

FRAUD LAW REFORM

GOVERNMENT RESPONSE TO CONSULTATIONS

The Consultation Exercise

1. In May 2004 the Home Office published the Consultation Paper 'Fraud Law Reform Consultation on Proposals for Legislation'. We received a total of 71 responses and are extremely grateful to all of those who took the time and trouble to reply: their views have helped inform decisions on the Government Bill that will be published and presented to Parliament when Parliamentary time permits. A list of those who replied is attached as Annex A.
2. The Consultation Paper asked a series of specific questions about the proposals for law reform. However some respondents made wider points which are discussed first.

Resources

3. Some respondents said that law reform is the wrong focus for tackling fraud and the real problem is police resources. The Government believes that, while law reform is not the focus, but only part of the overall picture, simple and effective law will reduce the scope for legal disputes and free up law enforcement resources for front line action. It is taking measures, in partnership with local government and the private sector, to bring new resources into play. We were very grateful for the offer from one respondent to provide some additional resources for the police and discussions are under way to see if a suitable project can be found.
4. In making our decisions on the consultation issues generally, we have borne in mind the need to ensure that the criminal law of fraud is restricted to matters which should properly be classed as criminal. The criminal justice system is, and can be expected to remain, under severe pressure and we can help law enforcement prioritise by restricting the scope of fraud law to matters which are not simply objectionable, but rightly dealt with by our criminal law.

Problems with the current law

5. The great majority agreed with the Law Commission and the Government that there are defects, in particular in the operation of the

deception offences in the Theft Acts, which would be overcome by a general offence of fraud. However one respondent questioned whether there was evidence of a problem with the current law on fraud. Some of the evidence is set out in Annex B. The operational solution to many problems with the statutory deception offences has been to rely on the common law of conspiracy to defraud. But though that offence is very wide it carries the fundamental limitation that it only applies when more than one person is involved.

Future work by the Law Commission

6. The same respondent called for the Law Commission to be given time to complete its review of the law of dishonesty before any further steps are taken in this exercise. This view reflects some misunderstanding of the Law Commission programme. There is no Law Commission review of the law of dishonesty as a whole in progress. The Commission's policy, which they set out in their 27th Annual Report in 1992, is to review areas of the criminal law so that one by one they can be modernised before being assembled into a code. Fraud is one of those areas. The Law Commission specifically recommended and drafted a Fraud Bill in 2002¹.

The New General Fraud Offence (Questions 2-4)

Alternative models for a general offence

7. The great majority of respondents welcomed the general fraud offence proposed in the Consultation Paper and, though some had concerns on points of detail, believed it was essentially on the right lines. By focussing on the dishonest intent of the perpetrator, rather than the deception of the victim, they thought it would enable a more effective response to fraud.
8. However a few respondents favoured a different approach. Three possible models were proposed:

An offence based on an adaptation of article 263.1 of the German Criminal Code:

'Anybody who, for the purposes of dishonestly enriching himself or another or dishonestly causing loss to another, causes pecuniary

¹ Report on Fraud (Law Comm Paper 276, Cm 5560)

damage to another by procuring or interposing an error through deception or distortion or suppression of the true fact, shall be guilty of the offence of fraud'.

An unimplemented draft Canadian Law Commission proposal (from 1987):

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

An option set out in Law Commission paper 104 (1987), which was for a general dishonesty offence as follows:

'any person who dishonestly causes another to suffer [financial] prejudice or who dishonestly makes a gain for himself or another' shall be guilty of fraud.

9. The Law Commission have themselves changed their minds on this issue since 1987 and they explained why they rejected the idea of a general dishonesty offence in Section 5 of their 2002 report. They considered examples from Canada, Hong Kong and New Zealand before reaching their final conclusions. The Law Commission may not have considered the German model, but we understand that this apparently simple provision has caused considerable problems of interpretation in Germany - for example how is the term 'error' to be understood, what constitutes enrichment and damage, and what connection has to exist between these elements. The German courts have developed a body of caselaw to address these problems, but we think that the transplantation of this provision would be likely to prove problematic. It would, at the least, require a great deal more work.
10. The same applies to the other proposals. We also note that the German and Canadian models would not clearly cover fraud by abuse of office, where no deception may be necessary. The Government proposals are clear on this point and represent the fruit of work started by the Law Commission in 1997. They have proved generally welcome and we prefer to proceed with them rather than go back to the drawing board.
11. We re-considered the argument, made by a few respondents, that the concept of fraud should include the requirement that the victim's financial interests be imperilled. However there was very wide support for the Law Commission's proposal that the crime should be complete

if the offender has the intention to make a gain or cause loss. The argument is that the focus should be on the offender's behaviour and that the gravity of the offence depends on his intention, not the result. Law enforcers also argued that, while the standard 'public interest' test for prosecutions ensures that cases are in practice not pursued unless there is some real risk of loss, it is difficult in some cases to provide evidence on this point, and such a requirement would lead to unproductive arguments in court.

European Convention on Human Rights

12. Two respondents said the elements of the general fraud offence are so broad that it is in effect a general dishonesty offence, overly broad and with uncertain scope, possibly infringing Article 7 of the ECHR. We do not agree with this view. It contrasts with the view of the Law Commission, who stated that, bearing in mind recent ECHR case law, even a general dishonesty offence 'could perhaps be compatible with Article 7'². We are not proposing a general dishonesty offence: dishonesty is an underlying requirement, but it is only one of the requirements, and each limb of the new offence sets specific tests which must be met, in addition to dishonesty. We therefore believe it fully meets the requirements of Article 7 and will provide a statement of ECHR compliance for the proposed Bill on this basis.

Fraud by false representation (Question 1)

13. Most respondents welcomed this first limb of the general offence. They felt it had advantages over the existing law - in removing the difficulty of proving that the representation operated on the mind of the victim, and in addressing the following:

- cases where the victim is indifferent as to whether the representation is false or not³.
- the activity of 'phishing' (i.e. the practice of sending requests which falsely claim to originate from banks, asking customers to re-register or 're-activate' their accounts at a replica bank website, with the aim of using the information provided to transfer money out of these accounts);

² Para 5.33 of their 2002 Report

³ We were referred to the problem cases of *Lambie* [1982 AC 449] and *Charles* [1977 AC 177]

- 'application fraud' (the giving of false information in applying for eg a mortgage);
- dishonest doorstep trading.

14. The main controversy concerned the proposal that this offence will be committed not only when the defendant knows that his representation is false or misleading, but when he is 'aware that it might be'. The phrase is precedented, for example in section 6 of the Public Order Act 1986, where one of the conditions for several offences (eg riot and violent disorder) is that the person is 'aware that his conduct may be harmful in one way or another (eg violent). However some respondents thought the phrase is too vague and potentially too wide.

15. One respondent suggested it should be replaced by the criterion that the offender had 'no reasonable grounds for believing it to be true'. We considered this and a similar alternative formulation: that the offender 'knows or ought to have known' that his representation was, or might be, false or misleading. The problem with objective tests like these is that any crime of dishonesty by its very nature requires a subjective fault and a case that failed a subjective test would be likely also to fail the *Ghosh*⁴ dishonesty test. Thus while such tests may be welcome to some, because they set a lower threshold for the offence than the 'aware that it might be' formulation, there may be objections to them in principle, for little practical gain.

16. We therefore concentrated on the suggestions for replacement which were based on a subjective test. There were 2 main proposals:

- *Cunningham*⁵ recklessness
- 'Knowing' (that it might be)

Several respondents were specifically opposed to the use of 'reckless' in view of the problems this term has posed in the past. Those who favoured it said it is well precedented (eg in section 15 of the Theft Act 1968) and argued that its meaning is now clearer, following the House of Lords decision in *R v. G and another*⁶. However many law enforcers think that an offender could make a false representation without being 'reckless' at any point. In practice subjective (*Cunningham*) recklessness is akin to awareness, but it was pointed

⁴ [1982]QB 1053

⁵ [1957] 2QB 396

⁶ [UKHL 53], 2003

out to us that there is a difference in that the former includes not only awareness of the risk, but the additional test that it was unreasonable of the offender to take the risk in all the circumstances known to him. It is therefore a slightly tighter and more complex test.

17. 'Knowing' was proposed as the most straightforward alternative to 'aware'. 'Know' is one of the dictionary meanings of 'aware' and vice versa. There is therefore little if any difference between the two, but 'know' is better preceded and less likely to give rise to technical arguments. We therefore decided to replace 'is aware that it might be' with 'knows that it might be'. The essential point is that an offence should be committed not only where the offender knows that he is making a representation that **is** false or misleading, but where he knows that it **might be** false or misleading.

18. There was a view from a few respondents that it would be going too far to provide that an offence is committed when the defendant knows his representation 'might be' misleading. An example was given of a seller of a Renoir painting which turns out to be incorrectly attributed. It was argued that, given the inevitable uncertainties in such areas, the seller would only be able to protect himself from a fraud charge if he had said 'I honestly believe this to be a Renoir' rather than 'This is a painting by Renoir'. We do not agree as the 'dishonesty' requirement will assist in drawing the line in marginal cases. But if the consequence were that sellers became more cautious in their statements this does not seem an undesirable result.

19. The question of the meaning of 'misleading' was raised. It was suggested that it means less than wholly true and capable of an interpretation to the detriment of the victim. We would agree with that.

20. Cases of negligent misrepresentation were also raised: one example was where a person hires a car for a fixed period but fails to return it at the end of that time. It was argued that although this may be technically an offence, prosecutors are likely to advise at present that this is a matter for the parties to resolve in the civil courts. We think that the Bill does not change this practical position.

Fraud by failing to disclose information (Question 2)

21. This second limb of the general offence was generally welcomed, subject to the point discussed below. There was a suggestion that

failure to disclose could in some cases amount to a false representation, and that therefore such cases were already covered by the first limb. However it was recognised that it might be helpful, particularly for juries, to have the point made clear on the face of the law.

22. The point of controversy was the proposal that this offence should extend to situations where a person dishonestly fails to disclose information which he is under no legal duty to disclose, but which the other person trusts him to disclose. There was substantial opposition to this proposal. One of the main arguments was that this would intrude on the caveat emptor principle, and create a conflict between civil and criminal law, in that it would become criminal not to provide information which you are entitled to withhold under civil law. Arlidge and Parry on Fraud says that this result would be 'bizarre'⁷. The Law Commission argued that this situation already exists in relation to the law of theft, following the House of Lords decision in *Hinks*⁸. In that case Lord Steyn said that in a practical world there will always be some disharmony between the systems.

23. The other main objection was the lack of certainty: while the requirement of 'dishonesty', which underlies all 3 limbs of the new fraud offence, provides a measure of protection, it will be necessary to make a judgement in each case as to whether the 'victim' is trusting the defendant to disclose the information. The example of a person selling a car who does not reveal that he has successfully camouflaged some damage to the bodywork with filler is one example presented to us of a situation where it is arguable that the purchaser trusts a disclosure to be made, but consensus is lacking and it will be hard to say where the line should be drawn. It was pointed out that this is a problem not only for juries but for police in deciding what to investigate. It was argued that the conduct covered by Clause 3 (4) may be dishonest and morally reprehensible, but that does not mean it should be criminal.

24. Others argued against this that if the offence is restricted to situations where there is already a legal duty to provide information then it adds little to the existing law, as the failure to meet the legal obligation will carry its own sanction. Also criminal prosecutions may then hinge on civil arguments about whether the duty exists. They argued that it was desirable to cover cases such as the Law Commission's example of a

⁷ 2nd Edition (4.021-023)

⁸ [2001] 2AC 241

vulnerable person being exploited by an antiques dealer, but some said that it was difficult to cover such cases without creating an undesirably wide offence.

25. Having carefully considered the arguments on both sides we were persuaded that failure to disclose information should not be fraud unless (inter alia) a legal duty is breached. In particular, we share the concerns over extending the criminal law into areas where something may be morally dubious, but not clearly seen as criminal. We believe even if we limit the offence to legal duties it will add to the existing law, as the existing sanctions for such failure may be of a civil nature and be both difficult to pursue and unlikely to lead to a sufficient sanction.

Fraud by abuse of position (Question 3)

26. There was general support for this 3rd limb of the general offence, which recognised that this type of behaviour is not well addressed by the existing law, as there may be cases where no deception is involved, or is at least difficult to prove. Examples were given of frauds by local and central government officials, internal banking frauds, the financial abuse of the elderly and Probate fraud, some of which was committed via Enduring Powers of Attorney. (It is however worth noting that in most cases where public officials are concerned the common law crime of misconduct in a public office should be available).

27. A minority opposed it on the grounds that it was too wide, with insufficient definition of crucial points – notably the relationships covered and the meaning of ‘abuse’ – and that it would bring to the police many complaints which are currently dealt with under civil law, for example by suing for breach of contract or by dismissal for gross misconduct. One respondent said they were strongly opposed to criminalising people simply as a result of the breakdown of everyday commercial and fiduciary relationships. We think however that while ‘simple’ breakdown of relationships could lead to allegations of ‘abuse’ of position, the offence will only be committed if the defendant is dishonest and seeks to make a gain or cause a loss. That is something more than a breakdown of relationships.

28. There was wide support for ‘secrecy’ as an ingredient of the offence – secrecy is a ‘hallmark’ of fraud, as one of our respondents put it. It was accepted that an open abuse is no less reprehensible than a secret

abuse, but while an open abuse might be rightly subject to sanction, the argument was that it should not fall under the criminal law of fraud. A secrecy requirement helps separate fraud from other offences (eg blackmail) and matters better dealt with under civil law. However some were concerned that, while secrecy would almost invariably be part of the offending behaviour in practice, it was difficult to define and represented an unnecessary complication, which could lead to technical arguments in court. There could be arguments about whether there had been an intention to disclose in the future, and about whether the employer knew what was going on, if a surveillance operation was in place. It was argued that the mischief lay in the dishonest abuse and that the value-laden concepts of 'dishonesty' and 'abuse' were sufficient in themselves to set the parameters for the offence.

29. We accept these arguments and in the light of this concern we decided to delete the secrecy requirement proposed by the Law Commission.

Definitions (Question 4)

30. Most respondents agreed that the definitions of 'gain', 'loss' and 'property' should be aligned with those used in the law of theft and accepted that the current definitions were tried and tested and had not given rise to problems. One pointed out that the same definitions also occur in the Trade Marks Act 1994.

31. Several respondents suggested that the definition of property should be expanded to include confidential financial data. We do not think any such change is appropriate or necessary, as simply by accessing confidential information, the offender will usually 'intend to make a gain' - albeit an economic gain from wrongful exploitation of the material, rather than a gain of the material itself. As long as that is his intention he is caught by the new offence. If he does not have that intention then fraud is arguably not the appropriate concept anyway. The Bill covers cases where, for example, an employee makes a gain by obtaining information by fraudulent means - for example, by abusing his position of trust. The new offence of being equipped to commit fraud also helps in this context: it will ensure that the possession of confidential financial information with the intent of committing fraud is a crime. In our view that strikes at the mischief, in a more practical way.

32. It was suggested that, as in the Theft Act, the term 'property' should be defined as including intangible property. We agree. That will ensure

that intangible things that can be property - notably intellectual property - are covered. However an essential problem will remain in that it is unusual for intellectual property to be 'gained' or 'lost' when someone misuses it. Normally the mischief lies in unauthorised duplication or use. But if a person abuses his position or makes a false representation in order to interfere (in some way) with intellectual property, or to access confidential information, a person will usually be aiming at an economic gain and so will be caught by the general fraud offence anyway.

33. A few respondents did not believe that fraud should be tied to gains or losses in property. However we agree with the majority, and with the Law Commission, that fraud must be by definition an economic crime, if it is not to become an unhelpfully wide concept.

34. One respondent said that there should be a new definition of property equally applicable to both theft and fraud to reflect more properly contemporary society's understanding of what is property that can be gained or lost. They did not however say what that definition should look like. In the absence of a consensus on this point, we think it advisable to use the Theft Act definition, as recommended by the Law Commission.

New offence of obtaining services dishonestly (Question 5)

35. Very nearly all respondents welcomed this offence to combat problems with the 'deception' of automated service provision. The Law Commission noted in their report that arguably the new focus on 'misrepresentation' will ensure this type of case is covered, but the problem is not confined to the deception of machines and the new offence deals with the obtaining of services dishonestly by whatever means.

36. Examples of services which respondents thought should be covered include the opening of a bank account, the setting up of a company, downloading software or music from the internet. We believe these are all covered within the normal meaning of the term 'services'.

37. An example mentioned by the Law Commission that is **not** covered by the new offence is where parents, who have every intention of paying all relevant fees, lie about a child's religious upbringing in order to

obtain a place at a fee paying school⁹. This case is in principle covered by the existing offence in section 1 of the 1978 Act, as it is not necessary under that provision to show that the defendant intended to avoid payment. One respondent thought that this type of case should be covered by the criminal law as there is loss to the school in that they have accepted a pupil they would not otherwise have taken and a loss to another family whose child has not obtained a place. We however agree with the Law Commission that this type of gain and loss should not be a matter for the criminal law of fraud and that the new offence should apply only where there is an intention not to pay.

38. A few respondents believed that the requirement that the defendant only be 'aware that the services **might be** chargeable' was too low and that it would assist unscrupulous service providers (of whom they say there is an increasing number, on the net). However the majority felt the overall dishonesty requirement provides sufficient protection for the innocent client.

Repeal of conspiracy to defraud (Question 6)

39. The repeal of Common Law Conspiracy to Defraud was the only proposal to which there was widespread opposition. It is normally fundamental to a codification exercise such as this, that the common law should be repealed in favour of the new statute. A large minority of respondents agreed with the Law Commission that it was illogical that what was legal for one person should be criminal for many, and that the offence is unfairly uncertain, and so wide it has the potential to catch behaviour that should not be criminal. They took the view that the new statutory offences, together with the possibility of charging statutory conspiracy to commit these new offences, and bearing in mind other possible charges – such as the new offence of cheating at gambling that is in the current Gambling Bill - cover all the behaviour that in practice should be covered by the criminal law.

40. However the repeal was opposed by the majority of consultees. The main argument was that, at least until we have experience of how the new offences operate in practice, it would be rash to repeal conspiracy to defraud as it provides flexibility in dealing with a wide variety of frauds. They argued that it was not clear that the new offences could successfully replace it in every case, especially bearing in mind developing technology and possible new types of fraud.

⁹ Para 8.12 of their 2002 report

41. It was argued that conspiracy to defraud was well defined¹⁰ and is not tied to economic gain or loss, but only requires that the conduct prejudices another person's rights. That makes it particularly useful in intellectual property cases and in cases where no economic loss has been suffered. An example of the latter was *Terry*¹¹ where the defendants made use of vehicle excise licences in a fraudulent manner. It is also useful in dealing with cases where the fraudulent nature of a transaction only becomes apparent in the context of several other transactions.
42. Some respondents referred to limitations on statutory conspiracy (under the Criminal Law Act 1977) - in particular that the parties to it must intend that the substantive offence will be perpetrated by one or more of the conspirators. This is not required for conspiracy to defraud. In *Hollinshead*¹² for example the defendants conspired to market devices for use by third parties to avoid paying for electricity used. The Court of Appeal held that this did not amount to a conspiracy to commit offences under section 2 of the 1978 Act, as the defendants themselves were not practising the fraud on the electricity companies, but it did constitute conspiracy to defraud. One respondent said that this situation often arose in cases involving intellectual property: for example a group of people conspire to manufacture counterfeit goods but do not themselves commit any deception in selling them on to another person, who makes the actual public sale.
43. In their 2002 report, the Law Commission suggested that this issue is more appropriately dealt with in the context of their work on assisting and encouraging crime rather than in the Fraud Bill. This work is not yet complete, though it should be published early in 2005.
44. A compromise position was proposed, under which repeal would be enacted but not implemented until after a transitional period during which experience may show it is no longer being used, having been successfully replaced in practice by the new offences. We are not attracted by this approach, which is somewhat untidy and unlikely to work in the absence of a solution to the *Hollinshead* type of case.
45. Bearing in mind in particular the *Hollinshead* type of case, we decided to accept the view of the majority and retain common law conspiracy

¹⁰ in *Welham v DPP* (1961) AC 103 and *Adams v R* [1995] 2 Cr. App.R 295

¹¹ [1984 AC 374 HL]

¹² [1985] 1 All ER 850

to defraud for the present. However it remains our long-term aim to repeal this common law crime and we will review the position in the context of the Law Commission's forthcoming report and any action to implement it. This should also allow any final decision to be made in the light of some experience of the Fraud Bill in operation.

New offence of possessing equipment to commit fraud (Question 7)

46. The proposal for this new offence was welcomed by almost everybody. It represents an addition to the Law Commission proposals, and replaces the 'going equipped to commit a cheat' offence in section 25 of the Theft Act 1968. Those respondents who had doubts were mainly concerned that proof of intent should be required. We accept the arguments against criminalisation of the simple possession of any article which could be used in a fraud, given that many have legitimate uses and that we are capturing articles kept at home. We believe that the prosecution should have to prove a general intention that the article be used by the possessor (or someone else) for a fraudulent purpose, though they should not have to prove intended use in a particular fraud. The caselaw on section 25 establishes that the offence requires an intention that the article be used for some future fraud, although the intention may be general rather than specific and the intended use may be by someone else¹³. We intend to use similar wording in order to attract that case law.
47. We do not however intend to repeat section 25 (3) of the 1968 Act, as that provision seems to do no more than state the obvious: i.e. that if an article is made or adapted for fraud it will be easier to establish the requisite intent than if the article has both legitimate and illegitimate uses.
48. Given the decision to have a requirement for a general intent, we do not consider there is any need to have a proviso about 'lawful authority or reasonable excuse' as if the suspect has an intent to commit fraud that rightly implies he can be charged with a crime even if there was some form of authority or excuse. If he is an undercover policeman, he would be protected not only by the public interest test but the dishonesty test.
49. One respondent suggested the offence should also cover cases where there is an intent to commit theft. However we do not see that as an

¹³ R v Ellames [1974] 3 All ER 130; Hargreaves [1985] Crim LR 243

issue within the scope of this Bill, whose purpose is to reform the law of fraud.

50. Several respondents raised the need to cover personal data, especially financial data, used in preparing to commit frauds. They referred to problems in dealing with cases where individual suspects are found who have, in their homes, lists of credit card details, expiry dates and security codes. Others mentioned blank (white) plastic cards and blank template documents (eg for utility bills). We agree that the offence should cover such articles and believe the ordinary meaning of the word 'article' is broad enough to ensure that it does. However we agree it may help to make clear that the term covers software and data stored electronically.
51. The Consultation Paper proposed a lesser offence of simple possession (with a 3 year maximum) and a greater offence of manufacturing and possession with intent (with a 10 year maximum). Several consultees thought 3 years too low, in view of the gravity of the offence, although one thought that 10 years for the higher level offence was too high. A close precedent was pointed out - s 126 of the Communications Act 2003, which created an offence of possessing anything that may be used for dishonestly obtaining electronic communications services. This has a 5 year maximum, and we think we should go up to, but not beyond, this level as the maximum for the possession offence (which will require a general intent).
52. Most respondents agreed that, considering the possible large sums at stake, a 10 years' maximum would be justified in the case of manufacture, sale and supply. A recent example is a Credit Card Cloning machine, whose makers are said to be contributing to the magnitude of fraud on an international scale. However, though there was a view that any such offence should be limited to articles specifically designed to commit frauds, or where the manufacturer knows the article is to be used to commit frauds, and we accept that.

Jurisdiction (Question 8)

53. The majority favoured taking nationality jurisdiction. As one put it, in an age of globalisation, the UK should take a certain responsibility for ensuring its nationals do not exploit people in other countries whose authorities are unable to protect them. However some of those who took this view cited types of cases which can in fact be dealt with already under the Criminal Justice Act 1993. Since the implementation of Part 1 of the 1993 Act, if any act or omission proof of which is

required for conviction of a crime of deception takes place in the UK, our jurisdiction will already catch the case. The wide effect of the 1993 Act is not always appreciated: it only came into effect in 1999 and its use so far has therefore been limited¹⁴.

54. So, for example, no jurisdictional problem will arise in 'phishing' cases, even though the fraudster typically operates abroad. If he targets people in the UK by sending them false representations in order to obtain their personal financial details, with a view to making a gain or causing them loss, then he will be committing an offence of fraud which falls within our jurisdiction under the 1993 Act. (Whether he can be successfully detected and brought to book for that offence is, of course, a different issue).

55. Some suggested that if the proposal was adopted some limitations should be imposed – for example that the jurisdiction should only be exercised:

- where the local authorities are unable or unwilling to proceed; and
- where the UK authorities conclude prosecution is justified having regard to the gravity of the offence, the likelihood of a conviction, etc.

56. A few expressed outright opposition to the proposal - based both on practical difficulties (gathering evidence overseas, securing the attendance of witnesses from abroad), and on doubts based on principle (potential conflicts with the applicable local law, doubts as to the public interest in cases where there is no impact on the UK, and as to whether UK nationals abroad should be subject to UK law as well as the local law). Others who supported it in principle nevertheless expressed concerns, due to the practical problems mentioned above, fears that law enforcement (already fully stretched to protect the UK from fraud) could not cope, and doubts as to whether it would prove cost-effective.

57. It is an unusual step in the criminal law to take extra-territorial jurisdiction and needs full justification. It is not clear that this is present for offences of fraud any more than for the majority of offences in our criminal law which our nationals may commit abroad. Generally our preference is for such offences to be tried abroad where the evidence and witnesses will be. On balance, therefore, and given the provisions in the Criminal Justice Act referred to above, we decided that we should **not** take nationality jurisdiction for fraud. The

¹⁴ We were however referred to the case of *R v Wallace Duncan Smith* [2004] EWCA Crim 631

Bill will however amend the 1993 Act to ensure that that its wide jurisdictional provisions apply to the new fraud offences.

58. We noted in our Consultation Paper that nationality jurisdiction already exists for corruption. However the view was expressed and we agree that these offences can be differentiated. The main arguments, in our view, are:

- The corruption of officials overseas is dealt with in several international conventions;
- This stems from the real concern over corruption in developing countries and its effect on their stability which gives countries such as the UK some responsibility over UK companies and individuals operating overseas;
- In contrast, fraud is a huge issue across the world, but domestically as much as internationally;
- Corruption is far less common than fraud; the resource implications for 'policing' UK nationals world wide for fraud are therefore much larger;
- Corruption involves more damage to the UK's reputation than does fraud because of the responsibility referred to above.

Fraudulent Trading (Question 9)

59. The majority were doubtful that much can be expected of the changes in the law on multiple offending in the Domestic Violence, Crime and Victims Bill in addressing the issue of multiple frauds. Many of the same bodies were also doubtful that anything meaningful would be added by an 'aggravated fraud' offence. (This was mentioned in the Consultation Paper as a possible alternative to the extension of Fraudulent Trading). One view was that the Proceeds of Crime Act 2002 (POCA) already provides all that is needed; that the number of frauds affects sentence and that there is no need to create a new offence to remind the court of the 'criminal lifestyle' provisions. There was a suggestion that the new general offence of fraud should be listed in POCA as a lifestyle offence, with the result that a single conviction could lead to the making of the lifestyle assumptions. However we do not agree that this is justified in the case of fraud, which could well be a one-off offence.

60. Those who favoured an 'aggravated fraud' offence said it would help to distinguish 'course of conduct' cases from others, and provide greater penalties for repeat offenders.
61. There was opposition from a few significant bodies to the extension of Fraudulent Trading. One thought we should not enact hasty laws but should wait to see the results of the Domestic Violence, Crime and Victims Bill. Another thought the new fraud offence will make any extension of fraudulent trading unnecessary. (It should be noted that extension was recommended by the Law Commission, along with the fraud changes – their recommendation on Fraudulent Trading¹⁵ following their Fraud Report in 2002). Others thought that in principle it should be limited - to creditors or, as a price to be paid for the benefit of limited liability, to the corporate sector. There were different views on the clarity of the existing section 458. Some said the caselaw on it was good, others that it was unclear.
62. However a strong majority supported extension. The main grounds for this view were that it enables a course of conduct over a period of time to be presented in one charge which is easy for juries to understand; and also that it deal with cases not caught by the new offences and not caught by conspiracy to defraud because only one person is involved.
63. A few respondents were concerned that the new offence would appear in a different context from s 458 of the Companies Act. One suggested that the Bill should take in s 458. We believe that s 458 should remain where it is, on the basis that company offences should feature in the Companies Acts, as it is convenient to see all the law relevant to incorporation in the same context. However we accept that the new offence in the Bill should as far as possible use the same terminology as s 458 to attract the same case law.
64. We decided that the idea of an 'aggravated fraud' offence be dropped and that the Bill should include a new offence extending to non-corporate traders the provisions of s 458.

Powers of Trading Standards Officers (TSOs)

65. This is a side issue arising from the Fraudulent Trading discussion. Most of the few who commented on this issue said they supported powers for TSOs to ensure they can pursue cases of Fraudulent Trading under the Bill. Nothing is needed in the Bill to allow TSOs to prosecute, as that is already possible under the general power in s 222

¹⁵ In their Report on Multiple Offending (Law Comm Paper 277, Cm 5609, 2002).

of the Local Government Act 1972. However a few respondents said TSOs should be given powers of entry, search and seizure (similar to those they have in the Trades Descriptions Act 1968). The argument is that as fraud increases TSOs' existing powers are being used for more serious cases, for which they were never designed. This argument has some force, but on the other hand Home Office is working to improve the police response to fraud (with both public and private funding) and arguably the police are the right body to tackle criminal frauds. Those who propose powers for TSOs and OFT require that this be matched by new resources.

66. The Fraud Bill is unsuitable as a vehicle for any such change as it is designed to reform the substantive law. The issue of TSO powers has also been raised in the context of modernising police powers and that is a better context in which to consider it. We would need to be convinced of the benefits of cases being investigated by TSOs rather than the police, and that the proposal had wider local government support, before pursuing it.

Race Equality Impact Assessment (Question 10)

67. Several respondents made helpful comments in relation to the REIA and a new assessment of the impact is included in the section on equity and fairness in the Regulatory Impact Assessment.

Regulatory Impact Assessment (Question 11)

68. We also received helpful comments on the draft RIA and a draft final RIA is enclosed as Annex C. This will remain subject to modification until it is laid before Parliament with the Bill.

New point

Privilege against incrimination

69. One respondent suggested that the scope of section 31(1) of the Theft Act should be broadened to remove the privilege against incrimination in relation to all civil claims relating to property. This may be desirable in general, but is perhaps a step too far in a Fraud Bill. The Law Commission recommended a new provision removing the privilege in relation (only) to the new offences in the Bill. However we accept the argument that the Bill ought also to remove

the privilege in relation to conspiracy to defraud and any inchoate offence arising from the new offences.

Criminal Law Policy Unit