

LETTERHEAD OF Hong Kong Bar Association

Your Ref: CB2/PL/AJLS

17th November 1998

Mrs. Percy Ma
Clerk to Panel
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear

**Re: LegCo Panel on Administration of Justice and Legal Services
On the Theft (Amendment) Bill 1998**

The Bar is concerned that the proposed new offence may not be construed as an offence of dishonesty notwithstanding what the present Administration says about the matter. The new offence of fraud focuses on an act of deceit and an intention to defraud. We do not think that an act of deceit with an intention to defraud necessarily includes dishonesty: see paragraph 5.44 of the LRC Report which says, 'Finally, the new offence would place fraudulent conduct within more precise bounds by tying it to deceit rather than dishonesty.' See also paragraphs 5.23-5.32 generally where LRC discusses why it did not recommend including a separate requirement of dishonesty. We think that including an express requirement of dishonesty is important for the reasons given at paragraph 5.31 of the LRC Report.

/2.

We also enclose for your information our correspondence with the Department of Justice, our letter dated 23rd October and their reply dated 6th November.

Yours sincerely,

Audrey Eu, S.C.
Chairman

Encl.

cc Mr. Llewellyn Mui
Deputy Principal Government Counsel (Ag)
Legal Policy Division

LETTERHEAD OF Hong Kong Bar Association

Your Ref: LP 5019/3C

23rd October 1998

Mr. Llewellyn Mui
Senior Assistant Solicitor General
Department of Justice
Legal Policy Division
4/F, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr. Mui

Draft Fraud Bill

Thank you for your letter dated 24th September 1998.

With respect, the Administration has confused the distinction between “deceit” and “dishonesty”. To make it simple: the words “deceit” and “intention to defraud” involve intention: on the other hand the modern concept of “dishonesty” within the Theft Ordinance is not limited to intention, it extends also to motive.

The Administration relies upon Wai Yu-tsang [1991] 2 WLR 1006. Wai's case followed and applied Welham v. D.P.P. [1961] AC 103. Welham related to intention and did not consider motive. The vital case of Ghosh [1982] 3 WLR 110 was two decades hence from being decided. Ghosh is a landmark decision on the question of dishonesty. Ghosh dishonesty encompasses motive. For example, the telling of lies might not be dishonest according to Ghosh. That is a matter for the tribunal of fact applying the current standards of ordinary decent people. Similarly, there is a clear distinction between sharp practice and dishonest behaviour. Sharp practice may be deceitful but may not be dishonest.

On the other hand, motive (and a good heart) is irrelevant where a conspiracy to defraud (whether statutory or common law) is concerned. If anyone may be prejudiced in any way by the action, that is (by definition) dishonest. So the concept of dishonesty in a conspiracy case is thus defined by the existence of prejudice coupled with the deceit. The motive for the deceit is thus excluded. This is contrary to Ghosh and the law relating to dishonesty regarding substantive offences within the Theft Ordinance.

In the result, with respect to conspiracy charges, a person is to be found guilty (upon the law as it presently stands) even if his actions are genuinely founded on good motives—for example where a man acts (for good motives) to prevent a second run on the bank as in Wai Yu-tsang. The prejudice and the deceit constitute dishonesty. Motive is irrelevant.

The modern law of dishonesty is founded upon Ghosh. The Administration should apply the modern law of dishonesty to conspiracies to defraud and express this intention in clear legislation (by use of the word “dishonest”) that the test of dishonesty is the “Ghosh” standard and not the “Welham” standard. Ghosh dishonesty is capable of being extraneous to any deceit and any prejudice. Welham dishonesty is entirely dependent on prejudice and deceit. It is for these reasons that Lord Goff had to state in Wai Yu-tsang that benign purpose is a matter that could be taken into account at the stage of sentence. The Bar Council’s position is simply that those persons who are not Ghosh dishonest should never be convicted in the first place.

Yours sincerely,

Audrey Eu, SC
Chairman

LETTERHEAD OF DEPARTMENT OF JUSTICE
Legal Policy Division

本司檔號 Our Ref: LP 452/00C
來函檔號 Your Ref:
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Ms Audrey Eu, SC
Chairman,
Hong Kong Bar Association
LG1, High Court,
38 Queensway
Hong Kong

6 November, 1998

Dear Ms Eu,

Theft (Amendment) Bill 1998
(formerly known as the Fraud Bill 1998)

Thank you for your letter of 23 October 1998.

With respect, the Administration has not confused the distinction between “deceit” and “dishonesty”. The concept of dishonesty does not include motive. While motive may be a factor to consider in deciding whether a person’s conduct was dishonest, it is not an element of dishonesty.

The case of *Welham v DPP* [1961] AC 103 did not deal with the question of dishonesty and whether it was an element of intent to defraud. *Wai Yu-tsang* [1991] 2 WLR 1006 applied *Welham* in so far as the latter dealt with the meaning of intent to defraud as used in that case. *Wai Yu-tsang* specifically included dishonesty in what constituted an intent to defraud. Whether conduct was dishonest is determined according to the twofold test in *Ghosh* [1982] 3 WLR 110. Under *Ghosh*, we do not agree that motive is an element of dishonesty.

With respect, it is not correct to say that if anyone may be prejudiced in any way, that is dishonest. A person may prejudice another without having done so dishonestly according to the *Ghosh* test.

The concept of dishonesty in a conspiracy case is not defined by the existence of prejudice coupled with deceit. It is defined according to the *Ghosh* test.

The Bar Association has suggested that the Administration should expressly provide by legislation that the test for dishonesty in conspiracy to defraud cases is the *Ghosh* standard and not the *Welham* standard. With respect, there is no *Welham* standard of dishonesty. The test of dishonesty which has been applied in practice in conspiracy to defraud cases is the *Ghosh* test. We, therefore, do not see the need to provide, by legislation, for dishonesty for conspiracy to defraud cases.

In respect of the proposed offence of fraud, the word “deceit” and the inclusion of “intent to defraud” as one of its elements show that it necessarily involves dishonesty.

In reviewing the draft Fraud Bill, the Administration is of the view that the proposals to create a substantive offence of fraud and to retain the offence of conspiracy to defraud should be carried forward by amending the Theft Ordinance. We enclose a draft Theft (Amendment) Bill for your reference.

With best regards,

Yours sincerely,

(Llewellyn Mui)
Deputy Principal Government Counsel (Ag)
Legal Policy Division

A BILL

To

Amend the Theft Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Theft (Amendment) Ordinance 1998.

2. Other definitions

Section 8(2) of the Theft Ordinance (Cap. 210) is amended -

- (a) in the definition of “gain” and “loss”, by adding”, except in section 16A,” before “to be construed”;
- (b) in the definition of “獲益” and “損失”, in paragraph (b) -
 - (i) by repealing “能會”;
 - (ii) by repealing “放棄” and substituting “失去” .

3. Section added

The following is added before section 17 -

“16A. 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” (不作爲) include respectively a series of acts and a series of omissions;

“benefit” (利益) includes any benefit or gain -

- (a) whether temporary or permanent;
- (b) whether financial or non-financial;
- (c) whether proprietary or non-proprietary;

“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 relating to the past, the present or the future and a deceit as to the intentions or opinions 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) includes any prejudice or loss -

- (a) whether temporary or permanent;
- (b) whether financial or non-financial;
- (c) whether proprietary or non-proprietary.

(4) This section shall not affect or modify the offence at common law of conspiracy to defraud.”.

4. Obtaining property by deception

Section 17(4) is amended, in the definition of “deception”, by adding “語言” before “文字”.

Consequential Amendments

Independent Commission Against Corruption Ordinance

5. Power of arrest

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

- (a) by adding -
 - “(ba) the offence of fraud under section 16A of the Theft Ordinance (Cap 210);”;
- (b) in paragraph (f), by adding “(ba),” after “(b),”;
- (c) in paragraph (g), by adding “(ba),” after “(b),”.

Organized and Serious Crimes Ordinance

6. Offences relevant to definitions of “organized crime” and “specified offence”

Schedule 1 to the Organized and Serious Crimes Ordinance (Cap. 455) is amended, in paragraph 12, by adding before “section 17” -

“section 16A fraud”.

Criminal Jurisdiction Ordinance

7. Offences to which this Ordinance applies

Section 2(2)(a) of the Criminal Jurisdiction Ordinance (Cap. 461) is amended by adding before “section 17” -

“section 16A (fraud)”.

Merchant Shipping (Seafarers) Ordinance

8. Forgery, etc. of certificate

Section 128(3) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478) is amended by repealing “a conspiracy to commit such an offence” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) in relation to a certificate of competency, or of a conspiracy to commit any such offence,”.

Merchant Shipping (Seafarers) (Certification of Officers) Regulation

9. Offences and penalties

Section 17(3) of the Merchant Shipping (Seafarers) (Certification of Officers) Regulation (Cap. 478 sub. leg.) is amended by repealing “a conspiracy to commit such an offence” and substituting “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) 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

10. 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 “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 “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) 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

11. 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 “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 “the offence of fraud under section 16A of the Theft Ordinance (Cap. 210) 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 amend the Theft Ordinance (Cap. 210), so as 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(a) amends section 8 of the principal Ordinance, to provide for the inclusion of the offence of fraud in the principal Ordinance.
3. Clause 3 adds new section 16A to the principal Ordinance. The new section provides for the offence of fraud and defines, among others, the key elements of “deceit” and “intent to defraud”, as well as “benefit” and “prejudice”. It also provides that the common law offence of conspiracy to defraud will not be affected or modified by the creation of the proposed offence of fraud.
4. Clauses 2(b) and 4 introduce miscellaneous amendments to the Chinese text of the principal Ordinance.
5. Clauses 5 to 11 deal with consequential amendments by adding references to the new offence of fraud in appropriate legislation.