

# Legislating the criminal code: fraud and deception

## *Liberty response to Law Commission Consultation Paper No 155*

### **Summary of conclusions**

Liberty welcomes legislation that will modernise the law of fraud and deception.

### **Liberty supports:**

The rejection of the creation of general offences of dishonesty and deception

Measures that will deal effectively with credit card fraud

Measures that criminalise the fraudulent obtaining of free services

### **Liberty does not support:**

Any proposal to remove or water down the requirement for dishonesty in offences of deception

Any proposal to remove the requirement for dishonesty for offences of theft

The criticisms of the *Ghosh* dishonesty test

The imposition of criminal sanctions for unauthorised borrowing by bank customers

### **Liberty would oppose:**

The abolition of the requirement of 'intention to permanently deprive' from offences of deception

Measures that would undermine the rights of defendants in the cause of "efficiency".

The weakening of the nexus between the deception and the specified result

### **Introduction**

In 1998 the Law Commission were asked by the Home Secretary to examine the Law of fraud. In particular they were asked to consider whether the current Law is adequate for effective prosecution and whether modernisation was required to reflect recent technological changes. Liberty welcomes these aims but recognises that a balance must be struck between the need to secure the conviction of the guilty, on the one hand, and the need to protect the rights of defendant's on the other. Liberty is concerned that any proposed changes to the law are proportionate to the perceived defects within the current system and do not have the incidental effect of trivialising minor interferences with property rights

### **A general dishonesty offence (Paras 1-3)**

Liberty agrees that the Commission is right to reject the creation of a General Dishonesty Offence. It would, by definition, have to be drafted in such indeterminate and broad terms that it is hard to see how it could be said to be "formulated with sufficient precision to enable the citizen to regulate his conduct". We therefore agree with the Commission's conclusion that such an offence is insufficiently precise to comply with the requirements of article 7 of the European Convention on Human rights. (No punishment without Law).

However we believe that the Commission's criticisms of the current "test" for dishonesty, as laid down in *R v Ghosh*, (5.25-26), are unfounded. We accept the Commission's view that

the criminal law should take a robust view of what should be allowed in the market place, and consider that generally criminal liability should not arise when the conduct is not actionable in a civil court. However we do not see, on the face of it why sharp (dishonest) practice resulting in loss, particularly to vulnerable victims, such as that in *Hopkins* and *Kendrick* or *Hinks* should escape the ambit of the criminal law. It may well be that in the majority of these cases there will be a civil remedy, if for example the contract can be shown to be entered into in bad faith. In any event we believe the Commission is mistaken in its concern in para 5.28 that this would allow the criminalisation of such acts 'merely because some people would regard it as a dishonest thing to do' as this ignores the protection of the second limb of the *Ghosh* test (whether the defendant knew the behavior to be dishonest). We see no reason why the criminal law should not compliment the civil law, particularly in relation to the absence of remedy or effective remedy.

#### **General deception offence (Para 4)**

We agree with the Commission's view that a General Deception Offence would not be justifiable in principle for the reasons set out in the paper. We agree that such "gaps" as there are should be closed by specific extensions to the existing offences.

#### **Obtaining property by deception (Para 5)**

Liberty agrees in principle with the Commission's proposal (7.7) that deprivation of property by deception should be sufficient to constitute an offence without the requirement for an actual 'obtaining.' However, we submit that the separate element of dishonesty incorporated in the current legislation, should be retained. (see below) It is not clear whether this is intended by the authors of the consultation paper.

#### **The intention to permanently deprive (Para 6)**

In our view the existing requirement of intention permanently to deprive should be retained for offences of deception and theft. The requirement makes an important distinction between the permanent deprivation of property, and other kinds of interference with property rights. We recognise that this can cause some anomalies in the law and some difficulties in prosecution however we are of the view that these difficulties have to be balanced against the serious infringements of civil liberties which would result from its abolition.

We consider that the existing law, in the form of s.6 Theft Act 1968, gives prosecuting authorities adequate powers to prosecute for serious infringements of property rights. If a person dishonestly obtains property belonging to another by deception he will be regarded as having had the intention to permanently deprive if it can be proved to the required standard that he intended to treat the thing as his own to dispose of regardless of the other's rights. In appropriate circumstances this can include a borrowing or lending. Indeed, the factual circumstances in which section 6 can bite are extremely wide and certainly cover the 'ransom', 'essential quality' and 'pawning' principles with which the CLRC were concerned (7.14).

The Commission is of the opinion (7.18) that section 6 is "...badly drafted and obscure." We do not take this view. There may be an argument for amending it in order to provide greater clarity, but we are not persuaded that there is. We accept that the current law does contain anomalies. Where such anomalies exist there may be a need for a general sweeping up of existing untidy provisions.

We do not accept the view (7.22) that the requirement can make it harder to secure convictions against those who do have an intention to permanently deprive. The intention is usually apparent from the circumstances of the taking. Where the issue is less certain, e.g. because tangible property is involved, then the requirement operates and it is important

that it does. We do not accept that fact finders necessarily find it difficult to distinguish between the two different intentions as set out.

### **Alternatives to the intention to permanently deprive**

Liberty rejects the Commission's view (7.19) that the intention to permanently deprive should be abolished altogether and that the "temporary deprivation of property should be criminalised". Liberty believes that such provisions would serve only to "trivialise" the criminal law, leading to uncertainty and injustice.

The Commission proposes that the "trivialisation" argument can be balanced by the effective use of prosecutorial discretion. Liberty does not consider this to be an effective safeguard and indeed takes the view this sets a dangerous precedent. It is impossible to predict or control the extent to which political or administrative expediency might be a factor in the decision making process at any given time in different police/CPS areas which may be subject to differing agendas.

Liberty rejects the Commission's proposed alternative requirement, that a 'significant practical detriment' should be proved. This seems to us to be far less manageable than the existing requirement which has the advantage of being fairly simple in concept and is therefore easily understandable. We believe that such a requirement might introduce further uncertainty into the law. We do not know what the experience of the Australian courts has been, but we foresee the potential for considerable inconsistency, given the case specific context of each situation as it arises. We believe that the measure would invite protracted argument on the meaning of each of the three key elements of the requirement. This may lead to lengthier trials, more appeals and added public expense.

We do not approve of abolishing the existing requirement subject to exceptions for specific circumstances. It would effectively call for 'honesty' to be defined. The circumstances in which criminality can arise are simply too wide to allow for this sort of categorisation. Any attempt to compile a list of exceptions is fraught with difficulty and is likely to lead to injustice and inconsistency.

### **Obtaining services by deception (Para 7)**

Liberty have no objections to the proposed amendments to Section 1 of the Theft Act 1978 in relation to the obtaining of free services. The commercial operation of the service sector has clearly changed considerably since 1978. However Liberty's views on the amendment to this provision are subject to :-

- (1) the retention of the causal nexus between the deception and the provision of the service and
- (2) the retention of the requirement for dishonesty

### **Causing a consequence by deception (Para 8).**

Liberty does not consider that any significant difficulties arise in practice from the requirement that the specified result be brought about by deception. Indeed we consider that the retention of the nexus between the act and the consequence to be of fundamental importance. There may be other reforms that can be considered to clear up some of the anomalies that currently exist in this area. However our view is that the essential link should be maintained.

### **Dishonesty (Para 9)**

Abolition of requirement.

We condemn the Commission's primary proposal that deception offences should cease to require proof of dishonesty as a separate element. We also condemn the secondary

proposal that belief as to legal entitlement (i.e. a claim of right) should be the sole defence, although we see no objection in principle to it applying in statutory form to deception as it currently does to theft.

It would appear that the primary proposal has been prompted by Lord Lane C.J.'s view as expressed in *R v Ghosh*, which is now the leading authority on the test of dishonesty. He said "The difficulty with section 15 of the Theft Act is that dishonesty comes in twice. If a person knows he is not telling the truth he is guilty of dishonesty. Indeed, deliberate deception is one of the two most obvious forms of dishonesty. One wonders whether 'dishonestly' in section 15(1) adds anything, except in the case of reckless deception."

We are troubled by the arguments put forward in the consultation paper. The Commission appears to have latched onto the view expressed by Lord Lane C.J, in order to justify its abolition across the board.

The commission asserts (7.44) that "It must be rare that a defendant can admit obtaining a benefit by deception, but claim that it was not a dishonest thing to do" given that deception is prima facie dishonest. We do not disagree with this in principle. However we do not believe that this "rarity" justifies the abolition of the requirement for the Crown to prove dishonesty in deception offences. Further, it ignores the difficulty that there are actually two distinct, albeit closely connected, issues. Apart from a deliberate or reckless deception there also has to be a dishonest obtaining. We are therefore opposed to the proposal for these and the following reasons :

- (1) The Commission appears to object to the dishonesty requirement for reasons of efficiency, expediency and effectiveness of prosecution rather than in the interests of justice being done and being seen to be done. However, in most cases dishonesty is not difficult for the Crown to prove and appears to cause little difficulty for juries and other fact finders in the majority of cases
- (2) The abolition of the requirement would have a significant impact on those rare and unusual cases in which a deception occurs in the absence of any dishonesty on the part of the deceiver. We do not believe that such conduct can be catered for by a limited number of 'statutory defences' since such rare circumstances are, by their very nature, difficult to foresee. It is also argued that statutory defences militate against the presumption of innocence by placing a 'reverse' evidential burden upon the defence.
- (3) The Commission draws attention to lengthy trials being encouraged "where there would otherwise be a plea of guilty" and also the extent to which the existence of the dishonesty requirement "makes it harder" to convict the guilty who are allowed to "go free". It is asserted that without the defence at present available "guilt would follow automatically from proof or admission of the conduct prohibited". We find these arguments particularly worrying in light of the conclusion that "In many cases a guilty defendant would be forced to plead guilty, a highly desirable outcome." (7.48). This view rather begs the question, 'Guilty according to whose standards?' Guilt would to an increasing extent effectively be determined by legislative draftsmen and professional lawyers.
- (4) We see the proposal to remove the dishonesty requirement as an attempt to dilute or restrict the role of the jury in the decision making process. We consider that this would be an erosion of civil liberties to which we are opposed, particularly in light of the current legislative proposals to completely remove the right of defendants to elect jury trial for a whole range of offences.
- (5) The abolition of the requirement for dishonesty in deception offences also opens up the possibility of removal of the requirement for the offence of theft This consequently raises the spectre of strict liability in offences of dishonesty across the board and would deprive a whole section of the Criminal Law from the requirement for Mens Rea. Liberty would condemn any such proposal.

## **Claim of right**

The Commission's secondary proposal is that, in the absence of the dishonesty requirement, it should be a defence that the defendant believes that he/she is legally entitled to secure 'the requisite consequence.' This is akin to the 'claim of right' exclusion that has applied to theft offences since the 1968 Act came into force. It has never applied by statute to deception offences. Whilst we have no objection in principle to a claim of right exclusion applying to deception offences we do oppose the removal of the Ghosh dishonesty requirement from deception. We approve of Ghosh because, firstly, it requires the defendant's behaviour to be placed into its contemporary cultural context and, secondly, it adds a subjective test directed at the defendant, where appropriate. It is therefore flexible and adaptable to a wide range of circumstances. Its removal would leave a claim of right as the sole defence. This is very narrow in scope and applies only in very limited factual circumstances.

## **Effective prosecution (Paras 10-11)**

We agree that it is desirable for the prosecution to be able to accurately represent the criminality of the conduct alleged.

We do not agree that a number of deception offences should be charged in a single count. We are concerned that this would lead to substantial unfairness to the defendant in a significant number of cases because:-

(1) the defendant would not know with sufficient clarity which allegations he would have to meet (a necessary element of a fair trial under Article 6 of the Convention), and

(2) when sentencing, the judge would not know the extent to which the jury found the defendant culpable - for instance, where a single count covered fifty allegations of wrongdoing, the jury could return a guilty verdict on the basis that the defendant was guilty of all fifty or, at the other extreme, only one. A defendant might then be sentenced on a factual basis completely at variance with the jury's findings. Transparency and fairness demand that the court be clear about what the jury decide.

Ease of prosecution should not be allowed to dominate considerations. The very nature of fraud dictates that the jury will often be asked to consider a series of transactions over an extended period of time. We consider it inevitable that this will be a longer and more complicated process than in a simple case. We believe that the jury should not be encouraged to skim over the detail. Rather, they need assistance in directing their attention to the individual issues as well as to the overall scheme. Each strand of evidence should be considered in a logical fashion.

This could be achieved in two ways : -

(1) a single count which is particularised in a coherent fashion so that , when the verdict is returned, a jury may be able to state what they find proven or not proven, or

(2) each matter to be delineated as the subject of an individual count.

We prefer option (2). We do not see that there is necessarily a problem with an indictment which contains a large number of counts where the individual counts are similar and closely related. The jury is presumed to give due consideration to each matter in their deliberations in any event. We are concerned that the proposal aims to foreshorten and simplify where, by the very nature of fraud, the allegation is not amenable to this sort of manipulation.

The existing rules of evidence, in our opinion, allow the prosecution to present their case in a coherent fashion and provide safeguards for the defendant. (see background evidence, similar fact evidence).

The existing law on duplicity and joinder of offences and offenders, likewise, are generous to the prosecution and give sufficient scope to present its case.

We agree with "the fundamental principle that you should not be sentenced for a crime that you have neither been convicted of nor admitted." R v Clark [1996] 2 Cr App R 282. The bar on sentencing for specimen counts may inconvenience the prosecution but is unavoidable in view of the core principle of the presumption of innocence enshrined in Article 6 ECHR. It is not possible to make the system more amenable to the prosecution without fundamentally undermining core principles.

### **Representation by conduct (Para 12)**

Liberty do not consider that there is any need to interfere with the legislation in this area. Section 15 Theft Act 1968 is sufficiently wide to allow for deception by words or conduct, express or implied. We believe that it is important that the requirement for a representation (express or implied) serves to exclude conduct which is not intended to deceive but has this incidental effect.

### **Imposing liability on another (Para 13)**

Liberty recognises that there is a clear need to address the widespread misuse of credit cards. We do not consider that fraudsters should escape liability for prosecution simply because they happen to land someone in debt rather than take money to which they are not entitled.

However we do not consider that the difficulties occasioned by credit card fraud warrant an intrusion into the private relationship between a bank and its customer. There is a real danger of criminalising those who have merely overspent on their account or have run up unauthorised overdrafts.

We believe that such conduct cannot properly be regarded as criminal and should not be treated as such. We are of the opinion that any such changes will have the incidental effect of criminalising the poorest members of society in order to protect the financial interests of the lending institutions.

We believe that under the law as it stands customers who obtain bank accounts by deception will be "caught" by other offences. Those who run up liabilities which they fail to meet will be pursued by the bank for payment in the Civil Courts. It is for the lending institutions to decide to whom they wish to lend and what risks they intend to take in this regard.

We propose that a special offence of imposing a liability in relation to payment cards or other electronic methods of payment with the proviso that the lawful card holder would be exempt from liability. This proposal would safeguard the position of the ordinary customer whilst imposing criminal liability upon cardholders whose cards have been withdrawn by the bank but who continue to use them. i.e. to obtain goods by telephone or on the Internet.

The commission expressed concern as to the difficulty this may create in relation to potential future technological developments (8.19). We recognise that technological developments are likely to present new challenges in all areas of the law. However we are of the opinion that future changes should be dealt with as they arise and there is no justification for drafting the legislation so widely as to catch those whose conduct is not currently regarded as criminal.

### **Obtaining services without deception (Para 14)**

Liberty agree that there is a need to deal comprehensively with the enormous potential for fraud which has been occasioned by the increased use of E trading. We believe that the

current law is sufficient to cover the majority of offences which are likely to arise since there is almost certainly a "human mind" which is deceived at some stage in the process. Whether the "human mind" in question cares very much about whether it has been deceived is another matter.

**Non disclosure ( Para 15)**

We agree with the Commission's proposal that non-disclosure should not count as deception.