



Ministry of
JUSTICE

Post-legislative assessment of the Fraud Act 2006

Memorandum to the
Justice Select Committee

June 2012



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Justice Select Committee

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

June 2012

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Introduction

1. This memorandum provides a preliminary assessment of the Fraud Act 2006 (2006 Ch. 35) and has been prepared by the Ministry of Justice for submission to the Justice Select Committee. It is published as required by the process set out in the document *Post-Legislative Scrutiny – The Government’s Approach* (Cm 7320).

Objectives of the Fraud Act 2006 (“the Act”)

2. The Act received Royal Assent on 8 November 2006. It was based mainly on the recommendations in the Law Commission’s *Report on Fraud* (Cm 5560) in 2002 and a Home Office consultation in May 2004 entitled *Fraud Law Reform*, which proposed reform on the basis that the deception-based offences in the Theft Acts 1968–78 were too specific, overlapped and were outdated.
3. The objectives of the Act were to clarify and modernise the law, and to make fraud law more straightforward for juries and practitioners. The offences contained in the Act were intended to provide law enforcers and prosecutors with a modern and flexible law of fraud capable of combating the increasing sophistication of fraudulent activity and the rapid technological advances made by fraudsters.
4. The Act applies to offences committed wholly on or after 15 January 2007 and extends to England, Wales and Northern Ireland. The deception offences contained in the Theft Acts 1968–78 remain applicable to any offence committed wholly or partly before that date.

Summary of the Act

5. The Act provides for a general offence of fraud (section 1), which can be committed in three different ways: by false representation (section 2), by failing to disclose information (section 3) and by abuse of position (section 4).
6. In each case, the defendant's conduct must be dishonest and his intention must be to make a gain or cause a loss, or the risk of a loss, to another. Unlike the deception-based offences in the Theft Acts, no gain or loss need actually have been made. The maximum sentence for each type of fraud is 10 years' imprisonment.
7. The Act also creates new offences of possessing articles for use in fraud (section 6), making and supplying articles for use in fraud (section 7), fraudulent trading (section 9), which only applies to those businesses beyond the reach of the fraudulent trading offence in the Companies Act 2006, and obtaining services dishonestly (section 11).

Implementation

8. The Act was commenced fully on 15 January 2007 by the Fraud Act 2006 (Commencement) Order 2006 SI 2006/3200.
9. Section 10 of the Act, which increased the maximum custodial sentence for fraudulent trading under companies legislation then in force to 10 years, was repealed by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 SI 2009/1941 with effect from 1 October 2009. The repeal was consequential upon the commencement of the Companies Act 2006, which provides for a maximum penalty of 10 years' imprisonment where a person is a party to a company's fraudulent trading.
10. The Crown Prosecution Service ('CPS') has published legal guidance on the Act. It provides guidance to prosecutors and caseworkers in relation to the new criminal offences and procedural issues, and is subject to the principles in the Code for Crown Prosecutors.
11. There was no secondary legislation made under the Act.

Preliminary assessment of the Act – an evaluation from key practitioners

12. To assess whether the 2006 Act is fulfilling its objectives we sought an evaluation from key practitioners responsible for prosecuting fraud cases in England and Wales. A joint response was received from the CPS (Central Fraud Group) and the Attorney General's Office. Responses were also received from the City of London Police ('COLP') and the Department for Works and Pensions ('DWP').

Has the Act simplified cases of fraud?

13. In their response to the evaluation the CPS advised that the Act has simplified fraud law. The offences are now easily understood by those involved in, and responsible for, the investigation of fraud. They felt the general offence "limbs" in section 1 of the Act are straightforward and the behaviour specified in section 2 (fraud by false representation), which account for the overwhelming majority of charges, successfully cover a broad range of fraudulent offending, and are easy to apply and understand.

Effective and diverse prosecutions

14. The Act has been very useful for the prosecution of fraud from investigation through to trial. COLP often investigate complex fraud cases involving thousands of documents, many of which are often deliberately confusing and designed to mislead the victim. They have been impressed with the simplicity and clarity of the reformed law on fraud and advise that the Act allows investigators to take prompt action to avoid further criminality. For instance the Act provided the Economic Crime Division within the COLP with the grounds to take action where a specific misrepresentation has been identified. For example:

'In a recent complex investment fraud causing a £1.75 million loss to the UK film industry. The investigator was able to cut through copious files and documents by focusing on the key documents that had been created to deceive. This provided the opportunity to charge the suspect, who was a long-term target of COLP, with a "simple" Fraud Act offence in respect of which it would be difficult to escape prosecution.'

15. The CPS has welcomed the broad span of offending covered by the Act. No longer having to prove a person was deceived, or suffered an actual loss, as in earlier legislation, has proved helpful to prosecutors. COLP reports that basing the offences on the **intention** of the defendant rather than on the established **outcome** has led, encouragingly, to increased consideration of early guilty pleas.

16. Practitioners generally report that guilt in respect of the new offences under the Act seems to be more readily admitted than for the former deception offences. For example, it appears that in the context of revenue offences, defendants are more willing to plead to a Fraud Act 2006 charge than to an alternative charge such as the common law offence of cheating the revenue.
17. Prosecutors are making use of all the offences in the Act. They have indicated that the Act provides a comprehensive suite of offences for a diverse range of cases. For example, the CPS has successfully used section 6 of the Act to prosecute offenders for recording films in cinemas, which has avoided the need to amend the criminal law to introduce offences to target that specific mischief. Further, COLP report that the Act is being considered as a means to prosecute a wide range of criminal activity including wine scams, land banking, a development scam in which investors are sold worthless plots of land, investment fraud, data theft and charity scams.

Challenges of developing technology

18. Practitioners agree the Act has proved valuable in respect of a variety of technology-related criminality, such as that relating to credit cards, PIN entry devices, internet frauds and “phishing”, and is flexible enough to respond to emerging types of criminality. COLP reports that the Act has met the challenges posed by developments in technology and internet crime. In its role as the national lead force for intellectual property (‘IP’) crime, COLP praised the Act and observed that the Act “has enabled the IP industry to report crime as fraud rather than before where the infringement of copyright or trading standards regulations were the only route forward for the industry.”
19. The CPS reports that cases brought under the Act tend to be disposed of more quickly than other types of cases involving fraud. All practitioners agree that it would be difficult to assess overall resource savings, but that a significant increase in guilty pleas, simplification of the offences and investigation of fraud indicate a productive use and considerable saving of resources.

New offences in the Fraud Act 2006

20. Feedback received from practitioner’s show that the new offences in the Act are proving to be useful.
21. The CPS has provided a snapshot of how the new offences have been used.
22. Section 6 – Possessing article for use in frauds. There were more than 2000 charges brought by the CPS under this section in 2010. With criminals often reluctant to dispose of computer hard drives, which may contain fraudulent data such as cloned credit cards, mobile phones, SIM cards and name badges, the new offence has enabled the CPS to

prosecute a person who is in possession of this type of data on a computer.

23. Section 7 – Making/supplying articles for use in frauds. There were 284 charges for this offence in 2010. This may appear a small number but it is significant as the CPS have used the offence in serious credit card frauds and PIN entry device cases. The offence is also available where hard drives contain preparatory documents and where victims fail to assist in the investigation.
24. Section 9 – Fraudulent trading. There were 14 cases recorded for 2009. This section has recently been used to obtain a conviction in relation to a banking facility that was established to provide a service to fraudsters.
25. Section 11 – Obtaining services dishonestly. On average there are between 305 and 446 charges a year for this offence.

Legal issues: conspiracy to defraud

26. Responses concerning the use of the common law offence of conspiracy to defraud were based on the experience of prosecutors, including those in the Serious Fraud Office.
27. The Law Commission's report, on which the Act is based, recommended that the common law offence of conspiracy to defraud should be abolished. The majority of those who expressed their views in response to the Home Office's consultation on this particular point were opposed to abolition. They had serious practical concerns about the ability to prosecute multiple offences and the largest and most serious cases of fraud. There were also concerns that limitations to the scope of statutory conspiracy meant that certain types of secondary participation in fraud might still only be caught by the common law charge. It was against this background that the previous Government took the decision to retain common law conspiracy to defraud. This was outlined at paragraph 6 of the Explanatory Notes to the Act.
28. Those opposed to repeal included those involved with various aspects of fraud prosecutions such as senior Appeal Court Judges, the CPS, the Serious Fraud Office, the Association of Chief Police Officers, the Fraud Advisory Panel, the Law Society, the British Bankers Association, the Confederation of British Industry and the NHS Counter Fraud and Security Management Service.

29. It was against this background that the previous Government concluded that immediate abolition of conspiracy to defraud would create considerable risks for the effective prosecution of fraud. The Government decided to consider the abolition of the offence as part of this review of the operation of the Act.
30. We have addressed this issue as part of this evaluation process. We asked practitioners for views on the continuing value of the common law conspiracy to defraud offence and whether behaviour currently prosecuted as conspiracy to defraud could be dealt with instead under the Fraud Act 2006.

City of London Police

31. COLP reported a number of cases where the offences under the Act would not have fully addressed the size and complexity of the criminality concerned. An example being:
- Operation Soundwave involved an investigation into a Spanish run fraud with suspects in Spain, Sweden and the North of England. 12 suspects were arrested. While their actions could be prosecuted under the Fraud Act, the full criminal activity would not have been demonstrated to the court without a global **conspiracy to defraud** charge.

Department for Work and Pensions

32. The Department for Work and Pensions continues to prosecute the common law offence of conspiracy to defraud. They report that where one or more persons have conspired to defraud the department, the interests of justice may be best served by selecting a conspiracy offence in preference to an offence under the Act. They, like COLP, report that the Act would not provide the court with an accurate picture of the complexity of the offending in these cases.

Joint response from the Attorney General's Office, the Crown Prosecution Service and the Serious Fraud Office

33. The conspiracy to defraud offence is enabling prosecutors to present a case more effectively than would be possible under the Fraud Act alone in certain circumstances, and it is considered an essential adjunct to that Act. Conspiracy to defraud allows the agreement that is the essence of the conspiracy to be reduced to one, short, well drafted count that reflects the totality of the criminal enterprise. That in turn enables the case to be effectively presented before a court.
34. The conspiracy to defraud offence provides the courts with an overall picture encompassing a broader range of criminal behaviour than would be possible with a series of statutory conspiracy offences. It also avoids severance into several trials in which relevant evidence in one trial may be held inadmissible in another.

35. There may be cases where the interests of justice can only be served by presenting to a court an overall picture which cannot easily be achieved by charging a series of substantive offences or statutory conspiracies. Typically, such cases will involve some, but not necessarily all of the following:

- evidence of several significant but different kinds of criminality;
- several jurisdictions;
- different types of victims, e.g. individuals, banks, web site administrators, credit card companies;
- organised crime networks.

The presentation of such cases as statutory conspiracies could lead to:

- large numbers of separate counts to reflect the different conspiracies;
- severed trials for single or discrete groups of conspiracies;
- evidence in one severed trial being deemed inadmissible in another.

36. The conspiracy offence facilitates the prosecution of complex and serious offences such as mortgage fraud, multi-million pound bank frauds, 'insider' frauds, boiler room frauds where investors are tricked into buying shares in underperforming or fake companies (often involving hundreds of victims and millions of pounds obtained from vulnerable victims), and the new trend of 'cash for crash' road traffic frauds costing millions to the motor insurance industry. The general view is that the Fraud Act could not effectively replace conspiracy in bigger cases, especially multi-jurisdictional investment frauds as the offence of conspiracy to defraud captures the entire criminality of all the defendants and enables the prosecution to convey the full story of the fraud and all the parties involved. Importantly, this ensures that the jury knows all the facts and fully understands the role of each defendant in the fraud.

37. The response shows that conspiracy to defraud is usually charged where it more clearly and accurately reflects the gravity of the offending, for example where multiple defendants are engaged in a fraudulent course of conduct; where the statutory offences (or statutory conspiracies) would otherwise lead to difficulties in presenting an overall picture of the offending; where it may avoid an overloaded indictment or procedural and evidential difficulties arising from issues of jurisdiction; and where there are different kinds and levels of criminality.

38. In short, the common law offence of conspiracy to defraud is thought still to be essential.

39. Conspiracy to defraud also captures:

- Fraud where there is no economic loss or gain involved – such as **R. v Moses and Ansbro** [1991] Crim L.R. 617, where the suspects facilitated access to items such as passports for ideological purposes, not gain or loss; and **R. v. Rigby and Bailey**, *The Times*, August 23, 2006, CA – a case involving trader deception, where no economic loss or gain could be proved.
- Agreements where there is more than one objective or which are designed to commit more than one offence.

40. The Attorney General's guidance on the use of the common law offence of conspiracy to defraud (2007) set the standard for the use of the offence. It has resulted in additional care being exercised by prosecutors and increased scrutiny of charging decisions by experienced lawyers.

Conclusion

41. We have carefully considered the evidence provided by those we consulted in this review. Our overall assessment of the Act is that it has been successful in achieving its initial objectives of modernising the former array of deception offences. It provides a clear statutory basis for fraud offences, targets complex fraud and introduces new offences specifically designed to assist in the prosecution of technology focused crime.

42. With regard to conspiracy to defraud, taking account of the comments and experience provided by the key prosecution practitioners, we have concluded that this offence continues to be an effective and essential tool in combating fraud. This is particularly pertinent where there are various levels of criminal activity involved and the court would not otherwise be aware of the full extent of criminality involved.

43. Whilst it would be possible to consider codifying the common law offence in statute, the evidence strongly suggests that the current situation is working perfectly satisfactorily and therefore we have concluded that we should leave matters as they are.



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