

## **Financial crimes in M'sia: Enact Fraud Act, pass burden of proof to suspects**

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WHITE collar crime, also known as financial crime, is defined by Edwin Sutherland as “a crime committed by a person of high social status and respectability in the course of his occupation.” Financial crime is not the same as normal crimes like murder or robbery. Money laundering, bribery, and corruption are examples of this sort of crime.

In most cases, the individual who has committed this type of crime, directly or indirectly, wields power and influence, making it difficult for prosecutors to properly prosecute him or her in court. The accused may also employ a variety of tactics to thwart the investigators' efforts to complete their inquiry.

Furthermore, he enlists the help of some shady professionals to carry out the scheme. The advancement of technology also works in favour of the suspects/defendants to commit such offences.

Therefore, it is important for lawmakers to enact a new statute aimed at increasing financial crime investigators' and prosecutors' investigative and prosecuting capabilities.

Last week, former Federal Territories Minister Tengku Adnan Tengku Mansor, was acquitted by the Court of Appeal from the charge of taking RM2 mil from a businessman five years ago. The court found that the defence had cast doubt on the prosecution's case. As a result, the conviction, which had been affirmed by the High Court last year, got overturned and declared unsafe.

According to the Department of Statistics Malaysia (DOSM), the number of investigation papers filed by the Malaysia Anti-Corruption Commission (MACC) increased by 24.7% to 1,039 in 2019, up from 833 in 2018.

In comparison to 2018, other offences and accepting bribes climbed to 48.1%, from 40.1% in 2019. The number of arrests made by the MACC spiked to 23.2%, during the same time period. In meantime, MACC's official portal published data indicating that public officials made up 55.71% of those detained in June this year.

Furthermore, the number of people arrested by the MACC last year was 998, compared to the 1,135 in 2019.

The amount of financial crime cases investigated and prosecuted in court is consistent year after year. Unfortunately, because this type of crime is time-consuming and difficult to investigate, the number of high-profile cases in which defendants have been found guilty is not encouraging.

In addition, the investigators also put their safety at risk in order to gather concrete evidence, such as documentary evidence and statements from key witnesses.

Before the accused is prosecuted in court, these evidences will be sent to the Public Prosecutor for scrutiny. The prosecution then has to prove a prima facie case against the defendant.

For such offences, the standard of proof is beyond reasonable doubt. The defendant will be acquitted if the person is able to throw a reasonable doubt on the evidence presented to the court.

In the case of *Sinnaiyah & Sons v Damai Setia*, the Federal Court determined that the balance of probabilities is the appropriate standard of proof for civil fraud.

The current financial crime legislation, such as the MACC Act 2009, the Anti-Money Laundering Act, Anti-Terrorism Financing Act and Proceeds of Unlawful Activities Act and other related statutes, are burdening investigators and prosecutors.

Therefore, legislators should create new laws transferring the burden of proof to the defendants rather than the prosecution, like the one UK has, Fraud Act 2006.

The UK Fraud Act 2006

The Fraud Act covers three main offences as follows:

1. Fraud by false representation (section 2). A representation may be express or implied. It is false if it is untrue or misleading and the person making it knows that this is, or may be, the case;
2. Fraud by failing to disclose information where there is a legal duty to disclose it (section 3);
3. Fraud by abuse of position (section 4). Abuse of position applies where a person occupies a position in which he/she is expected to safeguard, or not to act against, the financial interests of another person. A person may abuse that position through an act or omission.

The criterion that the individual acts dishonestly with the intent to make money for himself or another or to inflict loss to others (or expose another to a risk of loss) is common to all three Fraud Act offences.

A longer-term solution was required if the law was to keep up with embryonic technology and changes and, as a result, give an efficient response to the act of fraud.

Changes in dealing with financial crime are inevitable due to the ways in which these types of crimes are evolving, aided by advances in technology that are related to how this crime is perpetrated.

This Act confers a number of practical trial advantages, making it easier and faster (less expensive) to investigate and prosecute successfully, while reducing the likelihood of a successful appeal.

Establish a new agency

The UK prosecuting authority like Crown Prosecution Service (CPS) or Serious Fraud Office (SFO) will make the decision to charge a suspect who is involved with serious or complex fraud in UK.

SFO is a special prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption.

The “Full Code Test” is a code for Crown Prosecutors which states that prosecutors must first consider whether there is sufficient evidence to provide a realistic prospect of conviction, and only if there is sufficient evidence to justify a prosecution must prosecutors consider whether a prosecution is necessary in the public interest.

National Economic Crime Centre (NECC) is the national authority for the UK’s operational response to economic crime, maximising the value of intelligence, while tasking and coordinating to ensure the response achieves the greatest impact on the suspected crime.

There is need for us to establish such a new agency to deal with Malaysia’s sophisticated financial crime matters, similar to SFO and NECC.

This agency must be independent, answerable only to the Parliament, and have more prosecutorial authority.

Members or personnel for this agency can be recruited from various Government agencies, as well as from the private sector who are experts in the subject of financial crime.

Here are several reasons on why such a law and specific agency are needed to tackle financial crimes:

- To address the rising number of financial crime cases, a new comprehensive law must be enacted
- With the statute, a new agency can be established, which will be independent and have prosecutorial, investigative and arrest powers.
- Malaysian prosecutors could use the UK’s “Full Code Test” strategy to increase their prosecutorial authority to preserve justice.
- They must also be impartial and determined while dealing with financial crime matters to avoid public misconceptions.
- Malaysia has slid to 57th place on the Corruption Perceptions Index (CPI) last year, indicating that financial crime cases are on the rise and the Government must find strategies to combat this scourge. In contrast, UK stood at number 11 last year.
- The burden of proof should be placed on the accused or defendants rather than the prosecution establishing prima facie against them, under the new statute. The burden of proof determines who is responsible for proving the fact in question, during a case trial.
- In March this year, the Crown Prosecution Service (CPS) released the Economic Crime Strategy 2025 which states:
  - The focus of the strategy is to make sure that the appropriate individual gets prosecuted for the right crime, at the right time;

- It also acknowledged that victims and witnesses are at the focal point of the investigations
- It was also determined to recover any criminal proceeds; and
- It is a clear statement of CPS' responsibility in assisting to combat economic crime.
- We may use a similar strategy to dissuade financial criminals from committing such crimes openly in Malaysia.

The question now is, are we willing to admit our shortcomings in dealing with financial crime cases and apply a sound strategy by enacting a new statute and establishing an independent body to combat the surge in such cases in Malaysia? – July 18, 2021.

Source: <https://focusmalaysia.my/financial-crimes-in-msia-enact-fraud-act-pass-burden-of-proof-to-suspects/>