
Response to the Home Office Consultation Paper

**Fraud Law Reform:
Consultation on Proposals for Legislation**

August 2004

THE NEW GENERAL FRAUD OFFENCE

1. Should it be fraud for a person dishonestly to make a representation which he knows to be false or misleading, or which he is aware might be false or misleading?

1.1 The Panel welcomes the introduction of a general offence of fraud, and the three different ways of committing it. In particular, the Panel welcomes the shift of emphasis away from the notions of appropriation, property and deception in the Theft Act 1968 towards legislation against fraud which focuses on the defendant's malevolent intention and the dishonest character of the conduct in question. The Panel submits that in defining the constituent elements of the offence the Government ought to retain the language proposed by the Law Commission in the draft Bill¹, so that a person is guilty of fraudulently making a representation not only when he knows the representation to be false or misleading, but also when he is aware that the representation might be false or misleading.

1.2 The Panel agrees with the Government that an offence requiring the prosecution to prove that a defendant knew a representation to be false or misleading would not engage the dishonest conduct which the proposed offence is intended to capture. The Government is correct to conclude that it is difficult to prove that a fraudster knows in advance that his claims for a particular scheme (eg: a high yield investment) are untrue, whilst it should be possible for the prosecution to show that he was "aware that" his prospectus "might" be untrue.

1.3 In addition to this pragmatic consideration, the Panel believes that it is not juristically objectionable for the proposed new fraud offence to catch the fraudster who makes a representation not caring whether the representation is true or not. The notion of knowledge in criminal law is sufficiently wide to embrace a situation where a defendant turns a blind eye to a particular state of affairs². In the drugs context, knowledge of circumstances such that a defendant could be said to have shut his eyes to the obvious or allowed matters to go on without caring whether or not the smoking of cannabis had

¹ Law Commission, Fraud, No 276, Appendix A

² There is authority for the view that in criminal law "knowledge" includes "wilfully shutting one's eyes to the truth": see, e.g. per Lord Reid in Warner v. Metropolitan Police Commr [1969] 2 A.C. 256 at 279, HL

taken place, will amount to actual knowledge that premises are being used for the purposes of smoking drugs³.

1.4 The question for the Government to determine is whether the formula for this state of mind is best reflected by reference to “awareness that [the representation] might be untrue”, or by recourse to some other formula. One alternative is a reference to the notion of “recklessness” along the lines set out in section 15(4) of the Theft Act 1968 which provides that a deception must be “deliberate or reckless”. A second option is a reference to the notion of “suspicion” along the lines set out in the money laundering offences in Part 7 of the Proceeds of Crime Act 2002.

1.5 In the Panel’s view, the Government would be well advised to adhere to the “awareness” formula put forward by the Law Commission in clause 2(2)(b)(ii) of the draft Bill. As the Law Commission points out, the definition of “recklessness” in criminal law has been somewhat problematic in view of the multiple meanings it has been given⁴. Meanwhile, the notion of “suspicion” puts the threshold too low, since a person has a suspicion where he has little more than a fleeting thought or an inkling⁵ that a representation might be untrue⁶.

2. (a) Should it be fraud to wrongfully and dishonestly fail to disclose information?

2.1 The Panel supports the proposal that the offence can be committed by the wrongful and dishonest non-disclosure of information where there is a legal duty to make the disclosure. As the Government points out, the duty may be derived in statute, from a contract, from express or implied terms of a contract, from custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties. The

³ Souter, 55 Cr.App.R. 403, CA; Thomas and Thompson, 63 Cr.App.R. 65, CA

⁴ “Recklessness on the part of the doer of an act presupposes that there is something in the circumstances that would have drawn the attention of an ordinary prudent [and sober] individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section that created the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting ‘recklessly’ if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such a risk, he nevertheless goes on to do it” (per Lord Diplock in Lawrence [1982] A.C. 510 at 526E, following his own speech in Caldwell [1982] A.C. 341 at 354C).

⁵ Oxford English Dictionary;

⁶ In Hall, 81 Cr.App.R. 260, CA, where the mens rea of the offence of handling stolen goods was considered, the court illustrated “mere” suspicion as, “I suspect that these goods are stolen, but it may be on the other hand that they are not”.

Panel agrees with the Government's assessment that the application of the offence of fraud is uncontroversial in these circumstances.

2.2 Any concern about the extension of the law to include liability for fraudulent conduct by omission (in contrast to an act of commission) is assuaged by the stipulation contained in clause 3(3)(b) of the draft Bill requiring the prosecution to prove that the defendant knew that the circumstances giving rise to the duty to disclose existed or was aware that they might exist. An inference to this effect would not necessarily flow from the mere fact of non-disclosure; accordingly, the Panel believes that the requirement to prove this constituent element will have a significant impact in terms of the strength of evidence required to be adduced by the prosecution before a conviction for fraudulent conduct by omission will be recorded.

(b) Should this offence extend to situations where there is no legal duty to disclose the information?

2.3 The Government acknowledges that "there could be concern about the scope" of an offence of fraud which focuses on non-disclosure of information where there is no legal duty to disclose⁷. The Panel entertains this concern and urges the Government not to extend the proposed new fraud offence to cover the situation where there is no legal duty to disclose.

2.4 In 1966 the Criminal Law Revision Committee⁸ considered the possibility of defining the offence of obtaining property by deception (subsequently embodied in the Theft Act 1968, section 15) so as to include the concealment of a fact which there is no duty to disclose, and concluded that this would be "too great an extension" to the criminal law. The learned authors of Arlidge & Parry on Fraud⁹ endorse this conclusion, believing that "it would be bizarre if it were a criminal offence to fail to disclose a fact which there is no legal obligation to disclose: this would create a conflict between the criminal law and the civil".

⁷ Consultation Paper, paragraph 21

⁸ 8th Report, Theft and Related Offences, Cmnd 2977, para 101(iv)

⁹ 2nd edition, 1996, para 4-021 to 4-023

- 2.5 In terms of the potential clash between criminal and civil law, it is the principle of *caveat emptor* which looms large and is most problematic. The Latin maxim connotes the absence of an obligation on the part of a seller of property or goods to disclose material facts when entering into a contractual arrangement with a buyer. Typically, the maxim has come to the attention of the wider public in the context of buying and selling houses and motor cars, these being the two largest transactions that most people make in their lifetime.
- 2.6 A harsh illustration of the operation of *caveat emptor* occurred recently in Sykes v Taylor–Rose¹⁰, where in relation to pre-contractual enquiries, Question 13 of the “Seller’s Property Information Form” asked “Is there any other information you think the buyer may have a right to know?”, and this was answered by the vendor in the negative. What the vendor did not disclose was that a murder victim, previously a child house slave, had been murdered in the property, dissected into small pieces, and that police had found body parts secreted around the house and also buried in the back garden. However, not all the body parts within the property had been recovered. The Court of Appeal (Civil Division) concluded that the vendor was not obliged to make any disclosure to the purchaser about the gruesome history of the house. Question 13 was concerned with information which the purchaser had a right to know, and that there was nothing in the wording of Question 13 which required the vendor to disclose information which would affect the enjoyment of the property¹¹. The language of Question 13 was subjective, requiring the vendor to disclose information which he thought the buyer had a right to know, and bearing in mind the *caveat emptor* principle, the Court was satisfied that the vendor was honest in his answer since there was no legal obligation on him to disclose the property’s history. The decision caused considerable hardship to the purchaser, who became aware of the history only after the gruesome circumstances of the murder were revealed in a television documentary on Channel 5 about 18 months after he had purchased the property. The purchaser’s reaction was that he no longer wished to live at the property, and after trying to sell the house for six months it was eventually sold to an investor for approximately 75% of its market value.

¹⁰ [2004] EWCA 299, The Times, 2/3/04, LTL 4/3/04

¹¹ If the wording of Question 13 had been more explicit and the vendor had given a dishonest answer, the position would have been different and an action for fraudulent misrepresentation could have been brought. See Clinicare Ltd v Orchard Homes [2004] EWHC 1694, LTL 19/7/04

2.7 As noted, *caveat emptor* is not restricted in its application to purchasers of residential or commercial property. An interesting factual scenario came before a civil court recently in Thomson v Christie Manson & Woods Ltd (“Christies”)¹², where two vases were described in the auction catalogue as “Louis XV”. Although the vases were likely (70% chance) to have dated from the 18th century, there was a distinct possibility that the urns might have been made in Italy and not Paris, and that they had been designed and reworked for an Italian Duke. The court was satisfied that although the auction house was not negligent in presenting an incomplete picture in its catalogue, since there was a special relationship in this case existing between the auction house and the purchaser which was founded on the fact that the vendor had inspected the vases before the auction and discussed the vases with a representative of the auction house at that time, the purchaser was entitled to a fuller picture, and in particular a warning of the risk she ran in paying a large sum for the vases¹³. Although the auction house was obliged to make disclosure as a matter of civil law on the special facts of this case, in the absence of the prior visit and discussion with the auctioneers, the omission to disclose would not have triggered any liability in civil law.

2.8 The principle of *caveat emptor* also applies to the purchase of a second-hand motor car. In Smith v Lazarus¹⁴ a seller of a second-hand car avoided liability in civil law for selling a car that was so badly corroded that it was unfit to drive in circumstances. Although the seller had advertised the car as having an MOT certificate, the wording on the certificate expressly warned that it should not be accepted as evidence of a car’s satisfactory mechanical condition, and in the particular circumstances of the case the seller had not made any express or implied warranty to this effect. The purchaser had bought the car on a dark night, and as the Court of Appeal said, it was the purchaser’s responsibility to discover faults on inspection and the principle of *caveat emptor* applied.

2.9 In each of these situations, the same objections can be raised. How can it be correct for the criminal law to penalise conduct which is unimpeachable as a matter of civil

¹² [2004] EWHC 1101, LTL 14/6/04

¹³ If the auction house had mis-stated the position, liability in negligence would have been clearer (see de Balkany v Christie Manson & Woods, *The Independent*, 19/1/95, LTL 16/1/95); a mis-statement is treated differently from an omission, because of the operation of the *caveat emptor* principle.

¹⁴ [1982] NLJ 832

law? How is it possible for a person to act dishonestly when his conduct is acceptable in the eyes of the civil courts?

- 2.10 Historically, the criminal Courts have deprecated attempts by defence advocates to introduce concepts of civil law into criminal cases in an effort, no doubt, to spare the jury from having to decide complex legal issues. With reference to the Theft Act 1968, this sentiment was powerfully expressed by Sachs LJ in Baxter¹⁵ when he noted that “... the Theft Act 1968 was designed to simplify the law – it uses words in their natural meaning and is to be construed thus to produce sensible results; when that Act is under examination this Court deprecates attempts to bring into too close consideration the finer distinctions in civil law as to the precise moment when contractual communications take effect or when property passes”.
- 2.11 These sentiments were echoed in Morris¹⁶, when Lord Roskill expressed concern that it was “on any view wrong to introduce into this branch of the law [the meaning of appropriation] questions of whether particular contracts are void or voidable on the grounds of mistake or fraud or whether any mistake is sufficiently fundamental to vitiate a contract”.
- 2.12 Ultimately, however, when an issue about the lawfulness of commercial activity arises, how else are the legal incidents of relationships to be determined if not by reference to civil law? For this reason alone, interaction between civil law and criminal law is inevitable.
- 2.13 The Government seeks to meet these concerns by directing a jury to determine when a person should be convicted for acting fraudulently by requiring it to make a value judgment about whether the information is the kind that the victim trusts the defendant to disclose to him¹⁷ and whether any reasonable person would expect the defendant to disclose the information to the victim¹⁸.
- 2.14 In the Panel’s view, this approach is flawed for a number of reasons.

¹⁵ [1971] 2 All ER 359

¹⁶ [1984] AC 320

¹⁷ clause 3(4)(a) of the draft Bill, supra

¹⁸ clause 3(4)(c) of the draft Bill, supra

- 2.15 The proposed offence posits the imposition of a conviction for fraudulent conduct in circumstances where the conduct cannot be impugned in civil law. It is difficult to see how different consequences of the same conduct can be justified in terms of civil and criminal law; indeed, an inconsistency between the approach of civil law and criminal law to particular conduct is inimical to the rule of law. The objective underlying the notion of fraud by wrongfully and dishonestly failing to disclose information in the absence of a legal duty to disclose could be achieved only by the inclusion of an additional clause in the draft Bill directing the criminal courts to ignore for the purposes of the offence the operation of the *caveat emptor* principle.
- 2.16 Even if the potential clash between the principles of civil and criminal law could be averted, the Panel has residual concerns about the proposed offence of wrongful non-disclosure in the absence of a duty to disclose. The proposed offence would inevitably lead to inconsistent verdicts as juries made different value judgements as to whether information is the kind of information a victim would trust a defendant to disclose, and whether any reasonable person would expect a defendant to disclose it. The proposed offence also posits a jury making a different value judgment which will depend on the personal characteristics of the victim and defendant involved in the case. For example, a jury might take a stricter view of the kind of information which a purchaser would trust a seller to disclose where the seller happens to be a Judge, and it might also take the view that any reasonable person would expect a Judge to make greater disclosure to a purchaser than a vendor who did not occupy a public position of trust in the community. Taking the converse situation, a jury might well take a less strict view of the kind of information which a purchaser would expect a seller to disclose where the seller happens to be a second-hand car salesman, an antique dealer or an estate agent. Finally, if the proposed offence were to be adopted, there is scope for considerable uncertainty as to exactly what the defendant should have disclosed¹⁹.

¹⁹ In an editorial on the Law Commission's report, *Fraud*, No 276, the learned editor of the *Criminal Law Review* doubts whether there is a sufficient consensus about the existence and extent of commercial morality to justify distinctions on whether there is, or is not, a moral duty to disclose. "A notion of fair dealing needs much greater clarity and certainty if it is to form the basis of potential criminal liability" – [2002] Cr L R 769 at p. 770

3. **(a) Should it be fraud for a person to abuse his position secretly and dishonestly?**

(b) Is secrecy an essential element of this offence?

3.1 The Panel supports the introduction of this species of the proposed new fraud offence, and believes that the inclusion of secrecy as an essential ingredient of the offence is an uncontroversial feature. It is difficult to conceive of a situation where a victim is aware that a person is dishonestly abusing his position but permits fraudulent conduct to continue. One of the defining hallmarks of fraudulent conduct is the commission of conduct in secret. If a “victim” is aware that he is the object of conduct committed by the defendant, it is hard to see how this situation could properly be described as fraudulent.

4. **Should “gain” and “loss” be defined for the new fraud offence in the same way as for theft?**

4.1 The Panel submits there should be synergy between the definitions of concepts in the proposed Fraud Bill and the Theft Act 1968, and that any change in the meaning of “gain” and “loss” should not be effected piecemeal.

NEW OFFENCE OF OBTAINING SERVICES DISHONESTLY

5. **Do you agree that there should be a new offence of “obtaining services dishonestly”?**

5.1 The Panel supports the introduction of a new offence of obtaining services dishonestly for the reasons set out in the Consultation Paper.

REPEAL OF CONSPIRACY TO DEFRAUD

6. **Do you agree that all behaviour which is in practice rightly prosecuted as conspiracy to defraud can be prosecuted as fraud under the Bill (or under another existing law), and that conspiracy can be repealed?**

- 6.1 The Panel is extremely concerned about the exposure of potential lacunae in the ability to prosecute “system” type offences if conspiracy to defraud is abolished. The Panel fears that the abolition of conspiracy to defraud will severely restrict the ability of the prosecuting authorities to prosecute the largest and most serious fraud cases. It would be disastrous if, notwithstanding the enactment of the new proposed fraud offence in a Fraud Bill, the ability of the prosecuting authorities to tackle the most serious and complicated types of fraud were to be significantly restricted by the abolition of conspiracy to defraud. The offence of conspiracy to defraud is a vital weapon in the armoury of the prosecuting authorities, and the Panel urges the Government to retain it.
- 6.2 Strictly, it is incorrect to describe the new fraud offence as a general fraud offence because it is not a generic fraud offence which is proposed (eg: dishonest conduct causing loss) but rather a more specifically defined offence focusing on misrepresentation (false representation or wrongful omission to disclose) and abuse of position²⁰.
- 6.3 A number of significant consequences flow from this analysis.
- 6.4 Since the new fraud offence requires proof of specific instances of fraud, difficulties will arise in cases of multiple offences which the Panel does not believe the new multiple offending provisions contained in the Domestic Violence, Crime and Victims Bill will be able to resolve²¹.
- 6.5 There are many other variants on a theme.

²⁰ The Government has disappointingly rejected the model of a general fraud offence discussed by the Law Commission in its Working Paper No 104 on Conspiracy to Defraud: “Any person who dishonestly causes another to suffer [financial] prejudice, or who dishonestly makes a gain for himself or another” commits the offence of fraud. The Panel would have preferred the Government to have adopted this formulation. In this event, retention of the common law offence of conspiracy to defraud, and an extension of the offence of fraudulent trading to cover unincorporated traders, would not have been necessary.

²¹ The operation of the multiple offences provisions (trial by jury of sample counts only) is uncharted territory. It remains to be seen how the criminal courts will apply the new provisions in serious fraud cases, and in particular, clause 12(6) which will require a judge to have regard to any steps which might reasonably be taken to facilitate a trial by jury. A more aggressive judicial approach to case management in serious fraud cases would facilitate trial by jury, for example, by placing greater emphasis on the need to make admissions of non-contentious facts and evidence presented in the form of schedules.

6.6 One classic case occurs where doorstep salesmen target householders in particular neighbourhoods. The nature of the goods they peddle is diverse, ranging from repaving house driveways to selling bogus lottery tickets. It is true that doorstep salesmen could be prosecuted under the new fraud offence (false representation or wrongful omission to disclose) but the shape of the prosecution would be unwieldy and very problematic. Typically, in this sort of case, there will be thousands of victims. The prospect of an indictment alleging 20 counts with the balance of 980 counts to be held over for trial by a Judge under the new multiple offending provisions is an unhappy one, for the following reasons –

- (i) the jury in the first trial will not be apprised of the true extent of the fraudulent conduct which has occurred. Rather, the jury will be presented with a snapshot which reflects no more than a small fraction of the fraudulent activity in question;
- (ii) spurious defences will be difficult to rebut (eg: the salesman denies he made the representation; or the victim misunderstood the representation; or the victim was told important information which he does not recollect) if the prosecution is limited to adducing evidence of 20 examples. Defences of this sort are easier to rebut if the prosecution can point to a multitude of examples where identical representations were made. Often, this type of evidence is adduced by way of schedule and is so overwhelming that the defendant has no choice but to admit the accuracy of the testimony in question;
- (iii) the prosecution is fettered in its discretion to call victims to give evidence in the absence of a count on the indictment – so if a victim dies, or is unwell, or out of the country, or particularly nervous, or is not able to rebut the spurious defence assertions as to what he was or was not told, an alternative victim could not be substituted without adding a count to the indictment. Sometimes, changes to the number or identity of “victim” witnesses to be called are made during the course of the trial. The jury would get an unfortunate impression if there were late changes to the counts on an indictment during the course of the prosecution case;

(iv) as a variant on a theme, it is not uncommon for salesmen to assert that they were innocent agents acting on behalf of a person who had given them a script from which to read. On the other hand, the people employing the salesmen tend to assert that the salesmen were making unauthorised representations in order to boost their sales and swell their commission. In this situation, the admissibility of evidence of false representations made to many different victims would be difficult to sustain if the charge was limited to a substantive offence. If the case is prosecuted as a conspiracy to defraud, the dishonest agreement to make false representations is likely to be inferred by the jury from the totality of the evidence²².

6.7 The investor swindle scenario is equally common. Cases such as the Barlow Clowes fraud, the Ostrich investor swindle, and the malt whisky and millennium champagne investor fraud cases, where numerous investors were defrauded of their money on the strength of a raft of false representations, are cases *par excellence* where, for the same reasons as articulated above, the ability of the prosecuting authority to deploy the offence of conspiracy to defraud is extremely important.

6.8 Since the proposed new fraud offence is limited to specific instances of fraud, an allegation that two or more defendants conspired to commit the substantive offence of fraud will not overcome these difficulties. Indeed, the Government acknowledges in the Consultation Paper²³ that conspiracy to defraud has the procedural and evidential advantages of a wide “activity” offence, as it is not necessarily limited to specific instances of fraud. The argument would be taken by defendants that the object of the agreement is the commission of a specific act of fraudulent conduct identified by the substantive offence. The width of a statutory conspiracy will be limited to an agreement to commit a specific instance of fraud which would constitute the statutory offence, if committed. By way of contrast, in the case of conspiracy to defraud, the indictment would be framed to allege that a defendant had conspired to defraud investors by making representations which were false, misleading and deceptive in the manner

²² Cooper and Compton, 32 Cr.App.R. 102, CCA. Where there is clear evidence of conspiracy but little evidence that any of the conspirators committed any of the overt acts, a count for conspiracy to defraud is both justifiable and necessary.

²³ paragraph 38

described. The investors would not be specified but described as the category or class of victim to whom the fraudulent conduct was directed.

6.9 As the Government acknowledges in the Consultation Paper²⁴, there are some specific forms of behaviour covered by conspiracy to defraud which will not be covered by the new fraud offence. These are identified by the Law Commission as fixing an event on which bets have been placed, dishonestly failing to fulfil a contractual obligation, and dishonestly infringing a legal right. The Consultation Paper does not believe that retention of conspiracy to defraud is justified in order to catch these species of fraud. This is a matter of debate, but the Panel believes that the Government has significantly underestimated the number of cases which it would not be able to prosecute if conspiracy to defraud were abolished.

6.10 There are, for example, cases where conspiracy to defraud has been used to prosecute cases where no economic loss has been suffered, but the dishonest conduct is sufficiently great as to justify the invocation of the criminal law. The fundamental essence of a conspiracy to defraud is an agreement to undertake a course of conduct which takes the risk of prejudicing another person's rights, knowing that there is no right to do so²⁵. These rights do not need to be economic rights, and obtaining gain or causing loss is not an essential ingredient²⁶. Dishonestly to induce a person performing a public duty to act in a way which would be contrary to his duty if he had known the true position is to risk injury to the right of the state, and this type of conduct may be prosecuted as a conspiracy to defraud. An example of this type of case occurred in Terry²⁷, where the defendants made use of vehicle excise licences in a fraudulent manner.

6.11 There are other types of cases where the offence of conspiracy to defraud will be required to successfully prosecute dishonest defendants, even after the proposed new fraud offence has been enacted. For example, there are cases in which a transaction viewed in isolation may not be regarded as fraudulent, but when repeated or viewed in

²⁴ paragraph 38

²⁵ Welham v. DPP [1961] A.C. 103, HL. A prosecution for fraud can be brought in Scotland where a victim suffers some legally significant prejudice, whether the prejudice is economic or not. See Adcock v Archibald [1925] JC 58 and Gordon, *The Criminal Law of Scotland* (2nd edition, 1978), paragraph 18-17

²⁶ Adams v R [1995] 2 Cr.App.R. 295, PC; Alsop, 64 Cr.App.R. 29

²⁷ [1984] A.C. 374, HL

the context of other transactions, the fraudulent nature of the activity becomes apparent. The serious problem of “phoenixism” in relation to limited companies comes to mind. A trader incorporates a company, invariably in the garment manufacture or computer business, which becomes insolvent and is put into voluntary liquidation, leaving a number of unpaid creditors. There is nothing illegal or unlawful about this conduct which is replicated throughout the country on a daily basis. But suppose the trader during a five year period has incorporated 10 companies and put each of them into liquidation, leaving unpaid creditors on each occasion. The inference of a fraudulent scheme is extremely strong, but the conduct would not be caught by the new fraud offences. A count of fraudulent trading could be framed in relation to each company, but similar evidential problems would be encountered if the case was prosecuted as a series of substantive offences, or a series of conspiracies to commit a substantive offence, rather than conspiracy to defraud.

6.12 The Government acknowledges in the Consultation Paper²⁸ that the offence of conspiracy to defraud is flexible and can be adopted by the courts to fit new situations. The Panel views this flexibility as a considerable advantage in a fast moving commercial world in which new forms of financial instruments and new forms of technology rapidly develop. It is impossible for legislation to anticipate these developments, and inevitably the legislative response is reactive. The Panel believes that it would be an act of folly to abolish a criminal offence which affords the prosecuting authorities the ability to keep abreast of fast moving changes in the commercial world. Maintaining the integrity of the financial system is of critical importance, and as Baroness Scotland acknowledges in the Foreword to the Consultation Paper, “the fertility of man’s invention can contrive new schemes to elude any tightly-drawn law”. If the aim of the law is truly “to encompass all forms of fraudulent conduct, with a law that is flexible enough to deal with developing technology”, then the offence of conspiracy to defraud must be preserved.

6.13 Although computer crime is generally prosecuted under the Computer Misuse Act 1990 and is not problematic save for difficulties with jurisdiction, circumstances can be envisaged where conspiracy to defraud could be needed to prosecute an instance of

²⁸ paragraph 37

serious computer crime involving, for example, the writing and sale of a virus or a “bot net”²⁹ or the strategic placement of a “key logger”³⁰ for a fraudulent purpose.

6.14 In the Consultation Paper’s Executive Summary³¹, the Government notes that the paper is not intended to cover what might be described as specialist branches of fraud such as tax evasion and that these require separate consideration. In these circumstances, the Panel would deprecate any attempt to abolish the common law offence of cheating the public revenue during the passage of the Bill through Parliament. The offence of cheating the public revenue is a broadly defined “system” offence, embracing any fraudulent conduct which is directed at depriving a revenue department of any money to which it would otherwise be entitled³². Both the Inland Revenue and Customs and Excise utilize the offence in prosecutions of serious tax and VAT fraud. Any proposal to remove these offences would require prior discussion and careful consideration of the way in which revenue fraud is prosecuted.

NEW OFFENCE OF POSSESSING EQUIPMENT TO COMMIT FRAUD

7. (a) Should the Bill include a new offence covering the possession (without lawful authority or reasonable excuse) of articles for use in connection with the commission or facilitation of fraud with a maximum penalty of 3 years?

(b) Should the Bill provide a maximum penalty for the manufacture, sale or supply of articles made or adapted for use in frauds, and the possession of such articles with intent to commit fraud, of 10 years?

²⁹ The virus is designed to attack a vast number of computers and take control of them, perhaps obtaining control of 20,000 or more computers. The control of so many computers pursuant to a virus is called a bot net. The virus can itself be sold to somebody who wants to create a bot net, or once the bot net has been created, this can be sold or rented out for a period of time. The bot net is then used to focus the sending of multiple emails to a particular site, often a commercial competitor site, with the object of bringing down that site. This is known as a denial of services attack. Sometimes the bot net operator will contact the site and demand payment of money to prevent an attack. The sums are often worth paying, given the revenue which can be lost when a large internet retailing site goes offline. The bot net can also be utilised to send multiple spam, so that the sender of the spam cannot be traced. Another variant is to get the bot net to click on a banner on a specially designed site. The clicking on a banner earns a very small amount for the money holder, but if a number of computer users click the banner large sums of money are involved. Finally, the data collated through a bot net can be sold for data purposes. One of the problems prosecuting this offence is that data cannot be stolen under the Theft Act 1968. It is not defined as property.

³⁰ Where a person or a machine is strategically placed to observe and record the logging of person’s password and financial details.

³¹ page 6, para 4

³² Hunt [1994] STC 819

- 7.1 The Panel supports the introduction of a new offence involving possession of equipment to commit fraud for the reasons set out in the Consultation Paper. An offence of this sort would be extremely useful in cases where other offences cannot be prosecuted for jurisdictional reasons. Where, for example, a person is in possession of a computer programme which generates genuine credit card numbers, or a person possesses at his home a skimming machine or a scanner, or white plastic cards, or a professional photography machine for passport photographs, or blank template documents. These items are generally regarded as the paraphernalia of fraud, but unless some overt act has been committed, no criminal offence would be triggered. Section 25 of the Theft Act 1968 would not apply because the equipment is kept at home. The Panel supports the creation of a new possession offence to be deployed by the prosecuting authorities in these circumstances.

JURISDICTION

8. **Should the Bill grant our courts jurisdiction over UK nationals and UK companies who commit frauds overseas?**
- 8.1 For the reasons set out in paragraph 49 of the Consultation Paper, the Panel supports the application of jurisdiction by the criminal courts to cover UK nationals and UK companies who commit frauds overseas.

FRAUDULENT TRADING

9. **(a) Should we allow time to gauge the effect of the criminal lifestyle provisions of the Proceeds of Crime Act 2002, coupled with the new procedures for multiple offending under the Domestic Violence, Crime and Victims Bill?**
- 9.1 As the Panel has indicated in its response to the question concerning the abolition of conspiracy to defraud, the Panel does not believe that the new procedures for multiple offending under the Domestic Violence, Crime and Victims Bill will be adequate to meet the particular difficulties arising in the most serious fraud cases where multiple substantive offences have been committed. The Panel believes that the impact of the confiscation provisions in Part 2 of the Proceeds of Crime Act 2002 will also be

stultified if the prosecuting authorities are forced to rely upon a combination of the multiple offences provisions and the criminal lifestyle provisions in order to confiscate the totality of the proceeds of crime, rather than proceeding with confiscation following a conviction for conspiracy to defraud. Victim compensation paid from the proceeds of confiscated monies will be difficult where a victim has not been identified by name in a count alleging the proposed new fraud offence. It is axiomatic to observe that the criminal lifestyle provisions will assist only where four or more offences have been proved, and for the reasons already given the prosecution authorities will experience difficulty in proving specific substantive offences in certain types of fraud cases where the totality of the dishonest conduct cannot be adduced in evidence. Where a conviction for conspiracy to defraud has been obtained, the court is able to make an assessment of the total benefit received by a defendant as a result of his criminal activities, and in making this determination the Court is not limited to benefit obtained by reason of a small number of substantive offences which would otherwise have been proved. Victim compensation can be paid from confiscated monies where there is a conviction for conspiracy to defraud in which systematic dishonest conduct has been established. This can be achieved by placing before the court a schedule of victims showing loss as set out in each victim's witness statement.

For these reasons, the Panel does not believe that there is anything to be gained by allowing time to gauge the effect of the Proceeds of Crime Act 2002 or the Domestic Violence, Crime and Victims Bill.

(b) Would it help if the Bill provided that the commission of 4 or more offences is to be regarded as an aggravated fraud offence?

OR

(c) Should the scope of the offence of fraudulent trading be extended as suggested by the Law Commission?

If so, how is this offence to be distinguished from a continuing or multiple offence of fraud? and

Do Trading Standards Officers require any additional powers to enforce this new offence?

9.2 Whilst the Panel recognises that the offence of fraudulent trading was designed to deal with the abuse of incorporation and not dishonest conduct in general, and that the bite of the offence is presently focused on the conduct of company officers, the Panel remains concerned that there are many examples of dishonest conduct which, if committed by one or more defendants, could be prosecuted as a conspiracy to defraud, but where committed by a single defendant acting alone, the conduct would not be prosecutable. The examples given by the Panel of cases not caught by the proposed new fraud offence, if committed by a single defendant acting alone, fall into this category. The DTI has experienced difficulty, for example, in being unable to close down or use the offence of fraudulent trading against unincorporated entities trading in exactly the same manner as if they were incorporated companies and defrauding the public, for example, pyramid selling schemes set up by groups of individuals. Against this background, the Panel believes that it would prudent for the Government to take this opportunity to extend the offence of fraudulent trading to apply to non-incorporated traders who are carrying on a business.

9.3 The Government notes in the Consultation Paper³³ that it is odd to criminalise conspiracy where the action, if committed by a single person, would not be criminal. “If we achieve a proper and full definition of fraud, there should be no need for a fall back offence of this kind”. The Panel acknowledges the sentiment underlying this proposition, but since the proposed new offence of fraud is limited to specific instances of fraud and is not a general dishonest conduct offence, the Panel repeats its submission that a fall-back offence of conspiracy to defraud is still needed. If lacunae can be identified in the reach of the proposed new fraud offence, the remedy is not to abolish conspiracy to defraud in order to achieve consistency between the position of a single defendant and multiple defendants, but rather to extend the offence of fraudulent trading to cover the position.

9.4 For the reasons given, the Panel doubts whether the enactment of an aggravated fraud offence would materially assist the position.

³³ paragraph 37

- 9.5 There are others better placed than the Panel to make submissions in response to the question about the adequacy of powers given to trading standards officers to enforce the proposed new fraud offence.

RACE EQUALITY IMPACT ASSESSMENT

10. Have you any views on the race equality impact of these proposed charges?

- 10.1 There are others better placed than the Panel to make submissions in response to this question.

REGULATORY IMPACT ASSESSMENT

11. Have you any comments on the draft Regulatory Impact Assessment (on the following pages)? In particular we would like to know whether your organisation anticipates any costs or benefits to itself as a result of these proposals. If possible, please quantify in monetary terms. If this is not possible then please estimate the costs/benefits in other ways, eg: time (hours) taken / saved.

- 11.1 There are others better placed than the Panel to make submissions in response to this question.