

Information Paper

Creation of a Substantive Offence of Fraud

Theft (Amendment) Bill 1998

INTRODUCTION

It is proposed to introduce into Legislative Council the Theft (Amendment) Bill 1998 to create a new offence of fraud and to provide for the retention of the common law offence of conspiracy to defraud.

BACKGROUND AND ARGUMENT

2. In Hong Kong, there is at present no general offence of fraud, and a prosecution for conspiracy to defraud can only be brought where two or more persons are involved in fraudulent conduct. However, similar conduct committed by one person acting alone does not constitute an offence unless it falls within the confines of one of the Theft Ordinance offences. For example, a person borrowing a property from another person by deception but without the intention of permanently depriving the owner of it cannot be charged with any of the existing offences under the Theft Ordinance.

3. On 15 July 1996, the Law Reform Commission (LRC) published a report on the "Creation of a Substantive Offence of Fraud"(Annex). The Report followed the issue of a consultation paper in June 1995 on the LRC's preliminary proposal that a new offence of fraud should be enacted in Hong Kong. The Report recommended the abolition of the common law offence of conspiracy to defraud.

4. 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.

5. 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. For example, a defendant bribing cinema employees to lend him films for the purpose of making illegal copies and distributed them for profits can be charged, along with others, with conspiracy to defraud the film owners of the copyright and distribution rights.

6. 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.

7. 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.

PROPOSALS

The Offence of Fraud

8. It is proposed that the new offence of fraud should apply to 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.

Retention of Common Law Conspiracy to Defraud

9. It is proposed that the common law offence of conspiracy to defraud should not be affected or modified by the creation of the offence of fraud.

Consequential Amendments

10. As a consequence of the proposals, amendments to a number of Ordinances will need to be made. However, such amendments are not controversial and involve no policy implications.

PUBLIC CONSULTATION

11. 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.

12. 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.

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