

General Dishonesty

Introduction

- 2.1 There have been no submissions to this inquiry expressing opposition to the presence of the offence of general dishonesty in this Bill. Despite this, the Committee has some concerns about the potential misuse of this proposed offence.
- 2.2 Before discussing these concerns, however, it is helpful to give some explanation as to the nature of the proposed offence of general dishonesty.
- 2.3 The offence is set out in proposed s.135.1 of the Bill and covers three sub-offences:
- 1) doing anything with the intention of dishonestly causing a loss to the Commonwealth or the obtaining of a gain from the Commonwealth (135.1(1) and (3));
 - 2) doing anything that dishonestly causes a loss to the Commonwealth, knowing or believing the loss will occur or that there is a substantial risk of the loss occurring (135.1(5)); and
 - 3) doing anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official (135.1(7)).
- 2.4 The definition of 'dishonesty' for this general dishonesty offence is set out in proposed s.130.3:

130.3 Dishonesty

For the purpose of this Chapter, dishonest means:

- (a) dishonest according to the standards of ordinary people;

and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

- 2.5 This definition is the same as that applying to all the offences in the Bill using the word dishonesty. The definition is based on the definition of dishonesty in the Model Criminal Code.¹ This in turn is based on the definition of dishonesty in the UK Court of Appeal case of *Ghosh*.² Hence, the test is often known as the ‘*Ghosh* test’ of criminal dishonesty.
- 2.6 In that case the court explained this two step test as follows:
- ...a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.
- If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.³
- 2.7 The Court also explained that if the jury found that the defendant’s actions were clearly dishonest by these standards, the jury might easily infer that the defendant knew that he or she was acting dishonestly.⁴
- 2.8 Since its formulation the *Ghosh* test has been used in the Commonwealth jurisdiction in regard to the offence of conspiracy to defraud and the current general dishonesty offence in s.29D of the *Crimes Act 1914*,⁵ both of which apply common law tests of dishonesty.⁶
- 2.9 In February 1998, the High Court handed down its decision in *Peters v R*.⁷ Under the ‘*Peters* test’, conduct is criminally dishonest if the fact-finder concludes that ‘ordinary, decent people’ would consider the conduct to be dishonest. The test is therefore a purely objective test of criminal dishonesty that rejects in some measure the *Ghosh* test, but which retains some reference to ordinary community standards.⁸

1 *Exhibit No. 11*: MCCOC, Chapter 3, p. 10

2 [1982] 3 WLR 110

3 *Ibid* at 118-9

4 *Ibid*

5 The general dishonesty offence in the Bill will replace s.29D. See Explanatory Memorandum, Schedule 2, Part 1, Item 149

6 Explanatory Memorandum, p. 25

7 (1998) 192 CLR 493

8 *Exhibit No. 13*: Alex Steel, ‘The Appropriate Test for Dishonesty’, (Feb. 2000) *Criminal Law Journal*, vol. 24, p. 47

- 2.10 Despite *Peters* taking a different approach to defining dishonesty than *Ghosh*, in the absence of submissions expressing opposition to the way dishonesty is defined in the Bill and in light of the Committee's own consideration of the matter, the Committee accepts the Bill's definition of dishonesty.

The Committee's concerns

- 2.11 Turning to the Committee's concerns, the current maximum penalty for general dishonesty under s.29D of the *Crimes Act 1914* is ten years. Under the proposed general dishonesty offence in the Bill this will be reduced to five years. The Committee is concerned that the reduced penalty, combined with the fact that it is a general offence, may tempt prosecutors to use general dishonesty as a 'catch-all' offence. That is, it may be used to catch dishonest conduct that does not fall neatly into one of the more specific offences and which society may not expect to be subject to a criminal charge.⁹
- 2.12 A representative from the office of the Commonwealth Director of Public Prosecutions (DPP) noted that 'there could be some force' to the Committee's arguments about the potential negative effects of reducing the maximum penalty for general dishonesty. He stated that the DPP had not wanted to reduce the maximum penalty but accepted a five-year penalty in order to keep the offence, which it considered absolutely necessary, on the statute books.¹⁰

The DPP prosecution guidelines

- 2.13 The Attorney-General's Department and the DPP, however, gave the impression to the Committee that the DPP would seek to ensure by its prosecution guidelines that the proposed general dishonesty offence would not be abused.¹¹

9 *Transcript*, pp. 24-25

10 DPP, *Transcript*, pp. 24-25. The rationale that the Attorney-General's Department gave for reducing the penalty for general dishonesty in the Bill is that the offence of obtaining by deception in the Bill has a maximum penalty of 10 years. On this basis, they argued that general dishonesty should have a lesser maximum penalty, as it is easier to make out a case of general dishonesty than fraud. General dishonesty, for instance, does not require the proof of a deception. The DPP did not agree with this reasoning, however, as a basis for reducing the maximum penalty. See *Transcript*: AG's, p. 9 and DPP, p. 27

11 AG's, *Submissions*, p. S2; AG's, *Transcript*, pp. 13-14; DPP, *Transcript*, pp. 21, 26, 28, 32; DPP, *Submissions*, pp. S20-22

The Prosecution Policy Statement

- 2.14 The general DPP prosecution guidelines are set out in the DPP's Prosecution Policy Statement.¹² These guidelines contain guidance for prosecutors about when to charge someone, and if so, with what offence(s).¹³
- 2.15 The DPP acknowledged that the guidelines in this Statement would have to be amended to take account of the proposed new codified general dishonesty offence with its reduced five-year maximum penalty.¹⁴
- 2.16 The Committee asked the DPP whether it might provide it with a copy of the amended Prosecution Policy Statement.¹⁵ The DPP indicated that it could not do this as it had as yet not given thought to precisely how these guidelines would be amended.¹⁶ The DPP did, however, note that changes to this Statement may well be limited to 'reflecting the fact that many of the offences of general application [that is, general dishonesty] would now be contained in the *Criminal Code*'¹⁷ and not in the *Crimes Act*. This remark seems to suggest that the changes to this Statement may not be substantial.
- 2.17 On this basis, it may perhaps be helpful to look at the current prosecution guidelines in this Statement to determine whether they would adequately deal with the Bill's proposed general dishonesty offence, or whether they would lead to the possibility that this offence may be used by prosecutors to lay charges in situations where many would consider it inappropriate.
- 2.18 The basic principle that these guidelines set out for prosecutors in regard to charging is in paragraph 2.19, where it says that '[I]n the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence...'¹⁸
- 2.19 Even after satisfying himself or herself that the evidence is sufficient to justify the institution of a prosecution (the initial question), and before charging, the prosecutor still has the discretion to decide not to charge if he or she considers that the public interest would not require a prosecution to be pursued.¹⁹ So, despite the existence of evidence satisfying the elements of the offence of general dishonesty, he or she

12 *Exhibit No. 1: Commonwealth DPP, Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process, 1998, (Prosecution Policy Statement).*

13 DPP, *Submissions*, p. S20

14 DPP, *Transcript*, pp. 26, 32; DPP, *Submissions*, p. S20-22

15 *Transcript*, p. 13

16 DPP, *Transcript*, p. 26

17 DPP, *Submissions*, p. S21

18 *Exhibit No. 1: Prosecution Policy Statement*, p. 8

19 *Exhibit No. 1: Prosecution Policy Statement*, p. 5, paragraph 2.8

could decline to lay a charge, or decline to lay a charge of general dishonesty, and charge an offence with a lesser maximum penalty.²⁰

- 2.20 Some of the factors that a prosecutor may use to help him or her make this decision on whether there is a public interest to prosecute or not are set out in paragraph 2.10 of the Statement. These factors include:
- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;...
 - (g) the effect on public order and morale;...
 - (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;...[and]
 - (m) whether the alleged offence is of considerable public concern;
- 2.21 So, from the general guidelines in the Prosecution Policy Statement, the decision on whether or not to prosecute someone for general dishonesty is left to the prosecutor, who is given the discretion to decide what weight to be given to each of the factors in 2.10. The guidelines also state that the application and weight to be given to any of the factors in 2.10 will depend on the particular circumstances of each case. In the Committee's view, more specific guidance as to the use of the general dishonesty offence is required.

The internal DPP guidelines

- 2.22 Apart from these general guidelines in the Public Policy Statement, there are however, a number of internal guidelines of a more specific nature which prosecutors must follow in deciding when and with what offence to charge someone. It may be suggested then that, even if the general guidelines in the Prosecution Policy Statement are not enough to ensure the appropriate future application of the proposed general dishonesty offence, then these more specific internal guidelines will, or at the very least, suitably amended versions of these internal guidelines will do so.
- 2.23 These internal guidelines are not public documents. The DPP did, however, provide the Committee with one example of these internal guidelines that is of particular relevance to general dishonesty in the area of social security. These guidelines (the 'social security guidelines') apply to cases involving the obtaining of social security benefits to which there is no entitlement. They apply to such cases where the available evidence will support charges under both the *Social Security Act 1991* and one or more of the offences of general application in the *Crimes Act 1914*.²¹

20 See proposed s.135.2

21 DPP, *Submissions*, p. S20

- 2.24 The DPP noted that these social security guidelines would be re-written so as to cover the offences of general application (that is, general dishonesty) in the Bill.²²
- 2.25 Secondly, the DPP indicated that the new social security guidelines would state a preference for charging someone with one of the *Social Security Act 1991* offences instead of the general application offences in the *Criminal Code* (the Act in which the Bill's offences will be contained). The guidelines would state, however, that resort could be made to the general application offences in the *Criminal Code* if the prosecutor decides that the offences in the *Social Security Act 1991* do not adequately reflect the serious nature and extent of the criminal conduct disclosed by the evidence.²³
- 2.26 The DPP did not, however, indicate what factors the prosecutor could use to determine this question. The current factors in the social security guidelines for determining the same question in regard to the *Crimes Act 1914* offences should therefore be considered. In assessing whether criminal conduct is serious enough so as to require a charge under one of the general application *Crimes Act 1914* offences, rather than one of the *Social Security Act 1991* offences, factors to be considered include:
- (i) whether it is alleged that the claim for a pension, benefit etc was fraudulent from the outset, rather than a failure to disclose some change in circumstances which would have reduced or eliminated entitlement;
 - (ii) the amount it is alleged was unlawfully obtained, and the period over which the alleged offences occurred;
 - (iii) the use of forged documentation, a false address or misleading identity;
 - (iv) the income received by the alleged offender or that person's spouse or de facto over the relevant period;
 - (v) changes over the relevant period in the asset position of the alleged offender, that person's spouse or de facto, or children; [and]
 - (vi) whether the alleged offender has previous convictions for dishonesty, particularly for similar offences.²⁴
- 2.27 Finally, the DPP gave the impression that the new social security guidelines would state that if the prosecutor decided that charges under

22 DPP, *Submissions*, p. S21. Although of course the offences in the Bill will replace their equivalent offences in the *Crimes Act 1914*, which will be repealed upon enactment of the Bill.

23 DPP, *Submissions*, p. S21

24 *Exhibit No. 1*: See paragraph 6.13.1 of the internal social security guidelines

the *Social Security Act 1991* were inadequate to reflect the criminal conduct disclosed by the evidence, ordinarily the appropriate course would be for him or her to charge the general application offence of obtaining property by deception, leaving it to the court to determine the seriousness of the conduct in the sentence it imposes.²⁵ Where, however, charges of obtaining property by deception are not available in the particular circumstances of the case, the prosecutor could charge the offence of general dishonesty instead.²⁶

Conclusion

- 2.28 The information provided by the DPP on how its future prosecution guidelines would deal with the offence of general dishonesty does not entirely satisfy the Committee that this offence will necessarily be applied appropriately. The Committee remains concerned about this issue. This is not to suggest that the Committee is of the view that the guidelines would not have the potential to provide reassurance on the subject but the information provided by the DPP is not sufficient for the Committee to conclude this.
- 2.29 The Committee has decided, in these circumstances, that it cannot support the enactment of the offence of general dishonesty until both the Committee and the Attorney-General have been assured that the DPP's prosecution guidelines can be adequately amended to take account of the breadth and nature of this offence.

Recommendation 1

- 2.30 **The Committee recommends that the offence of general dishonesty in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999* not be proclaimed until the Attorney-General and the Committee are satisfied by the Director of Public Prosecutions that prosecution guidelines will ensure the proposed offence of general dishonesty will be applied appropriately.**

25 The DPP acknowledged that such an approach would represent a departure from its existing practice in which its 'assessment of the criminality of the alleged offender is reflected in the charges laid'. See DPP, *Submissions*, p. S22

26 DPP, *Submissions*, p. S22