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**Report of the Bills Committee on  
Theft (Amendment) Bill 1998**

**Purpose**

This paper reports on the deliberations of the Bills Committee on the Theft (Amendment) Bill 1998.

**Background**

The existing law

2. At present Hong Kong does not have an offence of fraud. There are a number of fraud-related offences in the Theft Ordinance (Cap. 210), but these offences do not cover all types of fraud. While two persons together engaging in fraudulent conduct may be charged with the common law offence of conspiracy to defraud, similar conduct committed by one person acting alone does not constitute an offence.

The Report of the Law Reform Commission (LRC)

3. The 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 recommended that the new offence of fraud should not be restricted to financial or proprietary gain or loss because such a restriction unnecessarily limits the scope of the offence and, to some extent, confuses its ambit with that of theft.

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

5. In its report on the *Creation of a Substantive Offence of Fraud* published in July 1996, the LRC concluded that a new offence of fraud restricted to circumstances in which there was financial or proprietary loss or gain should be created. Under this offence, a person by deceit induces another to act or make an omission resulting in either prejudice or a substantial risk of prejudice (financial or proprietary) to another,

or benefit (financial or proprietary) to the fraudster or another would commit an offence. The LRC further recommended that the existing common law offence of conspiracy to defraud should be abolished.

## **The Bill**

6. The Bill seeks to create a substantive offence of fraud which is not restricted to financial or proprietary gain or loss, and to retain the common law offence of conspiracy to defraud.

## **The Bills Committee**

7. At the House Committee meeting on 4 December 1998, members agreed to form a Bills Committee to scrutinise the Bill in detail. At the first meeting of the Bills Committee held on 5 January 1999, Hon Mrs Miriam LAU Kin-yea was elected Chairman. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee held seven meetings with the Administration and considered the views of the Hong Kong Bar Association and the Law Society of Hong Kong.

## **Deliberations of the Bills Committee**

### Comparison of the Bill and the LRC's recommendations

8. From the outset, members of the Bills Committee pointed out that a primary objective of the LRC study was to consider the creation of a substantive offence of fraud to encompass conduct currently caught by the common law offence of conspiracy to defraud, and the recommendations of the LRC were arrived at after lengthy and detailed deliberations. They had serious reservations about the proposals of the Bill which departed from the recommendations of the LRC in the following areas -

- (a) the offence of fraud was not restricted to cases involving financial and proprietary gain or loss; and
- (b) the common law offence of conspiracy to defraud was proposed to be retained, instead of being abolished.

9. According to the Administration, there had been concerns that, if the recommendations of the LRC were fully implemented, the law of fraud would be defective because the proposed offence of fraud would not cover certain matters which

were now covered by common law offence of conspiracy to defraud. The Bill sought to address these concerns in the following ways -

- (a) by removing the restriction to financial or proprietary loss or gain, the new offence would protect not only an individual's proprietary interest, but also the public interest in the integrity of the administration of public affairs; and
- (b) by retaining the existing common law offence of conspiracy to defraud, in addition to the creation of a new substantive offence of fraud, conduct not involving an element of deceit would continue to be caught.

Deliberations of the Bills Committee on these proposals are set out in paragraphs 10-16 below.

### Proposals of the Bill

#### *Proposal to remove the restriction to financial or proprietary gain or loss*

10. The Administration explained that the Bill enabled action to be taken on cases involving no financial benefit or prejudice, such as public officers being induced by false representations to breach their public duty or act in a way in which they would not have acted had they known of the true facts. The Administration quoted a number of cases to justify the need to remove the restriction to financial or proprietary gain.

11. Members considered that, in the cases quoted, the community would prefer to punish persons for deceiving people for the purpose of perpetrating economic gains for themselves and causing economic loss to others, than for causing a statutory or public body to breach its public duty. They queried the need to apply the proposed offence of fraud to cover situations involving non-economic gain or loss, in view of the fact that cases of the fraudster acting alone and not caught by any of the existing provisions of the Theft Ordinance or the Crimes Ordinance were rare.

12. Members cautioned that the scope of the new offence of fraud might be too wide such that it could catch situations not originally contemplated by the Administration. They shared the concern of the Law Society that the new offence of fraud might intrude upon ordinary lawful civil or commercial activities, in view of the wide scope of the terms "deceit", "benefit" and "prejudice" defined under the Bill. They also noted that the Bar Association was concerned about whether the new offence of fraud would be construed as an offence of dishonesty.

13. The Administration explained that the views of prosecuting officers were that the Bill as drafted was necessary to ensure that there would be no areas of fraud left

uncovered and that prosecutions could be brought against some cases of substantive commercial crimes which could not be prosecuted under the current law. On members' concern about the "wide definitions" used in the Bill, the Administration advised that any conduct that involved representations which were made with intent to defraud was criminal in nature. However, as to whether trivial matters such as cases of "white lie" would be subject to prosecution, this could be addressed by the Prosecution Policy which provided a prosecutorial discretion not to initiate criminal prosecution against conducts of a trivial nature.

14. On the Bar Association's concern, the Administration explained that the word "deceit" and the inclusion of "intent to defraud" as an element of the offence showed that the new offence necessarily involved dishonesty. The phrase "intent to defraud" meant that, at the time when the fraudster practised the deceit, he intended that another person would be induced to commit an act or make an omission which would 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 was practised with intent to defraud, be dishonest.

*Proposal to retain the common law offence of conspiracy to defraud*

15. The Administration pointed out that the offence of fraud under the Bill included the element of deceit. A considerable number of cases, many of which were high profile, would not have proceeded if the statutory offence of fraud alone was all that was available at that time. In each of these cases, any substantive offence that might have been available, such as false accounting, would have been wholly inadequate to reflect the criminality involved. Moreover, it was not always possible to establish that each and every conspirator was involved in the activity which might constitute a substantive offence, whereas it was obvious that they were involved in a wider conspiracy to defraud in which the commission of substantive offences might or might not have been contemplated by all. For example, in cases of bank and company fraud, where the manager of the bank or the manager of the company was a party to the fraud, it could not be said that the bank or company had been deceived. Accordingly prosecutions of these cases involving the management of the banks concerned would not have been possible under the provisions of the Bill.

16. Pointing out that a conclusion reached by the LRC in its detailed study was that a substantive offence of fraud should be able to encompass conduct fitting within the scope of the existing common law offence of conspiracy to defraud, members found it difficult to accept the justifications advanced by the Administration.

*Views of the legal professional bodies*

17. The Bills Committee has consulted the two legal professional bodies on the

Administration's justifications in support of its two proposals and the possible options to handle the Bill. The Law Society has reiterated that it supports the LRC's recommendation that the new offence of fraud be restricted to circumstances in which there is financial or proprietary loss or gain, and to abolish the common law conspiracy to defraud. The Bar Association is of the view that no sufficient case has been made out for the Bill to depart from the LRC's recommendation.

#### Revised proposals of the Administration

18. In order to meet the concerns of members that the scope of the new offence would be too wide, the Administration proposed to redefine the terms "benefit" and "prejudice" under the Bill so that they would refer to "financial or proprietary gain or loss" and to "a breach of public duty". The new definitions would include any gain or loss arising from a public officer being induced by deceit to commit an act or make an omission, which would be contrary to his duty if he knew the true position. Under the revised proposal, the common law offence of conspiracy to defraud would still be retained.

19. Members remain of the view that there would be relatively few cases of "breach of public duty" which could not be prosecuted under other offences and do not find it necessary to create an offence of fraud to cover "breach of public duty".

20. After reconsideration, the Administration has agreed to restrict the new offence of fraud to circumstances in which there is financial or proprietary loss or gain only, and will move an amendment to the definitions of "benefit" and "prejudice" in clause 3 of the Bill.

#### Further justifications provided by the Administration for retention of the common law offence of conspiracy to defraud

21. The Administration is of the firm view that there is a need to retain the common law offence of conspiracy to defraud along with the creation of a statutory offence of fraud. It has provided further justifications to justify its proposal which are set out in paragraphs 22-26 below.

#### *Limitations of the proposed offence of fraud*

22. The offence of "fraud" is defined in clause 3 (the proposed section 16A) of the Bill. It is essential for the commission of the new statutory offence that the act or omission of the person deceived to be induced by deceit, and that the act or omission must result in a benefit to some other person or prejudice or a substantial risk of prejudice to some other person. In order to prove the offence, it is necessary to prove the presence of all elements and a connection between these elements. These technical limitations may result in some offenders not being prosecuted.

*Extradition and Mutual Legal Assistance Treaties*

23. The concept of "double criminality" is a pre-requisite that must be met under both the 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 conduct had occurred in Hong Kong.

24. 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 which maintain a wider notion of fraud under their respective laws, because double criminality will not be met. One of the results is that Hong Kong will become a "haven" for international fraudsters.

*Retention of the common law offence of conspiracy to defraud in England*

25. The Criminal Law Act introduced in England in 1977 sought to abolish conspiracies at common law and create a statutory offence of conspiracy. However, the new law subsequently enacted specifically preserved the offence of conspiracy to defraud. Nevertheless, because of the way the legislation was drafted, a number of cases found their way to the House of Lords. As a consequence of the House of Lords' interpretation of the legislation, the usefulness of the conspiracy to defraud was severely limited. In view of the problems created by the House of Lords decisions and following a review, the UK Government amended the Criminal Justice Act in 1987 to restore the full usefulness of the offence of conspiracy to defraud.

26. According to the Administration, 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. As the fraud legislation in Hong Kong is virtually identical to the English Act, it would be sensible for Hong Kong to preserve the common law offence of conspiracy to defraud until the Administration has a chance to examine the conclusions of the review being undertaken by the English Law Commission.

*Views of the Bills Committee*

27. In the light of the further justifications provided by the Administration, the Bills Committee agrees to accept the Administration's proposal to retain the common law offence of conspiracy to defraud. However, it has requested the Administration to report the final recommendation of the English Law Commission on the review referred to in paragraph 26 above to the Panel on Administration of Justices and Legal Services in due course.

### Definition of "deceit"

28. Members have had detailed discussion on the term "deceit" which is defined in proposed section 16A to mean "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". Noting that the definition of "deceit" proposed in the LRC's Report made no reference to "the past, the present or the future" and "opinions", members question the necessity to include such references in the proposed definition.

29. The Administration considers that the references to "the past, the present or the future" and "opinions" should remain intact for several reasons. Firstly, there is a need for consistency in legislation. The proposed definition of "deceit" mirrors the definition of "deception" in section 17 of the Theft Ordinance. Secondly, the law has to be abundantly clear. Although there is no reference to "the past or the future" or "opinions" in the definition of "deception" in the English Theft Act 1968, an examination of some old departmental files relating to the 1970 Theft Bill and the Hansard reveals that it was the intention of the legislature that the definition should incorporate the best of the English definition whilst at the same time retaining provisions derived from the definition of "false pretence" in the Larceny Ordinance (the predecessor to the Theft Ordinance) which includes "...a false pretence or false representation relating to the past, the present or the future and a false statement or false representation of intention or opinion..". Thirdly, the word "opinions" should be left intact so that persons concerned (e.g. retailers or experts in a particular field) are left in no doubt that if they falsely or recklessly express an opinion, then such conduct will not be tolerated.

30. While members have no objection to including the reference to "the past, the present or the future" in the definition of "deceit", some members have expressed grave concern about the need to include the word "opinions" in the definition.

31. Members have noted that according to the LRC Report, it is clear from the case law in Scotland and South Africa that the deceit which forms the basis of the fraud offence does not extend to mere expressions of opinion nor to commercial exaggerations. It is the view of the LRC that commercial claims that a particular product is "the best" are matters better left to customer protection measures and that such conduct should not fall within the proposed offence of fraud. On members' concern about whether "trader's puff" may be prosecuted for the offence of fraud, the Administration agrees that it is difficult to draw a line. It has cited examples of misrepresentation of the true quality and value of goods by a fruit vendor selling rotten apples and a merchant selling poor quality diamonds. Although both are equally liable to be prosecuted for the offence of obtaining property by deception under

section 17 of the Theft Ordinance, the Administration is of the view that the fruit vendor is unlikely to be prosecuted because of the trivial nature of the offence, and that it would be incumbent upon the prosecution to prove beyond a reasonable doubt that the misrepresentation made by the diamond merchant was intentional. The Administration supplements that the proposed offence of fraud is intended to focus on organised schemes of fraud rather than isolated, one-off type of deceptive acts.

32. On members' request for information on cases which would not have proceeded with if the word "opinion" was not included in the definition of "deception" in section 17 of the Theft Ordinance, the Administration has not been able to provide any such cases. However, it has referred members to a leading case called *Bryan* which was decided in U.K. in 1857. In that case, the accused was found guilty by the jury for obtaining money from pawnbrokers by false pretences that the quality of certain spoons were equal to that of a specified brand, but the conviction was subsequently quashed by the judges who held the view that the misrepresentation merely amounted to puffing of goods which was a matter of opinion than a false pretence. The Administration advises that two eminent academics have expressed the view that facts similar to those in the *Bryan* case would support a prosecution, although the concept does not appear to have been tested in Court as to date.

33. A member considers it undesirable to criminalise mere expressions of opinion or commercial exaggerations. If it was intended that such conduct should fall within the proposed offence of fraud, she considers that a public consultation on the proposal should be conducted by the Administration before the Bill is taken any further. Members in general agree that criminal law must be clear as to what the new offence of fraud is intended to cover, and they have reservation to leave this to the discretion of the prosecution authorities. They also question the necessity to include the word "opinions" in the definition of "deceit", especially when the Administration has failed to demonstrate to the satisfaction of members how it would be handicapped in taking prosecution action if the word is taken out from the definition. After deliberation and having regard to the Administration's position, members agree that the Chairman should, on behalf of the Bills Committee, move an amendment to delete the words "or opinions" from the definition of "deceit" in clause 3 of the Bill.

34. Members have considered whether a similar amendment could be proposed to the definition of "deception" in section 17 of the Theft Ordinance for the sake of consistency. Members agree that it is not appropriate for the Bills Committee to do so as the amendment falls outside the scope of the Bill. However, they recommend that the Panel on Administration of Justice and Legal Services to look into the need to retain the word "opinions" in the definition of "deception" in section 17 of the Theft Ordinance as a separate issue.

### **Committee Stage amendments (CSAs)**



35. The CSAs to be moved by the Administration and the Bills Committee are in **Appendices II and III** respectively.

#### **Consultation with the House Committee**

36. The Bills Committee consulted the House Committee on 25 June 1999 and sought the latter's support that the Second Reading debate on the Bill be resumed on 7 July 1999.

Legislative Council Secretariat

28 June 1999

**Appendix I**

**Bills Committee on  
Theft (Amendment) Bill 1998**

**Membership List**

Hon Mrs Miriam LAU Kin-yee, JP (Chairman)

Hon Martin LEE Chu-ming, SC, JP

Hon Margaret NG

Hon Jasper TSANG Yok-sing, JP

Hon Ambrose LAU Hon-chuen, JP

Total : 5 Members

Legislative Council Secretariat

17 March 1999