

# **Guidance on the use of the common law offence of conspiracy to defraud**

## **Summary**

1. This guidance concerns the issues which the Attorney General asks prosecuting authorities in England and Wales to consider before using the common law offence of conspiracy to defraud, in the light of the implementation of the Fraud Act 2006. It may be supplemented by Departmental-specific guidance issued by individual Directors of the prosecuting authorities.

## **Background**

2. When the Fraud Act 2006 comes into force on 15 January 2007, the prosecution will be able to use modern and flexible statutory offences of fraud. The 2006 Act replaces the deception offences contained in the Theft Acts 1968-1996 with a general offence of fraud that can be committed in three ways:

- fraud by false representation;
- fraud by failing to disclose information; and
- fraud by abuse of position.

It also introduces other offences which can be used in particular circumstances, notably:

- new offences to tackle the possession and supply of articles for use in fraud; and
- a new offence of fraudulent trading applicable to sole traders and other businesses not caught by the existing offence in section 458 of the Companies Act 1985.

3. The new offences are designed to catch behaviour that previously fell through gaps in the Theft Acts and could only be prosecuted as conspiracy to defraud. Indeed the Act is based on a Law Commission report (Cm 5560) which also recommended the abolition of the common law offence of conspiracy to defraud. The argument is that the offence is unfairly uncertain, and wide enough to have the potential to catch behaviour that should not be criminal. Furthermore it can seem anomalous that what is legal if performed by one person should be criminal if performed by many.
4. However, consultations showed a widespread view in favour of retention of common law conspiracy to defraud, and the Government decided to retain it for the meantime, but accepted

the case for considering repeal in the longer term. Whether there is a continuing need for retention of the common law offence is one of the issues that will be addressed in the Home Office review of the operation of the Fraud Act 2006, which will take place 3 years after its implementation.

5. In 2003, 14,928 defendants were proceeded against in England and Wales for crimes of fraud; 1018 of these were charged with the common law crime of conspiracy to defraud of which 44% were found guilty (compared with 71% for the statutory fraud offences). The expectation now is that the common law offence will be used to a significantly lesser extent once the Fraud Act 2006 has come into force.

#### **Issues to be considered in using the common law offence**

6. In selecting charges in fraud cases, the prosecutor should first consider:
  - whether the behaviour could be prosecuted under statute – whether under the Fraud Act 2006 or another Act or as a statutory conspiracy; and
  - whether the available statutory charges adequately reflect the gravity of the offence.
7. Statutory conspiracy to commit a substantive offence should be charged if the alleged agreement satisfies the definition in section 1 of the Criminal Law Act 1977, provided that there is no wider dishonest objective that would be important to the presentation of the prosecution case in reflecting the gravity of the case.
8. Section 12 of the Criminal Justice Act 1987 provides that common law conspiracy to defraud may be charged even if the conduct agreed upon will involve the commission of a statutory offence. However, Lord Bingham said in *R v Rimmington and R v Goldstein* [(2005) UKHL 63]:

*“I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, **but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.**”*

9. In the Attorney General's view the common law charge may still be appropriate in the type of cases set out in paragraphs 12 – 15, but in order to understand the circumstances under which conspiracy to defraud is used **prosecutors should make a record of the reasons for preferring that charge.**

### **Records of decisions**

10. Where a charge of common law conspiracy to defraud is proposed the case lawyer must consider and set out in writing in the review note:
- how much such a charge will add to the amount of evidence likely to be called both by the prosecution and the defence; and
  - the justification for using the charge, and why specific statutory offences are inadequate or otherwise inappropriate.

Thereafter, and before charge, the use of this charge should be specifically approved by a supervising lawyer experienced in fraud cases. Equivalent procedures to ensure proper consideration of the charge and recording of the decision should be applied by all prosecuting authorities in their case review processes.

11. Information from these records will be collected retrospectively for the review to be conducted in 3 years. It will enable the identification of where and why the common law offence has been used. It could then also form the basis for any future work on whether, and if so how, to replace the common law or whether it can simply and safely be repealed. It is expected that in 3 years the Government will be able to review the situation in the light of the practical operation not only of the new fraud offences, but of other relevant changes. These include the Lord Chief Justice's protocol on the control and management of heavy fraud cases, and the sample count provisions in the Domestic Violence, Crime and Victims Act 2004. Any actual or proposed changes to the law on assisting and encouraging crime in the light of the Law Commission's study of that issue [*Cm 6878, published in July 2006*] will also be taken into account.

### **A Conduct that can more effectively be prosecuted as conspiracy to defraud**

12. There may be cases where the interests of justice can only be served by presenting to a court an overall picture which cannot 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.
13. The proper 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.
14. If so, the consequences might be that no one court would receive a cohesive picture of the whole case which would allow sentencing on a proper basis. In contrast a single count of common law conspiracy to defraud might, in such circumstances, reflect the nature and extent of criminal conduct in a way that prosecuting the underlying statutory offences or conspiracies would fail to achieve.

**B Conduct that can only be prosecuted as conspiracy to defraud**

15. Examples of such conduct might include but are not restricted to agreements to the following courses of action:
- The dishonest obtaining of land and other property which cannot be stolen such as intellectual property not protected by the Copyright, Designs and Patents Act 1988 and the Trademarks Act 1994, and other confidential information. The Fraud Act will bite where there is intent to make a gain or cause a loss through false representation, failure to disclose information where there is a legal obligation to do so, or the abuse of position;
  - Dishonestly infringing another's right; for example the dishonest exploitation of another's patent in the absence of a legal duty to disclose information about its existence;
  - Where it is intended that the final offence be committed by someone outside the conspiracy; and

- Cases where the accused cannot be proved to have had the necessary degree of knowledge of the substantive offence to be perpetrated;



**HER MAJESTY'S ATTORNEY GENERAL**

**Dated this** 9<sup>th</sup> **day of January 2007**

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