

The Law Commission

(LAW COM No 276)

FRAUD

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

*Presented to the Parliament of the United Kingdom by the Lord High Chancellor
by Command of Her Majesty
July 2002*

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION

FRAUD

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ABBREVIATIONS

In this paper we use the following abbreviations:

Ashworth on Criminal Law: A Ashworth, *Principles of Criminal Law* (3rd ed 1999)

CLRC: Criminal Law Revision Committee

CLRC Eighth Report: Criminal Law Revision Committee, Eighth Report: Theft and Related Offences (1966) Cmnd 2977

Consultation Paper No 150: Legislating the Criminal Code: Misuse of Trade Secrets (1997) Consultation Paper No 150

Consultation Paper No 155: Legislating the Criminal Code: Fraud and Deception (1999) Consultation Paper No 155

our conspiracy to defraud report: Criminal Law: Conspiracy to Defraud (1994) Law Com No 228

DPP: Director of Public Prosecutions

ECHR: European Convention on Human Rights

Griew on Theft: Edward Griew, *The Theft Acts* (7th ed 1995)

Hong Kong report: The Law Reform Commission of Hong Kong: Report on Creation of a Substantive Offence of Fraud (Topic 24) (July 1996)

our informal discussion paper: Fraud and Deception: further proposals from the Criminal Law Team (July 2000) unpublished

our money transfers report: Offences of Dishonesty: Money Transfers (1996) Law Com No 243

Smith on Theft: J C Smith, *The Law of Theft* (8th ed 1997)

Working Paper No 104: Criminal Law: Conspiracy to Defraud (1987) Working Paper No 104

THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of
the Law Commissions Act 1965

FRAUD

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I INTRODUCTION

1.1 In April 1998, the then Home Secretary asked the Law Commission

As part of their programme of work on dishonesty, to examine the law on fraud, and in particular to consider whether it: is readily comprehensible to juries; is adequate for effective prosecution; is fair to potential defendants; meets the need of developing technology including electronic means of transfer; and to make recommendations to improve the law in these respects with all due expedition. In making these recommendations to consider whether a general offence of fraud would improve the criminal law.¹

1.2 The Lord Chancellor subsequently explained that

The ability to respond effectively to major fraud is of the highest priority to the Government. We recognise that, in recent years, the public has at times felt that those responsible for major crimes in the commercial sphere have managed to avoid justice. Even when fraud is detected, the present procedures are often cumbersome, and difficult to prosecute effectively.²

1.3 Similarly, the then Solicitor-General³ said in October 1997 of the present law of dishonesty that “the modern sorts of commercial activity, and the modern methods by which dishonest activity may be effected make one constantly worried that the unoverhauled bus may not be able to cope”.⁴

1.4 The Commission had already been working on the law of fraud intermittently since the 1970s, when it began to examine the common law crime of conspiracy to defraud with a view to codification of the criminal law, and had already published several consultation papers and reports which had a bearing on the issues raised by the 1998 reference. The proposals advanced in these various

¹ Written Answer, *Hansard* (HC) 7 April 1998, vol 310, cols 176–177.

² “The feasibility of a unified approach to proceedings arising out of major City fraud”, KPMG lecture, 24 June 1998.

³ Lord Falconer of Thoroton QC.

⁴ “Commercial fraud or sharp practice – Challenge for the law” Denning Lecture, 14 October 1997.

publications (which are summarised in Part VI below) have been mainly directed towards two different and arguably competing objectives. One is to ensure that the scope of the criminal law of fraud is wide enough to enable fraudsters to be successfully prosecuted and appropriately sentenced, without being so wide as to impose unacceptable restrictions on personal freedom, or so vague as to infringe the principle of the rule of law. The other is to eliminate the indefensible anomaly represented by the continuing survival of conspiracy to defraud, under which it may be a crime for two people to *agree* to do something which, in the absence of an agreement, either of them could lawfully do. The task with which we have several times had to grapple is that of devising a statutory law of fraud which, by satisfying the first objective, would in turn make it possible to achieve the second, by abolishing conspiracy to defraud. In this report we bring those efforts to what we believe is a satisfactory conclusion.

- 1.5 One of the issues raised in the consultation paper that we published in response to the Home Secretary's reference⁵ was the procedural difficulty that arises where the number of offences alleged to have been committed by a defendant is too large to be comprised in a manageable indictment.⁶ Until recently it was normal practice to select a few counts as "specimens", and then if guilt was proved on those counts the Court would proceed to sentence on the basis that all the related counts had been proved. However, it has now been held that a defendant who is convicted only on specimen counts, and does not admit the remaining allegations, may be sentenced *only* in relation to the allegations on which he or she has been convicted.⁷ It may therefore be impossible to impose a sentence which properly reflects the seriousness of the defendant's conduct. While this is a problem that is particularly acute in the context of fraud offences, it is arguable that it is a general problem, not confined to fraud. We have therefore decided to examine it in a separate report which we hope to publish later this year. These two reports will together make up our response to the Home Secretary's reference.

SUMMARY OF RECOMMENDATIONS

- 1.6 In asking us to consider the law of fraud, the former Home Secretary was particularly interested in whether the introduction of a general fraud offence would improve the criminal law. We have now come to the conclusion that it would. We consider that it would improve the law in each of the respects raised by the former Home Secretary:
- (1) It should make the law more comprehensible to juries, especially in serious fraud trials. The charges which are currently employed in such trials are numerous, and none of them adequately describe or encapsulate the meaning of "fraud". The statutory offences are too specific to offer a

⁵ Consultation Paper No 155.

⁶ *Ibid*, paras 7.60 – 7.75.

⁷ *Kidd* [1998] 1 WLR 604.

general description of fraud; while the common law offence of conspiracy to defraud is so wide that it offers little guidance on the difference between fraudulent and lawful conduct. Thus, at present, juries are not given a straightforward definition of fraud. If they were, and if that were the key to the indictment, it should enable them to focus more closely on whether the facts of the case fit the crimes as charged.

- (2) A general offence of fraud would be a useful tool in effective prosecutions. Specific offences are sometimes wrongly charged, in circumstances when another offence would have been more suitable. This can result in unjustified acquittals and costly appeals. Furthermore, it is possible that excessively broad crimes, such as conspiracy to defraud, may result in prosecutors wasting resources on those who should never have been charged at all. A generalised crime which nonetheless provides a clear definition of fraudulent behaviour may assist prosecutors to weigh up whether they have a realistic chance of securing a conviction.
- (3) Introducing a single crime of fraud would dramatically simplify the law of fraud. Clear, simple law is fairer than complicated, inaccessible law. If a citizen is contemplating activities which could amount to a crime, a clear, simple law gives better guidance on whether the conduct is criminal, and fairer warning of what could happen if it is. Furthermore, when a defendant is charged with a clear, simple law, they will be better able to understand their options when pleading to the charge; and, if pleading not guilty, they will be better able to conduct their defence.
- (4) A general offence of fraud would be aimed at encompassing fraud in all its forms. It would not focus on particular ways or means of committing frauds. Thus it should be better able to keep pace with developing technology.

1.7 In line with these conclusions, we recommend that the eight offences of deception created by the Theft Acts 1968–96 should be repealed, and that the common law crime of conspiracy to defraud should be abolished. In their place we recommend the creation of two new statutory offences – one of fraud, and one of obtaining services dishonestly.

1.8 The offence of fraud would be committed where, with intent to make a gain or to cause loss or to expose another to the risk of loss, a person dishonestly

- (1) makes a false representation,
- (2) wrongfully fails to disclose information, or
- (3) secretly abuses a position of trust.

1.9 The offence of obtaining services dishonestly would be committed where a person by *any dishonest act* obtains services in respect of which payment is required, with intent to avoid payment. Deception is not an essential element of the offence. It would therefore extend to the obtaining of services by providing

false information to computers and machines, which under the present law may not amount to any offence at all.

THE STRUCTURE OF THIS REPORT

- 1.10 In Part II we summarise the present law, and in Part III we examine its defects. In Part IV we analyse the gaps that would appear in the law if conspiracy to defraud were abolished without replacement. In Part V we examine the role of the concept of dishonesty in the criminal law. In particular we consider whether it would be acceptable for criminal liability to hinge solely or primarily on proof of dishonesty, and conclude that it would not. This means that, in order to make conspiracy to defraud dispensable, we need to formulate proposals which strike a balance between the inadequate coverage of the existing statutory offences and the “general dishonesty offence” that we have rejected. In Part VI we summarise our previous attempts to do this.
- 1.11 In Part VII we set out our final recommendations for a new offence of fraud, and in Part VIII our recommendations for a new offence of obtaining services dishonestly. In Part IX we recommend the abolition of the existing offences of deception and of conspiracy to defraud. In Part X we set out our recommendations in full.
- 1.12 Appendix A is a draft Bill which would implement our recommendations. In Appendix B we summarise our previous work on fraud. Appendix C is a list of the individuals and organisations who commented on Consultation Paper No 155 and/or our informal discussion paper.⁸ We are grateful to Professor Sir John Smith CBE QC FBA, of the University of Nottingham, for acting as our consultant throughout this project.

⁸ See para 6.1 below.

PART II

OUTLINE OF THE PRESENT LAW

CONSPIRACY TO DEFRAUD

- 2.1 Conspiracy to defraud is a common law crime, which has been specifically preserved by statute.¹ It requires proof that two or more conspirators dishonestly intended to defraud another or others.

Conspiracy

- 2.2 There must be proof that an agreement has taken place. If negotiations do not culminate in an agreement, there is no conspiracy.² The conspirators need not all have met each other, nor need each conspirator agree to every element of the overall agreement; but in these circumstances, each conspirator must be aware that there is a larger scheme to which he or she is agreeing to become attached.³ Unlike statutory conspiracies, the agreement need not involve the commission of a substantive crime,⁴ but if it does it can still be charged as conspiracy to defraud rather than a statutory conspiracy.⁵ The conspirators need not envisage that they themselves will commit the fraud.⁶

Dishonest intent to defraud

- 2.3 The conspirators must be acting dishonestly,⁷ and they must intend to defraud the proposed victim or victims. Defrauding V need not be the conspirators' primary purpose, so long as they are aware that the successful implementation of the agreement will necessarily result in V being defrauded.⁸

The meaning of “defraud”

- 2.4 There is no offence of “fraud” in English criminal law. Hence it is possible for two people to commit conspiracy to defraud, even when they would not have committed any crime if they had acted separately.
- 2.5 The House of Lords has considered the words “to defraud”, and provided the following definitions:

¹ Criminal Law Act 1977, s 5(2).

² *Walker* [1962] Crim LR 458.

³ *Meyrick* (1930) 21 Cr App R 94; *Chrastny* [1991] 1 WLR 1381; *Barratt* [1996] Crim LR 495.

⁴ *Scott v Metropolitan Police Commissioner* [1975] AC 819.

⁵ Criminal Justice Act 1987, s 12.

⁶ *Hollinshead* [1985] AC 975.

⁷ This element is explained in full in Part 5.

⁸ *A-G's Ref (No 1 of 1982)* [1983] QB 751 decided that defrauding V must be D's primary purpose, but it has not been followed, and it is now widely thought to be wrong.

... “to defraud” ordinarily means ... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.⁹

Put shortly, “with intent to defraud” means “with intent to practise a fraud” on someone or other ... If anyone may be prejudiced in any way by the fraud, that is enough.¹⁰

- 2.6 Attempts to limit these broad definitions have been largely rejected. It is now clear that conspiracy to defraud need not involve deception;¹¹ nor an intent to cause financial loss;¹² nor even an intent to prejudice someone’s financial interests.¹³ Nonetheless, if two people agreed to make a dishonest gain without intending to inflict some form of loss, prejudice or detriment on another, it would probably not amount to a conspiracy to defraud. “Defraud” is a transitive verb. There cannot logically be a conspiracy to defraud if there is no victim, because there would be no-one who could be defrauded.¹⁴

Implied statutory restrictions

- 2.7 In *Zemmel*¹⁵ the defendants dishonestly induced a company not to press for immediate payment on previous orders, and to continue shipping goods to them in the meantime, but there was no intention to make permanent default. This conduct would, at one time, have amounted to a statutory crime,¹⁶ but Parliament had subsequently restricted the offence, so that it would only apply if there was intent to make permanent default.¹⁷ The prosecution therefore decided to proceed on charges of conspiracy to defraud. On appeal, the Court refused to accept that “by a side wind the common law has suddenly re-emerged to reinstate or create as a crime that which Parliament thought it right to take off the statute book as a crime”.¹⁸ The defendant’s conviction was quashed. This reasoning may apply more broadly, although it would probably need to be clear that Parliament had consciously decided that the conduct in question should not be criminal, rather than merely failing to make provision for it.

⁹ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 839, *per* Viscount Dilhorne.

¹⁰ *Welham v DPP* [1961] AC 103, 133, *per* Lord Denning.

¹¹ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 836, *per* Viscount Dilhorne.

¹² *Allsop* (1976) 64 Cr App R 29; *Wai-Yu Tsang* [1992] 1 AC 269, 279 – 280.

¹³ *Welham v DPP* [1961] AC 103; *DPP v Withers* [1975] AC 842; *Moses* [1975] AC 842.

¹⁴ This argument is supported by Lord Denning’s analysis of the word “defraud” in *Welham v DPP* [1961] AC 103, 133-134. See paras 4.26 – 4.31 for further discussion.

¹⁵ (1985) 81 Cr App R 279.

¹⁶ Theft Act 1968, s 16(2)(a), as applied in *Turner* [1974] AC 357.

¹⁷ Theft Act 1978, s 2(1)(b).

¹⁸ (1985) 81 Cr App R 279, 284.

THE STATUTORY OFFENCES

- 2.8 The most general statutory crimes of fraud are those created by the Theft Acts 1968 and 1978, as amended by the Theft (Amendment) Act 1996. They include:
- (1) theft, defined as the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it;¹⁹ and
 - (2) eight offences of deception, committed by a person who dishonestly and by deception
 - (a) obtains property belonging to another, with the intention of permanently depriving the other of it,²⁰
 - (b) obtains a money transfer,²¹
 - (c) obtains services,²²
 - (d) secures the remission of an existing liability to make a payment,²³
 - (e) induces a creditor to wait for payment or to forgo payment with intent to permanently default on the debt,²⁴
 - (f) obtains an exemption from or abatement of liability to make a payment,²⁵
 - (g) obtains a pecuniary advantage,²⁶ or
 - (h) procures the execution of a valuable security.²⁷
- 2.9 All the above offences require evidence of dishonesty. This key element is analysed in Part V below.

Theft

- 2.10 This report is not concerned with theft as such, but some of the deception offences have elements in common with theft. It is therefore impossible to

¹⁹ Theft Act 1968, s 1.

²⁰ Theft Act 1968, s 15. Broadly speaking, a “money transfer” is a transfer of funds from one bank account to another.

²¹ Theft Act 1968, s 15A, inserted by the Theft (Amendment) Act 1996 as recommended in Offences of Dishonesty: Money Transfers (1996) Law Com No 243.

²² Theft Act 1978, s 1. “Obtaining services” is widely defined as inducing another to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for: s 1(2).

²³ Theft Act 1978, s 2(1)(a).

²⁴ Theft Act 1978, s 2(1)(b).

²⁵ Theft Act 1978, s 2(1)(c).

²⁶ Theft Act 1968, s 16. A person obtains a “pecuniary advantage” only if he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so, or is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

²⁷ Theft Act 1968, s 20(2).

consider crimes of fraud and deception without some reference to the crime of theft.

Appropriation

- 2.11 The crucial concept in the definition of theft is that of “appropriation”, which is defined by section 3(1) of the Theft Act 1968 as “any assumption ... of the rights of an owner”. The House of Lords held in *Gomez*²⁸ that even an act authorised by the owner of the property can be an appropriation, and, if dishonest, can therefore amount to theft. In *Gomez* the owner’s consent was in fact obtained by deception, and the transaction was therefore voidable as a matter of civil law, but the House attached no importance to this fact. In *Hinks*²⁹ the House confirmed that even the acceptance of a gift is an appropriation, and it is no defence that the gift is valid and unimpeachable as a matter of civil law. The result is that theft is now an offence of dishonestly receiving property belonging to another by any means, lawful or unlawful.

Property belonging to another

- 2.12 “Property” is defined broadly in section 4(1) of the Theft Act 1968 as including “money and all other property, real or personal, including things in action and other intangible property”. Section 4 goes on to define property further so that land, wild flora and untamed creatures cannot be stolen, except in certain circumstances.
- 2.13 “Belonging to another” means that at the time when the defendant dishonestly appropriates the property, the victim must have some kind of proprietary right over it, or beneficial interest in it.³⁰ In *Hall*,³¹ clients of a travel agent provided him with money, and in return they expected him to provide them with flight tickets. There was no evidence that Hall acted dishonestly at the time when the agreements were struck, so there was no dishonest appropriation at this stage. Once the money changed hands, the clients ceased to have any proprietary rights or beneficial interests in relation to it. They merely had a contractual right to be provided with the tickets. Hall failed to provide the tickets, and was unable to reimburse the clients because he had spent the money. His theft convictions were quashed, because at the time he had dishonestly appropriated the money by spending it elsewhere, it had not belonged to another.

With the intention of permanently depriving the other

- 2.14 This requirement is a principle of long standing. It applied to the law of larceny because English law did not recognise *furtum usus*, or the theft of use. Thus in

²⁸ [1993] AC 442.

²⁹ [2001] 2 AC 241.

³⁰ “Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest...” Theft Act 1968, s 5(1).

³¹ [1973] QB 126.

earlier cases it was held that the taking of someone's horse in order to ride with it into town, subsequently abandoning it after riding many miles, was not theft.³² The Theft Acts incorporated this principle, by providing that taking an article for a temporary period will not amount to theft.³³

- 2.15 Section 6(1) of the Theft Act 1968 provides a partial definition of the phrase "with the intention of permanently depriving the other of it".³⁴ It provides:

A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

- 2.16 In *Downes*³⁵ the defendant received Inland Revenue vouchers made out in his name. He sold them on to others. Those who bought them would eventually have cashed them in with the Revenue, so the defendant did not intend the Revenue to be permanently deprived of them, but the Court of Appeal upheld his conviction for theft: he had intended to treat the vouchers as his own to dispose of regardless of the Revenue's rights.

The deception offences

Deception

- 2.17 Where the thing dishonestly obtained is property, *and* it "belongs to another" within the meaning of the Act until the defendant obtains it, *and* the defendant intends to deprive the other of it permanently, the defendant can be charged with theft. Where those requirements are not all satisfied, liability will usually hinge on whether the thing in question was obtained *by deception*.
- 2.18 This means that the defendant's deception must have been the reason, or one of the reasons, why the dupe relinquished control over the thing in question. Otherwise, the thing was not gained *by* the deception.³⁶ It also means that there must be evidence that the defendant induced a false belief in the mind of the dupe. This requirement has caused difficulties in cases involving guaranteed

³² G Williams, "Temporary Appropriation Should Be Theft" [1981] Crim LR 129, 134.

³³ Theft Act 1968, s 1(1).

³⁴ For the parliamentary history of this section see JR Spencer, "The Metamorphosis of section 6 of the Theft Act" [1977] Crim LR 653.

³⁵ (1983) 77 Cr App R 260.

³⁶ See, for example, *Roebuck* (1856) D & B 24.

payment cards and automated payment methods. We discuss these cases in detail in Part III below.³⁷

- 2.19 “Deception” means “any deception ... by words or conduct as to fact or as to law ...”³⁸ This provision was intended to allow courts “to decide whether any case of omission or concealment which may arise should be regarded as deception”.³⁹ In *DPP v Ray*,⁴⁰ the defendant ate a meal in a restaurant, decided not to pay the bill, remained at his table until the waiter went into the kitchen, and then made off without paying.⁴¹ The House of Lords held, by a bare majority, that he had evaded a debt by deception,⁴² on the grounds that by remaining at the table he gave the false impression that he intended to pay.
- 2.20 In *Williams (Jean-Jacques)*⁴³ the defendant, a schoolboy, had bought obsolete Yugoslavian banknotes which were worthless except as collectors’ items. He took them to a bureau de change and said to the cashier either “Will you change these notes?” or “Can I cash these in?” The cashier paid him over £100 for notes which had cost him £7. The Court of Appeal not only upheld a conviction of theft but also criticised the recorder’s ruling that there was no evidence of a false representation. In the court’s view, the defendant had impliedly represented that he believed the notes to be valid currency in Yugoslavia. It is arguable, however, that his conduct was no more than a failure to disclose material facts.
- 2.21 In *Firth*⁴⁴ the defendant was a consultant gynaecologist who omitted to inform a hospital that certain patients referred by him for treatment were private patients. Had the hospital known this, either he or the patients would have been charged for the services provided. It was held that he had evaded a liability by deception. It seems that the deception lay in the act of referring private patients *plus* the failure to correct the hospital’s natural assumption that they were NHS patients.
- 2.22 It seems from the above cases that the courts will usually find that a deception has taken place if the defendant has formed a dishonest intent, and then subsequently entered into or continued his dealings with the victim in an apparently honest manner. However, each case involving silence or non-disclosure must be judged on its merits. In *Rai*⁴⁵ the Court of Appeal pointed out

³⁷ See paras 3.29 – 3.35.

³⁸ Theft Act 1968, s 15(4).

³⁹ CLRC Eighth Report, para 101 (iv).

⁴⁰ [1974] AC 370.

⁴¹ He would now be guilty of making off without payment, contrary to Theft Act 1978, s. 3(1).

⁴² Theft Act 1968, s 16(2)(a). The relevant offence would now be one of those created by section 1 of the Theft Act 1978.

⁴³ [1980] Crim L R 589.

⁴⁴ (1990) 91 Cr App R 217.

⁴⁵ [2000] 1 Cr App R 242.

that *Firth* should not be taken as general authority for the proposition that mere silence can constitute deception.

Actus reus elements

- 2.23 The eight deception offences make it criminal for a person dishonestly to bring about a number of specified consequences by deception. Despite the number and variety of consequences specified, most of them are quite narrowly defined.⁴⁶ By far the broadest are the obtaining of property, and the obtaining of services.
- 2.24 Generally when obtaining property by deception D will obtain ownership, possession and control of the property. As section 15(2) of the Theft Act 1968 makes clear, however, any one of these will suffice for liability. “Property” bears the same meaning as it does in the context of theft;⁴⁷ and the property must “belong to another” at the time of the obtaining, just as, for the purposes of theft, it must belong to another at the time of the appropriation.
- 2.25 In the Theft Act 1978, section 1(2), “services” is defined more widely than its ordinary sense would suggest:

It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

OTHER OFFENCES INVOLVING FRAUD

- 2.26 There are many other offences which could be described as frauds. Perhaps the most important are:
- (1) forgery and counterfeiting offences,⁴⁸ and other documentary frauds such as false accounting;⁴⁹
 - (2) tax evasion offences;⁵⁰
 - (3) fraudulent trading;⁵¹
 - (4) insider dealing;⁵²
 - (5) misleading market practices;⁵³ and

⁴⁶ This includes the obtaining of a “pecuniary advantage”, despite the apparent width of that expression.

⁴⁷ See para 2.12 above.

⁴⁸ Forgery and Counterfeiting Act 1981, ss 1 – 5 and ss 14 – 19.

⁴⁹ Theft Act 1968, s 17.

⁵⁰ Eg, the offences set out in the Value Added Tax Act, s 72; and the common law offence of cheating the revenue, which was expressly saved from the general abolition of common law dishonesty offences by the Theft Act 1968, s 32(1)(a).

⁵¹ Companies Act 1985, s 458.

⁵² Criminal Justice Act 1993, s 52.

(6) the intellectual property offences.⁵⁴

2.27 These crimes are usually seen as specialist branches of fraud, which require separate consideration. For example, the Forgery and Counterfeiting Act 1981 followed a Law Commission report⁵⁵ on the subject. Similarly, the crime of employing misleading market practices is now absorbed into the new statutory framework for regulating the financial services industry,⁵⁶ following a long consultation period between the regulator and the regulated. The aim of the consultation was to produce detailed guidance to help draw the dividing line between sharp practice and criminal practice. Given the specialist setting of these crimes, this seems to be the most appropriate way to ensure that they are fair and comprehensive. This report is not concerned with the specialist forms of fraud, except in as much as they impinge on the more general fraud offences.

⁵³ Financial Services and Markets Act 2000, s 397.

⁵⁴ Copyright, Designs and Patents Act 1988, s 107; and Trade Marks Act 1994, s 92.

⁵⁵ Criminal Law: Report on Forgery and Counterfeit Currency (1973) Law Com No 55.

⁵⁶ Financial Services and Markets Act 2000, s 397.

PART III

DEFECTS OF THE PRESENT LAW

- 3.1 The defects of the present law may be divided into two main categories: those relating to conspiracy to defraud, and those relating to the statutory crimes.

CONSPIRACY TO DEFRAUD

An anomalous crime

- 3.2 The concept of fraud, for the purposes of conspiracy to defraud, is wider than the range of conduct caught by any of the individual statutory offences involving dishonest behaviour. Thus it can be criminal for two people to *agree* to do something which it would not be unlawful for one person to do.
- 3.3 This anomaly has an historical basis. Before the Criminal Law Act 1977, a criminal conspiracy could be based on an agreement to commit an unlawful but non-criminal act, such as a tort or breach of contract. It appears that the justification for this was that there was a greater danger from people acting in concert than alone. As Professor Andrew Ashworth has explained:

In legal terms, the reasoning seemed to be that acts which were insufficiently antisocial to justify criminal liability when done by one person could become sufficiently antisocial to justify criminal liability when done by two or more people acting in agreement. Such a combination of malefactors might increase the probability of harm resulting, might in some cases increase public alarm, and might in other cases facilitate the perpetration and concealment of the wrong.¹

- 3.4 The 1977 Act was the implementation of our Report on Conspiracy and Criminal Law Reform, which “*emphatically*” concluded that

the object of a conspiracy should be limited to the commission of a substantive offence and that there should be no place in a criminal code for a law of conspiracy extending beyond this ambit. An agreement should not be criminal where that which it was agreed should be done would not amount to a criminal offence if committed by one person.²

- 3.5 This Commission has repeated its adherence to this principle in subsequent reports³ and we believe it commands very wide support.⁴ *Either* conspiracy to defraud is too wide in its scope (in that it catches agreements to do things which are rightly not criminal) *or* the statutory offences are too narrow (in that they fail to catch certain conduct which *should* be criminal) – or, which is our view, the

¹ Ashworth on Criminal Law p 472.

² Law Com No 76 (1976) para 1.9.

³ See, eg, Law Com No 228 (1994) para 3.6.

⁴ See, eg, Ashworth on Criminal Law p 473.

problem is a combination of the two. On any view, the present position is anomalous and has no place in a coherent criminal law.⁵

The definition of “to defraud”

- 3.6 As we stated in paragraphs 2.4 to 2.6, the cases on the meaning of “to defraud” have given it a broad meaning, so that any dishonest agreement to make a gain at another’s expense could form the basis of conspiracy to defraud. We take the view that this definition is *too* broad. In a capitalist society, commercial life revolves around the pursuit of gain for oneself and, as a corollary, others may lose out, whether directly or indirectly. Such behaviour is perfectly legitimate. It is only the element of “dishonesty” which renders it a criminal fraud. In other words, that element “does all the work” in assessing whether particular facts fall within the definition of the crime.
- 3.7 In most cases it will be self-evident that the conduct alleged, if proved, would be dishonest, and the question will be whether that conduct has been proved. Nonetheless, in some cases, the defence will argue that the alleged conduct was not dishonest. There is no statutory definition of dishonesty, so the issue is determined with reference to *Ghosh*.⁶ In that case it was held that the fact-finders must be satisfied (a) that the defendant’s conduct was dishonest according to the ordinary standards of reasonable and honest people, *and* (b) that the defendant must have realised that it was dishonest according to those standards (as opposed to his or her own standards).
- 3.8 Activities which would otherwise be legitimate can therefore become fraudulent if a jury is prepared to characterise them as dishonest.⁷ Not only does this delegate to the jury the responsibility for defining what conduct is to be regarded as fraudulent, but it leaves prosecutors with an uncommonly broad discretion when they are deciding whether to pursue a conspiracy to defraud case. If, for example, the directors of a company enter into “industrial espionage” in order to gain the edge over a competitor, they could potentially be prosecuted for conspiracy to defraud, despite the absence of any statutory offence governing

⁵ The tort of “lawful means” conspiracy, in which an agreement to injure the claimant by doing a lawful act is actionable, is, in our view, more justifiable than conspiracy to defraud. There are two key differences. First, the tort requires the claimant to prove actual pecuniary damage so that (contrary to the criminal law position) the agreement alone is insufficient; and secondly, the claimant must show that the defendants’ predominant purpose was to injure the claimant, so that self-interested defendants will not have committed the tort. These distinctions are of great significance and might be sufficient to justify the existence of a lawful means conspiracy in tort (though we offer no view on this). Those additional elements reflecting the need respectively for harm and moral obloquy are not required for the crime of conspiracy to defraud. In fact the tort is highly controversial, and widely regarded as anomalous. See *Salmond and Heuston on the Law of Torts* (21st ed 1996) pp 356 – 59; *Winfield and Jolowicz on Tort* (15th ed 1998) pp 641 – 45; K M Stanton, *The Modern Law of Tort* (1994) pp 326 – 329.

⁶ [1982] QB 1053.

⁷ In view of *Hinks* [2001] 2 AC 241 (see paras 7.59 – 7.68 below), theft is open to the same objection, but we are not tackling the problem in that context.

such activities. As *Smith and Hogan* states, the offence opens “a very broad vista of potential criminal liability”.⁸

- 3.9 In effect, conspiracy to defraud is a “general dishonesty offence”, subject only to the irrational requirement of conspiracy. We consider the arguments for and against such offences in Part V below, where we conclude that their disadvantages outweigh their advantages.

THE STATUTORY CRIMES

The need for simplification and rationalisation

- 3.10 At present, there is a multitude of overlapping but distinct statutory offences which can be employed in fraud trials.⁹ As Griew noted:

No one wanting to construct a rational, efficient law of criminal fraud would choose to start from the present position. The law ... is in a very untidy and unsatisfactory condition. The various offences are not so framed and related to each other as to cover, in a clearly organised way and without doubt or strained interpretation, the range of conduct with which the law should be able to deal.¹⁰

- 3.11 Arguably, the law of fraud is suffering from an “undue particularisation of closely allied crimes”.¹¹ Over-particularisation or “untidiness” is undesirable in itself, but it also has undesirable consequences.

- 3.12 First, it allows technical arguments to prosper. When the original Theft Act deception offences were first proposed by the CLRC in their Eighth Report, this problem was foreseen by a minority of the committee members:

To list and define the different objects which persons who practise deception aim at achieving is unsatisfactory and dangerous, because it is impossible to be certain that any list would be complete. Technical distinctions would also inevitably be drawn – as they have been drawn under [the Larceny Act] 1916 s 32 – between conduct which did and which did not fall within the list.¹²

⁸ *Criminal Law* (10th ed 2002), p 312.

⁹ The most important are to be found in the Theft Acts of 1968 and 1978, but there are many others. For example, the offences of fraudulent trading (Companies Act 1985, s 458), insider dealing (Criminal Justice Act 1993, s 52), and misleading statements and practices in the context of the financial markets (Financial Services Act 1986, s 47).

¹⁰ Griew on Theft, p 141.

¹¹ F B Sayre, “Mens Rea” [1932] 45 HLR 974, 1020. This comment was made in the context of the law of larceny, in which it was said that “the combination of common law larceny, embezzlement, and false pretences into a single statutory larceny has proved highly advantageous” (p 1020).

¹² Para 98(ii).

- 3.13 The minority who took this view were in favour of a single deception offence, which would not define the offence by reference to the nature of the victim's loss or the relationship between that loss and the defendant's corresponding gain:

The essence of the offence would be dishonestly using deception for the purpose of gain ... What particular type of gain the offender may aim at getting for himself or somebody else at the expense of his victim should be of no account except for the purpose of sentence.¹³

- 3.14 They were echoing the sentiments of Lord Hardwicke:

Fraud is infinite, and were a court once to ... define strictly the species of evidences of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.¹⁴

- 3.15 However, the majority of the committee took the view that it would be wrong to introduce a general offence. This disagreement was resolved by a compromise. The CLRC recommended two specific offences and a general offence which would carry a limited sentence of two years.¹⁵ This compromise did not find favour with Parliament, and a somewhat complex legislative history ensued. The proposed general offence was not adopted, and the present array of specific offences developed over subsequent years.

- 3.16 Nonetheless, the views of the minority who had advocated the general offence were found by Lord Goff in *Preddy* to have been "prescient".¹⁶ This was a mortgage fraud case. The defendants made false representations when applying for loans to buy property, and they were charged with obtaining property by deception. Although this is one of the most general deception offences, Lord Goff came to the reluctant conclusion that their actions fell outside it. The rest of the House¹⁷ agreed.

- 3.17 The difficulty lay in the nature of the property which the defendants obtained. The mortgage lenders provided the defendants with loans by making transfers from their accounts to the defendants' accounts. As Lord Goff explained, the resulting credit balances in the defendants' accounts were choses in action which had never belonged to anyone but the respective defendants. While the lenders had corresponding decreases in their respective accounts, at no time had they had any form of proprietary interest in the defendants' credit balances. Therefore

¹³ Para 97(i) and 98(i).

¹⁴ A letter to Lord Kames, dated 30 June 1759, cited by W A Holdsworth, *A History of English Law* (1972), vol 12, p 262.

¹⁵ Para 100.

¹⁶ [1996] AC 815, 831.

¹⁷ The Lord Chancellor, Lord Jauncey of Tullichettle, Lord Slynn of Hadley and Lord Hoffman.

these balances had never been property “belonging to another”, for the purposes of section 15 of the Theft Act 1968.

- 3.18 In reaching this conclusion, Lord Goff considered the CLRC Eighth Report, and the subsequent legislative history. He made it clear that, in his view, the CLRC minority had been right to advocate a single deception offence.¹⁸ It is, perhaps, unsurprising that he reached this view. The defence argument in *Preddy* exploited the very elements of section 15 which the CLRC minority saw as irrelevant to the definition of fraud: the nature of the loss, and the relationship between the loss and the illegitimate gain.¹⁹
- 3.19 *Preddy* was not the only case of its kind. It was only the most significant of a long string of highly technical cases involving deception offences: *Duru*,²⁰ *Halai*,²¹ *King*,²² *Mitchell*,²³ *Manjadhria*,²⁴ and *Mensah Lartey and Relevy*.²⁵ Each of these defendants argued that the particular consequences which he had brought about by deception fell outside the definition of the offence with which he was charged. By relying on a range of specific fraud offences, defined with reference to different types of consequence, the law is left vulnerable to technical assaults.²⁶
- 3.20 The second difficulty that arises from over-particularisation is that a defendant may face the wrong charge, or too many charges. Some of the cases cited in the previous paragraph would have been less problematic had the defendant been

¹⁸ See *Preddy* [1996] AC 815, 830 – 832, *per* Lord Goff of Chieveley.

¹⁹ A similar argument was successfully deflected in *Clowes No. 2* [1994] 2 All ER 316. Clowes was actually charged with theft, but again the decision turned on the phrase “property belonging to another”. Clowes had persuaded his victims to part with their money by promising to invest it in gilts. In fact he used it for his own purposes. The standard agreements he had signed with them were unclear as to whether the victims retained a beneficial interest in their investments, with Clowes acting as a trustee, or whether they were merely his creditors. Fortunately, it was possible to read the agreements in the former light, and the Court of Appeal did so. In this way it was held that the investments did amount to “property belonging to another”.

²⁰ [1974] 1 WLR 2.

²¹ [1983] Crim LR 624.

²² [1992] 1 QB 20.

²³ [1993] Crim LR 788.

²⁴ [1993] Crim LR 73.

²⁵ 3 July 1995, CA Nos 93/2627/W5, 93/2791/W5; see also [1996] Crim LR 203.

²⁶ We considered all these cases in our money transfers report, which was produced in response to *Preddy*. The Commission was already committed to reviewing the law of dishonesty (our conspiracy to defraud report, paras 1.16 – 1.19), but in the meantime it recommended the urgent enactment of another specific deception offence, to fill the lacuna opened up by *Preddy*. The recommendations were swiftly followed, and the offence of obtaining a money transfer by deception was created by the Theft (Amendment) Act 1996, which amended section 15 of the Theft Act 1968. This, however, was recommended as an urgent solution to an immediate problem. Commercial practices change continually, and it is highly likely that new procedures will give rise to further challenges to the Theft Act offences, as we recognised in Consultation Paper No 155, paras 7.4 – 7.7.

charged with a different offence. In *Mensah Lartey and Relevy* the defendants were charged with conspiring and attempting to procure the execution of a valuable security.²⁷ The prosecution accepted in the Court of Appeal that they should have been charged with conspiring or attempting to obtain property by deception (although, since *Preddy*, section 15 would not have helped either). In *Duru* and *Mitchell*, the deceptions resulted in banks making out cheques in the defendants' favour. They were charged with obtaining property by deception, when the correct charge was procuring the execution of a valuable security.

3.21 This problem is not confined to cases which are wrongly prosecuted under one *deception* offence rather than another. In *Gomez*²⁸ the defendant was the assistant manager of a shop. He deceived the manager into giving a customer goods in exchange for cheques which the defendant knew to be stolen. He was charged with theft. The case went to the House of Lords, because of an ambiguity in the concept of "appropriation" in theft. Four of their Lordships upheld the conviction, but Lord Lowry gave a powerful dissenting speech, and the issue has continued to cause difficulty. In fact, the argument need not have arisen in that case: the defendant would not have been able to raise it if he had been charged with obtaining property by deception, and he would have been squarely convicted on the agreed facts. It is not clear why the prosecutors chose to persist with bringing a theft charge. Perhaps they were aware of potential legal or factual problems that might arise if the wrong deception offence were charged. They may simply have been insufficiently familiar with the deception offences. In either event, a clear general deception offence might have enabled them to charge an offence which more comfortably reflected the conduct alleged, even though it also fell within the legal definition of theft.

3.22 A similar situation arose recently in *Vincent*.²⁹ The defendant was charged with the offence of making off without payment.³⁰ He had stayed in two hotels and left without paying the full bill. He argued that he had made arrangements to pay the bills "when he could", so that by the time he left there was no expectation that he would pay for the services at that point, and therefore payment "on the spot" was not required or expected. The trial judge directed the jury that this was only a defence if the agreement to defer payment was made in good faith by both parties, so it was no defence if the agreement had been brought about by fraud or deception. The Court of Appeal quashed the resultant convictions, stating that this direction was incorrect: even if the agreement was brought about by fraud, it still meant that the defendant was not expected to pay when he left, so he could not be guilty of making off without payment. The court stated that to catch this fraud a different offence would need to be charged, such as obtaining services by

²⁷ Theft Act 1968, s 20(2).

²⁸ [1993] AC 442.

²⁹ [2001] 1 WLR 1172.

³⁰ Theft Act 1978, s 3(1).

deception.³¹ Again, had the right charge been selected, much legal argument could have been avoided.

- 3.23 We do not argue that all the Theft Act offences could or should be combined into one. The fewer there are, however, the easier it is for prosecutors to choose the right one, thus decreasing the likelihood of mistakes. At present, in order to avoid mistakes, prosecutors may take the “belt and braces” approach. In Law Com No 228 we recognised that this practice brings its own problems:

We are ... very conscious that there has been much criticism of the length and complexity of fraud trials ... [A]lthough much of the criticism was directed to the procedure in criminal trials, there was legitimate criticism of the substantive law in substantial fraud cases, which led to trials of excessive length and to perceptions of injustice. We are concerned to discover if it is possible to reduce the length and complexity of trials by simplifying the law, while always ensuring that the defendant is fully protected.³²

- 3.24 The over-particularisation of fraud offences can result in indictments made complex by the charging of alternative offences. A clearer, simpler law of fraud would make it easier for prosecutors to pursue one correct charge, which in turn would give fraud trials greater focus and structure.

The limitations of “deception”

- 3.25 The difficulties discussed in the preceding section could arguably be met by consolidating most or all of the eight existing deception offences into one general deception offence, along the lines of that proposed by the minority of the CLRC.³³ There are, however, further defects in the law of fraud which such an offence would do nothing to solve, because they are inherent in the concept of deception itself.
- 3.26 The concept of deception was introduced by the Theft Act 1968 in place of the older concept of a “false pretence”, which was broadly synonymous with fraudulent misrepresentation. The CLRC wanted to move the focus from the defendant’s conduct to the deceived person’s mistaken belief:

The word “deception” seems to us ... to have the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived, whereas “false pretence” makes one think of what exactly the offender did in order to deceive. “Deception” seems also more apt in relation to deception by conduct.³⁴

³¹ Theft Act 1978, s 1(1).

³² Para 1.17.

³³ See para 3.13 above.

³⁴ Para 87.

- 3.27 The change was not intended to have any great practical effect, because even before 1968 it was necessary to prove that the defendant had obtained property *by* a false pretence. This required evidence that the pretence *caused* the transfer of property to the defendant. If the false pretence was operative, this almost inevitably meant that the dupe was deceived by it.
- 3.28 Even so, two cases involving payment cards went to the House of Lords, because the defendants argued that even if they had committed a false pretence they had not committed a deception. The argument was rejected by the House of Lords, but some concerns with the reasoning in these decisions remain. Furthermore, there are two kinds of frauds in which the gain is obtained by neither deception nor false pretence: those which are practised on machines, and those involving an abuse of position.

Payment cards and “deceiving” merchants

- 3.29 To say that a defendant has deceived another person implies that the other person believed in the truth of the defendant’s false representation. Sometimes, however, a person will act upon a defendant’s false representation without actively considering whether or not it is true. Arguably, such a person has not been truly deceived.
- 3.30 This argument arose when defendants began using credit card, debit card, cheque guarantee card or similar payment instruments which they had no authority to use. Before these cards were introduced, if a merchant accepted a cheque there was a risk that the bank would not honour it. Many simply refused to take that risk, by requiring payment in cash. This led to the introduction of various forms of “guaranteed” payment cards. The card issuer guarantees that the merchant will receive payment, no matter whether the card is stolen, forged or over the credit or overdraft limit. So long as the merchant accepts the card in accordance with any terms and conditions of the contract between the merchant and the card issuer, the merchant’s bill will be settled. Therefore, the merchant has little interest in whether the card holder has authority to use it, and is unlikely to give the matter any thought. If a defendant presents a card to pay for goods or services, the merchant will act in reliance on the implicit representation that the defendant is authorised to use the card; but, if the defendant is not so authorised, it may not be accurate to describe the merchant as “deceived”.
- 3.31 In fact, under the present law, those who use cards without authority can be convicted of a deception offence. The House of Lords held in *Charles*³⁵ and *Lambie*³⁶ (in relation to cheque guarantee cards and credit cards respectively) that the cardholder obtains the goods or services “by deception” if

³⁵ [1977] AC 177.

³⁶ [1982] AC 449.

- (1) the tendering of the card carries with it (as it normally will) an implied representation that the cardholder has the issuer's authority to use the card for the transaction in question, and
 - (2) although the merchant may not positively address his or her mind to the issue of whether or not the cardholder has such authority, the merchant would not have accepted the card in payment if he or she had known that the cardholder had no such authority.
- 3.32 A merchant who accepted a card with such knowledge would be party to a fraud on the issuer, and therefore not entitled to payment. It may be assumed, without the need for direct evidence on the point, that the merchant is honest and rational and therefore would not accept a card with such knowledge. It follows, according to the House of Lords' reasoning, that a merchant who does accept a card (not knowing that the cardholder has no authority to use it) has been deceived by the cardholder.
- 3.33 This reasoning is widely thought to be artificial,³⁷ and it can lead to problems at trial. Shop assistants do not tend to consider themselves *deceived* about a fact which is of no interest to them, merely because they would have acted differently had they known the truth, and this may come across in their evidence. Those who do not appreciate the legal position may even admit that they would still have accepted the card even if they had known that the defendant had no authority to use it. In such a situation, the benefit would not have been obtained by deception, so the defendant would have to be acquitted.

Computers and machines

- 3.34 A machine has no mind, so it cannot believe a proposition to be true or false, and therefore cannot be deceived. A person who dishonestly obtains a benefit by giving false information to a computer or machine is not guilty of any deception offence. Where the benefit obtained is property, he or she will normally be guilty of theft, but where it is something other than property (such as a service), there may be no offence at all.
- 3.35 This has only become a problem in recent years, as businesses make more use of machines as an interface with their customers. There are now many services available to the public which will usually be paid for via a machine. For example, one would usually pay an internet service provider by entering one's credit card details on its website. Using card details to pay for such a service without the requisite authority would not currently constitute an offence. As the use of the internet and automated call centres expands, this gap in the law will be increasingly indefensible.

³⁷ See, for example, Smith on Theft, paras 4 – 19.

Non-disclosure and abuse of position

- 3.36 The authorities on conspiracy to defraud recognise that it is possible to defraud someone without making explicit false statements or overt representations,³⁸ but a deception offence will not always be available in such circumstances.
- 3.37 In some situations a swindler will disclose half-truths which give a false overall impression. For example, a dealer may prey on vulnerable people, giving them the impression that he will offer a fair price for their antiques, while actually offering to buy them at a substantial undervalue. Or, in a “long firm fraud”, the swindler may obtain goods on credit by giving the impression that the firm is a legitimate trading entity, whereas in fact it is established purely to obtain the goods. The swindler may not make any statements which are demonstrably untrue, and indeed may be careful to avoid doing so, but a false overall impression is conveyed to the creditors. In such circumstances, it may be possible to rely on a deception offence.³⁹
- 3.38 Alternatively, a person who is told nothing, and remains in complete ignorance of the defendant’s activities, will not have turned his or her mind to questions of truth and falsity. It is impossible to describe such a person as deceived. Usually when a swindler obtains a benefit in such circumstances, it is because he or she holds a position of trust and thus had privileged access to the benefit. The benefit is not obtained by deception, because the defendant does not need to deceive anyone to obtain it.
- 3.39 An example of such a case is where a defendant makes a secret profit by abusing a position of employment. In *Attorney-General’s Reference (No 1 of 1985)*⁴⁰ the manager of a public house was charged with theft, having sold his own beer on his employers’ premises. The theft charge foundered, because there was no “property belonging to another”. It was held that a constructive trust had not arisen, and therefore the employers had no beneficial or proprietary interest in the proceeds of the beer sales. In the alternative it was held that even if a trust had arisen, it was not such a trust as falls within the ambit of section 5(1) of the Theft Act 1968. Nonetheless, most people would probably say that the pub manager was practising a fraud on his employers. The customers who bought the manager’s beer would otherwise have bought his employers’ beer, and they were only buying the manager’s beer because he was selling it on his employers’ premises. He was making a gain by using their premises in a way that he was not entitled to, but which he had the opportunity to do because they had entrusted him with the management of their premises; and he was making the gain at their expense.

³⁸ See, for example, *Scott v Metropolitan Police Commissioner* [1975] AC 819.

³⁹ See, for example, the cases referred to in paras 2.17 – 2.22 above.

⁴⁰ [1986] QB 491.

- 3.40 *Tarling (No 1) v Government of the Republic of Singapore*⁴¹ was a similar case. There was evidence that certain directors of a company had bought shares belonging to the company at a considerable undervalue, without disclosing the transaction to the rest of the board (let alone the shareholders). Two of the charges alleged conspiracy to defraud the shareholders by dishonestly concealing these dealings from them, in breach of their fiduciary duty of disclosure, with the intention of ensuring that they should not require the directors responsible to account for the proceeds. A majority of the House of Lords thought that the evidence did not support these charges. The essence of the decision is that a failure to disclose a secret profit made in breach of fiduciary duty, even if dishonest, does not in itself amount to fraud. In *Adams (Grant)*,⁴² on the other hand, the appellant, a company director, set up an ingenious scheme for the laundering of funds which may or may not have originally belonged to the company. The Privy Council held that he had rightly been convicted of a conspiracy to defraud the company by dishonestly making a secret profit. *Tarling* was distinguished on the basis that the directors in that case had omitted to disclose the transactions but had not taken positive steps to *conceal* them. Adams had taken positive and indeed elaborate steps to conceal what was happening.
- 3.41 The distinction drawn between *Adams* and *Tarling* suggests that even in cases where the benefit is actually obtained by an abuse of a position of trust, there is a residual requirement akin to that of deception. No one is deceived at the time when the defendant makes the gain, so the benefit is not obtained *by* deception; but the concealment puts up a smoke-screen to deceive those who may make enquiries after the event. Thus if the publican in *Attorney-General's Reference (No 1 of 1985)* had tried to conceal his side-line from his employers, and if he had been conspiring with another, he would presumably have been guilty of conspiracy to defraud.
- 3.42 In any event, it is clear that where a benefit is obtained by an abuse of trust, and the victim remains in complete ignorance of the loss until after the event, the benefit is not obtained *by* deception. In some cases there will be another statutory offence which covers the situation. For example, in *Scott v Metropolitan Police Commissioner*,⁴³ which involved a cinema projectionist using his position to make illegal copies of films, the defendant could have been prosecuted under the predecessor of what is now section 107 of the Copyright, Designs and Patents Act 1988.⁴⁴ In many instances, however, there will be no offence available other than conspiracy to defraud.

⁴¹ (1978) 70 Cr App R 77.

⁴² [1995] 1 WLR 52.

⁴³ [1975] AC 819.

⁴⁴ Copyright Act 1956, s 21.

PART IV

CONDUCT THAT CAN BE PROSECUTED ONLY AS CONSPIRACY TO DEFRAUD

- 4.1 Many of the defects highlighted in Part III could be resolved by simply abolishing the crime of conspiracy to defraud, and consolidating the existing deception offences into a single offence. This would dispose of an anomalous and excessively broad offence, while simplifying and rationalising the law.
- 4.2 Unfortunately, the result of having a limited concept of deception, and an over-complex array of deception offences, is that conspiracy to defraud does much of the work in the law of fraud. There are various forms of conduct which could qualify as a conspiracy to defraud, but which would not be an offence if done by one person. If conspiracy to defraud were to be abolished without extending the scope of the present statutory crimes, these forms of conduct would be rendered lawful. The law of fraud would become riddled with loopholes.
- 4.3 It is important to note, however, that not all the holes which would emerge would necessarily be undesirable. As we have said,¹ we take the view that conspiracy to defraud is too widely defined. In our view, therefore, some of the conduct which falls within the offence *should* be rendered lawful. In this Part we discuss these forms of conduct *as well as* the gaps that, in our view, ought to be filled.
- 4.4 The kinds of conduct which could suffice for conspiracy to defraud, but which would not be an offence if done by one person, can be divided into two broad categories:
- (1) conduct which involves deception, but which is not criminal because the existing deception offences are so defined as to exclude it; and
 - (2) conduct which involves a view to gain or an intent to cause loss, but not deception.

CONDUCT INVOLVING DECEPTION WHICH IS EXCLUDED FROM THE EXISTING DECEPTION OFFENCES

- 4.5 The existing deception offences are narrowly defined. Even the two broadest offences – obtaining property and obtaining services – are considerably narrower in scope than conspiracy to defraud has been held to be. The following situations could give rise to charges of conspiracy, but, despite the element of deception, would not or might not give rise to a deception offence:
- (1) Deception which obtains a benefit which does not count as property, services or any of the other benefits defined in the Theft Acts.

¹ See para 3.6 above.

- (2) Deception which causes a loss and obtains a directly corresponding gain, where the two are not the same property (other than a transfer of funds between bank accounts).²
- (3) Deception which causes a loss and obtains a gain where the two are neither the same property nor directly correspondent.
- (4) Deception which does not obtain a gain, or cause a loss, but which prejudices another's financial interests.
- (5) Deception for a non-financial purpose.
- (6) Deception to gain a temporary benefit.
- (7) Deceptions which do not cause the obtaining of a benefit.

Deception which obtains a benefit which does not count as property, services or any of the other benefits defined in the Theft Acts.

- 4.6 There are two principal forms of benefit which cannot found a deception charge. The first is confidential information, which has been held to fall outside the definition of "property" in the Theft Act 1968.³ This means that it cannot be stolen or obtained by deception under section 15.
- 4.7 In Consultation Paper No 150, we considered the offences which are available to prosecute those who dishonestly use or disclose another's trade secrets⁴, and concluded that there are lacunae:

There may be no offence if an individual, acting alone, dishonestly uses or discloses secret information (not protected by copyright or a registered trade mark, and not amounting to personal data protected by the Data Protection Act 1984) without authority, provided that individual

(1) obtains the information with the consent of its owner (albeit in confidence) — for example where an employee is given the information for the purposes of his or her work — or

(2) though not authorised to have the information at all, obtains it without resorting to deception, corruption, unauthorised access to a computer, intercepting post, telephone tapping or any other prohibited means. A simple example would be the

² Which is caught by the new s 15A of the Theft Act 1968, inserted by the Theft (Amendment) Act 1996; as recommended in our money transfers report.

³ *Oxford v Moss* (1979) 68 Cr App R 183.

⁴ Paras 1.4 – 1.23. The offences were Copyright, Designs and Patents Act 1988, ss 107 and 198; Trade Marks Act 1994, s 92; Computer Misuse Act 1990, s 1; Data Protection Act 1984, s 5; Interception of Communications Act 1985, s 1; deception and corruption offences, which may be employable in very particular circumstances; and conspiracy to defraud.

industrial spy who gains access to premises without forcing entry (which would involve criminal damage) and inspects the contents of an unlocked filing cabinet.⁵

- 4.8 *Absolom*⁶ demonstrated how the lacuna can operate. The defendant obtained a “graphalog”, a technical document prepared by an oil company which was exploring an area off the Irish coast. It set out the company’s geological findings, and indicated the prospects of finding oil. It was unique, since no other company was exploring the area. The company had invested £13 million in the exploration, and could have sold the graphalog for between £50,000 and £100,000. The defendant obtained the graphalog with a view to selling it. He was charged with theft, but was acquitted, on the grounds that the graphalog was not “property”.
- 4.9 The lacunae have not been filled since the publication of Consultation Paper No 150. However, in many cases involving a misuse of trade secrets there will be more than one person involved, and if so the lacuna can be filled by charging conspiracy to defraud.
- 4.10 The second kind of benefit which cannot found a deception charge is land. This was specifically excluded from the definition of “property” in the Theft Act 1968.⁷ Hence in *Attorney General’s Reference (No 1 of 1985)*,⁸ the facts of which are set out at paragraph 3.39 above, the defendant’s misuse use of his employer’s premises could not have given rise to a deception charge, even if he had expressly lied to them in order to obtain access to their premises. However, had he been acting in agreement with another, the misuse of his employer’s premises could have founded a charge of conspiracy to defraud.

Deception which causes a loss and obtains a directly corresponding gain, where the two are not the same property (other than a transfer of funds between bank accounts)

- 4.11 As we have discussed at paragraph 3.17 above, when money is transferred directly between accounts, the altered balances are directly correspondent to each other without being the same property in law. Therefore the credit balance is not property which “belongs to another”, so it cannot form the basis of a charge of obtaining property by deception. Obtaining a money transfer by deception is now a separate offence,⁹ but there may be other examples of correspondent but non-identical property.

⁵ Para 1.24.

⁶ *The Times*, 14 September 1983.

⁷ Theft Act 1968, s 4(2).

⁸ [1986] QB 491.

⁹ Theft Act 1968, s 15A. This offence was introduced by the Theft (Amendment) Act 1996, following the decision in *Preddy* [1996] AC 815, 831, and our money transfers report.

4.12 The financial markets also use accounts and clearing systems to transfer property. It is arguable, although by no means clear, that a person who obtains shares or Eurobonds through a fraud on these clearing systems may be able rely on the *Preddy* lacuna. In Consultation Paper No 155 we concluded that even if such an argument were ultimately to prove unsuccessful, the uncertainty surrounding these issues is undesirable in itself.¹⁰ A cautious prosecutor would, perhaps, charge such defendants with conspiracy to defraud, rather than a deception, in order to avoid the possibility of a *Preddy* argument.

Deception which causes a loss and obtains a gain where the two are neither the same property nor directly correspondent

4.13 In Consultation Paper No 155 we gave the following examples which involve losses which may only linked indirectly to a defendant's view to gain:

- (1) D, V's business rival, starts a false rumour that A, V's best customer, is on the brink of insolvency. V hears the rumour, believes it, and withdraws A's credit. A takes his business elsewhere, and V's profits suffer.
- (2) D starts a false rumour that B, V's chief supplier, is having production difficulties which will affect B's ability to meet orders. V hears the rumour, believes it, and places most of her orders with another and more expensive supplier. V's profits suffer.
- (3) V is trying to sell her house. Her estate agent introduces a prospective buyer, C, whose requirements the house suits perfectly, and arranges for C to view it. Pretending to be an employee of the estate agent, D telephones V and tells her that C has cancelled his appointment. V therefore goes out for the day. C arrives as arranged, but gets no answer, and buys another house instead. V eventually sells her house for substantially less than C was willing to pay.
- (4) D, a manufacturer, falsely claims that his products are superior to those of his rivals, who lose sales as a result.

4.14 In each case, D may be motivated by a desire to make money at V's expense, but if so, the relationship between V's loss and D's gain would be too remote to be encompassed within the existing deception offences. The loss and gain may be linked, but they will not be the same property, and are unlikely to be of corresponding value.

4.15 The Guinness fraud¹¹ was an example of this kind of non-correspondent relationship between losses and gains. Guinness plc and Argyll Group plc were competing to take over Distillers Company plc. Both Guinness and Argyll made

¹⁰ Paras 2.43 and 2.50.

¹¹ The fraud resulted in a number of civil and criminal proceedings. The basic facts are set out in the judgment of the European Court of Human Rights: *Saunders v UK* (1997) 23 EHRR 313.

offers which were partly based on their own share price. To make the Guinness offer appear more valuable than the Argyll offer, the Guinness directors entered into a share support scheme. Third parties were paid or given indemnities against losses, in return for accruing Guinness shares. Guinness company funds were used to make these payments and back the indemnities. This practice inflated the share price by driving up demand and driving down supply. The Guinness share price rose dramatically during the course of the bid, and then fell once Guinness was confirmed as the successful bidder.

- 4.16 Guinness stood to gain from this fraud, because market experts took the view that Distillers was a “bargain”. Its share price was not reflecting its underlying value as a company. The individual conspirators also made substantial personal gains in the form of “success fees”, which were taken from Guinness company funds.
- 4.17 The victims were many: Argyll; Distillers; their shareholders; those who bought Guinness shares at falsely inflated prices; other companies who would have received more investment in their shares without the false enthusiasm for Guinness shares; and more indirectly still, all the individual and institutional investors whose investment portfolios were affected by news of the fraud. However, the losses were spread out, in some cases unquantifiable, and in any event, not correspondent to the defendants’ gains. It may, perhaps, have been possible to argue that Argyll or Distillers or their shareholders were deceived by the fraud, but none of the existing deception charges would have been able to reflect the way that the gains and losses were caused.
- 4.18 At that time the Crown was not able to employ charges of conspiracy to defraud either. In 1984, the House of Lords case of *Ayres*¹² imposed strict restrictions on the use of conspiracy to defraud. It was only available if the facts did not reveal a statutory conspiracy. This decision was reversed by statute,¹³ but events which took place before the statute came into force on 20 July 1987 had to be prosecuted in accordance with *Ayres*. The Guinness fraud took place in 1985 and 1986, so the Crown was obliged to put its case as a statutory conspiracy.
- 4.19 The defendants were charged with conspiring to mislead prospective investors, contrary to the Prevention of Fraud (Investments) Act 1958, s 13(1)(a)(i). Despite being a somewhat obscure offence, it was the only one which could represent the heart of the conspiracy: the defrauding of Argyll, Distillers, their shareholders and others. Charges of conspiracy to defraud would have been more resonant and more widely understood, and would no doubt be employed if similar events took place today.¹⁴

¹² [1984] AC 447.

¹³ Criminal Law Act 1987, s 12(1).

¹⁴ The Crown also employed charges of theft and false accounting in respect of the “success fees” and illegal payments to share-purchasers. These charges identified Guinness itself as

Deception which does not obtain a gain, or cause a loss, but which prejudices another's financial interests

- 4.20 *Wai Yu-Tsang*¹⁵ was an appeal to the Privy Council from Hong Kong. The Defendant was the chief accountant of the Hang Lung Bank which suffered a loss of US\$124m as the result of the unravelling of a “cheque kiting” cycle. The client of the bank, whose cheques to that amount were dishonoured, was Overseas Maritime Co Ltd SA (“OMC”).
- 4.21 In theory, the cheque kiting cycle was to be wound up at a time when OMC had sufficient funds from other sources to be able to honour the last few cheques without extending the duration of the cycle by writing yet more cheques. Unfortunately, before OMC was in such a position there was a run on the bank. It had no money with which to cash fresh cheques from OMC. So OMC's income stream dried up at a time when it did not have sufficient funds from other sources to honour the last few cheques it had written. They totalled US\$124 million. This meant that the bank had worthless cheques from OMC to that value, but it had effectively lost the money, the amount of which exceeded the assets of the bank at that time.
- 4.22 There was no suggestion that the defendant was involved in the cheque-kiting cycle, but it was alleged that he conspired with others to defraud the bank and its existing and potential shareholders, creditors and depositors by concealing the fact that the last few OMC cheques had been dishonoured. In breach of his duty to the relevant regulator, he did not report the dishonour of the cheques, nor did he record the dishonour in the bank's computerised ledgers. The details of the transactions were recorded only in private ledgers. These private ledgers hid the true state of affairs behind manufactured transactions.
- 4.23 The defendant did not dispute that he had set up the misleading private ledgers, but he argued that they were created for the purpose of preventing junior staff from hearing of the dishonoured cheques and precipitating a second run on the bank. He also argued that he believed that the manufactured transactions were actually bona fide. Ultimately, his defence was that he had not gained from the arrangement, and that he was acting in what he thought was the best interests of the bank and its potential shareholders, creditors and depositors.
- 4.24 Nonetheless, the judge directed the jury that imperilling the economic or proprietary interests of the shareholders, creditors and depositors was sufficient to constitute fraud, even if the defendant had no view to gain and no intent to cause loss. He was convicted. The defendant appealed on the basis that this direction was wrong, but he was unsuccessful. Citing *Allsop*,¹⁶ Lord Goff stated that

the victim, despite the fact that it stood to gain by the fraud. Perhaps it was this which gave rise to the notion that the Guinness fraud was a “victimless crime”.

¹⁵ [1992] 1 AC 269.

¹⁶ (1976) 64 Cr App R 29.

... it is enough for example that... the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk.¹⁷

- 4.25 The conviction for conspiracy to defraud stood, whereas a deception charge would not have succeeded without evidence that the defendant did more than merely put another's economic interests at risk.

Deception for a non-financial purpose

- 4.26 Conspiracy to defraud has not been confined to financial gains and losses. In *Welham v DPP*¹⁸ the defendant appealed his conviction on a forgery charge. Argument centred on the meaning of "defraud" within that context.
- 4.27 Welham was a sales manager of Motors (Brighton) Ltd. Originally he and others were charged with conspiring to defraud certain finance companies, through drawing up fictitious hire-purchase agreements, as a result of which the finance companies advanced money to Motors (Brighton) Ltd. His co-conspirators were convicted on these charges but he was acquitted. His defence, which was clearly accepted, centred on his intent to defraud. He said that he believed that the fictitious hire-purchase agreements were to protect the finance companies from their regulators, because they were not permitted to lend money directly. He therefore had no intent to defraud the finance companies, hence his acquittal on the conspiracy charge.
- 4.28 The trial judge, however, directed the jury that with regard to the forgery charge, it would be enough if the jury were to find that he had intended to defraud anyone, including the supposed regulators of the finance companies. He was therefore convicted on this count. On appeal, it was argued on his behalf that he did not intend to defraud the regulators, he merely intended to deceive them, because he had no intent to cause them economic loss.
- 4.29 With the agreement of the other members of the House, Lord Denning rejected this argument:

Put shortly, 'with intent to defraud' means 'with intent to practise a fraud' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

At this point it becomes possible to point to the contrast in the statute between an 'intent to deceive' and an 'intent to defraud.' 'To deceive' here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction... For instance, where a man fabricates a letter so as to puff himself up in the opinion of others. Bramwell B put the instance: 'If I

¹⁷ [1992] 1 AC 269, 280.

¹⁸ [1961] AC 103.

were to produce a letter purporting to be from the Duke of Wellington inviting me to dine, and say, “See what a respectable person I am”: *Reg v Moah*.¹⁹ There would then be an intent to deceive but it would not be punishable at common law or under the statute, because then it would not be done with intent to defraud.²⁰

- 4.30 Welham thought that the hire-purchase agreements were intended to induce the supposed regulators not to take any action against the finance companies. Therefore he intended the deception to induce a course of inaction, so he intended to “defraud” them. In *Wai Yu-Tsang*, Lord Goff expressed approval for this approach:

[*Welham*] establishes that the expression ‘intent to defraud’ is not to be given a narrow meaning, involving an intention to cause economic loss to another. In broad terms, it means simply an intention to practise a fraud on another, or an intention to act to the prejudice of another man’s right.²¹

- 4.31 It is evident that none of the deception offences would have been available to cover a non-financial “defrauding” such as that in *Welham*.

Deception to gain a temporary benefit

- 4.32 As we argued in Consultation Paper No 155, temporary benefits and deprivations do not fall within the general policy of the Theft Acts.²² Theft, obtaining property by deception, obtaining more time to pay a debt, and making off without payment are all offences which require proof that the defendant intended to permanently deprive the victim of their entitlement.²³ Conspiracy to defraud has no such requirement.

Deceptions which do not cause the obtaining of a benefit

- 4.33 As explained in paragraph 2.18 above, charges under the Theft Acts require the defendant’s deception to be operative. This means that the defendant’s false representation must first have caused the obtaining of the benefit, and second must have done so by inducing a mistaken belief in the deceived person.
- 4.34 Causation points of this nature have been made in many cases over the years. For example, in *Roebuck*²⁴ the defendant offered a metal chain to a pawnbroker, and falsely claimed that it was silver. The pawnbroker did not take the defendant’s

¹⁹ 7 Cox CC 503, 504.

²⁰ [1961] AC 103, 133.

²¹ [1992] 1 AC 269, 276.

²² See para 4.34.

²³ On the other hand, there are offences under the Theft Acts which are deliberately intended to apply to temporary deprivations, for example, taking a conveyance without authority (contrary to s 12 Theft Act 1968).

²⁴ (1856) D & B 24.

word, and inspected the chain himself. He accepted the chain as security for a loan, but this was on the basis of his own examination. He had placed no reliance on the defendant's statement. The defendant's false representation neither induced a false belief in the pawnbroker, nor did it result in the obtaining of the benefit. Therefore the defendant could be guilty of an attempt, but could not be guilty of a completed offence.

- 4.35 Because conspiracy is inchoate, it can be charged even if the deception is non-operative. As soon as the conspirators agree to employ a fraudulent deception, the offence is complete. It is not, therefore, necessary to prove that the deception was operative. (However, to prove that a defendant conspired with intent to defraud, it will be necessary to show that he or she *intended* the fraudulent deception to be operative.)

CONDUCT INVOLVING A VIEW TO GAIN OR AN INTENT TO CAUSE LOSS, BUT NOT DECEPTION

- 4.36 On one view, there can be no fraud without deception:

To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury.²⁵

- 4.37 The House of Lords, however, has held that this definition of fraud is not exhaustive.²⁶ The following are examples of frauds which do not necessarily involve deception:

- (1) Making a secret gain or causing a loss by abusing a position of trust or fiduciary duty.
- (2) Obtaining a service by giving false information to a machine.
- (3) "Fixing" an event on which bets have been placed.
- (4) Dishonestly failing to fulfil a contractual obligation.
- (5) Dishonestly infringing another's legal right.

- 4.38 Conspiracy to defraud will often be the only charge available to prosecute these instances of fraud, although some are partly covered by other legislation, and others may not even be covered by conspiracy to defraud.

Making a secret gain or causing a loss by abusing a position of trust or fiduciary duty

- 4.39 Many cases of this kind can be prosecuted as thefts. The most common instances involve employees using their position to steal from their employers. Likewise,

²⁵ *In re London Globe Finance Corporation Ltd* [1903] 1 Ch 728, 732, *per* Buckley J.

²⁶ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 836, *per* Viscount Dilhorne.

trustees of an express trust who appropriate trust property, or solicitors who appropriate client money, will usually commit theft.

- 4.40 There are, however, many instances where the dishonest conduct will not be covered by theft. At paragraph 3.39 above, we set out the facts of *Attorney-General's Reference (No 1 of 1985)*.²⁷ In that case it was held that there could be no theft of a secret profit made by an employee at his employer's expense, because the secret profit was not property "belonging to another". The Court of Appeal decided that the secret profit was not property belonging to another because (1) it was not held on a constructive trust for the employer; and (2) even if it were, the employer's equitable interest in the secret profit was not such that it could be described as "belonging" to him, within the meaning of s 5(1) of the Theft Act 1968:

Property shall be regarded as belonging to any person... having in it any proprietary right or interest...

- 4.41 This decision has been somewhat undermined by a Privy Council case, *Attorney-General of Hong Kong v Reid and others*.²⁸ The defendant accepted a bribe as an incentive to breach his fiduciary duty, and it was held that although the bribe belonged to the defendant in law, in equity he held it on constructive trust for the person to whom the fiduciary duty was owed. In other words, D took a bribe from X to induce him to breach his fiduciary duty to V. The constructive trust arose immediately. D was the trustee, and V was the beneficiary. In law, the bribe belonged to D, but in equity, the bribe belonged to V as the beneficiary under the trust.
- 4.42 This reasoning suggests that a constructive trust does arise over secret profits: If D makes a secret profit in breach of his duty to V, a constructive trust should arise with D as trustee and V as beneficiary. On the other hand, a bribe could be distinguished from a secret profit. Reid was a public servant who owed his fiduciary duty to the Crown. If he had merely betrayed the trust of a private employer there may have been less grounds for a constructive trust to arise.
- 4.43 Furthermore, the alternative finding in *Attorney-General's Reference (No 1 of 1985)* applies even if a constructive trust does arise over secret profits. If the alternative finding is correct, V's rights as a beneficiary under a constructive trust are not a "proprietary interest", within the meaning of s 5(1) of the Theft Act 1968. Therefore the secret profit does not "belong" to V. It must be pointed out, however, that the alternative finding may not be correct. The Act makes it quite clear that trust property does "belong" to the beneficiary of an express

²⁷ [1986] QB 491.

²⁸ [1994] 1 AC 324 .

trust.²⁹ Moreover, a conviction for theft of property held on a constructive trust was upheld in *Shadrokh-Cigari*.³⁰

4.44 It may be that *Attorney-General's Reference (No 1 of 1985)* would survive an attack based on the reasoning in *Reid*. In any event, since no attack has yet been mounted, the decision stands: the Theft Act 1968 does not recognise secret profits as property belonging to anyone other than the profit-maker. Therefore, it cannot be stolen by the trustee.

4.45 This applies not only to employees making secret profits, and public servants taking bribes, but to any fiduciary or entrusted person who uses their position to make money on the side. For example, we set out the facts of *Tarling (No 1) v Government of the Republic of Singapore*³¹ and *Adams (Grant)*³² at paragraph 3.40 above. Both of these cases involved fiduciaries abusing their positions. It would also apply to the following situations:

- (1) agents acting against their principals' interests (where bribery or corruption cannot be proved);
- (2) solicitors or accountants breaching their professional rules on client accounts (where theft cannot be proved because there is no trust over the property in question); and
- (3) employees who turn a profit from their position, for example accounts clerks passing money through their own high-yield accounts before sending it on to their employers' creditors.

4.46 For cases of this kind, conspiracy to defraud may be the only available charge.

Obtaining a service by giving false information to a machine

4.47 At paragraph 3.34 above we explained that providing false information to a machine does not amount to a deception offence, because machines cannot be "deceived".³³ If the benefit obtained is a service rather than property, it cannot be stolen, so a lacuna appears. On the other hand, if there is evidence of a conspiracy, conspiracy to defraud could be employed to close the lacuna.

"Fixing" an event on which bets have been placed

4.48 This may be done, for example, by "doping" a horse, bribing a sportsman or loading dice. In most, but not all, instances it will be possible to charge the "fixer" under section 17 of the Gaming Act 1845:

²⁹ Theft Act 1968, s 5(2).

³⁰ [1988] Crim LR 465.

³¹ (1978) 70 Cr App R 77.

³² [1995] 1 WLR 52.

³³ Other than by special deeming provisions in certain specific legislation. See, eg, Value Added Tax Act 1994, s 72(6); Forgery and Counterfeiting Act 1981, s 10(3).

Every person who shall, by any fraud or unlawful device or ill practice [(a)] in playing at or with cards, dice, tables, or other game, or [(b)] in bearing a part in the stakes, wages, or adventures, or [(c)] in betting on the sides or hands of them that do play, or [(d)] in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall... be liable to imprisonment...

- 4.49 Anyone who loads dice, fixes roulette wheels, or cheats at cards can be prosecuted under the limb of the offence which we have designated (a). However, the crime is only committed if the fraud is practised during the playing of the game. A person does not commit the crime by practising a fraud in order to induce another to play a game.³⁴ A “hustler” commits no offence if he convinces others to compete with him by pretending to be inexperienced. On the other hand, a group of hustlers could commit a conspiracy to defraud, if the jury were prepared to categorise their behaviour as dishonest.
- 4.50 Under the limb we have designated (d), the offence is committed by practising a fraud in order to induce another to enter into a wager,³⁵ as well as by fixing the event which the wager is based upon.³⁶ On the other hand, the wording of the provision suggests that those who fix an event but do not enter into a wager will not commit this crime: “Every person who shall, by any fraud... in wagering on the event...”
- 4.51 Thus if a contestant fixed an event in order to obtain the prize money, it seems it would not be an offence. For example, if a racehorse owner arranged to have the other horses drugged before a big race purely to obtain the prize, there would be no crime under this section. Again, such conduct could be caught by a charge of conspiracy to defraud, if there were evidence of a conspiracy.
- 4.52 We were unable to find any reported decisions on limbs (b) and (c) of the offence, perhaps because it is not clear what purpose they serve. Most fraudulent gambling possibilities seem to fall into the description of gaming in (a) or wagering in (d).

Dishonestly failing to fulfil a contractual obligation

- 4.53 Dishonest breach of a contractual obligation is not in itself an offence, though there will be a deception offence if the defendant *intends* to break the contract from the start. Even if the breach consists in a dishonest dealing with property, it will not be theft unless the property “belongs” to someone other than the defendant at the material time. For example, if P pays in advance for goods to be supplied by D, when the money changes hands it becomes D’s money. If D then fails to provide the goods, the money still belongs to D, despite the fact that P has

³⁴ *R v Governor of Brixton Prison ex parte Sjoland and Metzler* [1912] 3 KB 568.

³⁵ *Clucas* [1949] 2 KB 226.

³⁶ *Fountain* [1966] 1 WLR 212.

a right to sue D for damages or restitution. P cannot assert any direct claim over the money itself. The result is that, if D breaches the contract and “appropriates” the money, it may be impossible to show that the money “belongs” to P at the time of the appropriation.

- 4.54 In some such cases it may be possible to rely on section 5(3) of the Theft Act 1968, which provides:

Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

- 4.55 In virtually every case falling within this provision, either section 5(1) or section 5(2) will also apply, so that the property will “belong to another” in any event. If the person to whom the obligation is owed has a proprietary interest in the property section 5(1) will apply; or, if the property is subject to a trust enforceable by that person, it will “belong” to that person under section 5(2).³⁷ However, it seems that the CLRC intended section 5(3) to go further than the preceding sections.

- 4.56 Section 5(3) was considered, in *Hall*,³⁸ where a travel agent was charged with stealing money paid by customers for tickets which never materialised. The Court of Appeal declined to construe section 5(3) as extending to *every* case in which one person transfers property to another for a particular purpose. It held that the contracts in question did not put the defendant under an “obligation” to retain and deal with the money “in a particular way”. He was merely under an obligation to provide the tickets. The result of this ruling is that section 5(3) of the Theft Act 1968 does not apply to normal contracts for the sale of goods or services. A contractual obligation to provide goods or services is not to be equated with an obligation to deal with the purchase price in a particular way. It therefore remains unclear whether section 5(3) will apply in any circumstances other than those already encompassed by sections 5(1) and 5(2).

- 4.57 A similar issue came up in *Clowes (No 2)*³⁹ This was an infamous case: over a period of years, the defendants persuaded customers to provide them with millions of pounds, by promising to invest it in gilts. In fact almost none of it was. The fraudsters were charged with numerous offences. Ultimately, two of them were convicted of a number of counts of theft. Legal argument at their appeal centred on whether the agreements which the victims signed were contracts, or trust documents. The wording was ambiguous. If the agreements created express trusts, the victims had a beneficial interest in the money provided for investment in gilts, and therefore it was property “belonging to another”. On

³⁷ This is certainly true of the example given by the CLRC, viz the treasurer of a holiday fund: Eighth Report, p 127.

³⁸ [1973] 1 QB 126.

³⁹ [1994] 2 All ER 316.

the other hand, if the agreements were merely contracts, and the victims had no legal or beneficial interest in the money once it changed hands, and no enforceable rights over it under any implied trust, it “belonged” to the defendants alone. (Interestingly, the court did not consider s 5(3) in any detail. Given the trust-like wording of the agreements, it seems that they may have imposed an “obligation” on the defendants to retain and use the victims’ money solely to buy and sell gilts, even if they were in fact intended to be contracts. Therefore the property could have “belonged to another” according to s 5(3), even if it did pass under contract.)

- 4.58 In the end the Court of Appeal affirmed the trial judge’s ruling that the money was held under trust. The theft convictions were therefore upheld. It is also worth noting that the prosecution could probably have chosen to press charges of obtaining by deception instead of theft.⁴⁰ However, there are clearly cases where a dishonest breach of contract cannot be prosecuted as theft or deception, because the innocent party has no enforceable rights over the particular property appropriated. *Hall* was such a case. At present, however, such a case could be prosecuted as a conspiracy to defraud. (The *Clowes* defendants could have been prosecuted in this way, but for the fact that that the fraud largely took place during the *Ayres* period – see 4.18 above.)

Dishonestly infringing another’s legal right

- 4.59 In *Scott v Metropolitan Police Commissioner*⁴¹ the conspirators “borrowed” films from cinemas. After making copies for illegal distribution, they returned the films. They could not be charged with theft of the films, since there was no intent permanently to deprive, but they were convicted under charges of conspiracy to defraud.
- 4.60 In the absence of conspiracy to defraud, the *Scott* defendants could have been prosecuted under what is now section 107 of the Copyright, Designs and Patents Act 1988.⁴² However, not all intellectual property rights have a specific offence relating to them.⁴³ If, for example, a person dishonestly exploited someone else’s patent, they would commit no offence unless there was evidence of a conspiracy.

⁴⁰ The defendants invested almost none of their victims’ money in gilts, despite the fact that they clearly promised to under the agreements. This failure to comply with the agreements lasted for a period of four and half years. New agreements continued to be signed, and the money kept coming in. “Income” was paid to some victims, but this came from the money received from new victims. Instead of investing the money in gilts, the defendants simply spent it on luxuries for themselves: houses, farms, yachts, cars, antiques, a vineyard and company shares. The natural inference from these facts is that the defendants never intended to invest the money in gilts. It seems likely, therefore, that they obtained the “investments” by deception.

⁴¹ [1973] 1 QB 126.

⁴² Copyright Act 1956, s 21.

⁴³ Trade mark infringements may be criminal under the Trade Marks Act 1994, s 92. There are no equivalent provisions for patents, registered designs or unregistered designs.

(It should be noted, however, that we are not aware of any case in which conspiracy to defraud has been used to fill this lacuna.)

- 4.61 There could also be other instances of legal rights and entitlements which, if dishonestly transgressed, could give rise to a charge of conspiracy to defraud. For example, there could be a conspiracy dishonestly to trespass on land, or a scheme dishonestly to secure longer periods for debt repayment.

PART V

THE ROLE OF DISHONESTY IN THE CRIMINAL LAW

THE NATURE AND MEANING OF DISHONESTY AS A FAULT ELEMENT

- 5.1 Dishonesty is a defining element of all the major Theft Act crimes, and conspiracy to defraud. It is, however, an unusual element, because it necessitates a moral as well as a factual enquiry.¹ Traditionally, crimes consist of objectively defined conduct or events (external elements) and mental states (fault elements), subject to circumstances of justification or excuse (such as self-defence or duress). In general the fact-finders' task is (a) to determine what happened, (b) to determine what the defendant's state of mind was, and (c) to apply those facts to the definition of the crime in question, to see whether each of the external elements and fault elements have been made out. It is unusual for the fact-finders to be asked to decide whether they think the defendant's conduct or state of mind was sufficiently blameworthy for it to constitute a crime.

Is it possible to define dishonesty?

- 5.2 Legal definitions of "moral" elements, such as dishonesty, seem to be elusive. The case law on the meaning of these elements tends to offer structure or guidance rather than firm definitions. A parallel example can be found in the following consideration of the meaning of "gross negligence". For the purposes of manslaughter, Lord Hewart CJ said:

... the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.²

- 5.3 Thus "gross negligence" means negligence which is so gross that, in the opinion of the jury, it ought to be criminal. The jury are left to draw the line between criminal negligence and non-criminal negligence, and the law gives them no further guidance. In effect, "gross negligence" means what the fact-finders' understand it to mean.
- 5.4 Likewise, when fact-finders are asked to consider whether the defendant's conduct was or was not dishonest, the law does not provide them with a

¹ Professor Griew, in "Dishonesty: the Objections to *Feely* and *Ghosh*" [1985] Crim LR 341, 346 makes the point that many jurors ("ordinary dishonest jurors" – his criticism A6) may demand of defendants a higher standard than they impose on themselves in their ordinary, mildly dishonest, everyday lives. This, he argues, is disreputable "creative hypocrisy". It does not undermine our point: a hypocritical judgment is necessarily also a moral judgment (albeit a flawed one).

² *Bateman* (1925) 19 Cr App R 8, 11 – 12.

definition of the word. The fact finders draw the line, so that dishonesty means what they understand it to mean. As we discuss further at 5.12 below, this lack of definition has been criticised, but we are unaware of any proposed definitions which the law could adopt.

- 5.5 It may be that moral elements such as dishonesty can only be defined with reference to the fact-finders' judgement. Richard Tur argues that "what may constitute a just excuse is so context-dependent that exhaustive definition must necessarily limit the range of circumstances which might excuse".³ Therefore, if an exhaustive definition of "just excuse" or "dishonesty" were incorporated into the law, there would inevitably be examples of behaviour which were legally dishonest, but which the fact-finders would characterise as morally blameless.

The Ghosh approach

- 5.6 When dishonesty is a live issue, although the fact-finders are not given a definition, they are required to consider it in a structured way. The Court of Appeal in *Ghosh*⁴ laid down a two-stage test. The first question is whether the defendant's behaviour was dishonest by the ordinary standards of reasonable and honest people. If the answer is no, that is the end of the matter and the prosecution fails. If the answer is yes, then the second question is whether the defendant was aware that his or her conduct would be regarded as dishonest by reasonable, honest people.
- 5.7 While this approach provides structure, and prevents defendants from running "Robin Hood" defences, where the defendant acknowledges that his or her conduct would be regarded as dishonest by reasonable honest people, it still involves the jury drawing the line between what is and what is not dishonest. It is not, however, merely what the jury regards as the appropriate moral standard, by reference to their view of the ordinary standards of reasonable and honest people, which counts. In addition, the jury is required to find that the defendant recognised that his or her conduct was outside the norms of what society regards as honest.
- 5.8 Some academic critics argue that this approach must lead to inconsistency, such that the same set of facts could produce an acquittal in one court and a conviction in another.⁵ On the other hand, we are not aware of any research or evidence to show that verdicts are in fact significantly inconsistent when dishonesty is a live issue in a case.
- 5.9 There is some evidence that people's moral standards are surprisingly flexible. A MORI poll for the Sunday Times in October 1985⁶ found that only 35% of those

³ "Dishonesty and the Jury" in AP Griffiths ed, *Philosophy and Practice* (1985) p 75.

⁴ [1982] QB 1053.

⁵ Eg E Griew, "Dishonesty: Objections to *Feely* and *Ghosh*" [1985] Crim LR 341.

⁶ Cited by M Levi, *Regulating Fraud: White-collar Crime And The Criminal Process* (1987) p 65.

questioned thought it morally wrong to accept payment in cash in order to evade liability for tax. On the other hand, it does not follow that the other 65%, if sitting on a jury in a case of tax evasion where dishonesty was in issue, would necessarily have acquitted. Indeed, the proportion of those questioned who thought that such conduct was morally acceptable to *most* people was only 37%. This may suggest that people do not generally assume that their own moral standards are the norm. Indeed it indicates that a majority of respondents thought that their own moral standards fell below those of most others.⁷

- 5.10 It seems, therefore, that the first stage of the *Ghosh* test may not necessarily result in the jury simply applying their own standards of honesty. It may, indeed, be quite natural for fact-finders to form a view of what reasonable, honest, people would consider dishonest, as distinct from their decision reflecting their own personal moral view. This approach still leaves room for inconsistent verdicts, because fact-finders might have different views on what reasonable, honest people would categorise as dishonest. Nonetheless, there must be less inconsistency than if fact-finders were expressly required to apply their own moral standards.
- 5.11 The second limb imposes an important brake on what might, despite its express terms, tend to be a subjective approach to the first limb decision. First it prevents naive or innocent defendants from being found to be dishonest when the jury is not satisfied that they must have recognised that their behaviour fell outside the norms of reasonable honest people. On the other hand it operates as a brake on the jury acquitting by virtue of the “Robin Hood” defence.

What purpose does dishonesty serve as a defining element?

- 5.12 Some critics of the *Ghosh* approach have questioned whether dishonesty is a useful concept at all.⁸ Before answering this question, it is important to note a distinction between two ways that dishonesty can form part of the definition of an offence.⁹ In some crimes, such as conspiracy to defraud, the other elements of the offence are not *prima facie* unlawful, so dishonesty renders criminal otherwise lawful conduct. However, in deception offences the other elements of the offence, if proved, would normally be unlawful in themselves. If someone has practised a deception in order to gain a benefit their conduct is *prima facie* wrongful. Therefore dishonesty can be raised to rebut the inference that conduct was in fact wrongful. For ease of explanation, we will refer to the former type of crime as having a *positive* requirement of dishonesty, and the latter as having a *negative* requirement.¹⁰ It should be remembered, however, that even where

⁷ However, we are reluctant to draw firm conclusions from this survey without having seen it in full. It may be that the apparent disparity between the two findings was the result of confused questioning.

⁸ Eg D W Elliott, “Dishonesty in Theft: A Dispensable Concept” [1982] Crim LR 395.

⁹ See Consultation Paper No 155, paras 3.12 – 3.17.

¹⁰ Another way of looking at this distinction is to categorise the former cases as those which require dishonesty as part of the *actus reus*, and the latter as those which merely require

dishonesty is a negative requirement, so that the issue is likely to be raised by the defence to rebut the Crown's case, the burden of proof remains with the Crown. Whenever dishonesty is in issue, the Crown must prove that the defendant was dishonest.

- 5.13 In Consultation Paper No 155, we provisionally concluded first, that it is wrong in principle to use dishonesty as a positive element;¹¹ and second, that, for offences which require proof of deception, dishonesty could be more usefully be replaced by specific defences.¹² We stand by the first of these provisional proposals, and expand on that recommendation in Part V. However, we no longer propose to dispose of dishonesty as a negative requirement in fraud offences. This change in view was prompted by the consultation process, and the overall change in our approach.
- 5.14 Some of the respondents to the Consultation Paper, such as the Magistrates' Association, felt that the requirement of *Ghosh* dishonesty was unproblematic. This was because they appeared to take the view that there are shared community values in relation to such concepts as dishonesty. Others felt that the combined wisdom of the members of the jury meant that the potential for inconsistency between different juries should not be overstated.
- 5.15 Other respondents took the view that juries from different areas of the country may have substantially different views on dishonesty, depending on the prevailing financial circumstances and political views of those living in the area. However, we would question whether it is at all sensible to project an apparent divergence, on the macro level, in economic circumstances and political preference between different areas of the country onto the likelihood of a divergence in views where the focus is a decision of 12 individuals who have been asked the specific question whether reasonable, honest people would consider certain behaviour to be dishonest. Even if there is the potential for a divergence of views on such a question, we are unaware of any evidence of it.
- 5.16 While in principle we are against a crime of fraud which would be based on *Ghosh* dishonesty as a positive element (see paragraphs 5.20 to 5.22 below), we accept that in cases where the defendant's conduct is *prima facie* fraudulent, there is a need to ensure that those who most people would consider morally blameless are not found guilty. We have also concluded that it would not be possible to define dishonesty exhaustively while still achieving this result.

mens rea dishonesty. Where dishonesty is an *actus reus* requirement, it is necessary for the Crown to show that the other elements of the *actus reus*, which would otherwise be lawful, were unlawful because dishonest. Where it is merely a *mens rea* requirement this is not necessary because the other elements of the *actus reus* ensure that the conduct is already *prima facie* unlawful. It can therefore be easily inferred that they are also dishonest, as a matter of *mens rea*, unless there is evidence to suggest the contrary.

¹¹ Para 5.32.

¹² Paras 7.39 – 7.53.

- 5.17 In Consultation Paper No 155, which is discussed in Part VI below, we suggested that dishonesty could be replaced with specific defences. This proposal met with considerable opposition, and we now concede that specific defences would not be able to cover every situation where apparently fraudulent behaviour may have been justified. We have come to agree with the argument put forward by Richard Tur, cited at paragraph 5.5 above.
- 5.18 The fact that *Ghosh* dishonesty leaves open a possibility of variance between cases with essentially similar facts is, in our judgment, a theoretical risk. Many years after its adoption, the *Ghosh* test remains, in practice, unproblematic. We also recognise the fact that the concept of dishonesty is now required in a very large number of criminal cases,¹³ so to reject it at this stage would have a far-reaching effect on the criminal justice system.
- 5.19 We have therefore concluded that dishonesty should be a negative element in any crime of fraud, so that where other elements of the crime can be proved, a lack of dishonesty will nonetheless be a defence. However, for reasons which we set out below, we do not consider it right that dishonesty should be the key, positive element in a fraud offence. It should be a *necessary* element of the offence, but it should not be *sufficient*.

WOULD A GENERAL DISHONESTY OFFENCE BE DESIRABLE?

- 5.20 In Part V of Consultation Paper No 155 we provisionally concluded that a general dishonesty offence, in which dishonesty would be a positive rather than a negative element, was objectionable in principle. (Conspiracy to defraud is an example of a general dishonesty offence, and at paragraphs 3.6 to 3.9 above we cite this as one of our main reasons for proposing its abolition.)
- 5.21 41 respondents broadly agreed with this conclusion, and only nine disagreed.¹⁴ We take this as strong confirmation of the Consultation Paper's provisional view. The debate between those respondents who agreed and those who disagreed centred on differing judgments as to the appropriate balance between the advantages of flexibility and the disadvantages of uncertainty. This might be characterised as a debate between those, on the one hand, supporting the enhancement of efficiency in having a broad offence and, on the other, those favouring the enhancement of justice in formulating offences reflecting legal certainty and consistency on the other. One of our respondents anticipated that this would be the nature of the dispute because, in his words:

Ever since the abolition of the Star Chamber and the adoption of its jurisdiction by the common law courts, there has been a struggle between prosecutors who like to sweep everyone under a broad loosely defined offence, since that gives them maximum flexibility to meet the unexpected, and defenders who want precise offences in the

¹³ Andrew Ashworth estimates about a half of those tried on indictment: Ashworth on Criminal Law p 396.

¹⁴ Another two respondents discussed the point, but it is not clear whether they agreed.

hope that the prosecutor will pick the wrong charge. I describe both in pejorative terms, though obviously each approach could be described more positively. The whole impetus of the common law was and ought to be towards precise offences to protect the liberty of the subject.

- 5.22 This prediction was, to some extent, borne out in the consultation process in that both the Crown Prosecution Service and the Serious Fraud Office argued in favour of a general dishonesty offence, principally on the basis that it would offer greater flexibility.

The arguments for a general dishonesty offence

- 5.23 The Crown Prosecution Service favoured the creation of a general offence of fraud based on dishonesty “because of the flexibility it would offer in prosecuting fraud cases” and “because it would cover situations where deceit is not used to commit the fraud, or where it is difficult to establish a link between the deception and the outcome or intended outcome.” It argued that flexibility was crucial given the developments in financial markets and the increasing use of new technologies. It further argued that complicated and technical legal arguments could be avoided by a general offence and that clarifying issues might help to simplify complex fraud trials.
- 5.24 The Serious Fraud Office felt that the unresolved problems of internet fraud, where the fraud consisted of enjoyment of a service delivered over the internet which had legitimately been paid for by another, and fraud in financial markets, specifically Eurobond fraud, highlighted the complexity of modern financial practices. It felt that the speed at which such practices were changing and developing showed “the need for extreme flexibility in the relevant criminal law”. The Department of Trade and Industry expressly agreed with the views of the CPS and the SFO.

The arguments against a general dishonesty offence

Legal certainty and fair warning

- 5.25 An offence which is defined only by fact-finders’ moral opinions would necessarily be uncertain. Such an offence infringes, by a margin, the key principles of maximum (not absolute) certainty and fair warning and thus, the principle of legality. As Professor Andrew Ashworth has put it:

A vague law may in practice operate retroactively, since no one is quite sure whether given conduct is within or outside the rule. ... [R]espect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law’s provisions and no undue difficulty in ascertaining them.¹⁵

¹⁵ Ashworth on Criminal Law pp 76 – 77.

- 5.26 The CPS rejected our arguments in Consultation Paper No 155 that a general offence of fraud would be too subjective and uncertain. It did not accept the distinction between dishonesty as the sole defining element of a general offence of fraud and dishonesty as a single element of a more specific offence. The CPS also argued that the proposition that a widely drawn offence will cause uncertainty ignores the fact that a prosecution is only brought if a case passes the evidential and public interest tests under the Code for Crown Prosecutors. It pointed out that the prosecution must adduce evidence of improper and dishonest conduct on the part of the defendants – such as evidence of untruthfulness, concealment of dealings, failure to disclose material information etc. It said that if such evidence is not available it is unlikely that a case will pass the evidential test of the Code. For this reason, it did not accept that there was any appreciable danger of people being unfairly prosecuted for that which they did not know to be dishonest.
- 5.27 We can see the force of the argument that a person should be charged with a criminal offence involving dishonesty only where there is evidence of improper or morally dubious conduct and that the person acted dishonestly. Where we part company with the CPS is that we believe that the requirement of morally dubious conduct should be embedded in the definition of the offence, and not left to the good sense of the prosecution in screening the cases which should be charged or pursued to trial.
- 5.28 We continue to believe that a general dishonesty offence, by not requiring as an element some identifiable morally dubious conduct to which the test of dishonesty may be applied, would fail to provide any meaningful guidance on the scope of the criminal law and the conduct which may be lawfully pursued. We do not accept the argument that inherent uncertainty is satisfactorily cured by the promise of prosecutorial discretion. This cannot make a vague offence clear and, while it might ameliorate some of the risks, it does not excuse a law reform agency from formulating a justifiable and properly defined offence. We do not believe it is for the police and prosecutors to decide the ambit of the criminal law. As the Supreme Court of the United States has said:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.¹⁶

Human rights

- 5.29 The principle of maximum certainty is now linked to the question of compatibility with the Human Rights Act 1998. Article 7 of the European Convention on Human Rights¹⁷ states:

¹⁶ *Conally v General Construction Co* 269 US 385, 391 (1926).

¹⁷ Schedule 1 to the Act.

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.¹⁸

- 5.30 In Consultation Paper No 155 we doubted that a general dishonesty offence could safely be declared compatible with this provision. As Professor Ashworth pointed out in the passage quoted at 5.25 above, uncertain laws may have retroactive effect. We argued that the scope of a general dishonesty offence would be uncertain, and therefore it could be in breach of article 7.
- 5.31 A number of consultees who were opposed to the creation of a general dishonesty offence agreed with our doubts as to its compatibility.¹⁹ However, those who agreed with us tended, if they elucidated further, to qualify their agreement by suggesting that the issue was not a straightforward one, and that the possible lack of compatibility should not create an automatic bar to discussion and consideration.
- 5.32 Those who did not consider that such an offence would necessarily be incompatible included respondents who were nevertheless against the creation of a general dishonesty offence, as well as those who were in favour. Other jurisdictions, whose general fraud offences had not been held to violate their Bills of Rights,²⁰ were cited in support of this point of view, and several consultees pointed out that the Strasbourg jurisprudence has shown tolerance towards a number of offences, which could be considered imprecise or uncertain.²¹ Many of these respondents also considered that its importance should not be overemphasised, nor simply used to “bolster” arguments.
- 5.33 In the light of these responses, we take the view that general dishonesty offences (such as conspiracy to defraud) could perhaps be found to be compatible with

¹⁸ Paragraph (2) preserves retrospective effect in respect of the trial and punishment of crimes against humanity and war crimes.

¹⁹ 20 respondents agreed with us that the offence may be incompatible and 12 disagreed.

²⁰ It should be remembered, however, that a general *fraud* offence need not be a general *dishonesty* offence. General dishonesty offences use the concept of dishonesty as the sole defining factor which separates lawful conduct from criminal conduct. It is, however, perfectly possible to employ other defining elements in a general *fraud* offence, so that the defendant's conduct must be prima facie wrongful, before one considers the issue of dishonesty. As one of our respondents pointed out to us, Hong Kong and Scotland both have general fraud offences, and both have been found to be compatible with their respective Bills of Rights. However, neither of these general fraud offences were general dishonesty offences. See paragraphs 5.45 to 5.56 below, for a discussion of the general fraud and dishonesty offences employed in other jurisdictions.

²¹ The obscenity laws were given as examples by several respondents. In further support of the high threshold required before a law will be declared too uncertain to be incompatible, several cases were cited by respondents: *Sunday Times v UK* [1979] 2 EHRR 245, *Steel v UK* 23 Sept 1998, *SW and CR v UK* [1995] 21 EHRR 363, *Handyside v UK* [1976] 1 EHRR 737, *Kokkinakis v Greece* [1993] 17 EHRR 397.

the requirements of article 7. We nonetheless remain of the view that they offend against the principle of maximum certainty.

Fair labelling

- 5.34 Professor Ashworth has described how “fair labelling” of crimes is an important, if unacknowledged, feature of the criminal justice system:

Its concern is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking. ...

Fairness demands that offenders be labelled and punished in proportion to their wrongdoing; the label is important both in public terms and in the criminal justice system, for deciding on appropriate maximum penalties, for evaluating previous convictions, classification in prison, and so on. ...

The strength of the principle is to ensure that arguments of proportionality, fairness to individuals, and the proper confinement of executive and judicial discretion are taken seriously when new offences with broad definitions and high maximum penalties are under consideration.²²

- 5.35 We take the view that a general dishonesty offence would pay insufficient regard to the principle of fair labelling. It would not explain or reflect to society the nature of the wrongdoing or its scale of harm. The law in this area would lose its educative and declaratory functions.

Effect on other dishonesty offences

- 5.36 The practical consequence of the inroads into the principles of fair warning and fair labelling can be seen by the potential effect on other dishonesty offences. The widespread use of a general dishonesty offence would render largely academic the boundaries of all other offences of dishonesty. Where a person’s conduct fell outside a particular offence because of the specific requirements that Parliament has thought appropriate for that offence, the prosecution would be able to circumvent the difficulty by charging the general dishonesty offence instead. For example, the receipt of stolen goods is not an offence under section 22 of the 1968 Act unless the receiver *knows* or *believes* them to be stolen. But some people would say it is dishonest to receive goods which one *suspects* to be stolen. The prosecution could therefore invite the fact-finders to convict a receiver of the general dishonesty offence without being satisfied of the knowledge or belief that the 1968 Act expressly requires.

- 5.37 Similarly, legislation such as the Companies Acts 1985 and 1989, the Insolvency Act 1986 and the Financial Services Act 1986 provide comprehensive regulatory

²² Ashworth on Criminal Law pp 90 – 93.

codes in their respective areas, which include numerous specific criminal offences. These are essential for people in the commercial sphere to know what they can and cannot do. The distinctions between these offences, and between them and more general, mainstream criminal offences, would be obliterated by a general dishonesty offence. The same could be said of many other offences. The effect of a general dishonesty offence would be to widen every dishonesty offence, dramatically and indiscriminately; and we believe that this would be wrong.

Is dishonesty criminal?

- 5.38 In Consultation Paper No 155, we argued that the case for a general dishonesty offence had to rest on the argument that *all* dishonest conduct should in principle be criminal.²³ There would be no logical reason to attach criminal sanctions to every form of dishonesty for commercial gain, while giving complete licence to those who use dishonesty for political, emotional, social or sexual gains. On the other hand, if all dishonesty were to be criminalised, it would offend against the principle of minimum criminalisation. People across the jurisdiction tell small lies every day. This will often rightly result in social retribution, but such instances of dishonesty cannot be properly described as criminal. It is simply not appropriate to extend the scope of the criminal law to cover every minor social problem or instance of human frailty. A general dishonesty offence would be based on principles which, if taken to their logical conclusion, would trivialise the law and extend its scope too far.

Discretion

- 5.39 Ultimately, as we have explained above, we do not accept the CPS view that a general dishonesty offence would be rendered certain and fair by the benign application of prosecutorial discretion. An offence as broad as a general dishonesty offence would necessarily demand that prosecution services would be called upon to exercise their discretion in an increasing number of cases. This must raise concerns about consistency, and prosecutorial discretion leaving “the boundaries of the criminal law in a distinctly uncertain state”.²⁴
- 5.40 This is no mere academic concern. Both ILEX and the Justices’ Clerks’ Society were cautious about prosecutorial discretion. They stated that it creates concern for the victims of crime, the accused and the police. It is notable that those who expressed the strongest reservations about prosecutorial discretion are those who have to deal with the impact of it in relation to minor offences on a regular basis. If a general dishonesty offence were introduced, it would replace the current deception offences, and therefore it would be used on a daily basis in Magistrates’ Courts across the country. Its uncertain scope could have a highly deleterious effect on the ability to dispense summary justice in a fair and consistent manner.

²³ Consultation Paper No 155, para 4.35.

²⁴ Ashworth on Criminal Law p 422.

The role of the jury (and other fact-finders)

- 5.41 One of our consultation respondents offered the thought that to ask the jury whether conduct ought to be criminal was to ask the wrong thing of it, as the jury is a fact-finding institution which tries only one case. He focused on the difficulties caused by jury psychology when considering vague notions such as dishonesty. He felt that a general dishonesty offence could lead to the frequent acquittal of those who ought to be convicted because the jury could not cope with the decision being asked of it.²⁵
- 5.42 In the absence of research, this argument cannot be established. It is clear, however, that where dishonesty is a live issue, the fact-finders must decide what dishonesty means. If the crime in question is a general dishonesty offence, with dishonesty as a positive requirement, this is a heavy burden. In effect the fact-finders are being asked to determine the scope of the crime in question, rather than simply determining whether the defendant committed the crime.
- 5.43 It may be that Hughes J is correct in saying that juries cannot cope with this function, and that they will be more likely to acquit in default of coming to a resolution. However, that is, perhaps, secondary to the fact that they should not be asked to set the boundaries of the criminal law. The same applies to any other fact-finding tribunal. As a law reform commission, it is our role to recommend where the boundaries of the criminal law should lie, and it is then for Parliament to set them. Where the facts of a certain case result in uncertainty, it should be for the judge or the magistrates (performing their legal function) to make a reasoned decision on whether the case falls on one side or the other. Importantly, such a decision is subject to appeal, whereas a decision of the fact-finders is not.
- 5.44 It is worth noting in this context that dishonesty need not be an issue that requires the fact-finders to set the boundaries of the law. That only occurs when dishonesty is a positive requirement which draws the boundary between wrongful and legitimate conduct. If dishonesty is a negative requirement, because the conduct is prima facie wrongful, it becomes a question of intent: was the defendant aware that the conduct was wrongful?

Other jurisdictions

Canada

- 5.45 The Canadian Criminal Code contains a general offence of fraud in section 380. This provides:

Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act,

²⁵ It might be said in reply that this is a risk which the prosecution would have to consider when deciding whether to charge such an offence. Similarly one of our respondents argued that a general dishonesty offence would lead to a considerable increase in the number of trials, because many defendants would always believe that it was worth running the imprecise defence of “not dishonest”.

defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service... is guilty of an indictable offence...

5.46 The phrase “or other fraudulent means” has been very widely interpreted. The leading case on section 380 is *Olan*²⁶. The Supreme Court of Canada held that the essential elements of the offence were deprivation in the sense of economic prejudice, or risk of such prejudice, and dishonesty. Thus section 380 has become a general dishonesty offence, because dishonesty is the sole element which distinguishes wrongful behaviour from lawful behaviour.

5.47 However, in 1987, the Law Reform Commission of Canada published a wide-ranging report, *Recodifying Criminal Law*. It recommended replacing section 380 with a new fraud offence. While the Commission remained in favour of a general fraud offence - that is a single offence which would capture all or most forms of fraudulent behaviour - they sought to provide further definitional elements, so that the offence would not be merely a general dishonesty offence. Two alternatives were put forward:

Everyone commits a crime who dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof.

or

Everyone commits a crime who, without any right to do so, by dishonest representation or dishonest non-disclosure induces another person to suffer an economic loss or risk thereof.

5.48 For either alternative, a representation would be defined as relating to a matter of fact either past or present; and non-disclosure would relate to misrepresentation by omission where there was a duty to disclose arising from a special confidential relationship or a duty to correct a false impression created by, or on behalf of, the defendant.²⁷

5.49 These alternatives are not general dishonesty offences. They seek to ensure that the prohibited behaviour is prima facie wrongful. Thus dishonesty would be an additional element, rather than the sole element which defines criminal behaviour. Nonetheless, nothing has come of this recommendation, so Canada still has a general dishonesty offence.

Hong Kong and New Zealand

5.50 Hong Kong and New Zealand both have offences of conspiracy to defraud. They exist in these jurisdictions in much the same form as the common law offence does in England and Wales, although New Zealand has a statutory definition of

²⁶ (1978) 41 CCC (2d) 145.

²⁷ Law Reform Commission of Canada, *Recodifying Criminal Law* (Report 31, 1987) pp 77 - 81.

the offence.²⁸ As we have said in paragraph 5.20 above, conspiracy to defraud is, in effect, a general dishonesty offence. The Law Reform Commission of Hong Kong considered it in 1988.²⁹ Their report came to the conclusion that it should be replaced by a general *deception* offence.

- 5.51 A general deception offence seeks to capture all deceptive conduct in one offence. Such offences cannot be described as general dishonesty offences, because deception is *prima facie* wrongful, and thus dishonesty is not left as the sole factor defining wrongful conduct. On the other hand, a general deception offence is not necessarily a general fraud offence. On one view, deception is only one way of committing fraud. (We investigate the relationship between deception and fraud in Parts III and IV above.)
- 5.52 The original legislation based on the Hong Kong Commission's report lapsed during the change of sovereignty in Hong Kong. New legislation was introduced in 1998, which included the new general deception offence, but it also retained conspiracy to defraud, despite the Commission's recommendation.³⁰ Thus Hong Kong has both a general deception offence and a general dishonesty offence.
- 5.53 There have been similar efforts made to reform conspiracy to defraud in New Zealand. In 1991 the Crimes Consultative Committee examined the Crimes Bill 1989, which had been introduced by the Government to clarify and modernise the offence of conspiracy to defraud. The Committee recommended that the offence should be redrafted to cover cases of deception only, so that dishonesty alone would not be sufficient.³¹ Meanwhile, however, the Bill lapsed, so conspiracy to defraud remains unamended.³² Thus New Zealand still has a general dishonesty offence.

Other common law jurisdictions

- 5.54 We have not found any other examples of general dishonesty offences in common law jurisdictions. There are examples of general fraud offences, but these have a definition of wrongful conduct embedded within them, so that dishonesty is not the sole element which distinguishes lawful conduct from

²⁸ Crimes Act 1961, s 257.

²⁹ The Hong Kong report.

³⁰ Stuart M I Stoker, Secretary of the Law Reform Commission of Hong Kong, provided an analysis of the legislative process which followed the publication of the Hong Kong report.

³¹ *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991) p 109, quoted in the Hong Kong report, p 46.

³² Crimes Act 1961, s 257.

criminal conduct. For example, Scotland has a general deception offence,³³ and the USA Model Penal Code³⁴ has a crime of theft by deception.³⁵

- 5.55 These general fraud offences define deception more broadly than it has been interpreted in the context of the Theft Acts 1968 and 1978. In Scotland, for example, there is no need to prove that someone was in fact deceived, so long as there is a causal link between the false pretence and the resulting loss, gain or prejudice.³⁶ Nonetheless, these elements of the crime ensure that the defendant's behaviour was *prima facie* wrongful, before the question of dishonesty is considered.

Summary

- 5.56 It seems, therefore, that a number of common law jurisdictions have general fraud offences, but only three have general dishonesty offences. In each of those three jurisdictions, law reform commissions have recommended repealing the general dishonesty offence in favour of a more closely-defined fraud offence.

CONCLUSION

- 5.57 In light of the above arguments, we stand by our provisional decision not to propose a general dishonesty offence. Dishonesty should only function as a negative element to rebut the *prima facie* criminality of the defendant's conduct.

³³ This is a common law offence, which was strongly commended by the House of Lords in *Preddy* [1996] 1 AC 815, 830-831, *per* Lord Goff of Chieveley; and 841, *per* Lord Jauncey of Tulichettle.

³⁴ Adopted by the American Law Institute in 1962.

³⁵ Article 223.3.

³⁶ R A A McCall Smith and David Sheldon, *Scots Criminal Law* (1992) p 242.

PART VI

OUR PREVIOUS PROPOSALS

6.1 So far we have concluded that the present law is defective, but that a general dishonesty offence would not be an appropriate way of remedying its defects. In this Part we summarise the recent proposals put forward by this Commission as alternatives to such an offence. They are to be found within Consultation Paper No 155 and our informal discussion paper. A history of our less recent work on this subject can be found in Appendix B, which summarises the relevant publications dating back to 1976.

CONSULTATION PAPER NO 155

6.2 Following the Home Secretary's reference,¹ in 1999 we published Consultation Paper No 155 in which we provisionally rejected not only the option of a general *dishonesty* offence but also the less radical option of a general *deception* offence, arguing that the case for such an offence was not made out. Instead we proposed that the existing deception offences should be extended in a number of specific ways.

6.3 One such proposal was that the separate requirement of dishonesty should be discarded – in other words, a defendant against whom all the other elements of a deception offence are proved should not be able to appeal to the fact-finders for an acquittal on the ground that his or her conduct was not “dishonest”.² As we explained in Part V above, we have now decided to abandon this proposal.

6.4 The other extensions of liability that we proposed were:

- (1) that, for the purposes of the offence of obtaining property by deception, it should be sufficient that the owner of the property is deprived of it, regardless of whether or not anyone else *obtains* it (thus overcoming any remaining problem analogous to that identified in *Preddy*);³
- (2) that that offence should cease to require proof of an intention permanently to deprive;⁴

¹ See para 1.1 above.

² We proposed that it should instead be a defence that the defendant believed he or she had a *legal right* to act as he or she did.

³ [1996] AC 815. There was overwhelming support for this proposal. Representatives of the business community, in particular, argued that there are still types of transaction in which the need to prove that the property received by the alleged fraudster is the same as that of which the victim has been deprived creates an obstacle to prosecution.

⁴ There was no consensus on this proposal – though many of the respondents who disagreed with it seemed to be concerned more with theft (to which it did not apply) than with obtaining by deception.

- (3) that the offence of obtaining services by deception should apply not only (as at present) where the services are provided on the understanding that they have been or will be paid for, but also where
 - (a) they are provided free as a result of the deception, or
 - (b) they are provided with a view to gain (for example, free banking facilities);⁵ and
- (4) that, to meet the difficulties in proving an offence of deception where bank and credit cards have been used without authority,⁶ there should be a new offence of dishonestly imposing on another person, without authority, a liability to pay money to a third party.⁷

6.5 We also expressed the provisional view that the kind of conduct conveniently described as “deceiving a machine”⁸ should be made criminal, but that this should be done by creating a new, “theft-like” offence rather than by extending the concept of deception. This is the basis of a recommendation that we make in Part VIII below, where we also make a recommendation based on proposal (3) above. Proposals (1), (2) and (4) would be rendered unnecessary by the more radical reforms we now recommend in Part VII.

THE DISCUSSION PAPER OF JULY 2000

6.6 The responses to Consultation Paper No 155 led the criminal law team to reconsider the proposals we had made. This resulted in our informal discussion paper which was circulated in July 2000 to those who had responded to Consultation Paper No 155. The views expressed in this paper reflected the thinking of the criminal law team at that time, rather than those of the Commission as a whole.

A general deception offence

6.7 The principal change in thinking between Consultation Paper No 155 and our informal discussion paper was in relation to the option of introducing a general deception offence, under which the infliction of financial loss by deception would be an offence *in itself*, irrespective of the particular kind of transaction involved. Although a little over half of the respondents to Consultation Paper No 155 who considered this issue agreed with our provisional rejection of the arguments for such an offence, those who did not were vocal and persuasive in their views. The benefits of a general deception offence were apparent, they argued, and (unlike

⁵ There was general support for this proposal.

⁶ See para 3.29 above.

⁷ There was general support for this idea. It became apparent, however, that the proposal would cause difficulties because, without close study of the relevant agreements, it is often unclear whether a particular transaction does or does not impose on the credit-card issuer a legal obligation to reimburse the merchant who accepts the card (or card details) in payment.

⁸ See para 3.29 above.

the broadly similar benefits of a general dishonesty offence) were not outweighed by concerns that such an offence would be too indeterminate. The need to be able to respond to unpredictable changes in commercial and other practices was emphasised. Developments in these areas have led to a proliferation in the means by which frauds can be carried out, some of which do not easily fit within the existing definitions. It was considered that the breadth of the offence, far from being detrimental, would be highly beneficial, by allowing conduct which is not readily captured under the specific definitions currently employed to be prosecuted.

- 6.8 Moreover, the view we had expressed in Consultation Paper No 155, that a general deception offence would be too broad to be justifiable, was based partly on our provisional conclusion that the requirement of dishonesty was contrary to principle and should be abolished. As a result of that conclusion we proceeded in Consultation Paper No 155 on the basis that a general deception offence, if created, could not be subject to a requirement of dishonesty: it would have to consist *solely* in the infliction of loss by deception. As we have explained,⁹ the responses to Consultation Paper No 155 persuaded us that our objections to a requirement of dishonesty were unfounded. This opened up the possibility of a general offence requiring both deception *and* dishonesty. Such an offence would clearly be less open to objections of undue width than the offence we originally had in mind.
- 6.9 For these reasons, our informal discussion paper proposed the introduction of a general offence which would cover the infliction by a false pretence¹⁰ of *any* kind of financial loss, and the making by deception of any financial gain. This time there was strong support for this proposal: of the 33 respondents who addressed the issue directly, 30 were in favour. In general, respondents thought that the time had come for the patchwork of existing offences that have been modified and developed in response to changing needs to be replaced by one offence, in order to simplify and rationalise the law.

The concept of deception

- 6.10 Our informal discussion paper also discussed certain difficulties that currently exist in relation to the concept of deception, and would continue to exist if a new general offence were defined in terms of that concept.
- 6.11 First, as we explained in Part III above, there is a problem where the victim is indifferent to the truth of the proposition asserted by the defendant to be true, and it is therefore debatable whether he or she can be said to have been *deceived* – for example, where the fraud consists in the unauthorised use of a credit card or similar payment instrument. Our informal discussion paper suggested that this

⁹ See para 5.13 above.

¹⁰ The paper proposed the substitution of “false pretence” for “deception” for reasons summarised at paras 6.11 below. We now recommend, for similar reasons, that the requirement of deception be replaced by one of misrepresentation: see para 7.15 below.

problem would be avoided if the law's focus were shifted away from the mind of the victim on to the conduct of the defendant, and to this end it proposed that the new general offence be defined in terms of "false pretence" rather than deception. It would still have to be proved that the loss or gain *resulted* from the pretence. In order to meet the argument that a pretence has no effect unless it is believed, however, the paper proposed that it should be sufficient if the victim responded in some way to the actions of the defendant *as a whole* (as distinct from responding to the pretence in particular), even if that response were "automatic" and not based on any positive belief in the truth of the pretence. This idea attracted only limited support: many respondents argued that it would be less artificial simply to recognise that the element of pretence is not essential in the first place. We are now persuaded by this argument. Misrepresentation is therefore one, but only one, of the ways in which the new fraud offence we recommend in Part VII could be committed.

- 6.12 Secondly, as we also pointed out in Part III, a requirement of deception cannot be satisfied where no human being is deceived because the defendant's false assertion was made only to a machine. It follows that, at present, it is not normally an offence to obtain services (as distinct from property, the dishonest acquisition of which is theft) by "deceiving" a machine. Our informal discussion paper proposed to meet this problem by taking the idea of "automatic" response by a human being and applying it to the literally automatic responses of machines. There was general agreement among respondents that the dishonest obtaining of services from machines should be brought within the criminal law, but again there was some opposition to the idea of doing this by stretching the concept of pretence. We are now persuaded that an offence designed to cover such conduct should be formulated simply in terms of the dishonest obtaining of services, rather than requiring that the services be obtained in a particular way which is analogous (but not identical) to deception; and we make a recommendation to this effect in Part VIII below.

PART VII

A NEW FRAUD OFFENCE

A FRESH APPROACH

- 7.1 As long ago as 1976 this Commission concluded that it should not be an offence for two people to agree to do something which would not be an offence if done by one, and that conspiracy to defraud should be abolished as soon as that could safely be done.¹ The inexhaustible ingenuity of fraudsters, however, and the bewildering variety of methods they employ, mean that some frauds are difficult or impossible to prosecute for any offence other than conspiracy to defraud. Where no conspiracy can be proved, it may be difficult or impossible to prosecute at all. In order to make it practicable for conspiracy to defraud to be abolished, therefore, new offences would have to be introduced in respect of conduct which (a) currently falls within conspiracy to defraud (if done in concert) but no other offence, *and* (b) is thought sufficiently culpable to justify the imposition of criminal liability. The problem is to identify that conduct, and to formulate one or more offences that would catch it.
- 7.2 There are several possible approaches to this problem. The most radical is to reject the suggestion that there are forms of dishonesty which ought *not* to be criminal, and simply criminalise dishonest conduct per se. At the other extreme is the cautious approach exemplified by the proposals in Consultation Paper No 155 – namely to identify certain specific types of dishonest behaviour as deserving of criminality, and make such piecemeal reforms as are necessary to ensure that those types of behaviour are criminal.
- 7.3 In the light of our consultation exercises, neither approach now seems to us to be wholly satisfactory. On the one hand, as we explained in Part V, we still think it would be wrong to let the concept of dishonesty “do all the work”. On the other, we now accept that it is no longer realistic to continue plugging the gaps in the law of fraud on an ad hoc basis, adding to the array of offences with which this area of the law is already replete. Such a technique is bound to be always lagging behind developments in technology and commerce. It means we can never be confident that conspiracy to defraud is not needed to fill any gaps that may appear. Conspiracy to defraud therefore has to be retained indefinitely – thus frustrating our long-held objective of abolishing it once the necessary reforms have been made to the substantive law.
- 7.4 We now believe that what is needed is a fresh approach, involving a middle course between these two extremes. We think it is possible to devise a general fraud offence which, without relying too heavily on the concept of dishonesty, would nevertheless be sufficiently broad and flexible to catch nearly every case that would today be likely to be charged as a conspiracy to defraud. Conspiracy to

¹ Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76.

defraud would then be virtually redundant (in practice if not in theory), and could safely be abolished.

- 7.5 In our view, the key to defining such an offence ought to be the ordinary (non-legal) usage of the word “fraud”. At present, the criminality or otherwise of a fraudulent act depends whether it falls within one of a multitude of offences of varying degrees of specificity. The fact that it is fraudulent will not necessarily mean that it is an offence. Most non-lawyers would think this an extraordinary state of affairs. It was therefore a matter of simple common sense for the courts to recognise that “fraud”, in the ordinary sense of the word, was an objective which could not be pursued by two or more people in combination without infringing the criminal law.
- 7.6 The difficulty that we have encountered in seeking to formulate a satisfactory fraud offence, we believe, results largely from the fact that the concept of fraud developed by the criminal courts has in some respects parted company from the word’s ordinary meaning. This is not to say that the courts have overtly treated “fraud” as a legal term of art. On the contrary, they have purported to analyse its ordinary meaning, and to apply that meaning for the purposes of conspiracy to defraud and of other offences defined as involving an element of fraud. It does not follow that they have always succeeded in accurately stating that meaning. According to the classic definition in *Scott*,² for example, fraud includes any dishonest conduct which causes, or exposes another to the risk of, financial loss.³ This definition is wide enough to include conduct such as shoplifting, robbery or burglary, which a non-lawyer would hardly describe as fraud.
- 7.7 This divergence between the ordinary and legal meanings of fraud has laid a trap for law reformers. We have tended to assume that a fraud offence worthy of the name must inevitably embrace any conduct which the law currently regards as fraud, even if non-lawyers would not so regard it. Yet there is no need for a fraud offence to catch shoplifting, robbery or burglary, because these activities are adequately dealt with by existing statutory offences. To render conspiracy to defraud dispensable, a new fraud offence needs *only* to catch those kinds of dishonest conduct that an ordinary person would call fraud. The question is: what are the hallmarks of such conduct?
- 7.8 The classic statement of the nature of fraud is Stephen’s:

I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words “fraud” or “intent to defraud” or “fraudulently” occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to

² *Scott v Metropolitan Police Commissioner* [1975] AC 819, 839, *per* Viscount Dilhorne.

³ See paras 2.5 – 2.6 above.

actual injury or to a risk of possible injury by means of that deceit or secrecy.⁴

7.9 We note first that Stephen did not say these two elements are *sufficient* to constitute fraud: he said that they *at least* are essential. For reasons explained in Part V above, we are now persuaded, contrary to the view we provisionally expressed in Consultation Paper No 155, that the element of *dishonesty* should be essential to (though not sufficient for) criminal liability for fraud. With the addition of this element, Stephen's definition requires

- (1) deceit, intention to deceive or secrecy, *and*
- (2) *either*
 - (a) actual or possible injury to another *or*
 - (b) an intent thereby to cause injury to another or to expose another to a risk of possible injury,
- (3) *and* dishonesty.

7.10 We have adopted this analysis as our starting point.

7.11 In this Part we discuss first *what kinds of conduct* should suffice for an offence of fraud. In discussing this first issue we assume

- (a) that the conduct in question would be regarded by fact-finders as dishonest according to the *Ghosh* criteria, and
- (b) that it is intended to, and does, cause actual financial loss to another. This kind of consequence is the paradigm, and we think it clear that it should suffice for liability. By assuming that it has occurred, therefore, we hope to focus attention on the different kinds of conduct that may have caused it, and on whether they should or should not suffice.

7.12 We then consider

- (1) whether the new offence should also extend to the intentional and dishonest causing, by one of the requisite kinds of conduct, of any consequences *other* than actual financial loss to another; and
- (2) whether a person should commit the offence by engaging in one of the requisite kinds of conduct with the *intention* of causing one of the requisite kinds of consequence, but without actually doing so.

7.13 Finally we discuss whether the new offence should be subject to any special defences, and what mode of trial and maximum sentence are appropriate.

⁴ *History of Criminal Law* (1883) vol 2, pp 121 – 122.

WHAT KINDS OF CONDUCT SHOULD SUFFICE?

Misrepresentation

- 7.14 The paradigm of fraudulent conduct, which can obviously constitute fraud if it is dishonest and causes financial loss, is deception. Clearly deception should be one of the ways in which the new fraud offence can be committed.
- 7.15 One of the issues we considered in Consultation Paper No 155 was whether the concept of deception was in need of further definition or clarification. We pointed out that deception is commonly thought to require proof of *misrepresentation*, and argued that this is an unnecessary source of confusion and artificiality. We suggested that the legislation might make it clear that there is a deception where the defendant deliberately or recklessly induces another to believe something that is not true. Whether the defendant does this by misrepresentation or in some other way is, we argued, immaterial. The majority of respondents agreed with our analysis, though some thought the current wording was clear enough.
- 7.16 One of the defects of the present law identified in Part III above, however, is that the concept of deception arguably implies a *belief*, on the part of the victim, in the truth of the proposition falsely represented by the defendant. In general such a requirement would present no more difficulty than the requirement in the pre-1968 law that the property be obtained *by* the false pretence, because if the victim handed over the property despite *not* believing the pretence to be true then the required causal link would not be present.⁵ Even where the representation is successful in achieving the desired objective, however, in certain circumstances it is arguably unrealistic to speak of the representee *believing* it.⁶ The chief example is the misuse of credit cards and other payment instruments. We now believe that such conduct would be covered in a more convincing and less artificial way if the concept of deception were replaced by that of misrepresentation. Since the merchant who accepts the card in payment does not care whether the defendant has authority to use it, it is debatable whether the merchant can be said to be *deceived*. It is clear from *Charles*⁷ and *Lambie*,⁸ however, that by tendering the card the defendant is impliedly and falsely *representing* that he or she has authority to use it for the transaction in question. In our view that should suffice, even if the defendant knows that the representee is indifferent whether the representation is true. We have therefore concluded that this form of the new offence should be defined in terms of misrepresentation rather than deception. For most practical purposes, however, the distinction is immaterial.
- 7.17 The concept of fraudulent misrepresentation is well established in both the civil and criminal law. It may be defined as an assertion of a proposition which is

⁵ For our approach to the issue of causation, see paras 7.53 – 7.54 below.

⁶ See para 3.29 above.

⁷ [1977] AC 177; see para 3.31 – 3.33 above.

⁸ [1982] AC 449; see para 3.31 – 3.33 above.

untrue or misleading, either in the knowledge that it is untrue or misleading or being aware of the possibility that it might be.⁹ The assertion may be express, implicit in written or spoken words, or implicit in non-verbal conduct. The proposition asserted may be one of fact or of law. It may be as to the current intentions, or other state of mind, of the defendant or any other person:¹⁰ for example, a person who orders a meal in a restaurant thereby impliedly claims to have not only the means of payment but also the intention to pay. An assertion as to *future* events will not suffice; but this is academic, since such an assertion would be dishonest only if the maker of the assertion knew that it was likely to prove untrue – in which case the maker would be making a false assertion about a present fact, namely the maker’s own state of mind.

Secrecy

7.18 In Part IV we identified various kinds of conduct which can amount to fraud at common law (with the result that persons who *agree* to engage in such conduct are guilty of conspiracy to defraud), but which are not an offence if engaged in by one person alone, and which would therefore cease to be criminal (even if engaged in by more than one person in concert) if conspiracy to defraud were abolished without replacement. Some of the examples we identified involve misrepresentation, but the authorities on conspiracy to defraud recognise that misrepresentation is not an essential element of fraud. This was established in

⁹ Section 15(4) of the Theft Act 1968 reflects these alternatives by saying that a deception may be “deliberate or reckless”. The word “reckless”, however, is somewhat problematic. In other contexts, such as criminal damage, it has been construed as denoting a culpable state of mind falling short of actual awareness of risk, namely where the defendant gives no thought to the possibility of a risk even though it is obvious: *Caldwell* [1982] AC 341. It cannot mean this in the context of fraud, because if the defendant is unaware of the possibility that what is asserted may be untrue then the requirement of dishonesty cannot be satisfied, even if any reasonable person in the defendant’s position would have thought it obvious that the assertion was likely to be untrue. Nevertheless, we think it is less confusing to avoid the word “reckless” and to refer simply to an awareness that the assertion might be untrue or misleading.

This also has the advantage of not imposing a separate requirement that the risk in question should have been such as to make it *unreasonable* in all the circumstances for the defendant to take it. Such a requirement is implicit in both the objective and the subjective concept of recklessness. We do not believe that the defendant should be convicted of fraud merely because he or she was aware of a small risk that the representation in question might be untrue, if in all the circumstances that was a reasonable risk to take; but under our recommendations such a defendant could expect to be acquitted on the ground that such conduct is not dishonest. We see no need for a *separate* rule that the taking of the risk be unreasonable, and we believe that the law would be simpler without such a rule.

¹⁰ The pre-1968 concept of “false pretence” did not include a misrepresentation as to the defendant’s state of mind: *Dent* [1955] 2 QB 590. Such a misrepresentation is sufficient for the tort of deceit, however (*Edgington v Fitzmaurice* (1885) 29 Ch D 459), and section 15(4) of the Theft Act 1968 expressly provides that “deception” includes a deception as to the present intentions of the person using the deception or any other person. Clause 2(3) of our draft Bill similarly provides, for the avoidance of doubt, that, for the purpose of the new fraud offence, “representation” includes a representation as to the intentions of (a) the person making the representation or (b) any other person.

Scott v Metropolitan Police Commissioner,¹¹ where the appellant bribed cinema staff to let him borrow films and make pirate copies, and the House of Lords upheld his conviction of conspiracy to defraud. He made no representation to the owners of the copyright and distribution rights – they knew nothing about him – but he nevertheless intended to *defraud* them.

- 7.19 We note that in some jurisdictions it has been thought sufficient to create a general fraud offence requiring misrepresentation (or deception). The Law Reform Commission of Hong Kong, for instance, recommended such an offence in 1996.¹² We also note, however, that the Hong Kong legislature, in enacting that recommendation,¹³ decided that the new offence should supplement conspiracy to defraud rather than replacing it. Apparently it was thought unsatisfactory that the *only* fraud offence should be one confined to deception.
- 7.20 We think that our definition of fraud should not be confined to misrepresentation – even if it is designed (as we believe it should be) to reflect the ordinary meaning of fraud rather than its wider legal meaning.¹⁴ As Stephen’s definition recognises, misrepresentation is no more essential to the former than to the latter. If an employee embezzles her employer’s money, both lawyers and non-lawyers would agree that her conduct can properly be described as fraud even if she makes no misrepresentation (for example, by falsifying the accounts).
- 7.21 Fraudulent conduct which does not involve misrepresentation obviously cannot be brought within the reach of the criminal law either by extending the individual deception offences while still requiring proof of deception (as we proposed in Consultation Paper No 155) or by replacing them with a general “fraud” offence requiring such proof (an option that we there considered and rejected). If, however, we are to stop short of criminalising *any* conduct which causes loss and is deemed by the fact-finders to be dishonest (an option which we considered and rejected both in Consultation Paper No 155 and in Part IV above), we must identify the circumstances in which conduct not involving misrepresentation nevertheless amounts to fraud. Viscount Dilhorne’s definition, “to deprive a person dishonestly of something ... to which he ... might ... be entitled”, seems too wide: it would allow dishonesty to do all the work. So would Lord Diplock’s dictum that “Dishonesty of any kind is enough”. In our view Stephen was closer to the truth when he said that fraud requires deceit (or an intention to deceive) *or in some cases mere secrecy*. We have concluded that there are two further kinds of “secret” conduct, not involving misrepresentation, which can properly be described as fraud and should be sufficient for the new fraud offence. They are (a) non-disclosure, and (b) secret abuse of a position of trust.

¹¹ [1975] AC 819.

¹² The Hong Kong report.

¹³ Theft (Amendment) Ordinance 1999.

¹⁴ See para 7.6 – 7.7 above.

Non-disclosure

- 7.22 Secrecy can be regarded as a kind of deception by omission. One person may deceive another by taking positive steps to create a false impression in the other's mind, or may simply refrain from taking any steps to dispel such an impression. It is arguable (though by no means clear) that simple non-disclosure can constitute deception under the present law, at any rate where there is a legal duty to disclose.¹⁵
- 7.23 In Consultation Paper No 155 we provisionally concluded that mere non-disclosure should not be sufficient for an offence of deception, regardless of whether there is a legal duty to disclose. The majority of respondents who responded on this issue agreed. A substantial minority, however, argued that, from the victim's point of view, a failure to reveal material facts can be just as devastating as, and tantamount to, deception by conduct. Some went further and argued that criminal liability for non-disclosure ought not to depend on the existence of a duty of disclosure in civil law, which might well be difficult to identify.
- 7.24 The view we expressed in Consultation Paper No 155 related to the definition of *deception*, for the purpose of offences requiring deception. As we have explained, however, we now believe that a fraud offence ought not to be confined to cases of deception, but should include other kinds of conduct which non-lawyers would regard as fraud. The question is therefore whether the ordinary concept of fraud is wide enough to embrace at least some cases of dishonest non-disclosure. In our view it clearly is – whether or not there is a legal duty to disclose. For example, an antique dealer calls on vulnerable people and buys their heirlooms at unrealistically low prices, making no misrepresentation as to the value of the items but exploiting the victims' trust. There may be no *legal* duty to disclose the truth, but there is clearly a *moral* duty to do so. If the dealer's failure to do so is regarded by the fact-finders as dishonest, we see no reason why he should not be guilty of fraud.
- 7.25 We have considered the possibility of defining deception (or misrepresentation) in such a way as to make it clear that the breach of a moral duty to disclose will suffice. We have concluded, however, that this would not be helpful. In the first place it would perpetuate the artificiality of the present law, under which a defendant who fails to disclose material facts can be convicted (if at all) only on the basis of a positive misrepresentation supposedly implicit in his or her silence. In reality, the antique dealer's dishonesty lies not in any implied representation but in the dealer's failure to provide crucial information which the other party trusts the dealer to provide. We think the legislation should expressly reflect this, by providing for a separate kind of fraudulent conduct which does not masquerade as a form of misrepresentation but is a genuine alternative to it.

¹⁵ See para 2.22 above.

- 7.26 Moreover, we think it important that the legislation should state *when* non-disclosure qualifies as fraud, rather than simply permitting the fact-finders to treat it as fraud if they think that disclosure ought to have been made (which would be tantamount to letting dishonesty do all the work). It would clearly be wrong to impose liability for fraud on a private individual who sees a valuable antique on a stall at a car boot sale and offers a very low price for it, which is accepted. Such a person might be guilty of *theft*, if dishonesty were proved,¹⁶ but in our view should not be guilty of fraud.
- 7.27 We have concluded that the dishonest non-disclosure of information should qualify as fraud in two cases.

LEGAL DUTY OF DISCLOSURE

- 7.28 First, non-disclosure of information should suffice if there is a *legal duty* to disclose it. Such a duty may derive from statute (such as the provisions governing company prospectuses),¹⁷ from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).
- 7.29 For this purpose there is a legal duty to disclose information not only if the defendant's failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure. For example, a person in a fiduciary position has a duty to disclose material information when entering into a contract with his or her beneficiary, in the sense that a failure to make such disclosure will entitle the beneficiary to rescind the contract and to reclaim any property transferred under it.
- 7.30 It is perhaps unlikely that a person might be under a legal duty to disclose information despite being ignorant of the circumstances giving rise to the duty. On principle, however, we believe that the offence should require knowledge that such circumstances exist, or at least awareness that they might exist.

DEFENDANT TRUSTED TO DISCLOSE

- 7.31 Secondly, even if there is no *legal duty* to disclose the information in question, we believe that it should be sufficient if
- (1) the other person trusts the defendant to make disclosure of information of that kind, and
 - (2) the defendant knows that this is the case, or is aware that it might be the case, and

¹⁶ See para 2.11 above.

¹⁷ Financial Services and Markets Act 2000, s 90.

- (3) in all the circumstances it is reasonable to expect the defendant to disclose the information which he or she fails to disclose.

7.32 This situation is broadly similar to the existence of a relationship which imports fiduciary duties as a matter of civil law, but it does not depend on the existence of such a relationship.¹⁸ The essence of requirement (1) is that the parties are not at arm's length. The other person expects the defendant to disclose information which would be likely to influence the other's decision, without being specifically asked for it, and in that sense to subordinate the defendant's own interests to those of the other. If the defendant knows that this is what is expected, or realises that it may be what is expected, two options are available: the defendant can either correct the expectation – that is, make it clear that the other must obtain any information that he or she regards as material without the defendant's help – or comply with it, by disclosing such information as it is in the circumstances reasonable to expect.

7.33 Requirement (3) is additional to requirements (1) and (2), because even if the defendant knows that he or she is trusted to make full disclosure it may nevertheless not be reasonable to expect disclosure of the particular information in question. For example, a dealer buying an antique is guilty of fraudulent non-disclosure if she knows that the seller is trusting her to disclose any marked discrepancy between the price offered and the true value of the item, *and* it is reasonable to expect her to do so. This is a question of degree. If the dealer knows that she can resell the item for £10,000, but does not disclose this and offers only £2,000, it would be open to a jury to conclude that her failure to disclose the true value was unreasonable. It would be otherwise if she did not expect to be able to resell the item for more than, say, £4,000, because it is not reasonable to expect a dealer to disclose the full extent of the reasonable profit she hopes to make, and such a mark-up would be within the bands of what is reasonable. In such a case we would expect the court to direct an acquittal, on the basis that no reasonable jury could be sure that it was reasonable to expect the defendant to disclose the information in question.

7.34 Whether the defendant is trusted to make disclosure, and if so whether a failure to disclose the information in question is unreasonable, will depend on a variety of factors – for example, whether the defendant is believed by the other to have special expertise, and if so whether the defendant has induced the other to believe this; whether the other has such expertise; the value of the transaction, from the other's point of view; whether the other is in receipt of legal, financial or other advice; and so on. A trial judge would of course remind a jury of any such factor that may have particular relevance to the facts of the case.

¹⁸ See para 7.62 – 7.68 below for our views on the relationship between the civil and criminal law.

Secret abuse of position

- 7.35 The kind of conduct we have described as “non-disclosure” is broadly analogous to, though in our view distinct from, that of positive misrepresentation which brings about a transfer of property or some other economic consequence. It is in the nature of the situation that the person who trusts the defendant to disclose the information in question will act, or omit to act, in reliance on the defendant’s failure to do so.
- 7.36 In addition to this case, however, we believe that some kinds of conduct can properly be described as fraudulent on the ground that they amount to an abuse of an existing position of trust, even if there is no question of the victim’s thereby being induced to act or omit to act. The difference between this case and that of non-disclosure is that in this case the defendant does not need to enlist the victim’s co-operation in order to secure the desired result. An example would be the employee who, without the knowledge of his employer, misuses his or her position to make a personal profit at the employer’s expense.
- 7.37 The essence of the kind of relationship which in our view should be a prerequisite of this form of the offence is that the victim has voluntarily put the defendant in a privileged position, by virtue of which the defendant is expected to safeguard the victim’s financial interests or given power to damage those interests. Such an expectation to safeguard or power to damage may arise, for example, because the defendant is given authority to exercise a discretion on the victim’s behalf, or is given access to the victim’s assets, premises, equipment or customers. In these cases the defendant does not need to enlist the victim’s *further* co-operation in order to secure the desired result, because the necessary co-operation has been given in advance.
- 7.38 The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm’s length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential.¹⁹ This does not of course mean that it would be entirely a matter for the fact-finders whether the necessary relationship exists. The question whether the particular facts alleged can properly be described as giving rise to that relationship will be an issue capable of being ruled upon by the judge and, if the case goes to the jury, of being the subject of directions.
- 7.39 The abuse of position may be an omission as well as a positive act – for example, where an employee omits to take up a chance of a crucial contract, intending to enable an associate to pick up the contract instead.

¹⁹ See para 7.62 — 7.68 below for our views on the relationship between the civil and the criminal law.

- 7.40 We do not think, however, that dishonest abuse of position per se should be enough to constitute fraudulent conduct. In accordance with Stephen's view that fraud involves either deceit or secrecy, we believe that, in order to qualify as fraud, an abuse of position (in the absence of misrepresentation) should be not only dishonest but also *secret* – that is, undisclosed to the victim. If the defendant lets the victim know what is happening, in our view the defendant's conduct cannot properly be described as fraud.
- 7.41 Arguably it follows that there should be *no* liability if, although the victim has no knowledge of the abuse at the time when it occurs, the defendant intends to disclose it in due course. Such an intention could not, however, be a complete defence in all circumstances. No-one would say, for example, that a particular abuse was not fraudulent because the culprit intended to make disclosure many years later, in his memoirs or on his deathbed. We have tried to identify the circumstances in which an intention to disclose ought to be a defence, but have been unable to formulate principled criteria which would not yield arbitrary results. It should be remembered, in any event, that the offence always requires proof of dishonesty. If the defendant is unable to make disclosure (for example, because the victim is uncontactable), but intends to do so at the first opportunity, it is unlikely that dishonesty could be proved. We have therefore decided to recommend simply that, with one exception, the abuse of position must occur without the victim's knowledge, or that of a person acting on the victim's behalf.
- 7.42 The exception relates to the situation where the defendant *thinks* that the victim is unaware of the defendant's conduct, but is mistaken. The defendant may, for example, be under police surveillance. Even if the victim's knowledge negated the defendant's liability for the fraud offence itself, there would still be liability for *attempted* fraud (on the basis that the defendant would have been committing the fraud offence had the facts been as he or she believed them to be). In the interests of clarity, however, we think it would be better if the defendant's liability in this situation were apparent from the fraud legislation alone, without the need to invoke the law of attempts. Our recommendation is therefore that it should be sufficient, for the full fraud offence, if the defendant *believes* that the victim is unaware of the abuse of position.

CONSEQUENCES OTHER THAN ACTUAL FINANCIAL LOSS

- 7.43 We now turn to the question whether it should be sufficient if by misrepresentation, non-disclosure or secret abuse of position the defendant dishonestly and intentionally brings about some consequence other than actual financial loss to another.

Parting with money or other property

- 7.44 To say that a person has suffered actual financial loss implies that that person's overall financial position has deteriorated. A requirement that the victim of the fraud should have suffered loss in this sense would clearly be too restrictive. It would mean, for example, that, where a person has been induced by misrepresentation to invest in a business venture, it would be necessary to prove

not merely that that person would not have made the investment but for the misrepresentation, but also that the investment was objectively a bad one – that the securities bought were actually worth less than the price paid for them. There is no such requirement in the existing offence of obtaining property by deception,²⁰ and to introduce it would make the law less effective than it is now. In our view it should be sufficient for the new fraud offence if the defendant causes another to part with money or other property, whether or not the other's overall financial position is adversely affected.

Not receiving money or other property

- 7.45 The definition of “loss” in the Theft Act 1968 includes “a loss by not getting what one might get, as well as a loss by parting with what one has”.²¹ Again, we think that a loss in this sense should be sufficient for the new fraud offence. Thus it could be fraud to prevent another person from receiving money or other property which that person might otherwise have received – whether or not that person would have been financially better off as a result of receiving it.

Having one's economic interests put at risk

- 7.46 At common law it is possible to defraud a person by putting his or her financial interests at risk, even if the risk is not expected to materialise and does not in fact do so.²² An example is *Allsop*,²³ where the defendant was held to have defrauded a finance company by deceiving it into accepting loan applications that it might otherwise have rejected. It was no defence that the defendant expected all the money to be repaid. In our view, exposing another to this kind of risk should continue to qualify as a form of fraud.

Financial gain without a corresponding loss

- 7.47 The next question is whether it should be sufficient that the defendant (or another) makes a financial *gain*, or whether it should be necessary that another sustains a loss in one of the senses described above. This issue was not considered in Consultation Paper No 155, because that paper proposed only certain specific extensions to the existing deception offences. In our informal discussion paper, however, we proposed a kind of general deception offence, and

²⁰ Similarly, the Theft Act 1968 creates several offences of which one element is an intent to cause loss to another (viz false accounting, suppression of documents, procuring the execution of a valuable security by deception, and blackmail), and “loss” is defined for this purpose by s 34(2)(a) as any loss, temporary or permanent, in money or other property. According to Sir John Smith, “D intends P to suffer a loss if he intends him to be deprived of particular money or property, though he may also intend that P be fully compensated in economic terms”: *Smith on Theft*, para 10-18. Clause 5 of our draft Bill is framed in similar terms.

²¹ Section 34(2)(a).

²² See paras 4.20 — 4.25 above.

²³ (1976) 64 Cr App R 29.

for this purpose we proposed that it should be sufficient if by deception the defendant *either* causes a loss *or* makes a gain. We explained:

This might go somewhat further than is strictly necessary in order to ensure that the existing offences are superseded. But the offence of obtaining services already applies to most cases where D makes a gain by deception, other than by obtaining property, because a “service” can consist of any act or omission. The only real limitation is that the act or omission must be understood to be paid for. If the new offence extended to the making of *any gain* by deception, it would catch the obtaining of a valuable service which costs the victim nothing to provide *and* for which the victim does not expect to be paid. We believe that there is no reason why such conduct should not be criminal, and that the greater simplicity of this approach is ample justification for the marginal widening of liability that it would entail. Defining the offence in terms of gain to the fraudster, without the need to prove a corresponding loss to the victim, would also preclude any argument that no offence has been committed because the victim got value for money and so suffered no “loss”.

7.48 Of those who commented on this proposal, 15 supported it²⁴ and only four were opposed.²⁵ These latter respondents argued that intervention of the criminal law requires to be justified, and the justification comes in protecting people against harm; where there is no harm, it is hard to see what point there is in criminalising the dishonesty.²⁶

7.49 In our view, however, the law should take a robust and realistic line on this issue. It may be that, where a person’s dishonest conduct has genuinely caused no harm whatsoever to anyone else, that conduct is not appropriately described as fraud. However, for every case where this is truly so, there will be many where the loss to others is hard to identify but is none the less real. At paragraph 4.15 we set out the facts of the Guinness fraud, in which it was clear that there were many losers, but it would have been very hard to bring evidence of these widely dispersed losses. Similarly, in cases of insider dealing it is clear that market participants suffer as a result of the insiders’ actions, but the losses are indirect and diffuse. The fact that the defendant has dishonestly made a gain is not itself the *reason* for criminalising the defendant’s conduct. It is, however, the obvious and visible symptom of conduct which, on closer inspection, proves to be anti-social in less obvious ways.

²⁴ Including the CPS, the SFO, the Criminal Bar Association and the Law Society.

²⁵ Including the North Eastern Circuit and Liberty.

²⁶ This conception of fraud as being confined to the defrauding of others, rather than the making of dishonest gains for oneself, was also advanced in our work on the law of corruption. In *Legislating the Criminal Code: Corruption*, Consultation Paper No 145 we argued (at paras 1.23 – 1.30) that this is why corruption is not in essence, and should not be treated as, an offence of fraud, although in practice it usually does cause loss to others. Some respondents argued that corruption is an offence of *dishonesty* (see *Legislating the Criminal Code: Corruption* (1998) Law Com No 248, para 5.127), but there was general agreement that it is not an offence of *fraud* (*ibid*, n 134).

- 7.50 Moreover, it is already possible to incur liability for deception without causing loss of any kind. For example, section 20(2) of the Theft Act 1968, which creates the offence of procuring the execution of a valuable security by deception, expressly provides that it is sufficient if the defendant acts with a view to gain *or* with intent to cause loss. We see no reason why conduct which already falls within a deception offence should be excluded from the new fraud offence.
- 7.51 For these reasons we believe that it would be unrealistic and artificial to say that the new fraud offence requires proof of loss to others. The dishonest making of a financial gain should suffice.
- 7.52 On the other hand we also believe that, where the defendant *has* dishonestly caused financial loss to another, it should not be a defence that the defendant acted out of malice or mischief and not for financial gain. It should be sufficient that the defendant *either* causes financial loss to another *or* makes a financial gain (or enables a third party to do so).

Non-economic prejudice

- 7.53 Fraud is essentially an economic crime, and we do not think the new offence should extend to conduct which has no financial dimension. Thus it would not be *fraud* (as distinct from a sexual offence) for a man to deceive a woman into having sex with him, even if fact-finders thought this was “dishonest”. It would be different if the woman were a prostitute and the deception went to the prospect of payment.²⁷ The draft Bill achieves this result by defining the offence in terms of “gain” and “loss”, which are in turn defined (as in section 34(2)(a) of the Theft Act 1968) as extending only to gain or loss “in money or other property”.²⁸

FRAUD AS AN INCHOATE OFFENCE

- 7.54 Arguably the full offence should not be committed unless the defendant has succeeded in *actually* causing a loss or making a gain: where the defendant has acted with *intent* to cause loss or make a gain, but that intent has been frustrated, a conviction of attempt would adequately reflect the criminality of the defendant’s conduct. It may sometimes be debatable, however, whether a loss has actually been caused or a gain made, whilst it is clear beyond doubt that the defendant *intended* to bring about one or both of those outcomes. We think it would be unfortunate if, in such a case, it had to be determined whether there had in fact been gain or loss within the meaning of the Act, when that question had little bearing on the gravity of the defendant’s conduct or the appropriate sentence. We think that, as in the case of those offences under the Theft Act 1968

²⁷ Eg *Linekar* [1995] QB 250, where the defendant paid a prostitute with a worthless cheque.

²⁸ Clause 5(2).

whose definitions employ the concepts of gain and loss,²⁹ it should be sufficient if the defendant acts *with intent* to make a gain or to cause a loss.

7.55 In the light of this conclusion we have considered whether it should be possible to prosecute for an *attempt* to commit the new offence. At present, a conviction of attempt is appropriate where, for example, the defendant deceives the victim but fails to obtain the desired benefit, or where the victim sees through the fraud. Under our recommendations there would be no need to charge an attempt in these cases, because the defendant would be guilty of the full offence. The offence would not, however, be committed by a defendant who makes a representation in the belief that it is false when it is actually true, or who does not succeed in making a representation at all (for example because the relevant communication fails to arrive). If these cases are to be covered at all, it can only be done via the law of attempts. It may be arguable that this would be inappropriate, because the resulting liability would be doubly inchoate. On the other hand, these cases would be attempts to obtain by deception under the present law, and we see no reason why they should cease to be criminal. We think that the law of attempts should apply to the new offence as it applies to other indictable offences.

Intended causation

7.56 In Consultation Paper No 155 we asked whether the need to prove a causal link between the deception and the resultant loss or gain gave rise to difficulty. Although some evidential difficulties do arise, a significant number of respondents strongly argued that the nexus between the defendant's act and its consequences is fundamental and should continue to be a vital part of the offence. Since we have concluded that the new fraud offence should be inchoate in character – in other words, that it should not be necessary for any particular event actually to *occur* after the defendant's fraudulent conduct – there can obviously be no requirement that any such event be *caused* by the defendant's conduct. The requirement of intent to make a gain or cause a loss, however, implies a requirement of *intended* causation (as distinct from *actual* causation). The defendant's intention must be to make a gain or cause a loss *by means of* his or her conduct.

7.57 In most cases this requirement will cause no difficulty. There may be a theoretical difficulty in the case of the misuse of payment cards, because the prosecution will have to prove both (a) that by using the card the defendant made an implied misrepresentation that he or she was authorised to use it, *and* (b) that he or she hoped to get the desired property (or services) *by means of* that

²⁹ The expression used in the Theft Act is “with a *view* to gain ... or with intent to cause loss ...” (italics supplied). Strictly speaking, a *view* to gain is probably a kind of purpose, whereas a defendant can *intend* to cause loss where he or she does not wish to do so but knows that that is an inevitable side-effect of the making of the desired gain. But it is hard to imagine a person intending to make a gain without having a view to the making of a gain, and for simplicity the draft Bill abandons the distinction.

misrepresentation. In view of the reasoning in *Charles and Lambie*³⁰ the former requirement should be easily satisfied. A defendant might perhaps deny having intended to get the goods *by means of* that representation, on the ground that he or she knew that the retailer would be indifferent whether the representation was true. The necessary intent will exist only if, at the time of tendering the card, the defendant believed that the retailer would not accept the card (or at any rate thought that the retailer *might* not accept the card) if the retailer *knew* that the defendant was not authorised to use it. In some circumstances the defendant may plausibly, or even truthfully, claim not to have believed this – for instance where he or she has slightly exceeded the credit limit, but does not expect the card issuer to object, and assumes that the retailer would take a similar view but does not think it necessary to ask. We are not especially concerned at the possibility of an acquittal in such circumstances. The case we wish to catch is that in which the defendant has stolen the card, or forged it, or has obtained it legitimately but has been expressly requested to return it to the issuer or to stop using it. In such a case we doubt that many fact-finders would give credence to a claim that the defendant thought the retailer would still have accepted the card even if the retailer had known the truth.

OUR RECOMMENDATION

7.58 **We recommend that any person who, with intent to make a gain or to cause loss or to expose another to the risk of loss, dishonestly**

(1) makes a false representation, or

(2) fails to disclose information to another person which

(a) he or she is under a legal duty to disclose, or

(b) is of a kind which the other person trusts him or her to disclose, and is information which in the circumstances it is reasonable to expect him or her to disclose, or

(3) abuses a position in which he or she is expected to safeguard, or not to act against, the financial interests of another person, and does so without the knowledge of that person or of anyone acting on that person's behalf,

should be guilty of an offence of fraud. (Recommendation 1)

POSSIBLE DEFENCES

Lawful conduct, “claim of right” and “belief in a claim of right”

7.59 In Consultation Paper No 155 we said that we thought it wrong that conduct which is not “actionable” (in the sense of amounting to no civil wrong and giving rise to no civil remedy) should be regarded as a crime of dishonesty. We refer to this possible defence as a “claim of right”, to be distinguished from a possible

³⁰ See paras 3.31 – 3.33 above.

defence of “belief in a claim of right,” an example of which is provided by section 2(1)(a) of the Theft Act 1968, which we also consider.

The proper role of the criminal law of dishonesty, in our view, is to provide additional protection for rights and interests which are already protected by the civil law of property and obligations. To apply it to conduct which gives rise to no civil liability is to extend it beyond its proper function.³¹

- 7.60 Similarly, in our informal discussion paper we proposed that there should be a general offence of making a gain or causing a loss by deception, *but* that, for the purposes of that offence, the making of a gain or the causing of a loss should not be regarded as dishonest if the defendant has, or believes that he or she has, a legal right to do what he or she does.
- 7.61 Only a few respondents passed comment on this. Professor G R Sullivan, perhaps the leading academic champion of a general fraud offence, agreed that it was a necessary limitation. Both the CPS and the SFO, however, opposed it. The CPS thought it would make criminal cases more complex if concepts of civil law were introduced. The Law Society thought it would be “confusing”.³² We find these concerns compelling.
- 7.62 In reaching our provisional conclusion in Consultation Paper No 155 we criticised certain decisions of the Court of Appeal to the effect that *theft* may be committed by a person who accepts a transfer of property as a valid gift or under an unimpeachable contract, if in all the circumstances the acceptance of the property is dishonest. One of those decisions, *Hinks*, has since been affirmed by the House of Lords. Lord Steyn said, in a speech with which Lord Slynn of Hadley and Lord Jauncey of Tullichettle agreed:

Counsel for the appellant ... pointed out that the law [as the majority held it to be] creates a tension between the civil and the criminal law. In other words, conduct which is not wrongful in a civil law sense may constitute the crime of theft. Undoubtedly, this is so. The question whether the civil claim to title by a convicted thief, who committed no civil wrong, may be defeated by the principle that nobody may benefit from his own civil or criminal wrong does not arise for decision. Nevertheless there is a more general point, namely that the interaction between criminal and civil law can cause problems ... The purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on a priori grounds that the criminal law rather than the civil law is defective.³³

³¹ Consultation Paper No 155, para 5.28.

³² The Law Society also thought that such a defence was unnecessary because the defendant would not be dishonest within the *Ghosh* test. But this is clearly not the case, as *Hinks* shows (see para 7.65 below).

³³ [2001] 2 AC 241, 252.

- 7.63 There were powerful dissenting speeches in *Hinks* and the case has attracted vigorous academic criticism on a number of points, including this one. Whilst we can see that there may be merit in those criticisms on certain technical aspects of the law of theft, in so far as the passage cited above formulates a general proposition on the interrelationship between civil and criminal liability we respectfully agree with it.
- 7.64 Whilst it is likely that the vast majority of cases covered by the new offence will involve civil liability, we cannot be sure that this will always be the case. For example, in the absence of misrepresentation or a legal duty of disclosure, the dealer who dishonestly buys an antique at a gross undervalue is protected in civil law by the rule of caveat vendor, but this would not in itself be a defence to the new fraud offence (just as, under *Hinks*, it is not a defence to a charge of theft). Moreover, the concept of constructive trust and restitutionary relief for unjust enrichment or undue influence is still developing and is unpredictable.
- 7.65 We have, in our definition of the offence, carefully set out a series of conditions which must be satisfied before the conduct or omission described may be said to be potentially criminal by being, in addition, dishonest. We are satisfied that if such conduct or omission is proved and if it is dishonest then the label “criminal” would be entirely proper. Further, we would be very surprised were such conduct, if proved, not to attract a civil remedy in all save the rarest of cases. Indeed, we suspect that on the facts of *Hinks* there may well have been a civil remedy. The absence of civil liability might, of course, be a factor relevant to, and perhaps, in the view of the jury, conclusive of, the issue of dishonesty. What we think it is important to avoid, however, is explicitly tying criminal consequences to the establishment of a civil wrong. The criminal law should be free standing, particularly where the civil law is complex and, perhaps, to some extent unpredictable. Thus, we do not think that the absence of a civil wrong should be a defence *in itself*, and we make no such recommendation. If this results, in a very small number of cases, in a want of congruence between criminal and civil sanctions then that would be unfortunate but a price worth paying to avoid the criminal courts becoming embroiled in arguments over civil liability.
- 7.66 We do not therefore recommend that a “claim of right” should be a complete defence to the offence of fraud, nor do we recommend that “belief in a claim of right” should be a complete defence. However, we believe that in the vast majority of such cases the requirements of *Ghosh* dishonesty will suffice to ensure that justice is done, and that the civil and criminal law are kept closely in line with each other.
- 7.67 The first limb of the *Ghosh* test requires the jury to consider, on an objective basis, whether the defendant’s actions were dishonest. If the defendant may have believed that she had a legal right to act as she did, it will usually follow that the jury will be unable to conclude that they are sure that she was dishonest, on an objective basis. In appropriate cases we believe it would be proper for a judge to direct the jury to the effect that if that is the case then an acquittal should follow, without their having to consider the second limb of the *Ghosh* test.

- 7.68 In some exceptional cases it may be important for the judge in summing up to emphasise to the jury that the “belief in a claim of right” should be considered in the context of the first limb of the *Ghosh* test, rather than the second limb. Such cases may arise where a defendant recognises that “reasonable and honest” people might consider his actions dishonest, despite also believing that he had a legal right to act as he did. For example, D works for V plc as a shop manager, and has accrued many hours of overtime. V plc has failed to pay him for his overtime, despite D’s repeated requests and complaints. D feels that he cannot sue the company for the money, because he would risk being sacked, but on the other hand he cannot afford to let the matter drop. Eventually D uses his position as a manager to take cash from V plc’s account. Knowing that he is not authorised to take money from the account to pay himself, he falsifies the documentation. D states in evidence that he genuinely believed that he had a legal right to the money, that he was only taking that which he believed was already his by the only means available to him, but he concedes that he also believed that most reasonable, honest people would consider his actions dishonest. Although he would, on his own admission, have fallen foul of the second limb of the *Ghosh* test, if the jury were not satisfied that his actions were *in fact* dishonest, on the ordinary standards of reasonable and honest people, it would be wrong for them to convict D merely on the basis that he *erroneously* believed that reasonable, honest people would find his actions dishonest.
- 7.69 We think it likely that using the *Ghosh* approach as a means of analysing cases of “belief in a claim of right” would ensure that defendants who genuinely believe that they have a claim of right will be acquitted. However, it would not operate as an automatic and complete defence as it does to theft by reason of section 2(1)(a) of the Theft Act 1968. We believe that this is right, as a matter of policy, not only because we are seeking to ensure that the criminal law is not tied to the civil law, but also because there may be cases where a belief in a claim of right should not lead to an acquittal. For example a “Robin Hood” defendant could seek to exploit legal “loopholes” in order to redistribute property in a way, not amounting to theft, which she believes to be morally right, but which she knows most reasonable, honest people would consider dishonest. She may then argue that she genuinely believed that she had a legal right to act as she did, despite knowing that most reasonable, honest people would categorise her actions as dishonest. If there were a complete “belief in a claim of right” defence, such a defendant would have to be acquitted. Under the *Ghosh* test, however, it would be for the jury to decide whether her exploitation of legal loopholes was in fact dishonest, on the ordinary standards of reasonable, honest people.
- 7.70 It is conceivable that there might be a case involving a belief in a claim of right which would be decided differently depending on whether the offence charged is theft or fraud, because section 2(1)(a) will only apply to the former. That this is likely to be rare in the extreme is reflected in the authorities which we cite below. In the light of our conclusion, however, it is possible that at some point in the future we may re-visit the interaction between section 2(1)(a) and *Ghosh*, in the context of the law of theft.

7.71 In *Woolven*³⁴ the defendant was charged with an attempt to obtain property by deception. He appealed because the trial judge had not specifically referred to the “belief in a claim of right” defence in the summing up, although he had given a *Ghosh* direction. The Court of Appeal stated that

... any direction based on the concept of claim of right as set out in section 2(1)(a) [of the Theft Act 1968], or otherwise, would have added nothing to what the learned judge in fact said. Indeed a direction based on *Ghosh* seems likely to us to cover all occasions when a section 2(1)(a) type direction might otherwise have been desirable.

7.72 This statement was approved by a more recent judgment of the Court of Appeal.³⁵ We are therefore confident that the twin requirements of *Ghosh* dishonesty will ensure that “belief in a claim of right” cases are dealt with justly, and in a way that will keep the criminal law closely aligned to the civil law without being restrictively tied to it.

Public interest

7.73 Commenting on our informal discussion paper, the Newspaper Society pointed out that responsible investigative journalism can occasionally require subterfuge, and that this is supported by the Press Complaints Commission’s Code of Practice. They argued that a general deception offence might criminalise legitimate undercover journalism, and called for an explicit public interest defence.

7.74 In Consultation Paper No 150, where we provisionally proposed that it should be an offence to use or disclose another’s trade secret without authority, we recognised the force of this argument and proposed that the new offence should not extend to

- (1) the use, or the disclosure to an appropriate person, of information for the purpose of the prevention, detection or exposure of
 - (a) a crime, a fraud or a breach of statutory duty, whether committed or contemplated;
 - (b) conduct which is in the nature of a fraud on the general public; or
 - (c) matters constituting a present or future threat to the health or welfare of the community; or

³⁴ (1983) 77 Cr App R 231.

³⁵ *Wood* [1999] Crim LR 564. The full judgment is available on the Smith Bernal Casetrack website, in which Beldam LJ is quoted as saying that “Whilst there has been academic discussion whether a direction based on *Ghosh* is sufficient to cover all cases of claim of right, this Court has said that it is likely to do so.” He then cites *Woolven*. (No page or paragraph numbers are provided in the Casetrack judgment.)

(2) any use or disclosure of information which, under the law of confidence, would be justified on grounds of public interest.³⁶

7.75 Of the respondents who commented on this proposal, the vast majority agreed that such a defence was necessary. The DTI and FSA both reported that whistleblowing was a valuable source of information in the investigation of companies and that such disclosure must be protected. We have not yet formulated final recommendations on this subject.

7.76 In our 1998 report on corruption, on the other hand, we rejected the Newspaper Society's call for a public interest defence:

We have considered whether it would be appropriate to have a public interest defence in the law of corruption so that a defendant could argue, for example, that the purpose of the alleged bribe was to cause an agent to expose his or her principal's criminal activities.³⁷ We have decided against recommending such a defence. It may indeed be the case that an agent should be protected if he or she discloses information for the benefit of the public and not for personal gain. Where an advantage is conferred by one party on another, however, we fear that a public interest defence would positively encourage a climate of corruption.³⁸

7.77 We think that similar considerations apply to misrepresentation, non-disclosure and abuse of position. Under the existing law, investigative journalists in search of evidence of wrongdoing may well engage in conduct which is itself prima facie criminal.³⁹ The risk of such liability does not appear to have discouraged the development of a thriving industry in such investigations. Our new fraud offence, moreover (unlike the offences recommended in our corruption report), requires proof of dishonesty. If no moral obloquy can attach to the defendant's conduct, the fact-finders are unlikely to be satisfied that it was dishonest. We therefore do not agree that any such special defence is necessary or desirable. The CPS has regard to whether a prosecution would be in the public interest as

³⁶ Consultation Paper No 150, para 6.54.

³⁷ Although article 10(1) of the ECHR gives everyone the right "to receive and impart information and ideas without interference by public authority", we doubt that this provision would afford the "bribing" investigative journalist with a defence to a charge of corruption. Not only has the right to receive information been interpreted as "basically prohibit[ing] a Government from restricting a person from receiving information *that others wish or may be willing to impart to him*" (*Leander v Sweden* (1987) 9 EHRR 433, 456 (italics added)), but article 10(2) provides a broad list of public interest purposes which will justify public interference with freedom of expression: it may be circumscribed "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". (Footnote in original)

³⁸ Legislating the Criminal Code: Corruption (1998) Law Com No 248, para 5.152.

³⁹ Eg *Shannon* [2001] 1 WLR 51, where a journalist posing as an Arab sheikh had induced the defendant to supply him with prohibited drugs. The journalist would appear to have been guilty of an offence.

one of its twin criteria for deciding whether to pursue a prosecution.⁴⁰ We think that the combination of the dishonesty requirement and the role of the prosecutor should sufficiently allay this legitimate concern, and make no separate recommendation in respect of it.

MODE OF TRIAL AND SENTENCE

- 7.78 The majority of the existing offences of dishonesty, including all the deception offences, are triable either summarily or on indictment. Conduct falling within the new offence might range from the extremely serious to the comparatively minor, and we think it clear that the offence should be triable either way. If Lord Justice Auld's recent recommendation of a third, intermediate, level of criminal court were adopted,⁴¹ this would mean that the new offence could, depending on the circumstances, be tried at any of the three levels.
- 7.79 On conviction on indictment, the maximum sentence for obtaining property or a money transfer by deception is ten years.⁴² Whilst the maximum sentences for the other deception offences are lower, the maximum for the new offence needs to be adequate for the most serious cases. We therefore recommend that it be set at ten years. This would not of course mean that conduct which at present falls within one of the other deception offences would necessarily be punished more severely than at present: that would be a matter on which the Criminal Division of the Court of Appeal might wish to provide guidance.
- 7.80 **We recommend that fraud should be triable either way, and on conviction on indictment should be punishable with up to ten years' imprisonment. (Recommendation 2)**

⁴⁰ See the Code For Crown Prosecutors, sections 4 and 6 (<http://www.cps.gov.uk>). It should be noted however that, in accordance with our conclusions in Consents to Prosecution (1998) Law Com No 255, we do not recommend that the consent of the DPP or the Law Officers should be required before proceedings can be brought. Private prosecutions would therefore be possible.

⁴¹ Lord Justice Auld, Review of the Criminal Courts of England and Wales (October 2001), p 275

⁴² Theft Act 1968, ss 15(1) and 15A(5).

PART VIII

OBTAINING SERVICES DISHONESTLY

- 8.1 Because it requires proof of deception, the offence under section 1 of the 1978 Act fails to catch a person who succeeds in obtaining a service dishonestly but without deceiving anyone. This may happen in various ways.
- (1) The service may be obtained by the defendant's failure to disclose a material fact, rather than by a positive deception.¹
 - (2) The service may not be provided for the defendant *personally*, but for anyone who is there to receive it. For example, the defendant climbs over the fence of a football ground and watches the match without paying the admission charge.²
 - (3) The service may not be provided directly by *people* at all, but through a machine. For example, the defendant downloads, via the internet, software or data for which a charge is made, or which is available only to those within a certain category of person who have paid to be included within that category, by giving false credit card or identification details; or receives satellite television transmissions by using an unauthorised validation card in a decoder.³
 - (4) Some cases are a hybrid of types (2) and (3). For example, the defendant gives false credit card details to an automated booking system, or tenders a forged or stolen credit card to an electronic vending machine, and thus obtains a ticket for a journey or entertainment. There is no deception of the booking system (because it is not a person), nor of the staff who check the tickets of the passengers or audience (because the staff are only interested in whether each person has a ticket, not how they got it).
- 8.2 Case (1) would be caught by the new fraud offence which we recommend in Part VII above, because, for that offence, misrepresentation *or* non-disclosure

¹ It may be arguable that such non-disclosure counts as deception; but this is not clear, especially in the absence of a legal duty of disclosure. See para 2.22 above.

² Under section 3 of the Theft Act 1978 Act a person commits an offence if he dishonestly makes off without paying for a service, knowing that payment on the spot is required or expected and intending to avoid payment. It could perhaps be argued that the dishonest spectator commits this offence on leaving the ground at the end of the match. But the section appears to envisage that the supplier of the service (or the supplier's agent) will be aware of the individual defendant's presence and will expect the defendant to pay before leaving. We do not think it could fairly be applied where the defendant is an unauthorised member of a group to which the service is provided, where it is expected that all members of the group will already have paid. The defendant enters intending to avoid payment, but that is not the purpose of his or her departure as it is in the case of the customer who leaves without paying a hotel or restaurant bill. The defendant does not "make off" but simply goes home.

³ This is an offence under s 297(1) of the Copyright, Designs and Patents Act 1988, but the maximum penalty is a £5,000 fine.

would suffice.⁴ Cases (2) to (4) would not normally be caught by that offence, because they do not normally involve misrepresentation, wrongful non-disclosure or secret abuse of a position of trust⁵ but we think that they nevertheless ought to be criminal. In this Part we consider how the law might be extended in order to catch them.

DECEIVING A MACHINE?

- 8.3 One approach would be to extend the concept of deception so as to include the giving of false information to a machine as well as a person. There is a kind of precedent for this in the Forgery and Counterfeiting Act 1981. Under section 1, the offence of forgery consists in making a false instrument with the intention of using it to induce somebody to accept it as genuine. Section 10(3), however, provides that “references to inducing somebody to accept a false instrument as genuine ... include references to inducing a machine to respond to the instrument ... as if it were a genuine instrument”.⁶
- 8.4 In our informal discussion paper we proposed a general deception offence, but one which would have employed an extended concept of deception so as to catch (among other things) the “deception” of machines. The response convinced us that this approach was too artificial and would have introduced new difficulties in the ordinary case where it is a human being who is deceived. We are persuaded that we should tackle the problem head on. Rather than requiring deception but diluting its meaning, we need to accept that deception should not be essential at all. This is because, where a person dishonestly obtains a service by giving false information to a machine, the gravamen of that person’s conduct is not the provision of the false information but the taking of a valuable benefit without paying for it.

⁴ See paras 7.26 – 7.34 above.

⁵ It may be arguable that, where the defendant provides false information to a machine, there is a misrepresentation although there is no deception. In our view, however, this possibility is somewhat academic. Since we think that liability for the dishonest obtaining of services should not be confined to those who obtain services *by providing false information* (see paras 8.4 – 8.5 below), a separate offence of obtaining services would be needed even if the provision of false information to a machine did count as a misrepresentation for the purposes of the fraud offence; and, if there is a separate offence of obtaining services, we would expect prosecutors to use that offence against defendants who have obtained services from machines, even if such defendants have done so by providing false information and might arguably be guilty of the fraud offence as well.

⁶ Similarly, under section 72(3)(a) of the Value Added Tax Act 1994 a person commits an offence if he or she “with intent to deceive produces, furnishes or sends for the purposes of this Act or otherwise makes use for those purposes of any document which is false in a material particular”. But section 72(6) adds:

The reference in subsection (3)(a) above to furnishing, sending or otherwise making use of a document which is false in a material particular, with intent to deceive, includes a reference to furnishing, sending or otherwise making use of such a document, with intent to secure that a machine will respond to the document as if it were a true document.

- 8.5 Suppose, for example, that an internet website offers valuable information to subscribers, who are supposed to gain access to the information by giving their password. If a non-subscriber dishonestly downloads the information, it hardly matters whether she does so by giving the password of a genuine subscriber (and thus impliedly representing herself to be that subscriber) or by somehow bypassing the password screen altogether. To distinguish between these two situations would be like distinguishing between the person who puts a foreign coin into a vending machine and the one who gets at the contents by opening up the machine with a screwdriver, on the basis that the former makes a “misrepresentation” to the machine (that the coin is legal tender) whereas the latter does not. This would be absurd. Both are guilty of stealing the contents. Equally, in our view, a person who “steals” a service should be guilty of an offence, whether it is obtained by providing false information or in any other way.
- 8.6 Moreover, as the football match example shows, the problem is not confined to services provided by machines. Even where the service is provided by people, it may not be possible to regard it as being obtained by deception. It can hardly be said that the footballers are induced to play, and thus to provide a service for the spectators, by the spectators’ implied representations that they have all paid the admission fee.⁷

A “THEFT-LIKE” OFFENCE

- 8.7 In Consultation Paper No 155 we provisionally concluded that obtaining a service without permission, but without the deception of a human mind, should be criminalised; and that this should be done *not* by extending the concept of deception but by extending the offence of theft or creating a separate, “theft-like” offence.⁸ Of 28 responses on this issue, only one disagreed.⁹ The Association for Payment Clearing Services in particular, agreed with us that “the notion of deception was problematic when no human being was deceived”, and argued that “deeming” a machine to have been deceived was an unnecessary fiction which could only confuse juries and further complicate an already complicated area of law.

⁷ It is arguable that the service provided by the football club is not the playing of the match but simply admission to the ground, and that *that* service is not provided at all to the spectator who gains entry by unauthorised means. In our view, however, this is unrealistic. The paying spectators would hardly be satisfied if they were admitted to the ground but the advertised match was not played. All the spectators are obtaining the service provided by the players. The non-paying spectator is obtaining that service dishonestly, but is not obtaining it by deception.

⁸ We made no specific proposal as to how such an offence might be formulated, but proposed to return to the issue in the context of our planned review of the law of theft. Many respondents argued, however, that the problem was too urgent to await the outcome of what would inevitably be a difficult and lengthy exercise. We agree, and have decided that our recommendations on the subject should appear in this report.

⁹ The dissenter was Liberty, which argued that the current law is adequate because there is nearly always a human being who is deceived. In our view this is no longer the case.

- 8.8 This show of support for our provisional conclusion has persuaded us that it was the right approach. We are therefore proposing that it should be an offence to obtain a service dishonestly – whether by deceiving a person, giving false information to a machine, manipulating a machine without giving it false information, or by any other dishonest means. This offence would be more analogous to theft than to deception, because it could be committed by “helping oneself” to the service rather than dishonestly inducing another person to provide it. The draft Bill would mark this difference of approach by repealing the existing offence under section 1 of the Theft Act 1978 and replacing it with a new one, rather than amending it. The analogy with theft also suggests that this offence, unlike the new fraud offence, should not be inchoate in character. It should require the actual obtaining of the service, not merely conduct intended to result in the obtaining of the service.
- 8.9 The offence is not intended to apply to the obtaining of anything which cannot reasonably be described as a service; but a service need not be provided by one person directly to another. It may be provided through the medium of a machine. Obviously this can be done by directly causing the machine to behave in the manner required – for example, by switching it on – but it can also be done indirectly. Where a machine is designed or programmed to perform a task *automatically* whenever certain criteria are satisfied at any future date, a person who causes the machine to perform that task on a particular occasion is obtaining a service, even though those responsible for designing or programming the machine may not be personally aware that the necessary criteria have been satisfied on that occasion. Even if such a person procures the performance of the task dishonestly, it is not obtained *by deception*. Our intention is that such conduct should in some circumstances be criminal despite the absence of deception. The new offence could be committed *either* by deception *or* by simply “helping oneself” to a service.¹⁰
- 8.10 An offence consisting *simply* in the dishonest obtaining of a service, however, would in effect be a kind of general dishonesty offence. Any obtaining of services would be criminal if done in such circumstances that the fact-finders regarded it as dishonest. This would be inconsistent with the arguments we advanced in Part V above. In order to ensure that the offence does not catch an unacceptably wide range of conduct, therefore, we have concluded that two further elements should be required.
- 8.11 First, we believe that it should not be possible to commit the offence by omission alone. This offence would not, for example, be committed by a person who innocently happened to be on a boat and, despite hearing an announcement that anyone who had not paid for the next trip should disembark, remained on the

¹⁰ The *obtaining* of a service must however be distinguished from the *use* of items already obtained. It is not our intention that the offence should be committed by a person who dishonestly listens to an unauthorised recording of music which is subject to copyright, or who makes unauthorised use of computer software. Such conduct is not in itself criminal, and we do not suggest that it should be.

boat and thus received a free ride. It might, however, amount to the commission of the general fraud offence.¹¹

8.12 Secondly, we envisage that the offence could be committed *only* where the dishonesty lies in an intent *not to pay* for the service as expected. This is more restrictive than section 1 of the 1978 Act. Under that provision, the services must be provided on the understanding that they have been or will be paid for, but it is *not* necessary to show that the defendant intended to *avoid* payment. For example, subject to the requirement of dishonesty, the offence under section 1 would be committed by a parent who lies about a child's religious upbringing in order to obtain a place at a fee-paying school, with every intention of paying the fees. It is not clear why Parliament thought it necessary to bring such conduct within the 1978 Act,¹² and we do not think it should fall within the offence of obtaining services dishonestly. Unlike the fraud offence, this offence will not require any specific *type* of dishonest conduct: any dishonest act will suffice. To impose liability for such a potentially wide offence where the defendant is willing to pay the full amount required would in our view allow dishonesty to do too much of the work. If the defendant's dishonest act is a misrepresentation, and there is the necessary intent to make a gain or cause a loss, there will in any event be liability for the new fraud offence. We do not think it necessary to impose liability where those requirements are not satisfied *and* the defendant is willing to pay. Under our recommendation, therefore, the defendant would escape liability for the offence of obtaining services dishonestly *not only* (as under section 1 of the 1978 Act) where no payment is expected,¹³ *but also* where payment is expected but the defendant has paid in full, or intends to do so.

8.13 **We recommend that any person who by any dishonest act obtains services in respect of which payment is required, with intent to avoid payment, should be guilty of an offence of obtaining services dishonestly. (Recommendation 3)**

SERVICES PROVIDED OTHERWISE THAN ON THE UNDERSTANDING THAT THEY HAVE BEEN OR WILL BE PAID FOR

8.14 In Consultation Paper No 155 we argued that, by requiring the services to be provided on the understanding that they have been or will be paid for, section 1 of the 1978 Act excludes two cases which ought to be covered.

¹¹ Depending on the circumstances, the defendant's conduct in remaining on the boat might itself amount to a representation that he had paid: cf *DPP v Ray* [1974] AC 370. The line between positive acts and omissions is a fine one.

¹² See Griew on Theft, para 9-16.

¹³ The draft Bill refers to payment being required for *or in respect of* the supply of the services. This wording is intended to meet the case where services are provided to those within a limited class of people who pay for the privilege of belonging to that class, rather than paying directly for the services themselves. According to Sir John Smith this case is caught by section 1 of the 1978 Act (Smith on Theft, para 4-87) and our intention is that it should equally be caught by the new offence.

- (1) A service for which payment would *normally* be required may be provided on the understanding that in this case it will *not* be paid for, precisely because the deception results in the usual payment being waived.¹⁴
- (2) Some services of an economic character are provided in the hope of future gains rather than payment for the services themselves. A person does not commit the offence under section 1 by opening a bank account with a bad cheque, because banks do not charge for the opening of an account.¹⁵

8.15 In Consultation Paper No 155 we provisionally proposed that the offence under section 1 should be extended so as to cover these two cases. Of the 29 respondents who considered this proposal, all but two agreed. However, we are now recommending a fraud offence, which would be committed by (among others) anyone who dishonestly makes a false representation with intent to make a gain or to cause a loss. Virtually all the cases within the two lacunae that we identified would fall within our fraud offence; and the rest are not, in our view, important enough to justify the additional complexity that this would entail.¹⁶ We therefore make no separate recommendation in respect of these cases.

MODE OF TRIAL AND SENTENCE

8.16 Like the new fraud offence, and for the same reasons, we believe that the new offence of obtaining services dishonestly should be triable either way. On conviction on indictment, the maximum sentence available for the existing offence of obtaining services by deception is five years,¹⁷ and we see no reason why the maximum for the new offence should not be the same. **We recommend that the offence of obtaining services dishonestly should be triable either way, and on conviction on indictment should be punishable with up to five years' imprisonment. (Recommendation 4)**

¹⁴ D might perhaps be said to have obtained an "exemption" from payment within the meaning of section 2(1)(c), but would not commit the offence under section 1.

¹⁵ *Halai* [1983] Crim LR 624. *Halai* has been reversed (by *Cooke* [1997] Crim LR 436, and the Theft (Amendment) Act 1996) on the question whether the obtaining of a *loan* can be an obtaining of "services", but not on the point made in the text.

¹⁶ It is debatable whether the fraud offence would be committed where by deception D obtains, for nothing, a service which would otherwise have had to be paid for, and which costs the supplier nothing to supply. Arguably it depends whether, had D not been able to get the service for nothing, he or she would have (a) paid for it, or (b) done without it. In the former case there would be an intent to make a gain, by keeping the money that D has; in the latter, arguably not. But it is equally arguable that D has an intent to make a gain even in the latter case, on the basis that the deception makes the difference between getting the service for nothing and having to pay for it. We think it unlikely that many defendants would escape liability as a result of this case not being expressly covered.

¹⁷ Theft Act 1978, s 4(2)(a).

PART IX

ABOLITION OF EXISTING OFFENCES

- 9.1 In this report we have recommended the introduction of two new offences. Any conduct which at present falls within one of the existing deception offences under the Theft Acts would fall within at least one of the new offences. The existing deception offences would therefore become redundant. It would be possible to leave them on the statute book, in the expectation that prosecutors would use the new offences only for conduct which cannot conveniently be charged as one of the existing offences. We believe, however, that this would merely exacerbate the complexity which is one of the main defects of the present law. In practice, moreover, prosecutors would be likely to charge the new offences in the majority of cases, out of uncertainty as to whether the use of the more specific offences posed any risk of unexpected technical difficulties. We do not believe it is sensible to retain offences which add nothing of substance to the rest of the criminal law.
- 9.2 Conspiracy to defraud is a different matter, since it clearly does embrace some conduct which does not involve deception and would not fall within any of the offences we recommend (or conspiracy to commit those offences). In Part IV we identified the following examples of potentially fraudulent conduct which does not involve deception:
- (1) Making a secret gain or causing a loss by abusing a position of trust or fiduciary duty.
 - (2) Obtaining a service by giving false information to a machine.
 - (3) "Fixing" an event on which bets have been placed.
 - (4) Dishonestly failing to fulfil a contractual obligation.
 - (5) Dishonestly infringing a legal right.
- 9.3 Of these, (1) would fall within the new fraud offence, and (2) within the new offence of obtaining services dishonestly. (3) would usually fall within section 17 of the Gaming Act 1845; there may be some such cases which fall outside that section and ought to be criminal, but in that case the remedy is to amend the section, or to introduce new offences specifically directed at this kind of activity.
- 9.4 (4) and (5), on the other hand, represent a huge range of activities which is potentially criminal at common law but, in the absence of misrepresentation, wrongful non-disclosure or abuse of position, would fall outside the new offences we recommend. We accept that there may be a good case for imposing criminal liability in the case of some of these activities where, apart from conspiracy to defraud, no such liability currently exists. As far as we know, however, conspiracy to defraud is very rarely used in this kind of case. If it is thought that certain torts, breaches of contract or equitable wrongs should be criminal, legislation can be framed with reference to the particular kinds of conduct involved. To retain conspiracy to defraud on the ground that it might

occasionally prove useful in such a case would in our view be an excess of caution. Since it is not practicable to identify all such cases in advance, it would mean that we could never be in a position to abolish conspiracy to defraud – unless we were willing to replace it with a general dishonesty offence, an option that we rejected in Part V above. The advantages of abolishing it, in our view, greatly outweigh any possible advantage that might accrue from retaining it alongside the new offences we recommend. We believe that those offences cover enough of the ground presently covered by conspiracy to defraud to make it unnecessary to retain that offence any longer.

- 9.5 This would not of course mean that conspiracy charges could no longer be laid in fraud cases. An agreement to commit an offence is a *statutory* conspiracy, contrary to section 1 of the Criminal Law Act 1977. There is no reason why the offences we recommend should be an exception to this principle. An agreement to commit either of the new offences would be a statutory conspiracy.
- 9.6 **We recommend the abolition of all the deception offences under the Theft Acts 1968–1996, and of conspiracy to defraud. (Recommendation 5)**

PART X

OUR RECOMMENDATIONS

Our full recommendations are as follows.

FRAUD

1. Any person who, with intent to make a gain or to cause loss or to expose another to the risk of loss, dishonestly
 - (1) makes a false representation, or
 - (2) fails to disclose information to another person which
 - (a) he or she is under a legal duty to disclose, or
 - (b) is of a kind which the other person trusts him or her to disclose, and is information which in the circumstances it is reasonable to expect him or her to disclose, or
 - (3) abuses a position in which he or she is expected to safeguard, or not to act against, the financial interests of another person, and does so without the knowledge of that person or of anyone acting on that person's behalf,should be guilty of an offence of fraud. (paragraph 7.55)
2. Fraud should be triable either way, and on conviction on indictment should be punishable with up to ten years' imprisonment. (paragraph 7.68)

OBTAINING SERVICES DISHONESTLY

3. Any person who by any dishonest act obtains services in respect of which payment is required, with intent to avoid payment, should be guilty of an offence of obtaining services dishonestly. (paragraph 8.13)
4. The offence of obtaining services dishonestly should be triable either way, and on conviction on indictment should be punishable with up to five years' imprisonment. (paragraph 8.16)

ABOLITION OF EXISTING OFFENCES

5. All the deception offences under the Theft Acts 1968–1996, and conspiracy to defraud, should be abolished. (paragraph 9.5)

(Signed) ROBERT CARNWATH, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary*
14 June 2002

Fraud Bill

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EXPLANATORY NOTES

Clause 5

This clause defines “gain” and “loss” by adapting the Theft Act definitions of “property”, “gain” and “loss” (see sections 4(1) and 34(2)(a) of the Theft Act 1968).

Clause 7

This clause repeats the effect of section 18 of the Theft Act 1968, thus ensuring that the liability of company officers for offences committed by the company will not depend on whether they are charged with offences under this Bill or offences under the Theft Act.

Clause 8

This clause repeats the effect of section 31(1) of the Theft Act 1968, so that a person is protected from incriminating him or herself for the purposes of offences under this Bill and the Theft Act, while nonetheless being obliged to co-operate with certain civil proceedings relating to property. However, the Bill does not include an equivalent to section 30 of the Theft Act 1968. Section 30 was a positive statement, which went with the repeal of sections 12 and 16 of the Married Women’s Property Act 1882. It was aimed at ensuring that a pre-1882 common law rule that husbands and wives could not steal from each other would not be resurrected. It should no longer be necessary to include a provision of this sort, as it seems highly unlikely that this rule could now be resurrected.

Clause 9

Subsection (1) puts into effect our recommendation that all deception offences under the Theft Acts 1968 – 1996, and conspiracy to defraud, should be abolished (paragraph 9.5). However, subsection (1) also ensures that the repealed offences will remain applicable to offences committed wholly or partly before the Bill is brought into force. Those offences which are committed partly before the commencement of the Act will need to be charged under the old law, because the defendant will have committed elements of the offence *before* the new law is in force. The new law will be presumed not to be retrospective, so it cannot apply unless all the elements of the offence have been committed after it commences. Thus it is important to ensure that the old law remains applicable to those offences partly committed before the new law commences.

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Replace conspiracy to defraud and certain offences under the Theft Act 1968 and the Theft Act 1978 with offences of fraud and obtaining services dishonestly; and for connected purposes.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Fraud

1 Fraud

- (1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).
- (2) The sections are— 5
 - (a) section 2 (fraud by false representation),
 - (b) section 3 (fraud by wrongfully failing to disclose information), and
 - (c) section 4 (fraud by abuse of position).
- (3) A person who is guilty of fraud is liable— 10
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum (or to both);
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).

2 Fraud by false representation

- (1) A person is in breach of this section if he— 15
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.

- (2) A representation is false if—
- (a) it is untrue or misleading, and
 - (b) the person making it—
 - (i) knows that it is untrue or misleading, or
 - (ii) is aware that it might be.
- 5
- (3) “Representation” means any representation by words or conduct as to fact or law, including a representation as to the state of mind of—
- (a) the person making the representation, or
 - (b) any other person.
- 3 Fraud by wrongfully failing to disclose information** 10
- (1) A person is in breach of this section if he—
- (a) wrongfully fails to disclose information to another person,
 - (b) is dishonest in failing to do so, and
 - (c) intends, by failing to do so—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- 15
- (2) A person (D) wrongfully fails to disclose information to another person (P) in two situations.
- (3) The first is where—
- (a) D is under a duty under any enactment, instrument or rule of law to disclose the information to P, and
 - (b) D knows that the circumstances which give rise to the duty to disclose the information to P exist or is aware that they might exist.
- 20
- (4) The second is where—
- (a) the information is the kind of information that P trusts D to disclose to him,
 - (b) D knows that P is trusting him in this way or is aware that he might be, and
 - (c) any reasonable person would expect D to disclose the information to P.
- 25
- 4 Fraud by abuse of position** 30
- (1) A person (D) is in breach of this section if he—
- (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person (P),
 - (b) dishonestly and secretly abuses that position, and
 - (c) intends, by means of the abuse of that position—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- 35
- (2) D abuses his position secretly only if he believes that P and any person acting on P’s behalf are ignorant of the abuse.
- (3) D may be regarded as abusing his position even though the conduct alleged to amount to the abuse consists of an omission rather than an act. 40

5 “Gain” and “loss”

- (1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.
- (2) “Gain” and “loss” extend only to gain or loss in money or other property (real or personal), but include any such loss whether temporary or permanent. 5
- (3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.
- (4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.

Obtaining services dishonestly 10

6 Obtaining services dishonestly

- (1) A person is guilty of an offence under this section if he obtains services for himself or another—
 - (a) by a dishonest act, and
 - (b) in breach of subsection (2). 15
- (2) A person obtains services in breach of this subsection if—
 - (a) they are made available on the basis that payment has been, is being or will be made for or in respect of them,
 - (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and 20
 - (c) when he obtains them, he—
 - (i) knows that they are made available on the basis described in paragraph (a), or
 - (ii) is aware that they might be, but intends that payment will not be made, or will not be made in full. 25
- (3) A person guilty of an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum (or to both);
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine (or to both). 30

Supplementary

7 Liability of company officers for offences by company

- (1) Subsection (2) applies if an offence under this Act is committed by a body corporate.
- (2) If the offence is proved to have been committed with the consent or connivance of—
 - (a) a director, manager, secretary or other similar officer of the body corporate, or
 - (b) a person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly. 40

- (3) If the affairs of a body corporate are managed by its members, subsection (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

8 Evidence

- (1) A person is not to be excused from— 5
- (a) answering any question put to him in proceedings relating to property, or
 - (b) complying with any order made in proceedings relating to property, on the ground that doing so may incriminate him or his spouse of an offence under this Act. 10
- (2) But, in proceedings for an offence under this Act, a statement or admission made by the person in—
- (a) answering such a question, or
 - (b) complying with such an order,
- is not admissible in evidence against him or (unless they married after the making of the statement or admission) his spouse. 15
- (3) “Proceedings relating to property” means any proceedings for—
- (a) the recovery or administration of any property,
 - (b) the execution of a trust, or
 - (c) an account of any property or dealings with property, 20
- and “property” includes money and all other property (real or personal).

9 Abolition of conspiracy to defraud etc.

- (1) The offences referred to in subsection (2) are abolished for all purposes not relating to offences wholly or partly committed before the commencement of this Act. 25
- (2) The offences are—
- (a) the common law offence of conspiracy to defraud;
 - (b) the offences under the following provisions of the Theft Act 1968 (c. 60)— 30
 - (i) section 15 (obtaining property by deception);
 - (ii) section 15A (obtaining a money transfer by deception);
 - (iii) section 16 (obtaining pecuniary advantage by deception);
 - (iv) section 20(2) (procuring the execution of a valuable security by deception);
 - (c) the offences under the following provisions of the Theft Act 1978 (c. 31)— 35
 - (i) section 1 (obtaining services by deception);
 - (ii) section 2 (evasion of liability by deception).
- (3) An offence is partly committed before the commencement of this Act if— 40
- (a) a relevant event occurs before its commencement, and
 - (b) another relevant event occurs on or after its commencement.
- (4) “Relevant event”, in relation to an offence, means any act, omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

10 Minor and consequential amendments and repeals

- (1) Schedule 1 contains minor and consequential amendments.
- (2) Schedule 2 contains repeals.

11 Short title, commencement and extent

- (1) This Act may be cited as the Fraud Act 2002. 5
- (2) This Act (except this section) comes into force on such day as the Secretary of State may appoint by an order made by statutory instrument.
- (3) Subject to subsection (4), this Act extends to England and Wales only.
- (4) Any amendment or repeal in Schedule 1 or 2 of a provision which extends outside England and Wales extends to any place to which the provision extends. 10

SCHEDULES

SCHEDULE 1

Section 10(1).

MINOR AND CONSEQUENTIAL AMENDMENTS

Visiting Forces Act 1952 (c. 67)

- | | | |
|---|--|---|
| 1 | In the Schedule (offences referred to in section 3 of the 1952 Act), in paragraph 3 (meaning of “offence against property”), after sub-paragraph (l) insert— | 5 |
| | “(m) the Fraud Act 2002.” | |

Theft Act 1968 (c. 60)

- | | | |
|-----|---|----|
| 2 | In section 18(1) (liability of company officers for offences by company under sections 15, 16 or 17), omit “15, 16 or”. | 10 |
| 3 | In section 20(3) (suppression etc. of documents—interpretation), omit ““deception” has the same meaning as in section 15 of this Act, and”. | |
| 4 | (1) In section 24(4) (meaning of “stolen goods”) for “in the circumstances described in section 15(1) of this Act” substitute “, subject to subsection (5) below, by fraud (within the meaning of the Fraud Act 2002)”. | 15 |
| | (2) After section 24(4) insert— | |
| | “(5) Subsection (1) above applies in relation to goods obtained by fraud as if— | |
| | (a) the reference to the commencement of this Act were a reference to the commencement of the Fraud Act 2002, and | 20 |
| | (b) the reference to an offence under this Act were a reference to an offence under section 1 of that Act.” | |
| (3) | Nothing in this Act affects the operation of section 24 of the Theft Act 1968 in relation to goods obtained in the circumstances described in section 15(1) of that Act where the obtaining— | 25 |
| | (a) occurred before the commencement of this Act, or | |
| | (b) is the result of a deception made before the commencement of this Act. | |
| 5 | (1) In section 24A (dishonestly retaining a wrongful credit), omit subsections (3) and (4) and after subsection (2) insert— | 30 |
| | “(2A) A credit to an account is wrongful to the extent that it derives from— | |
| | (a) theft; | |
| | (b) blackmail; | |
| | (c) fraud (contrary to section 1 of the Fraud Act 2002); or | 35 |
| | (d) stolen goods.” | |

-
- (2) In subsection (7), for “subsection (4)” substitute “subsection (2A)”.
- (3) Nothing in this Act affects the operation of section 24A(7) and (8) of the Theft Act 1968 in relation to credits falling within section 24A(3) or (4) of that Act and made before the commencement of this Act.
- (4) For subsection (9) substitute— 5
- (9) “Account” means an account kept with—
- (a) a bank; or
- (b) a person carrying on a business which falls within subsection (10) below.
- (10) A business falls within this subsection if— 10
- (a) in the course of the business money received by way of deposit is lent to others; or
- (b) any other activity of the business is financed, wholly or to any material extent, out of the capital of or the interest on money received by way of deposit; 15
- and “deposit” here has the same meaning as in section 35 of the Banking Act 1987 (fraudulent inducement to make a deposit).
- (11) For the purposes of subsection (10) above—
- (a) all the activities which a person carries on by way of business shall be regarded as a single business carried on by him; and 20
- (b) “money” includes money expressed in a currency other than sterling or in the European currency unit (as defined in Council Regulation No. 3320/94/EC or any Community instrument replacing it).”
- 6 In section 25 (going equipped for burglary, theft or cheat)— 25
- (a) in subsections (1) and (3) for “cheat” substitute “fraud”, and
- (b) in subsection (5) for “and “cheat” means an offence under section 15(1) of this Act” substitute “and “fraud” means fraud contrary to section 1 of the Fraud Act 2002”.
- Criminal Law Act 1977 (c. 45)* 30
- 7 Omit section 5(2) (saving for conspiracy to defraud).
- Theft Act 1978 (c. 31)*
- 8 In section 4 (punishments), omit subsection (2)(a).
- 9 In section 5 (supplementary), omit subsection (1).
- Limitation Act 1980 (c. 58)* 35
- 10 (1) In section 4 (special time limit in case of theft), for subsection (5)(b) substitute—
- “(b) obtaining any chattel (in England and Wales or elsewhere) by—
- (i) blackmail (within the meaning of section 21 of the Theft Act 1968), or 40
- (ii) fraud (within the meaning of the Fraud Act 2002);”.

- (2) Nothing in this Act affects the operation of section 4 of the Limitation Act 1980 in relation to chattels obtained in the circumstances described in section 15(1) of the Theft Act 1968 where the obtaining—
- (a) occurred before the commencement of this Act, or
 - (b) is a result of a deception made before the commencement of this Act. 5

Finance Act 1982 (c. 39)

- 11 In section 11(1) (powers of Commissioners with respect to agricultural levies) after “the Theft Act 1978,” insert “the Fraud Act 2002,”.

Nuclear Material (Offences) Act 1983 (c. 18)

- 12 In section 1 (extended scope of certain offences), in subsection (1)(d) omit “15 or” (in the first place where it occurs). 10

Police and Criminal Evidence Act 1984 (c. 60)

- 13 In section 1 (power of constable to stop and search persons, vehicles etc.), in subsection (8) for paragraph (d) substitute—
- “(d) fraud (contrary to section 1 of the Fraud Act 2002).” 15

Criminal Justice Act 1987 (c. 38)

- 14 Omit section 12 (charges of and penalty for conspiracy to defraud).

Criminal Justice Act 1993 (c. 36)

- 15 (1) In section 1(2) (Group A offences), omit the entries in paragraph (a) relating to sections 15, 15A and 16 of the Theft Act 1968. 20
- (2) Omit section 1(2)(b).
- (3) After section 1(2)(c) insert—
- “(cc) an offence under either of the following provisions of the Fraud Act 2002—
- (i) section 1 (fraud); 25
 - (ii) section 6 (obtaining services dishonestly);”.
- (4) In subsection (3) (Group B offences), omit paragraph (b) (conspiracy to defraud).
- 16 In section 3(2) (questions immaterial to jurisdiction in the case of certain offences), omit “, or on a charge of conspiracy to defraud in England and Wales”. 30
- 17 (1) Omit section 5(3) (extended jurisdiction in relation to conspiracy to defraud).
- (2) In section 5(5), for “Subsections (3) and (4) are” substitute “Subsection (4) is”.
- 18 (1) Omit section 6(1) (relevance of external law to certain charges of conspiracy).
- (2) In section 6(4)— 35
- (a) for “a condition specified in subsection (1) or (2)” substitute “the condition specified in subsection (2)”, and
 - (b) in paragraph (a) for “the relevant conduct” substitute “what the defendant had in view”.

- (3) Omit section 6(5).

Powers of Criminal Courts (Sentencing) Act 2000 (c. 60)

- 19 (1) In section 130 (compensation orders) in subsection (5) for “an offence under the Theft Act 1968” substitute “a relevant offence against property”.
 (2) After section 130(5) insert— 5
 “(5A) “Relevant offence against property” means—
 (a) an offence under the Theft Act 1968, or
 (b) an offence under section 1 of the Fraud Act 2002 which involves the obtaining of any property.”
 (3) In section 130(6)(a) for “an offence under the Theft Act 1968” substitute “a relevant offence against property”. 10

Criminal Justice and Court Services Act 2000 (c. 43)

- 20 (1) In Schedule 6 (trigger offences), in paragraph 1, omit the entry relating to section 15 of the Theft Act 1968.
 (2) After paragraph 2 of Schedule 6 insert— 15
 “3 Fraud (contrary to section 1 of the Fraud Act 2002) is a trigger offence.”

Armed Forces Act 2001 (c. 19)

- 21 In section 2(9) (definition of prohibited articles for purposes of powers to stop and search) for paragraph (d) substitute— 20
 “(d) fraud (contrary to section 1 of the Fraud Act 2002).”

SCHEDULE 2

Section 10(2)

REPEALS

<i>Short title and chapter</i>	<i>Extent of repeal</i>	
Theft Act 1968 (c. 60)	Sections 15, 15A, 15B and 16. In section 18(1) “15, 16 or”. Section 20(2). In section 20(3), ““deception” has the same meaning as in section 15 of this Act, and”. Section 24A(3) and (4).	25 30
Criminal Law Act 1977 (c. 45)	Section 5(2).	
Theft Act 1978 (c. 31)	Sections 1 and 2. Section 4(2)(a). Section 5(1).	
Nuclear Material (Offences) Act 1983 (c. 18)	In section 1(1)(d) “15 or” (in the first place where it occurs).	35
Criminal Justice Act 1987 (c. 38)	Section 12.	

<i>Short title and chapter</i>	<i>Extent of repeal</i>	
Criminal Justice Act 1993 (c. 36)	In section 1(2), the entries in paragraph (a) relating to sections 15, 15A and 16 of the Theft Act 1968. Section 1(2)(b) and (3)(b). In section 3(2), “, or on a charge of conspiracy to defraud in England and Wales”. Section 5(3). Section 6(1) and (5).	5
Theft (Amendment) Act 1996 (c. 62)	Sections 1, 3(2) and 4.	10
Criminal Justice and Court Services Act 2000 (c. 43)	In Schedule 6, in paragraph 1, the entry relating to section 15 of the Theft Act 1968.	

APPENDIX B

SUMMARY OF PROPOSALS MADE PRIOR TO CONSULTATION PAPER NO 155

WORKING PAPER NO 56

B.1 In our report *Criminal Law: Report on Conspiracy and Criminal Law Reform*,¹ published in 1976, we recommended the abolition of common law conspiracy (a recommendation that was implemented by the Criminal Law Act 1977), but made an exception for conspiracy to defraud because its abolition would have left unacceptable lacunae in the law. We had made provisional proposals for the filling of those lacunae in 1974, in Working Paper No 56.² In the economic field,³ they would have involved criminalising

- (1) the unlawful taking of property, without deception, which has the effect of depriving the victim of the charge that he or she would have made for the use of the property;
- (2) the fraudulent manipulation of machines which enable a person to obtain by payment a service or facility;⁴ and
- (3) the use, with intent to make a gain or cause a loss, of any fraud or ill-practice to affect the outcome of any game or event, upon which anyone stands to lose or gain money, whether as a participant or by betting on the outcome;

but *not*

- (4) taking without deception those kinds of property which cannot normally be stolen;⁵ or
- (5) commercial practices by which loss is caused without deception.

¹ *Criminal Law: Report on Conspiracy and Criminal Law Reform* (1976) Law Com No 76.

² *Criminal Law: Conspiracy to Defraud* (1974) Working Paper No 56.

³ In the *non-economic* field, they would have involved criminalising (1) the making of false statements in relation to legislative schemes; (2) fraudulently inducing non-fulfilment of statutory duty; (3) fraudulently obtaining the grant of a licence, certificate, permission or the like; (4) fraudulently obtaining membership of an organisation which confers, or confers a prerequisite to, some qualification; (5) fraudulently obtaining information; and (6) fraudulently obtaining overdraft facilities; but *not* (7) fraudulently obtaining membership of a purely social organisation; (8) making false statements to hamper the investigation of contraventions of the law; or (9) fraudulently obtaining entry to premises where no charge is made for entry.

⁴ "This conduct should be penalised by specific legislation as required in particular instances".

⁵ Land, things growing wild, and game.

WORKING PAPER NO 104

B.1 In 1987 Working Paper No 56 was superseded by a further working paper on conspiracy to defraud,⁶ in which we set out a number of options but did not express a preference. The main options we considered were:

- (A) retention of the present law;
- (B) the replacement of common law conspiracy to defraud with a statutory offence of conspiracy to defraud (not necessarily as wide as the common law offence);
- (C) the creation of new discrete offences, each concerned with different areas of fraudulent conduct, together with the revision of some existing statutory offences; and
- (D) the creation of a general offence of fraud, capable of being committed by an individual acting alone – that is, a general dishonesty offence.

B.2 Option (C), we suggested, might involve

- (i) the extension of the definition of “deception” to cover the deception of a machine;
- (ii) the extension of fraudulent trading to unincorporated business organisations;
- (iii) the creation of a new offence (in place of section 17 of the Gaming Act 1845) of dishonestly, and with a view to gain or intent to cause loss, affecting (a) the outcome of any event upon which anyone stands to lose or gain in money or money’s worth, or (b) the amount which stands to be lost or gained by betting on the outcome of any such event; and/or
- (iv) the creation of a new offence of making or supplying an article which the defendant knows or believes is likely to be used in the commission of any offence involving fraud.

We expressed the provisional view that, if option (C) were adopted, *no* new offence (or extension of any existing offence) would be required in relation to the acquisition of confidential information by dishonest means; the making, by a person in a fiduciary position, of secret profits from the abuse of that position; or dishonestly inducing a person performing a public duty to act contrary to that duty. The main advantage of this option, we said,

⁶ Working Paper No 104. We explained at para 1.7 that “It had been the Commission’s intention to follow up the proposals in Criminal Law: Conspiracy to Defraud, Working Paper No 56 with final recommendations, but progress was held up by the need to complete work on other projects and for other reasons. There have been a number of substantial changes and developments in the law since then which means that many of the original proposals require reconsideration. More importantly, however, it has become evident that in formulating those proposals insufficient weight was given to the procedural and other advantages in being able to charge conspiracy to defraud which must now be taken into account if a satisfactory reform of the law in this field is to be achieved. In the light of these matters we decided to initiate further consultation. This working paper therefore supersedes the earlier paper ...”.

is that it is consistent with generally accepted principles of the substantive criminal law. The main disadvantage is that it would share few, if any, of the advantages attaching to conspiracy to defraud and could make the prosecution of fraudsters more difficult.⁷

LAW COM NO 228

B.1 We returned to these issues in 1994, in our conspiracy to defraud report. We there concluded that conspiracy to defraud adds substantially to the reach of the criminal law in the case of the following kinds of conduct (or planned conduct), all of which we thought should, at least in certain circumstances, be criminal:

- (1) the “theft” of land and other property which cannot normally be stolen;
- (2) *some* (but not necessarily all) cases in which the owner of property is temporarily deprived of it;
- (3) the dishonest appropriation of property which does not “belong to another” within the meaning of the Theft Act;⁸
- (4) the making of secret profits by employees and fiduciaries;⁹
- (5) the obtaining without deception¹⁰ of benefits other than property (eg services);
- (6) the evasion of liability by deception, without intent to make permanent default;¹¹
- (7) dishonest failure to pay for goods or services;¹²
- (8) gambling swindles;
- (9) breach of an agent’s duty to his or her principal, which is not (or cannot be proved to be) corrupt within the meaning of the Prevention of Corruption Acts in the sense that a bribe has been paid or is expected;
- (10) the causing of “prejudice” to another which does not involve financial loss;¹³
- (11) assisting in fraud by third parties;¹⁴ and

⁷ Para 14.16.

⁸ Eg *Preddy* [1996] AC 815.

⁹ But, as the report pointed out, in view of the Privy Council’s decision in *A-G for Hong Kong v Reid* [1994] 1 AC 324 this is arguably theft.

¹⁰ Or by “deceiving” a machine, which in law does not count as deception.

¹¹ That is, deceiving a creditor into allowing more time to pay, with the intention of paying the debt in full eventually. This is not an offence under s 2 of the Theft Act 1978.

¹² This is criminal only if (a) payment “on the spot” is required or expected, (b) the defendant “makes off” without paying, and (c) the defendant intends *never* to pay: Theft Act 1978 s 3, as interpreted in *Allen* [1985] AC 1029.

¹³ Eg *Welham* [1961] AC 103, where forged documents were used to evade statutory credit restrictions.

¹⁴ Eg *Hollinshead* [1985] AC 975, where the defendants sold “black boxes” designed to impair the proper functioning of electricity meters and thus enable the user to defraud the electricity

(12) cases in which a party is ignorant of the details of the fraud.¹⁵

We did not, however, recommend the extension of the criminal law so as to bring any such conduct within its reach.¹⁶

B.2 We added that conspiracy to defraud is also relevant to the criminal law relating to the unauthorised collection or disclosure of confidential information, but expressed no opinion on whether it is right that this should be so. We discussed this issue at length, however, and made provisional proposals to criminalise such conduct in certain circumstances, in Consultation Paper No 150. We hope to return to the issue of confidential information following the publication of this report. If such conduct is to be criminal at all, in our view it should be covered by tailor-made legislation rather than the general law of fraud.

supplier. This point is now being dealt with in the context of our separate project on assisting and encouraging crime.

¹⁵ We explained:

We have been informed by a number of prosecutors of cases in which it is clear that substantive offences have been committed in the furtherance of a fraudulent scheme, but it is doubtful whether persons on the fringe of the scheme can be charged as parties to those offences, or to conspiracies to commit them, because there is insufficient evidence that they knew the details of what was planned. In a mortgage fraud, for example, if a number of defendants are charged with a substantive offence of deception, or with conspiracy to commit such an offence, the prosecution must prove that each defendant knew what form the deception was to take and how the desired benefit was to be obtained – for example, in the case of a conspiracy to procure the execution of valuable securities by deception, what valuable securities were to be procured. It would not be sufficient to prove, against a particular defendant, that he knew in general terms that something dishonest was going on but was not sure of the details.

On a charge of conspiracy to defraud, however, this would be enough: fraud requires only the dishonest causing of prejudice, and one can therefore be a party to it without any detailed knowledge of how the prejudice is to be caused. ...

We believe that liability should extend, and should be clearly understood to extend, to a person who knowingly participates in a fraud without knowing exactly what substantive offences are to be committed, or how, or against whom. (paras 4.69 – 4.72)

Again, this issue is more appropriately dealt with in the context of our work on assisting and encouraging crime generally, rather than as a problem peculiar to fraud.

¹⁶ With the exception of our recommendation, implemented by the Theft (Amendment) Act 1996, that section 1 of the Theft Act 1978 be amended so as to make it clear that the obtaining of a loan can constitute the obtaining of services.

APPENDIX C

PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 155

Judges and judicial bodies

Donald Barton, former magistrate in Tanganyika
Mr Justice Bell
Mr Justice Curtis
Lord Davidson
Judge Denison QC, Common Serjeant of London
Lord Hope
Judge Sir Rhys Davies QC, Honorary Recorder of Manchester
Mr Justice Hughes
Magistrates' Association
Northern Ireland judiciary
Mr Justice Penry-Davey
Mr Justice Poole
Judge JW Rant
Judge Rivlin QC
Lord Justice Sedley
Joint Council of HM Stipendary Magistrates (Legal Committee)
Lord Justice Swinton Thomas
Judge JJ Wait
Mr Justice Wright

Government departments and public bodies

Bank of England
Crown Prosecution Service
Department of Social Security
Department of Trade and Industry
Directorate of Counter Fraud Services of the National Health Service
HM Treasury (Financial Crime Branch)
Inland Revenue (Solicitor's Office)
Office of the Judge Advocate General
Police Federation of England and Wales
Royal Ulster Constabulary
Serious Fraud Office

Practitioners

Anthony Arlidge QC (18 Red Lion Court)
William Blair QC and Natalie Baylis (3 Verulam Buildings)
Nicholas Bohm (Salkyns)
Brian Davenport
MJ Devaney
Norman Marsh QC
Justin McCarthy

Flora Page (Thanki Novy Taube)
Leslie Portnoy
Kuldip Singh QC (5 Paper Buildings)

Professional organisations

The Association for Payment Clearing Services
British Bankers' Association
Council of Mortgage Lenders
Criminal Bar Association
Financial Law Panel
Fraud Advisory Panel
General Council of the Bar
The Institute of Legal Executives
Justices' Clerks' Society
The Law Society of England and Wales (Criminal Law Committee)
London Criminal Courts Solicitors' Association
The Newspaper Society
North Eastern Circuit
Northern Circuit South Eastern Circuit
Wales and Chester Circuit

Academics

Professor Ian Dennis (Criminal Law Review)
Professor DW Elliott (University of Newcastle)
PR Glazebrook (Jesus College, Cambridge)
Jeremy Horder (Worcester College, Oxford)
David Ormerod (University of Nottingham)
Nicola Padfield (Fitzwilliam College, Cambridge)
Dr Terence Palfrey (Leeds Metropolitan University)
Simon Parsons (Southampton Institute)
Alex Steel (School of Business Law and Taxation, University of New South Wales)
Professor GR Sullivan (University of Durham)
Richard Tur (Oriel College, Oxford)

Members of the public

Mr S Bedford
Catherine Gunn
Mr A Lewis
Mr EA Marsh
Edward F Northcote
Edgar and Edith Vincent

Others

Lord Davidson (member of the House of Lords)
The Law Reform Commission of Hong Kong
Liberty (interest group)