



WORKING PARTY PAPERS

Fraud and Deception

Law Commission Consultation Paper No.155

1. Introduction

- 1.1 The Law Commission is engaged in a comprehensive review of dishonesty offences. As part of this review, in April 1998 the Home Secretary asked the Commission “to examine the law of fraud, and in particular to consider whether it is readily comprehensible to juries; is adequate for effective prosecutions; is fair to potential defendants; meets the need of developing technology including electronic means of transfer; and to make recommendations to consider whether a general offence of fraud would improve the criminal law” This consultation paper on Fraud and Deception (no 155) (the “paper”) deals primarily with the issue of whether a general offence of fraud should be introduced into the criminal law of England and Wales, but also with extending the present law of deception.
- 1.2 The paper does not deal in any detail with reform of other offences of dishonesty, which topic is to be the subject matter of a separate consultation paper from the Commission.
- 1.3 The Fraud Advisory Panel is a body which was set up by the Institute of Chartered Accountants of England and Wales to advise it on the law of, and on matters relating to, fraud. The Panel, and its Investigations and Prosecution Working Party, is made up of (amongst others) accountants, solicitors, barristers, and members of the law enforcement agencies. Taken together, the working party represents a substantial body of experience in the law of fraud and matters relating to fraud. A list of members of the working party accompanies this response. Unless otherwise stated, this is the response of the working party.
- 1.4 Unless otherwise stated, all paragraph references are to paragraphs in the paper.

2. Conclusions

- 2.1 Before stating our conclusions, it is helpful to define our general approach. We believe that the law of fraud and deception needs, wherever sensibly possible, to be rid of technicalities or lacunae which allow conduct which is morally blameworthy, and which as a matter of public policy should be criminal and punished, to go unpunished, or which force the prosecution, contrary to the public interest, to opt for an inappropriate or lesser or less effective offence. We also believe that not only should the law be adequate for effective prosecution, but it should also be comprehensible to juries, and are fair to potential defendants. Like the Commission we are concerned to ensure that, wherever possible, the length and complexity of trials is reduced by simplifying the law, whilst always ensuring that the defendant is fully protected (*paragraph 1.8*).
- 2.2 Like the Commission, we approach the issue of law reform by asking whether a particular reform is made *necessary* by the present inadequacy of the law. To the extent defined below, we accept that the present law of fraud and deception needs to be reformed.
- 2.3 Although we broadly agree with the provisional proposals of the Commission, *we strongly disagree with the Commission’s provisional proposal that the requirement of dishonesty in the deception offences should be abolished*, and would be opposed to any such proposal in relation to other offences, such as conspiracy to defraud or cheating. The Commission’s proposal is based upon its belief that the requirement of dishonesty leads to problems of uncertainty, inconsistency, injustice, and to difficulties in the trial of such cases. Our own experience and enquiries have revealed no such problems, or none that would justify such an extreme step.

- 2.4 Although at various times in the past some of us have been attracted by the suggestion that a general offence of fraud should be introduced, for the reasons set out below the majority of us agree with the Commission's rejection of such suggestion, and believe that the lacunae which undoubtedly exist in the law of fraud and deception should be and are best addressed by specific reforms targeted at specific lacunae which have been identified. The majority of us believe that this debate has now moved on, and developed to such an extent, that it is now for those who maintain that a general offence of fraud should be introduced to spell out what such an offence will achieve that cannot be achieved by the specific targeted reforms that the Commission provisionally proposes. A minority of us does, however, favour the introduction of a general offence of fraud, for reasons, which include those set out in paragraph 5.3 below.

3. **Summary of the Paper**

- 3.1 In Part 1 of the paper, the Commission sets out the nature of the project, its understanding of the term "general fraud offence" (which term is sometimes used to refer to a general dishonesty offence, and sometimes to a general deception offence), and what it believes to be available options for the question of reform – the creation of a general dishonesty offence, the creation of a general deception offence, more limited reforms to the law of deception falling short of a general deception offence (its preferred option) and no change to the present law.
- 3.2 In Part II, the Commission deals with the current law. In Part III, it deals with the role of dishonesty in the present law. In Part IV, it sets out the case for a general fraud offence. In Part V, it states the case against a general dishonesty offence. In Part VI, it sets out its proposals for extending the law of deception. In Part VII, it deals briefly with the future of the existing offences of dishonesty. In Part VIII, it sets out a summary of its provisional proposals and conclusions, and issues on which it seeks responses.
- 3.3 The most important provisional conclusions reached by the Commission are that neither a general dishonesty offence nor a general deception offence (and, therefore, a general offence of fraud) should be introduced into the criminal law; the offence of obtaining property by deception should be amended so that it would be sufficient that the person to whom the property belongs is deprived of it by deception whether or not anyone else *obtains it*, and the requirement of an intention permanently to deprive should be abolished; the offence of obtaining services by deception be extended to include cases where a service is provided free, and where it is provided with a view to gain; that the requirement of dishonesty in deception offences be abolished; the requirement of deception in the deception offences be re-defined; there be a new offence of intentionally or recklessly causing a legal liability to be imposed on another, knowing that the other does not consent to its imposition and that the defendant has no right to impose it.

4. **Part IV: The Case for a General Fraud Offence**

- 4.1 After analysis, the Commission provisionally concludes that a general fraud offence is neither necessary nor sufficient to achieve what it regards as being essentially procedural reform, i.e. to enable the prosecution better to express the relevant criminality in the indictment, and to avoid overloading the indictment, and to put evidence before a jury which would otherwise be inadmissible (*paragraph 4.44*). The majority of us agree with this conclusion, particularly as (like the Commission) we believe that more limited reforms to the law of deception, falling short of a general fraud offence, is the appropriate way forward, and as we believe that many if not all of the advantages of a general fraud offence can be achieved by such reforms (*paragraph 5.32*). The majority of us believe that if lacunae exist in the present law of fraud and deception, as they do, they are best closed by specific

reforms targeted at the lacunae that have been identified.

- 4.2 A minority of us favour the introduction of a general fraud offence or, more accurately (and to use the Commission's terminology), a general offence of dishonesty. A summary of the minority's reasoning appears in paragraph 5.3 below.

5. **Part V: The Case Against a General Dishonesty Offence**

- 5.1 Having considered the case against a general dishonesty offence, the Commission provisionally conclude that there should not be a general dishonesty offence (*paragraphs 5.32 and 5.53*). The majority of us agree with the Commission's conclusion, but not necessarily with the whole of its reasoning. We prefer to base our reasoning primarily on the fact that a general dishonesty offence would extend the law too far, and in too indeterminate a way, to be justifiable in principle, and that if lacunae exist in the law of dishonesty, as they do, they are best closed by specific reforms targeted at the specific lacunae that have been identified.
- 5.2 One of the reasons for the Commission's conclusion is "that it is undesirable in principle that conduct which is otherwise unobjectionable should be rendered criminal merely because fact-finders are willing to characterise it as "dishonest". If this is right then it follows that a general dishonesty offence would not be acceptable" (*paragraph 5.32*). The majority of us agree that one of the effects of a general dishonesty offence would be to criminalise lawful conduct and/or conduct which would be and ought to remain a civil but not a criminal wrong, such as a breach of contract or failure to pay a debt.
- 5.3 A minority of us favour the introduction of a general offence of dishonesty, which should be based on and adapted from the present definition of conspiracy to defraud – to deprive a person dishonestly of something which is his/her or of something to which he/she is or would or might but for the perpetration of the fraud be entitled. The minority believe that such an offence is required in order to overcome the strait jacket of the Theft Act 1968-1978 and the problems created by the outdated and/or inadequate language and offences of those Acts. The problems created for prosecutors by the Acts are well documented, and are illustrated by cases such as *R v. Preddy (1996) AC 815*. The minority also believe that a general offence of dishonesty would close many if not all of the lacunae presently to be found in the criminal law of fraud and deception, and would be better deal with offences involving machines (as it would be a dishonesty-based and not deception- based offence). The minority further believes that any concerns about such an offence giving a prosecutor too much power could, perhaps, be dealt with by requiring the consent of the Director of Public Prosecutions for such an offence.

6. **Part VI: The Case Against a General Deception Offence**

- 6.1 The Commission provisionally concludes that a general deception offence would extend the law too far, and in too indeterminate a way, to be justifiable in principle, and provisionally reject the option of creating such an offence (*paragraph 6.30*). We agree, and also are in agreement with the Commission that if lacunae exist in the law of deception, as they do, they are best closed by specific reforms targeted at the specific lacunae that have been identified (*paragraph 6.30*). As with a general dishonesty offence, the majority of us believe that one effect of a general dishonesty offence would be to criminalise lawful conduct and/or conduct which would be and ought to remain a civil but not a criminal wrong, examples of which are given by the Commission (*paragraph 6.27*).

7. Part VII: An Extended Law of Deception

- 7.1 In relation to obtainings by deception, the Commission (rightly in our view) believes that the problem identified in *R. v. Preddy (1996) AC 815* in relation to bank accounts may also arise in relation to financial markets and, accordingly, the law should be amended (*paragraphs 7.4*). We agree.
- 7.2 The Commission provisionally proposes that, for the purpose of the offence of obtaining property by deception, it should be sufficient that the person to whom the property belongs is deprived of it by deception, whether or not anyone else *obtains it (paragraph 7.7)*. We agree. The offence would have to be given a new name (there no longer being a requirement that property should be obtained, it would not be appropriate for it to be called an offence on obtaining property by deception), and we suggest it be called criminal deception.
- 7.3 The Commission provisionally proposes that, for the purposes of the offence of obtaining property by deception, the requirement of intention permanently to deprive should be abolished altogether (*paragraph 7.29*). For the reasons set out in the Commission's paper (*paragraphs 7.9 – 7.28*), and subject to what we say below, *and provided the requirement of dishonesty is retained*, we agree.
- 7.4 The Commission invites views on the desirability of the greater reliance on prosecutorial discretion which the abolition of the requirement of intention permanently to deprive in the offence of obtaining property by deception would involve (*paragraph 7.30*). The Commission (rightly) believes that such abolition would widen the law to criminalise comparatively trivial conduct, which at present is not criminal at all, and would increase the number of cases in which prosecutors would be called upon to decide whether a prosecution was in the public interest. We believe that the requirement of dishonesty in the offence of obtaining property by deception (and in all the deception offences) should and must be retained. This would control and reduce the criminalisation of comparatively trivial conduct to, we believe, a very small number of cases. It would also reduce the number of cases in which the prosecutorial discretion was to be applied, and the number of cases, which might appropriately be allowed to proceed to court, and reduce the risk of unjust and inappropriate convictions. The abolition of the requirement of the intention permanently to deprive has to be balanced by the retention of the requirement of dishonesty, as to abolish both would, we believe, create an imbalance and criminalise comparatively trivial conduct, and give rise to reliance on the prosecutorial discretion in too great a number of cases.
- 7.5 The Commission also provisionally proposes that, for the purpose of the offence of obtaining services by deception (section 1 of the Theft Act 1978), the definition of services should be extended to include a benefit conferred with no understanding that it has been or will be paid for, provided that, but for the deception it would not have been conferred without such an understanding, and also to include any benefit conferred with a view to gain (*paragraph 7.34*). Subject to what we say below about the retention of the requirement of dishonesty in all deception offences, we agree.
- 7.6 The Commission invites views on whether much difficulty arises in practice from the requirement in the deception offences that the specified result be brought about by deception and, if so, it invites suggestions as to how that requirement might usefully be modified (*paragraph 7.38*). We are not aware of any difficulty. In any event, if there is a deception, and property is obtained, but the deception is not effective or operative on the victim's mind, so that the specified result (the obtaining) cannot be shown to have been brought about by the deception, if dishonesty is proved the accused is guilty of attempting to obtain property by deception (see *Hensler (1870) 11 Cox 570; Edwards (1978) Crim LR*

49).

- 7.7 The Commission provisionally proposes that “the deception offences should cease to require proof of dishonesty as a separate element” i.e. that the requirement of dishonesty in such offences should be abolished (*paragraph 7.53*). For reasons we set out below, and for reasons we have referred to above, we strongly disagree.
- 7.8 The Court of Appeal have said, and rightly in our view, that “a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968”. (*R. v. Feely (1973) QB 530, 539*). Although Feely was a case of theft, and not deception, the same applies to offences of deception. We take the view that the answer to the question posed by the Commission – should the substantive law of dishonesty exclude conduct, which is not blameworthy at all? - is yes, and the main mechanism by which it should do so is by the requirement of dishonesty in the relevant offences. The Commission believes that “this is perhaps the most significant function of the requirement of dishonesty in the existing law” (*paragraph 7.43*). We agree.
- 7.9 The Commission (rightly) states that it “*must be rare* that the defendant can admit obtaining a benefit by deception, but claim that it was not a dishonest thing to do. Deception is prima facie dishonest” (*paragraph 7.44*, our emphasis) and, we would add, is recognised as such by most of society (including jurors). “*But evidence which proves deception will in most cases tend to establish dishonesty*. One proved to have deliberately deceived another in order to obtain property, if he is to have any hope of avoiding conviction, is virtually bound to give evidence either of an actual or supposed claim to the property or of his honest intention in relation to the overall transaction ...” (*Edward Crieve, ‘The Theft Acts’ 7th Ed. (1995), paragraph 8.72*, our emphasis). Accordingly, the number of cases in which the requirement of dishonesty can potentially be used to obtain an unjustified acquittal will clearly be small or very small, a factor which the Commission appears to note (*paragraph 7.44*) but fails to appreciate its significance in undermining the Commission’s reasoning (and belief) that the current law requires reform by the draconian step of abolishing the requirement of dishonesty in deception offences.
- 7.10 The Commission recognises that the abolition of the requirement of dishonesty in the deception offences “would deprive a defendant of any defence in a range of (at least theoretical) circumstances in which most people would regard his or her conduct as morally blameless or even morally preferable” (*paragraph 7.45*). It is precisely in this sort of case that the requirement of dishonesty comes into its own. In the absence of any requirement that the defendant’s conduct should be “unlawful”, the requirement of dishonesty in the deception offences plays a vital controlling and disciplinary role, consistent with the public interest, in excluding from the criminal law conduct which was morally blameless. Although the Commission recognise this in part, it fails to appreciate its significance, or that any acceptable law of dishonesty must as a matter of public policy seek to exclude such conduct if the law is to be respected, avoid falling into disrepute, and be applied by fact-finders.
- 7.11 The Commission states that it “would obviously be preferable to avoid criminalising conduct “to which no moral obloquy can reasonably attach”. If that can be done without creating uncertainty and inconsistency or inviting the introduction of evidence of negligible probative value. But our provisional view is that a requirement of *Ghosh* dishonesty has these drawbacks, and that they are too high a price to pay” (*paragraph 7.47*). We disagree with the Commission’s provisional view.
- 7.12 One of the very advantages, and functions, of dishonesty is that (in deception offences) it serves to avoid criminalising conduct to which no moral obloquy can reasonably attach.

- 7.13 If the Commission's proposals on the deception offences were to become law, the relevant offences would, in essence, become "conduct-based offences" in which the state of mind of a defendant (in non claim of right cases) would become irrelevant or almost irrelevant, and conviction would follow merely on proof of certain conduct. As we believe that such offences should be "dishonesty-based", we regard such an approach as contrary to the public interest and wholly undesirable, and potentially unfair to defendants.
- 7.14 It should also be borne in mind that a conviction for a "dishonesty-based" offence carries a particular moral stigma, and one, which is often referred to and reflected in sentencing. If the Commission's proposals became law, and dishonesty no longer featured in the deception offences, it may be that such offences would not carry the same moral stigma as "dishonesty-based" offences.
- 7.15 As to the assertion of uncertainty or inconsistency (including the suggestion in *paragraph 5.15* of endemic inconsistency"), we disagree with this assertion/assumption which is made by the Commission, and are not aware of such undue uncertainty or inconsistency, or if it exists and causes difficulties, of such uncertainty or inconsistency being of such sufficient magnitude and frequent occurrence as to justify or *make necessary* the draconian step of abolishing the requirement of dishonesty in the deception offences. No justification or evidence is provided for its assertion/assumption by the Commission. In addition, it is not the case that, merely because the criminal justice system cannot guarantee the same verdict in relation to the same evidence in every case, or that in every case all fact-finders will agree on the precise criteria for deciding issues of dishonesty, the system is fundamentally flawed or incapable of doing justice, or that the answer is to abolish the requirement of dishonesty.
- 7.16 The Commission appears (without providing any evidence to justify such an approach) to approach the deception offences on the basis that the requirement of dishonesty in the present deception offences is a cause of injustice in the law. We do not agree and, in fact, believe the contrary to be the case. The requirement of dishonesty enables fact-finders to do *justice* in the particular case.
- 7.17 We wish to underline that, as the law prohibits disclosure of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings (section 8 of the Contempt of Court Act 1981), there is no evidence to support the Commission's views that in some ways juries (or, for that matter, other fact-finders) are reaching unjust or inconsistent verdicts in deception offences because of the requirement of dishonesty. Unless and until such evidence is provided, we believe that, allowing for an appropriate "margin of appreciation" for a system based upon human beings and their fallibility, there is no evidence that removal of the requirement of dishonesty is necessary to deal with injustice or inconsistency in this area of the law. Indeed, the Commission concedes that how juries cope with any problems concerning dishonesty is something it "cannot tell, given the prohibition on research into jury discussions" (*paragraphs 5.17*).
- 7.18 The suggestion by the Commission that the requirement of dishonesty leads to "the introduction of evidence of negligible probative value" (*paragraph 7.47*) is one which does not square with our experience. In any event, if there is such a problem (and we are not aware of it being such as to make necessary the abolition of the requirement of dishonesty), it should and can be easily met by more pro-active judicial case management rather than by the draconian step the Commission proposes.
- 7.19 We turn to deal with the Commission's assertion that dishonesty, as defined in *Ghosh (1982) QB 1053*, has drawbacks which "are too high a price to pay" (see paragraph 7.11 above). We do not accept the assertion that because dishonesty is a requirement of deception offences too high a price is being paid by the present law, *and no evidence to*

support such assertion is provided by the Commission. We do not accept that the present law of deception creates *undue* uncertainty or inconsistency by requiring proof of dishonesty. It is worth stating that any system of criminal law in which fact-finders are asked to define the accused's relevant state of mind in relation to specified conduct will, by its very nature and the involvement of human beings, always involve some acceptable uncertainty or inconsistency. The same applies across the spectrum of criminal offences.

- 7.20 The Commission states that a jury might be disposed to use the requirement of dishonesty as a way of acquitting a defendant who is morally blameless, but "it might not, and there is no way of challenging a failure to do so. Dishonesty is what the jury says it is" (*paragraph 7.47*). Even assuming such a problem exists, and we are not aware of any such problems, abolishing the requirement of dishonesty is hardly an appropriate way in which to meet such a problem, and might be thought to throwing the baby out with the bath water. Further, a wrongful conviction in such circumstances can be challenged by a defendant – he can appeal against conviction from the magistrates' court to the Crown Court (and such appeal is by way of a complete re-hearing) and, in the case of a conviction by a jury, he can appeal (with leave on any question of fact or of mixed fact and law) to the Court of Appeal, which has a statutory duty to consider whether a verdict is unsafe and, if it is, to quash it.
- 7.21 As to dishonesty being what the jury (or any other fact-finder) says it is, the assumption underlying this part of the Commission's paper is that in some way juries (and other fact-finders?) are either not suited to this task, which has specifically and rightly been delegated to them by law (see *Feely (1973) 1QB 530,539* and *Ghosh (1982) QB 1053*), or are applying inappropriate criteria when deciding such issue. Our experience and information does not bear this out. Further, we are not aware of any evidence, which would make necessary the abolition of the requirement of dishonesty in the deception offences.
- 7.22 The Commission also asserts that the requirement of dishonesty in deception offences can "act against the interests of justice, in that it allows those who should be convicted to go free, or at least to make it harder to convict them. It has been said to encourage trials where there would otherwise be a plea of guilty, and to lengthen trials (*paragraph 7.48*). As to the first sentence, no evidence is provided for such an assertion, and we are not aware of any such problem and/or of a problem of sufficient seriousness to *make necessary* the radical step of abolishing dishonesty in the deception offences, and we repeat *paragraph 7.9* above. As to the second sentence, no evidence is provided for such an assertion, other than an article by Edward Griew, "*Dishonesty: the Objections to Feely and Ghosh*" (1985 *Crim LR 341* which, on analysis, provides no evidence for such an assertion, but merely contains the like assertions without any evidence (and on which article the Commission's assertion is clearly based).
- 7.23 As to the suggestion that the present law encourages guilty defendants to plead not guilty and run a false defence of "no dishonesty", no evidence is provided for such an assertion or, it exists, how widespread such a problem is but, assuming it is the case, we are not aware of this being an undue problem, and repeat our reasoning as set out above. We are not aware of any evidence showing that the number of perverse acquittals (assuming there are at least some) in deception cases is any different to that in other areas of the criminal law. We would also add that decisions by fact-finders in deception (and other) cases will often depend on their conclusions as to the defendant's veracity when giving evidence. Most fact-finders are perfectly capable of seeing through a false defence, and of correctly.
- 7.24 As to the suggestion that abolition of the requirement of dishonesty in the deception offences would allow guilt to follow automatically from proof or admission of the prohibited conduct and/or "force" defendants to plead guilty, so that fewer cases would reach a jury (*paragraphs 7.48 – 7.49*), even assuming that all of this may well be true, the injustice caused by such a law to defendants who ought not be prosecuted, or who are convicted because morally blameless conduct or other conduct become criminalised under such law,

is such that abolition would cause serious problems. By analogy, no doubt abolition of the requirement that the force used in murder and other assaults be “unlawful” would lead to similar advantages to those stated by the Commission as following if the requirement of dishonesty were abolished in the deception offences (*paragraphs 7.47 – 7.49*), but nobody would suggest that such a change was desirable or just.

- 7.25 The Commission also asserts that trails may be longer because the limits to evidence, which may be relevant to dishonesty, are wide and difficult to draw (*paragraph 7.48*). Again, no evidence is provided to justify such an assertion, and we are not aware of any such problem. If there is such a problem, it should be dealt with by pro-active judicial case management, and by applying and taking advantage of the case statement provisions of the Criminal Procedure and Investigations Act 1996, and not by the extreme step of abolishing the requirement of dishonesty.
- 7.26 The Commission further asserts that there are particular problems with an open-ended notion of dishonesty in the context of deception offences, in that in practice “it may be difficult to disentangle effectively the elements of deception and dishonesty. Many jurors think that deception is necessarily dishonest ...” (*paragraph 7.51*). There is no evidence that distinguishing the elements of deception and dishonesty is a particular or recurring problem in deception cases, or that jurors (or other fact-finders), when properly directed, have thought that a deception was necessarily equivalent to dishonesty (and the only specific example given by the Commission is an Australian case). In any event, such a problem, if it exists, should be dealt with by better prosecution presentation to fact-finders and judicial directions to the jury, and not by abolishing the requirement of dishonesty in deception cases.
- 7.27 The Commission states that the deception offences are unique, in that it is not aware of any other area of criminal law which recognises an open-ended defence that the conduct in question is morally blameless (*paragraph 7.52*) However, mistake of fact is a defence to range of criminal offences (e.g. violence, sexual offences, public order offences, firearms offences etc.) the defence of lawful forces or self defence is available in murder and all assault cases, lawful excuse is a defence in, for example, cases of offensive weapons and firearms. The Commission’s analysis in *paragraph 7.52* provides no or no sufficient justification for abolishing the requirement of dishonesty.
- 7.28 Ultimately, we believe that the requirement of dishonesty in deception offences serves a valuable and necessary function, and also serves to exclude morally blameless conduct from the scope of the law of deception. The problems which the Commission puts forward as justification for its provisional conclusion that the requirement of dishonesty in deception offences should be abolished are either not problems in practice, or not problems that we are aware of, or are insufficient to justify or *make necessary* the extreme step of abolition of such requirement.
- 7.29 Unless all possible cases of morally blameless conduct would be covered by the Commission’s proposed claim of right defence (*paragraph 7.53*), which they obviously would not, dishonesty should remain as a requirement in deception offences. All claim of right defences to deception offences are covered by the “no dishonesty” defence, but not all “no dishonesty” defences to deception offences are covered by the claim of right defence.
- 7.30 Claim if right is a defence to a charge of theft (section 2(2) Theft Act 1968). Curiously, there is no specific provision in the Thefts Acts 1968-1978 providing such a defence for the deception offences, but the courts have held that the requirement of dishonesty (which is common to all the deception offences) imports such a defence into such offences. The Commission provisionally propose that it should be a defence to any of the deception offences that the defendant secures the requisite consequence in the belief that he or she is legally entitled to do so, whether by virtue of the deception or otherwise (*paragraph 7.59*).

We agree with this proposal.

- 7.31 In order better to prosecute deception cases, the Commission proposes that conduct which would in any event be criminal (under one or more of the existing deception offences) should be capable of being charged in one count rather than several, so that it would be possible to charge a single criminal enterprise involving two or more related instances of the offence as one continuing offence (“continuing deceptive conduct”) (*paragraph 7.73*) but this proposal would not mean that any conduct which was not otherwise criminal would become so. As a matter of legislative technique, the Commission believes it would be preferable to do this by treating the whole enterprise as constituting a single offence as a matter of substantive law, rather than by creating an exception to the rule against duplicity (*paragraph 7.73*). Subject to what we say below, we agree with these provisional proposals.
- 7.32 If the prosecutions are to be allowed the benefit of the above proposals, as we believe they should, appropriate safeguards of the kind we now refer to need to be put in place. The prosecution would be under an obligation (at or by a time specified by law) to provide to the court and to the defence a schedule of written particulars detailing all instances of deceptive conduct said to make up the single criminal enterprise alleged in the indictment; the court would be under a duty to provide such schedule, together with the indictment, to the jury before the case is opened; when returning a guilty verdict, the jury would be required to state which of the particular instances of deceptive conduct were found by them to have been proved. This would enable the parties, and the court, to deal with the issue of sentence on a proper and fully informed basis, and would ensure that the defendant was sentenced only in respect of criminality which had been proved against him or her, and would therefore in such cases remove the difficulties posed by the Court of Appeal’s decision in *R. v. Canavan (1998) 1 Cr App 79*.
- 7.33 The Commission provisionally take the view that the rule against duplicity is based on considerations of fairness to the defence (*paragraph 7.66*). This is correct, but such considerations include the important consideration that, if the jury convict, the parties and court should know with appropriate precision the conduct found to be proved, so that the sentencing exercise can take place on a fully informed basis.
- 7.34 Accordingly, subject to the above, we agree that, where a single fraudulent scheme involves the commission of two or more deception offences, the carrying out of that scheme should be regarded as a single offence, and it should therefore be possible to charge it in a single count of an indictment (*paragraph 7.74*).
- 7.35 We also agree, subject to the above, that the same should apply in relation to a single fraudulent scheme involving the commission of two or more thefts (*paragraph 7.75*).

8. **Part VIII: The Boundaries of Deception**

- 8.1 The Commission provisionally conclude, with a view to clarifying the law on deception offences and ridding it of the artificiality of *Ray v. Sempers (1974) AC 370*, that deception should be understood as the inducing of a state of mind by words or conduct, with or without representation, and that the relevant legislation should be amended accordingly (*paragraph 8.7*). We agree.
- 8.2 In certain situations, particularly cheque card and debit card cases, the relevant person (such as a shop assistant) may be indifferent as to any particular deceptive conduct of a defendant, and may even deny that he or she was in fact deceived, but the law insists that such a person has (for the purpose of the present offence of obtaining property by deception) been or is to be treated as having been deceived (“constructive deception”) (see

Charles (1977) AC 177; Lambie (1982) AC 449, and Ray v. Sempers (1974) AC 370). The Commission suggests that misuse of payment cards should form the subject matter of a new offence, which would properly identify the actual wrongdoing and the real victim, namely the bank (or other card provider) (*paragraph 8.17*). Accordingly, the Commission provisionally proposes (*paragraph 8.31*)

- (1) that a person should commit an offence if he or she intentionally or recklessly causes a legal liability to pay money to be imposed on another, knowing that the other does not consent to his or her doing so and that he or she has no right to do so; and
 - (2) that the other should not be regarded as consenting to the imposition of liability if his or her consent is procured by deception; and
 - (3) that a person should not commit the offence if, at the time of causing the liability to be imposed, he or she believes that the other would have consented to his or her doing so if the other had known all the material circumstances.
- 8.3 Subject to our view that the offence should a requirement of dishonesty, we agree with the Commission's provisional proposal.
- 8.4 In relation to machines and the like, the Commission provisionally concludes (*paragraph 8.58*)
- (1) that it should be criminal to obtain a service without the permission of the person providing it, albeit without the deception of a human mind; but
 - (2) that this change should be effected by extending the offence of theft or creating a separate theft like offence, rather than by extending the concept of deception.
- 8.5 Accordingly, the Commission makes no proposal on this issue, but intends to return to it when it reviews the law of theft. We agreed with the Commission's approach, and with the need for such an offence.
- 8.6 The Commission provisionally concludes that non-disclosure should not count as deception, whether or not there is a legal duty to disclose (*paragraph 8.65*). We agree.
- 8.7 The Commission states that it "seems uncontroversial to conclude that liability for deception should not be extended to mere silence" (*paragraph 8.61*). We agree.

9. **Part IX: The Future of the Existing Dishonesty Offences**

- 9.1 The Commission invites views as to whether the existing offences of theft, conspiracy to defraud, fraudulent trading and cheating the revenue have any features which render inapplicable their criticisms of offences which rely heavily on the concept of dishonesty.
- 9.2 We have made clear in this response why the requirement of dishonesty should be retained in the deception offences and why we believe that the Commission's criticisms of the present law of dishonesty are unjustified and/or misconceived. Assuming that the offences referred to in paragraph 9.1 above survive the Commission's review and any amendments of the law, for similar reasons the requirement of dishonesty should be retained in such offences. To remove dishonesty from such offences would be to invite the very problems the Commission seeks to remove or limit.
- 9.3 As to whether offences such as conspiracy to defraud should survive, there being no adequate discussion of such matters in the paper, before expressing an opinion we would

wish to see the Commission's final report on the present topic and its proposals as to other offences of dishonesty.

10 Other Reform

- 10.1 As the Commission intends to issue another consultation paper in relation to other offences of dishonesty . We confine ourselves to some brief provisional comments on other possible and desirable reform in that area of the law, with a view to making the law simpler and more effective.
- 10.2 Consideration should be given to widening the offence of false accounting (section 17 Theft Act 1968) by adding to the categories of documents which fall within the offence – for example, by adding “any document made or adapted for any business purpose”.
- 10.3 Consideration should be given to widening or replacing the offence of procuring the execution of a valuable security (section 20(2) Theft Act 1968) and, in particular, in redefining “valuable security” to widen such definition and remove the present obstacles and technicalities which prevent effective use of this provision.
- 10.4 Consideration should be given to amending section 25 of the Theft Act 1968 (going equipped to cheat) so that is also applied to sections 15A and 24A of the Theft Act 1968.

11 Conclusion

- 11.1 Our conclusions have been summarised in paragraph 2 above. Although in the main we agree with the provisional proposals of the Commission, we disagree with it on the fundamental issue of whether dishonesty should remain a requirement in the deception offences (and other offences), and a minority of us believe that a general offence of dishonesty should be introduced.

26 October 1999

KULDIP SINGH QC
For and on behalf of the Investigation
and Prosecution Working Party of
the ICAEW's Fraud Advisory Panel