

The way in which **criminal fraud** is defined, investigated and prosecuted differs across the UK and important differences exist. This guide provides a general overview of how fraud is usually dealt with under the criminal law in Scotland.

INTRO

AN INTRODUCTION TO UK LEGISLATION | DECEMBER 2015



Criminal fraud in Scotland

4TH EDITION

WHAT IS FRAUD?

The term 'fraud' refers to the deliberate use of deception or dishonesty to disadvantage or cause loss (usually financial) to another person or party. Definitions of fraud vary from country to country and between legal systems.

OVERVIEW OF THE LAW

In Scotland, criminal fraud is mainly dealt with under the common law and a number of statutory offences.

The main fraud offences are:

- ◆ common law fraud;
- ◆ uttering;
- ◆ embezzlement; and
- ◆ statutory frauds.

It is important to note that the Fraud Act 2006 does not apply in Scotland.

WHO DOES IT APPLY TO?

Fraud can be committed by both individuals and companies. Companies are liable based on the 'directing mind and will' principle.

WHEN IS AN OFFENCE COMMITTED?

Common law fraud

Common law fraud is the common 'catch all' for most fraud prosecutions in Scotland.

Fraud is committed when someone achieves a practical result by the means of a false pretence. In other words, where someone is caused to do something they would not otherwise have done by use of deception.

Proving an intention to deceive is essential in all cases, and can often be inferred from the actions of the accused. The range of 'false pretences' observed in Scottish courts is incredibly wide, from outright lies to sinister silence, and the practical results that have been achieved are equally diverse. If the practical result is not achieved there may be a prosecution for attempted fraud.

Uttering

The crime of 'uttering' occurs when someone tenders 'as genuine' a forged document to the prejudice of another person. Forging a document only becomes a crime if it is shown to have been tendered (to an individual or the public at large) with an intention to defraud/cause someone prejudice.

In many cases, uttering and fraud are interchangeable offences that can equally apply to the same circumstances, but prosecutors tend to proceed with an uttering charge if a forged document is used.

Embezzlement

Embezzlement is the felonious appropriation of property without the consent of the owner, where the appropriation is by a person who has received a limited ownership of the property, subject to restoration at a future time, or possession of property subject to liability to account for it to the owner.

There is an element of breach of trust in embezzlement which makes it more serious than

simple theft. In most cases embezzlement involves the appropriation of money.

Statutory frauds

In addition there are a wide range of statutory offences which are closely related to the common law offence. The main examples can be found in the following statutes:

- ◆ Bankruptcy (Scotland) Act 1985
- ◆ Business Protection from Misleading Marketing Regulations 2008
- ◆ Companies Act 2006
- ◆ Computer Misuse Act 1990
- ◆ Consumer Protection from Unfair Trading Regulations 2008
- ◆ Criminal Justice and Licensing (Scotland) Act 2010 (articles for use in frauds)
- ◆ Financial Services and Markets Act 2000 (to protect investors)
- ◆ Food Safety Act 1990 (labelling and substandard food)
- ◆ Forgery and Counterfeiting Act 1982 (counterfeiting of bank notes and coins)
- ◆ Insolvency Act 1986
- ◆ Weights and Measures Act 1985.

OVERVIEW OF ENFORCEMENT

There are many interested parties involved in the detection, investigation and prosecution of fraud in Scotland, including:

- ◆ Police Scotland
- ◆ Financial Conduct Authority
- ◆ Trading Standards
- ◆ Department for Work and Pensions
- ◆ Crown Office and Procurator Fiscal Service.

REPORTING CONCERNS

Fraud can be reported to **Police Scotland**, by calling 101 (non-emergency) or 999 (if in immediate danger or risk of harm). A police crime reference number will be given.

In certain circumstances it may be possible to report to Action Fraud (the UK's national fraud and cybercrime reporting centre), by calling 0300 123 2040 or using the online reporting tool, or to Crimestoppers (anonymous reporting) and sector regulators.

Reporting duties

Those in the regulated sector or those who are concerned about involvement in money laundering (for example, a transaction that may involve the transfer of criminal proceeds) may also need to make a suspicious activity report (s330 of the Proceeds of Crime Act 2002) or an authorised disclosure (s338 of the Proceeds of Crime Act 2002) to the National Crime Agency (NCA).

In addition, if, in the course of business or through a close personal relationship, a person becomes aware or suspicious that two or more people have got together for the principal purpose of committing a serious crime (such as fraud), that person commits an offence if s/he does not report that knowledge or suspicion to Police Scotland (s31 Criminal Justice and Licensing (Scotland) Act 2010).

INVESTIGATING FRAUD

Frauds committed in Scotland are usually investigated by Police Scotland, which has regional specialist units within its Specialist Crime Division to deal with complex economic crime cases.

Serious and complex fraud and other economic crimes are investigated under the direction of the Economic Crime Unit, part of the Serious Organised Crime Division of the Crown Office and Procurator Fiscal Service (COPFS) which is Scotland's prosecution service.

In the investigation of serious or complex fraud the Lord Advocate, the ministerial head of COPFS, may exercise powers under ss27 and 28 of the Criminal Law (Consolidation) (Scotland) Act 1995 to authorise a nominated investigator to compel the production of documents and to require a person to answer questions and to provide information. These powers are similar to the Serious Fraud Office's (SFO) s2 powers.

For UK-wide frauds, both the English and Scottish authorities will have concurrent jurisdiction and it will very much depend on the nature of the crime and the level of local involvement as to who leads the investigation.

PROSECUTING FRAUD

COPFS is the sole prosecuting authority in Scotland.

Most fraud prosecutions are dealt with by the local Procurator Fiscal who has a duty to consider the evidence available to them and make further enquiries as necessary. They may choose to pass the matter to the Crown Office's Economic Crime Unit if they consider the crime serious enough.

The SFO does not have jurisdiction to prosecute in Scotland, although its powers under s2 of the Criminal Justice Act 1987 may be used to investigate a serious or complex fraud which is prosecutable in England, Wales or Northern Ireland. The SFO also works with Scottish authorities in relation to UK-wide fraud.

Once a decision has been made about the nature of the crime and the evidence available to the prosecutors, the individual may be served with one of the following.

A summary complaint

This is used for less serious crimes and is heard by a sheriff sitting without a jury. The maximum penalty on conviction is imprisonment for up to 12 months and/or a fine up to the 'prescribed sum'.

An indictment

This is used for more serious crimes. The case will proceed either with a sheriff (lower-level judge) and jury or in the High Court. If a prosecution is successful, the maximum penalty at sheriff and jury level is an unlimited fine and/or imprisonment of up to five years, subject to any wider power granted by statute for particular offences. In addition, the sheriff may remit to the High Court for sentence any case where they hold that any competent sentence that they could impose would be inadequate. The maximum penalty at the High Court is an unlimited fine and/or life imprisonment subject to any restrictions imposed by statute.

On conviction, the Crown may seek to use its powers under the Proceeds of Crime Act 2002 to confiscate from the accused a fixed sum of money relating to the benefit obtained from their general criminal conduct in a criminal lifestyle case, and from their particular criminal conduct otherwise.

SUMMARY OF THE MAIN FEATURES

Criminal offences	Common law fraud Uttering Embezzlement Other statutory frauds
Reporting fraud	Police Scotland Action Fraud Crimestoppers Other government agencies and regulators
Investigating authorities	Police Scotland
Prosecuting authorities	Crown Office and Procurator Fiscal Service
Sentencing	Up to 12 months' imprisonment or a fine up to the prescribed sum or both
Summary conviction	
Conviction on indictment	Up to life imprisonment or unlimited fine or both

It is important to note that where insufficient evidence exists to commence a criminal prosecution, a case may be referred to the Crown Office's Civil Recovery Unit to enable legal action to be taken to recover the proceeds of crime through the civil courts instead.

PRACTICAL DIFFERENCES WITH ENGLAND AND WALES

An important difference in criminal law between the two jurisdictions may lie in the fact that Scottish courts require 'corroboration' of evidence (ie, two independent sources of evidence pointing to the crime having been committed). In most fraud cases this is unlikely to make a practical difference and, in both jurisdictions, victims should seek to identify and retain as much information as they can in order to assist a successful prosecution.

Another important difference relates to the investigation of crimes in Scotland, particularly the conduct of interviews under caution (note: PACE

does not apply in Scotland). Often no or limited pre-interview disclosure is provided. Also, unlike in England and Wales, an adverse inference cannot be drawn from giving a 'no comment' interview.

FURTHER INFORMATION

Available from the **resources** section of our website:

- ◆ Criminal fraud in England and Wales
- ◆ Money laundering and the proceeds of crime.

Other resources

- ◆ **Action Fraud**
- ◆ **Crimestoppers**
- ◆ **Crown Office and Procurator Fiscal Service**
- ◆ **Police Scotland**

ACKNOWLEDGEMENTS

Thanks to Tom Stocker (Pinsent Masons LLP) and Barbara Bolton (Shepherd and Wedderburn LLP) for their valuable contributions to this guide.

FRAUD ADVISORY PANEL

Chartered Accountants' Hall
Moorgate Place
London EC2R 6EA UK

T +44 (0)20 7920 8721
E info@fraudadvisorypanel.org
www.fraudadvisorypanel.org

Company Limited by Guarantee Registered in England and Wales No. 04327390
Charity Registered in England and Wales No. 1108863

© Fraud Advisory Panel 2015 All rights reserved. If you want to reproduce or redistribute any of the material in this publication, you should first get the Fraud Advisory Panel's permission in writing. Laws and regulations referred to in this Fraud Advisory Panel publication are stated as at 1 December 2015. Every effort has been made to make sure the information it contains is accurate at the time of creation. The Fraud Advisory Panel cannot guarantee the completeness or accuracy of the information in this Fraud Advisory Panel publication and shall not be responsible for errors or inaccuracies. Under no circumstances shall the Fraud Advisory Panel be liable for any reliance by you on any information in this Fraud Advisory Panel publication.

