

Fraud in Scotland

AN INTRODUCTION TO UK LEGISLATION | JULY 2020 | FOURTH EDITION

The way in which criminal fraud is defined, investigated and prosecuted differs across the UK. This guide explains how fraud is usually dealt with under the criminal law in Scotland.



OVERVIEW OF THE LAW

In Scotland criminal fraud is mainly dealt with under the common law and a number of statutory offences. The main offences are:

- common law fraud;
- uttering;
- embezzlement; and
- statutory frauds.

It is important to note that the Fraud Act 2006 **does not** apply in Scotland.

WHEN IS AN OFFENCE COMMITTED?

Common law fraud

Common law fraud is the common 'catch all' for most fraud prosecutions in Scotland.

Fraud is committed when someone achieves a practical result by the means of an intentional false pretence or dishonest misrepresentation. In other words, where a deliberate deception is used to cause someone to do something they would not otherwise have done. There must be a causal connection between the deception and the practical result.

The range of false pretences observed in Scottish courts is incredibly wide, from outright lies to implied representations or suggestions of something which was untrue, including silence as to the truth in certain circumstances. An omission can be sufficient if the accused is under a duty to make a representation.

The false pretence must have a 'practical result'. Any practical result will suffice. There is no minimum requirement of loss for the offence, nor is there any need for the perpetrator to have gained as a consequence.

If the practical result is not achieved there may be a prosecution for attempted fraud.

Uttering

The crime of 'uttering' occurs when someone tenders 'as genuine' a forged document to the prejudice of another person. Forging a document only becomes a crime if it is shown to have been tendered (to an individual or the public at large) with an intention to defraud/cause someone prejudice.

In many cases, uttering and fraud are interchangeable offences that can equally apply to the same circumstances, but prosecutors tend to proceed with an uttering charge if a forged document is used.

Embezzlement

Embezzlement is the dishonest appropriation of property without the consent of the owner where the appropriation is by a person who has received a limited ownership of the property, subject to restoration at a future time, or possession of property subject to liability to account for it to the owner.

There is an element of breach of trust in embezzlement, making it more serious than simple theft. In most cases embezzlement involves the appropriation of money.

Statutory frauds

In addition there is a wide range of statutory offences which are closely related to the common law offence. The main examples can be found in the following statutes:

- Bankruptcy (Scotland) Act 2016;
- Business Protection from Misleading Marketing Regulations 2008;
- Companies Act 2006;
- Computer Misuse Act 1990;
- Consumer Protection from Unfair Trading Regulations 2008;
- Criminal Justice and Licensing (Scotland) Act 2010 (articles for use in frauds);
- Financial Services and Markets Act 2000 (to protect investors);

- Food Safety Act 1990 (labelling and substandard food);
- Forgery and Counterfeiting Act 1981 (counterfeiting of bank notes and coins);
- Insolvency Act 1986; and
- Weights and Measures Act 1985.

If you are ever in doubt about whether conduct falls within the scope of the legislation, always seek appropriate legal advice.

CIVIL FRAUD

Fraud can also feature in a civil context as a delict (the Scots law equivalent of tort) allowing recovery of loss, for example where a party is induced to enter into a contract through fraudulent misrepresentation. As with criminal fraud, the false statement must be made with the relevant intention; however, unlike for the crime of fraud, recklessness or negligence can be sufficient for civil fraud if the person making the representation does not positively know the statement to be true.

REPORTING CONCERNS

Allegations of fraud can be reported to Police Scotland by calling 101. For UK-wide frauds, a report can be made to **Police Scotland** or to **Action Fraud** (the UK's national reporting centre for fraud and cybercrime).

Generally there is no obligation on anyone to report a suspected crime in Scotland. However, the **Criminal Justice and Licensing (Scotland) Act 2010** requires a person (or a company) who knows or suspects (where that knowledge or suspicion originates from information obtained in the course of employment or business, or from a close personal relationship) that another person is involved in serious organised crime to report this to Police Scotland. Failure to do so is an offence.

Serious organised crime is defined as a crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit one or more serious offences. Certain acts of fraud may meet this definition.

If you are the victim of fraud in the course of business or receive or acquire information in the course of business that leads you to know or suspect that another person is or has been involved in fraud, you should seek professional legal advice to assist you in determining whether you are required to make a report to the police.

INVESTIGATING FRAUD

Frauds committed in Scotland are usually investigated by Police Scotland, which has regional specialist units within its Specialist Crime Division to deal with complex economic crime cases.

Serious and complex fraud and other economic crimes are investigated under the direction of the Economic Crime Unit, part of the Serious Organised Crime Division of the **Crown Office and Procurator Fiscal Service** (COPFS), which is Scotland's prosecution service. In these cases the Lord Advocate (the ministerial head of the COPFS) may exercise powers under ss27 and 28 of the **Criminal Law (Consolidation) (Scotland) Act 1995** to authorise a nominated investigator to compel the production of documents and to require a person to answer questions and to provide information. These powers are similar to the **Serious Fraud Office's** s2 powers.

For UK-wide frauds, both the English, Scottish and/or Northern Irish authorities will have concurrent jurisdiction and it will very much depend on the nature of the crime and the level of local involvement as to who leads the investigation.

PROSECUTING FRAUD

The sole prosecuting authority is the COPFS. Most fraud prosecutions are dealt with by the local Procurator Fiscal who has a duty to consider the evidence available to them and make further enquiries as necessary. They may choose to pass any crimes considered serious enough onto the Economic Crime Unit, which has primary responsibility for the investigation and prosecution of serious fraud and economic crimes.

The SFO does not have jurisdiction to prosecute in Scotland, although its powers under s2 of the **Criminal Justice Act 1987** may be used for the purpose

MAIN FEATURES

Criminal offences	Common law fraud Uttering Embezzlement Other statutory frauds
Reporting fraud	Police Scotland
Investigating authorities (main)	Police Scotland
Prosecuting authorities (main)	Crown Office and Procurator Fiscal Service
Sentencing	
Summary conviction	Up to 12 months imprisonment or a fine up to the prescribed sum or both
Conviction on indictment	Up to life imprisonment or unlimited fine or both

of investigating a serious or complex fraud which is prosecutable in England, Wales or Northern Ireland. It also works with Scottish authorities in relation to UK-wide fraud.

PENALTIES AND COMPENSATION

Cases are heard by a Sheriff, a Sheriff and jury, or in the High Court.

- A summary complaint is used for less-serious crime and is heard by a Sheriff sitting without a jury. The maximum penalty on conviction is imprisonment for up to 12 months and/or a fine up to the 'prescribed sum', which is currently £10,000.
- An indictment is used for more serious crimes. The case will proceed either with a Sheriff (lower-level judge) and jury or in the High Court. If a prosecution is successful, the maximum penalty at Sheriff and jury level is an unlimited fine and/or imprisonment of up to five years subject to any wider power granted by statute for particular offences. In addition, following conviction in the Sheriff Court, the Sheriff may remit the case to the High Court for sentencing should the Sheriff consider their powers of sentencing to be inadequate for the crime committed. The maximum penalty at the High Court is an unlimited fine and/or life imprisonment subject to any restrictions imposed by statute.

The Court can order the convicted person to pay compensation to the victim under the **Criminal Procedure (Scotland) Act 1995**.

The Court can also use its powers under the **Proceeds of Crime Act 2002** to confiscate from the convicted person a fixed sum of money relating to the

benefit obtained from their criminal conduct. Sums recovered are then paid into the Scottish Consolidated Fund.

It is important to note that where insufficient evidence exists to commence a criminal prosecution, a case may be referred to the Scottish Government's Civil Recovery Unit for legal action to be taken to recover the proceeds of crime through civil recovery.

PRACTICAL DIFFERENCES TO OTHER PARTS OF THE UK

One important difference in criminal law between England and Scotland is that Scottish courts require 'corroboration' of evidence (that is, two independent sources of evidence pointing to the crime having been committed). In most fraud cases this is unlikely to make a practical difference, and in both jurisdictions businesses should seek to identify and retain as much information as they can in order to assist a successful prosecution.

FURTHER INFORMATION

See the **resources** section of our website.

This helpsheet was kindly reviewed and updated by Tom Stocker and Alistair Wood at Pinsent Masons LLP.

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