offence of conspiracy to defraud since the new offence of fraud will not cover cases in which no deceit is involved.
7. As to para 5(b), it is considered that “deceit” should be construed in accordance with its common usage. It is noted that the definition of “deception” under section 17 of the Theft Ordinance is rendered in similar terms to that of “deceit” in relation to the new offence of fraud. There is no specific meaning assigned to the word “deception” in the Theft Ordinance, yet the courts have experienced no problem in determining the scope of that term. The Bill contains inclusive definitions

of “benefit” and “prejudice”. It is considered that these terms should also be construed in accordance with their common usage.

8. As to para 5(c), it is considered that, being a general offence, the ambit of the new offence of fraud should not be restricted to protecting individual interests in respect of financial or proprietary benefit or prejudice. It should also protect the integrity of the administration of public affairs. In order to constitute an offence of fraud, there must be deceit on the part of the offender with intent to defraud. It is, therefore, difficult to envisage how the new offence of fraud would intrude upon ordinary lawful intrude upon ordinary lawful civil or commercial activities.

9. As to para 5(d), the possibility of an overlap between the common law offence of conspiracy to defraud and the new offence of fraud, it must be pointed out that overlap is not uncommon in criminal law. It should also be noted that the penalty for the new offence is the same as that for conspiracy to defraud, and a defendant will be at the same risk whichever charge is chosen.

Comments on the submission from the Bar Association

10. The Bar Association has expressed concern that the new offence of fraud may not be construed as an offence of dishonesty. The Administration considers the word “deceit” and the inclusion of “intent to defraud” as an element of the offence show that the new offence necessarily involves dishonesty. The phrase “intent to defraud” means that, at the time when the fraudster practises the deceit, he intends that another person will be induced to commit an act or make an omission which will result in benefit to any person other than the one induced or prejudice to any person other than the fraudster. Therefore, the deceit must, by the fact that it is practised with intent to defraud, be dishonest.

11. The LRC considered the arguments for and against including a separate requirement of dishonesty in the new offence of fraud (see paragraphs 5.31 and 5.32 of the LRC Report) and concluded that there should be no separate requirement of dishonesty. Apart from the above reasons for not including the element of dishonesty, the LRC considered, and the Administration agrees, that to suggest that the inclusion of dishonesty as an element of the offence avoids criminalising conduct done with good intention, or commercial exaggeration, is to confuse motive with the objective fact of the falsity or otherwise of a statement or other representation made with intent to defraud. Motive goes to mitigation alone, not criminality. A false statement would found a charge of fraud (if there was the intent to defraud), regardless of the motive which prompted it.

Department of Justice
December 1998

**Comparison Table on Provisions of the Bill and
Recommendations of the Law Reform Commission**

The Bill	LRC's Recommendation	Remarks/Justifications
<p><u>Clause 1:short title</u></p> <p>It provides for the citation of the Ordinance as the "Theft (Amendment) Ordinance 1998".</p>	<p>Instead of amending an existing Ordinance, the LRC recommended the enactment of a separate Ordinance (the "Fraud Bill").</p> <p>(Annexure 4 to the LRC Report)</p>	<p>The enactment of a Fraud Ordinance may create the misleading impression that it covers all types of fraud-related offences. It is considered that the new offence should be created by amending the Theft Ordinance.</p>
<p><u>Clause 2:other definitions</u></p> <p>(a) Clause 2(a) seeks to provide that the definitions of "gain" and "loss" under section 8 of the Theft Ordinance will not be applied to the words "gain" and "loss" in relation to the new offence of fraud.</p>	<p>(a) The LRC did not touch upon this aspect of the Theft Ordinance.</p>	<p>(a) Clause 2(a) is necessary as a result of the difference in the revised definition of "gain" and "loss" adopted for the new offence of fraud and those under section 8 of the Theft Ordinance.</p>

The Bill	LRC's Recommendation	Remarks/Justifications
(b) Clause 2(b) provides for certain minor amendments to the Chinese text of the definition of "gain" and "loss" under section 8 of the Theft Ordinance.	(b) The LRC did not touch upon this aspect of the Theft Ordinance.	(b) Clause 2(b) is necessary to ensure consistency in wordings in the Chinese text of the Theft Ordinance.

The Bill	LRC's Recommendation	Remarks/Justifications
<p><u>Clause 3:Section added</u></p> <p>A substantive offence of fraud is created. The new offence of fraud is not restricted to financial or proprietary gain or loss. The common law offence of conspiracy to defraud is retained.</p>	<p>The LRC recommended that the new offence of fraud should be limited to financial or proprietary gain or loss. (Paragraphs 5.38 to 5.39 of the LRC Report)</p> <p>The LRC recommended that the common law offence of conspiracy to defraud should be repealed. (Paragraph 5.48 of the LRC Report)</p>	<p>The LRC, in its original consultation paper issued in May 1995, recommended that the new offence of fraud should not be restricted to financial or proprietary gain or loss. It is considered that the new offence of fraud should protect, apart from individual's proprietary interests, the public interest in the integrity of the administration of public affairs.</p> <p>The new offence of fraud requires as one of its elements the proof of deceit. It is considered necessary to retain the common law offence of conspiracy to defraud which covers cases where no deceit is involved.</p>

The Bill	LRC's Recommendation	Remarks/Justifications
<p>The definition of “deceit” as an element of the new offence of fraud is amended in the light of the parallel wordings of the definition of “deception” in section 17(4) of the Theft Ordinance.</p> <p><u>Clause 4:Obtaining property by deception</u></p> <p>It amends the wordings of the Chinese text of the definition of “deception” under section 17(4) of the Theft Ordinance.</p>	<p>The definition of “deceit” as an element of the new offence of fraud, as recommended by the LRC, did not tally with the definition of “deception” in the Theft Ordinance.</p> <p>The LRC did not touch upon this aspect of the Theft Ordinance.</p>	<p>It is considered desirable that the definition of “deceit” should be amended to tally with definition of “deception” appearing also in the Theft Ordinance.</p> <p>Clause 4 aims to ensure consistency in wordings in the Chinese text of the Theft Ordinance</p>

The Bill	LRC's Recommendation	Remarks/Justifications
<p data-bbox="272 409 491 539"><u>Clauses 5 to 11:</u> <u>Consequential</u> <u>amendments</u></p> <p data-bbox="272 600 584 875">These clauses deal with consequential amendments by adding references to the new offence of fraud in appropriate legislation.</p>	<p data-bbox="652 600 906 1684">On the basis of the LRC's recommendations to create a new offence of fraud and to repeal the common law offence of conspiracy to defraud, consequential amendments were made by removing references to the common law offence of conspiracy to defraud and adding references to the new offence of fraud in appropriate legislation.</p>	<p data-bbox="971 600 1289 875">The consequential amendments are based on the provision that the common law offence of conspiracy to defraud is retained.</p>

A sentencing judge cannot take into consideration as matters of aggravation any circumstance of aggravation not charged in the indictment. See *R v King* [1983] 2 Qd R 168.

As to the stealing of the petrol in the motor vehicle, see *R v Bailey* [1924] QWN 38; (1924) 18 QJPR 34, noted also under s 391. As to the desirability of adding a charge of stealing the petrol, see *R v Flower* (1956) 40 Cr App R 189.

A verdict under this section is not open on a charge of stealing a motor vehicle, unless such a count is expressly included in the indictment. However, under the provisions of s 588 a verdict of unlawfully using cattle (s 445) is open on a charge of cattle stealing (ss 391, 398).

Compare s 190A of the Western Australian Criminal Code which deals with the unauthorised use of vehicles.

Counts of stealing a motor vehicle and of unlawful use of a motor vehicle may be joined in the one indictment either separately or as alternatives. See *R v Leavitt* [1978] Qd R 444.

[s 408B] Indictable offences relating to user or possession of motor vehicles, aircraft or vessels that may be dealt with summarily

408B (Repealed)

[s 408B rep Act 3 of 1997 s 120 and Sch 1, opn 1 July 1997]

Editor's note: For the text of repealed s 408B with relevant annotations, see [REP s 408B] in the "Repealed Legislation" guide card, following.

CRIMINAL LAW OF QUEENSLAND

[s 408C] Fraud

[Heading am Act 3 of 1997 s 66, opn 1 July 1997]

408C (1) A person who dishonestly—

- (a) applies to his or her own use or to the use of any person—
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
- (b) obtains property from any person; or
- (c) induces any person to deliver property to any person; or
- (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
- (e) causes a detriment, pecuniary or otherwise, to any person; or
- (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
- (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
- (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

commits the crime of fraud.

[subs (1) subs Act 3 of 1997 s 66, opn 1 July 1997]

(2) An offender guilty of the crime of fraud is liable to imprisonment for 5 years save in any of the following cases when he is liable to imprisonment for 10 years, that is to say—

- (a) if the offender is a director or member of the governing body of a corporation, and the victim is the corporation;
- (b) if the offender is an employee of another person, and the victim is the other person.

(c) if any property in relation to which the offence is committed came into the possession or control of the offender subject to a trust, direction or condition that it should be applied to any purpose or be paid to any person specified in the terms of trust, direction or condition or came into the offender's possession on account of any other person;

(d) if the property, or the yield to the offender from the dishonesty, is of a value of \$5000 or more.

[s (2) am Act 3 of 1997 s 66, opn 1 July 1997]

(3) For the purposes of this section—

(a) "property", without limiting the definition of property in section 1, include credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations;

(b) a person's act or omission in relation to property may be dishonest even though—

- (i) he or she is willing to pay for the property; or
- (ii) he or she intends to afterwards restore the property or to make restitution for the property or to afterwards fulfil his or her obligations or to make good any detriment; or
- (iii) an owner or other person consents to doing any act or to making any omission; or
- (iv) a mistake is made by another person; and

(c) a person's act or omission in relation to property is not taken to be dishonest if when the person does the act or makes the omission, he or she does not know to whom the property belongs and believes on reasonable grounds that the owner cannot be discovered by taking reasonable steps, unless the property came into his or her possession or control as trustee or personal representative;

(d) persons to whom property belongs include the owner, any joint or part owner or owner in common, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender's application of the property, had control of it

(e) "obtain" includes to get, gain, receive or acquire in any way, and

(f) if a person obtains property from any person or induces any person to deliver property to any person it is immaterial in either case whether the owner passes or intends to pass ownership in the property or whether he or she intends to pass ownership in the property to any person.

s 408C insert Act 2 of 1979 s 5; am Act 88 of 1988 s 5 and Sch II; Act 17 of 1989 s 39, Act 3 of 1997 s 66, opn 1 July 1997]

Editor's note: For the text of s 408C in force immediately prior to the 1997 amendments, see [REP s 408C] in the "Repealed Legislation" guide card, following.

COMMENTARY ON SECTION 408C

408C(1) Scope of section. The term "property" and term "money" (included by definition in the term "property") are defined in s 1. Section 408C(3)(a) further extends that definition. As to indictments for offences against this section, see ss 566(15) and 568(3). The latter section permits a charge for one count of fraud where a number of specific frauds of the same type extending over any space of time have been committed.