

## THE LEGCO PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES MEETING ON 17 NOVEMBER 1998

### Submissions by the Law Society

The Society's Criminal Law & Procedure Committee has submissions on the Prosecution Policy and the Theft (Amendment) Bill as follows:

#### ~~II A Year to the Day – Statement issued by the Director of Public Prosecutions~~

The Committee notes the DPP's statement that there are legitimate public interest reasons for prosecution work to be briefed out to the private sector and is of the view that practitioners of *both branches of the profession* are equally competent to act as prosecutors on fiat. Therefore, the allocation of this work should be conducted in an even-handed and transparent manner.

#### IV Creation of a new rank of Chief Court Prosecutor in the Department of Justice

As the Society does not have sufficient information or material on why the post is required, the qualifications expected of the candidate and the function and scope of duties involved, the Committee cannot comment on the proposal.

#### V. Prosecution Policy

The Committee believes that the information contained in the booklet "*Prosecution Policy*" will serve as a good yardstick to all personnel who act as decision-makers in the prosecution process. However, it is important to bear in mind the distinct roles to be played by the prosecutors and investigators of crimes. Care must be exercised to ensure that the guidelines would not affect the investigation work of all those in the law enforcement bodies who are solely involved in the investigation process, i.e. ICAC, Custom & Excise Department. For this reason, the Committee takes the view that the booklet should be distributed to the head of such bodies for reference purpose only but ~~not as a guidebook for their investigative personnel~~.

#### IV THEFT (AMENDMENT) BILL

The Committee has reviewed the November 1998 Information Paper submitted by the Legal Policy Division of the Department of Justice on "*Creation of a Substantive Offence of Fraud*" and will elaborate its stance on the issue.

In Paragraph 11 of the Information Paper, the Law Society is stated as supporting the recommendations of the Law Reform Commission (LRC). In this respect, it is useful to note the background of the present proposal.

## **Background**

Consultation on the subject dates back to 1995 when the LRC issued a Consultation Paper whereby the defects of the existing offences relating to fraudulent behaviour under both the Theft Ordinance and the common law offence of conspiracy to defraud were highlighted. The Consultation Paper recommends the creation of a new offence of fraud and the abolition of the common law offence of conspiracy to defraud. The paper also proposes the new statutory offence to be constituted where a person by deceit induced another to commit an act or make an omission resulting in *prejudice* to a person other than the fraudster, or *benefit* to the fraudster. The proposal then is that the two elements of “*prejudice*” or “*benefit*” should not be restricted to financial or proprietary gain or loss.

As a result of responses received through the consultation process and concern expressed by various interested bodies concerning the ambit of the new statutory offence, the proposal was revised and reflected in LRC’s Report (“the Report”) in July 1996. In the Report, the proposed offence was amended to restrict the statutory offence of fraud to “*financial or proprietary*” prejudice or benefit.

The Society would stress that it is on the basis of the recommendations put forward in the Report that the Society provided its “general” support to the idea of the creation of a substantive offence of fraud. *However, it should be noted that such support is a qualified one.* A Fraud Bill (since lapsed) was introduced by the Administration in October 1996 and considered by a Bills Committee. That Bill, however, lapsed on the dissolution of LegCo on 30 June 1997. Copies of the lapsed Bill and comments submitted by the Society are respectively annexed as Annexures A and B.

The Society was approached by the Administration in August 1998 on the proposal to reintroduce a Fraud Bill (2nd draft) in the current session of the Legislative Council. A copy of the 2<sup>nd</sup> draft Bill is annexed as Annexure C. **However, the Committee notes with concern two material changes made in the second draft Fraud Bill:**

- (1) the offence of fraud is not restricted to cases involving *financial/proprietary* benefit/prejudice; and
- (2) instead of being abolished, the common law offence of conspiracy to defraud has been expressly retained.

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(16.11.98)

## The Society's Concerns on the 2<sup>nd</sup> Draft Fraud Bill

The Society's concerns with the 2<sup>nd</sup> draft Fraud Bill relate to the following:

1. *Express preservation of the Common Law Offence of Conspiracy to Defraud*

The common law offence of conspiracy to defraud is fraught with confusion and capable of unjust application. The original intention of introducing a substantive offence of fraud is to remove any confusion created in law by the common law offence. The Law Society submits that with the retention of the common law offence and the creation of a new statutory offence of fraud, the original intention of the Bill will be frustrated, resulting in more confusion.

2. *The lack of any proper definition of "deceit" and "benefit/prejudice" both being important elements constituting the offence of "fraud".*

The Committee has expressed dissatisfaction with the lack of clear definitions for the concept of "deceit", "benefit" or "prejudice" which constitute the main elements of the offence of "fraud". Although definitions of these concepts appear in the proposed amendments to the Theft Ordinance, those definitions do no more than repeat the very terms being defined and can hardly be considered as definitions at all. The Committee considers it inappropriate for such important concepts to be left to the common sense interpretation of the judge and the jury.

3. *The wide ambit of the statutory offence and its possible intrusion into the civil arena*

As drafted, the new offence of fraud does not appear to be restricted to cases involving *financial/proprietary* benefit/prejudice in the criminal arena, nor has the element of "dishonesty" been built into the definition of fraud. The statutory offence could thus be interpreted to apply to civil or commercial activities and innocent activities may easily be caught. Representatives of the Administration have acknowledged such problem in the joint meeting with the Committee but suggested that the public could rely on the good integrity of the prosecution as a proper safeguard. The Committee considers such suggestion to be hardly desirable.

4. *The possibility of overlap between the common law and statutory offences*

The Committee notes that there will be two offences, one common law and one statutory which appear to overlap but carry different penalties. In real life situations, such complications will provide too much latitude to the enforcement agencies to enter into "fishing expeditions".

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The Committee was taken aback by the unilateral changes made not only to the formulation of the statutory offence, but also the decision to retain the common law offence. A meeting took place with representatives of the Administration on 12 October 1998 when members of the Committee voiced their concerns. The Administration stated the following reasons for the changes in the 2<sup>nd</sup> draft Fraud Bill:

- (1) They believe that the new offence of fraud, being a general offence, should not be so restrictive as to exclude cases where no financial/proprietary benefit/prejudice exists; and
- (2) If the common law offence is repealed, cases where no deceit as defined under the 2<sup>nd</sup> draft Bill, which are presently covered under the common law offence of fraud, will escape prosecution.

The Committee believes that the approach taken by the Administration in introducing the 2<sup>nd</sup> draft Fraud Bill is a “filling in the gap exercise”. This course of action is inconsistent with one of the main objectives of law reform, which is to provide more certainty in law.

Subsequently, the Administration informed the Committee that the proposal to create a new statutory offence of fraud would be implemented by amending the Theft Ordinance. The Society therefore restates its view on the 2<sup>nd</sup> draft Fraud Bill in relation to the proposal to amend the Theft Ordinance.

The Law Society of Hong Kong  
16 November 1998

I: 22105  
(16.11.98)

**FRAUD BILL**  
**欺詐罪條例草案**

6/17 A

# A BILL

To

Create the offence of fraud, to abolish the offence at common law of conspiracy to defraud and to provide for related matters.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

1. Short title

This Ordinance may be cited as the Fraud Ordinance:

2. The offence of fraud

(1) If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either—

- (a) in benefit to any person other than the second-mentioned person; or
- (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

(2) For the purposes of subsection (1), a person shall be treated as having an intent to defraud if, at the time when he practises the deceit, he intends that he will by the deceit (whether or not the deceit is the sole or main inducement) induce another person to commit an act or make an omission, which will result in either or both of the consequences referred to in paragraphs (a) and (b) of that subsection.

(3) For the purposes of this section "act" (作為) and "omission" (不作为) include respectively a series of acts and a series of omissions.

"benefit" (利益) means any financial or proprietary gain, whether temporary or permanent.

# 本條例草案

旨在

訂立取討罪和廢除普通法中的串謀取討罪，並就有關事宜訂定條文。

由香港總督參照立法局意見並得該局同意而制定。

1. 簡稱

本條例可引稱為《取討罪條例》。

2. 取討罪

(1) 如任何人藉任何欺騙(不論所作欺騙是否唯一或主要誘因)並意圖誘使另一人作出任何作為或有任何不作為，而導致

- (a) 該另一人以外的任何人獲得利益；或
- (b) 該進行誘使的人以外的任何人蒙受不利或有相當程度的可能性會受不利。

則該進行誘使的人即屬犯取討罪，一經循公訴程序定罪，可處監禁十四年。

(2) 為施行第(1)款，任何人如在進行欺騙時意圖誘使另一人作出任何作為或有任何不作為，而因此引致該款(a)及(b)段所描述的兩種後果或其中一種後果產生，則該人須視為意圖誘使。

(3) 為施行本條——  
“不利”(prejudice)指在經濟上或所有權上的任何損失，不論是暫時性的或是永久性的。

“利益”(benefit)指在經濟上或所有權上的任何得益，不論是暫時性的或是永久性的。

"deceit" (欺騙) means any deceit (whether deliberate or reckless) by words or conduct (whether by any act or omission) as to fact or as to law, including a deceit as to the intentions of the person practising the deceit or of any other person;

"gain" (獲益) includes a gain by keeping what one has, as well as a gain by getting what one has not;

"loss" (損失) includes a loss by not getting what one might get, as well as a loss by parting with what one has;

"prejudice" (不利) means any financial or proprietary loss, whether temporary or permanent.

### 3. Abolition of common law conspiracy to defraud

(1) Subject to subsection (2), the offence at common law of conspiracy to defraud is abolished.

(2) Subsection (1) shall not apply for any purposes to offences committed before the commencement of this Ordinance.

## Consequential Amendments

### Crimes Ordinance

#### 4. Penalties

Section 159C(6) of the Crimes Ordinance (Cap. 200) is repealed.

#### 5. Abolitions, savings and transitional provisions

Section 159E(2) and (3) is repealed.

### Independent Commission Against Corruption Ordinance

#### 6. Power of arrest

Section 10(5) of the Independent Commission Against Corruption Ordinance (Cap. 204) is amended

(a) by adding

"(cb) the offence of fraud under section 2 of the Fraud Ordinance (Cap. 191) of 1996";

(b) in paragraph (f)

(i) by repealing "the offence of conspiracy to defraud and";

(ii) by repealing "(or (ca))" and substituting "(ca) or (cb)".

"作為" (act) 與 "不作為" (omission) 分別包括 故意的作為與 故意的不作為  
 "欺騙" (deceit) 指就事實或法律而以語言文字或行為作出的任何欺騙，包括誘使行欺騙的人或任何其他人的意圖而作出的欺騙，而在不定表中，行為指任何作為或不作為。欺騙亦指蓄意或因疏忽果地作出的欺騙。  
 "損失" (loss) 包括沒有取得可得之物的損失，以及失去已有之物的損失。  
 "獲益" (gain) 包括保有已有之物的獲益，以及取得未有之物的獲益。

### 3. 廢除普通法的串謀詐騙罪

(1) 除第(2)款另有規定外，普通法中的串謀詐騙罪現予廢除。

(2) 第(1)款就各方面而言均不適用於在本條例生效日期之前所犯的罪行。

## 相應修訂

### 《刑事罪行條例》

#### 4. 罰則

《刑事罪行條例》(第200章)第159C(6)條現予廢除。

#### 5. 廢除、保留及過渡性條文

第159E(2)及(3)條現予廢除。

### 《總督特派廉政專員公署條例》

#### 6. 逮捕權力

《總督特派廉政專員公署條例》(第204章)第10(5)條現予修訂

(a) 加入——

"(cb) 《欺詐罪條例》(1996年第191號)第2條所訂的欺詐罪"

(b) 在(f)段中

(i) 廢除"串謀詐騙罪以及";

(ii) 廢除"(或(ca))"而代以"(ca)或(cb)"。





12. Extended jurisdiction in relation to certain conspiracies, attempts and incitements

Section 6(1) is amended

- (a) by repealing "or of conspiracy to defraud,";
- (b) by repealing "or fraud"

Merchant Shipping (Seafarers) Ordinance

13. Forgery, etc. of certificate

Section 128(3) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478) is amended by repealing "or of a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a certificate of competency" and substituting "... or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1996) in relation to a certificate of competency, or of a conspiracy to commit any such offence".

Merchant Shipping (Seafarers) (Certification of Officers) Regulation

14. Offences and penalties

Section 17(3) of the Merchant Shipping (Seafarers) (Certification of Officers) Regulation (L.N. 600 of 1995) is amended by repealing "or of a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a certificate of competency or a certificate of service" and substituting "... or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1996) in relation to a certificate of competency or a certificate of service, or of a conspiracy to commit any such offence".

Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation

15. False pretences and supply of false information

Section 7(2) of the Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation (L.N. 3 of 1996) is amended by repealing "or of a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a document referred to in that Subsection" and substituting "... or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1996) in

12. 擴大對某些串謀、企圖犯罪及勸導他人的罪行的司法管轄權

第 6(1) 條現予修訂 -

- (a) 廢除 "或串謀詐騙";
- (b) 廢除 "或取詐行為"

《商船(海員)條例》

13. 證書的偽造等

《商船(海員)條例》(第 478 章)第 128(3) 條現予修訂, 廢除 "串謀犯以假冒或欺騙手段進行與合格證書有關的欺詐" 而代以 "... 或就合格證書犯(取詐罪條例(1996 年第 號)第 2 條所訂的欺詐罪, 或串謀犯任何該等罪行)".

《商船(海員)(高級船員資格證明)規例》

14. 罪行及罰則

《商船(海員)(高級船員資格證明)規例》(1995 年第 600 號法律公告)第 17(3) 條現予修訂, 廢除 "就合格證書或服務資格證書欺詐或犯了第 (1) 或 (2) 款所訂罪行, 或串謀犯或串謀詐騙" 而代以 "該條訂罪行, 或就合格證書或服務資格證書犯(欺詐罪條例)(1996 年第 號)第 2 條所訂的欺詐罪, 或串謀犯任何該等罪行".

《商船(海員)(機房值班員證照)規例》

15. 欺詐行為和提供虛假資料

《商船(海員)(機房值班員證照)規例》(1996 年第 3 號法律公告)第 7(2) 條現予修訂, 廢除 "就第 (1) 款所規定的文件欺詐或犯了該條所訂的罪行, 或串謀犯"



**LETTERHEAD OF THE LAW SOCIETY OF HONG KONG**

27 December 1996

Clerk to the Bills Committee  
on the Fraud Bill,  
Legco Secretariat,  
Legislative Council Building,  
8 Jackson Road,  
Central, Hong Kong

Dear Sir/Madam,

The Society's Criminal Law and Procedure Committee have reviewed the provisions contained in the Fraud Bill and have the following queries which it feels the Bills Committee should consider:-

- 1 Why enact a new Ordinance, namely the Fraud Ordinance rather than add new provisions to the Theft Ordinance?
- 2 What has happened to the proposed examination of the existing offences that overlap?

Members of the Bills Committee are referred to the Law Reform Commission's Report on Fraud particularly paragraph 5.6 which states:-

We think that there should be an examination of the existing Theft Ordinance offences and their interaction with a new fraud offence, and we think such an examination should be carried out once the concept of a substantive offence of fraud has been accepted in principal by the Administration.

The Society was advised by the Administration that the matter of the overlapping problem would be examined particularly in relation to the existing offences under the Theft Ordinance.

- 3 Is it really necessary to use the notion of “deceit”, rather than the term “deception” which is used in the existing deception offences in the Theft Ordinance?
- 4 Does “deceit” involve dishonesty or not? There seems to be an assumption that a person using “deceit” and acting with “an intention to defraud” must inevitably be acting “dishonestly” so that there is therefore no need to expressly included “dishonesty” as an element.
- 5 Why make fraud punishable by 14 years of imprisonment compared to only 10 years for deception under the Theft Ordinance? Is putting a person’s interest at risk more serious than actually obtaining another’s property by deception?

The Law Society has stated that it generally supports the introduction of a new offence of fraud but in light of the above queries, there should be a complete review of the provisions contained in the Theft Ordinance to ensure that there is no overlapping.

Please could you advise me when the Bills Committee is likely to be convened to discuss this Bill.

I look forward to hearing from you.

Yours sincerely,

Joyce Wong  
Director of Practitioners Affairs

附件 C

1st revised draft	:	22.4.98
2nd draft	:	21.3.98

**A BILL**

To

Create the offence of fraud, and to provide for related matters.

Enacted by the Legislative Council.

**1. Short title**

This Ordinance may be cited as the Fraud Ordinance.

**2. The offence of fraud**

(1) If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either -

- (a) in benefit to any person other than the second-mentioned person; or
- (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,

the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

(2) For the purposes of subsection (1), a person shall be treated as having an intent to defraud if, at the time when he practices the deceit, he intends that he will by the deceit

(whether or not the deceit is the sole or main inducement; induce another person to commit an act or make an omission, which will result in either or both of the consequences referred to in paragraphs (a) and (b) of that subsection.

(3) For the purposes of this section -

“act” ( ) and “omission” ( ) include respectively a series of acts and a series of omissions;

“deceit” ( ) means any deceit (whether deliberate or reckless) by words or conduct (whether by any act or omission) as to fact or as to law, including a deceit as to the intentions of the person practising the deceit or of any other person.

### **3. Common law conspiracy to defraud not affected or modified**

This Ordinance shall not affect or modify the offence at common law of conspiracy to defraud.

## **Consequential Amendments**

### **Independent Commission Against Corruption Ordinance**

#### **4. Power of arrest**

Section 10(5) of the Independent Commission Against Corruption Ordinance (Cap. 204) is amended -

- (a) by adding -
  - “(eb) the offence of fraud under section 2 of the Fraud Ordinance ( of 1998);”;
- (b) in paragraph (f), by repealing “or (ea)” and substituting”, (ea) or (eb)”;
- (c) in paragraph (g), by repealing “or (ea)” and substituting”, (ea) or (eb)”.

### **Organized and Serious Crimes Ordinance**

#### **5. Offences relevant to definitions of “organized crime” and “specified offence”**

Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended by adding -

- “18. Fraud Ordinance  
( of 1998)  
section 2 fraud”.

### **Criminal Jurisdiction Ordinance**

#### **5. Offences to which this Ordinance applies**

Section 2 of the Criminal Jurisdiction Ordinance (Cap. 461) is amended -

- (a) in subsection (2), by adding -
  - “(c) the offence of fraud under section 2 of the Fraud Ordinance ( of 1998).”;

## **Merchant Shipping (Seafarers) Ordinance**

### **7. Forgery, etc. of certificate**

Section 123(3) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478) is amended by repealing “or of a conspiracy to commit such an offence” and substituting”, or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1998) in relation to a certificate of competency, or of a conspiracy to commit any such offence,”

## **Merchant Shipping (Seafarers) (Certification of Officers) Regulation**

### **8. Offences and penalties**

Section 17(3) of the Merchant Shipping (Seafarers) (Certification of Officers) Regulation (Cap. 478 sub. leg.) is amended by repealing “or of a conspiracy to commit such an offence” and substituting”, or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1998) in relation to a certificate of competency or a certificate of service, or of a conspiracy to commit any such offence,”.

## **Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation**



**9. False pretences and supply of false information**

Section 7(2) of the Merchant Shipping (Seafarers) (Engine Room Watch Ratings) Regulation (Cap. 478 sub. leg.) is amended by repealing “or of a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a document referred to in that subsection” and substituting”, or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1998) in relation to a document referred to in subsection (1), or of a conspiracy to commit any such offence, or of a conspiracy to defraud in relation to a document referred to in subsection (1)”.

**Merchant Shipping (Seafarers) (Navigational  
Watch Ratings) Regulation**

**10. False pretences and supply of false information**

Section 7(2) of the Merchant Shipping (Seafarers) (Navigational Watch Ratings) Regulation (Cap. 478 sub. leg.) is amended by repealing “or of a conspiracy to commit such an offence or of a conspiracy to defraud in relation to a document referred to in that subsection” and substituting”, or of the offence of fraud under section 2 of the Fraud Ordinance ( of 1998) in relation to a document referred to in subsection (1), or of a conspiracy to commit any such offence, or of a conspiracy to defraud in relation to a document referred to in subsection (1)”.

## **Explanatory Memorandum**

The main object of this Bill is to create the offence of fraud under the laws of Hong Kong, in the light of the recommendations of the Law Reform Commission of Hong Kong in its report entitled “Creation of a Substantive Offence of Fraud”.

2. Clause 2 creates the offence of fraud and defines, among others, the key elements of “deceit” and “intent to defraud”.

3. Clause 3 provides that the common law offence of conspiracy to defraud will not be affected or modified.

4. Clauses 4 to 10 deal with consequential amendments by adding references to the new offence of fraud in appropriate legislation.