

## Essays for sale: time for legal regulation?

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### **Abstract**

The expansion of essay writing services of the kind offered, for example, by coursework4you<sup>1</sup> and Academic Answers Ltd<sup>2</sup> has attracted the ire of the academic community. The detection of such essays submitted by students has presented a real challenge to the sector. The fact that the Turnitin software relies upon comparisons to websites and other essays submitted to its database makes the routine detection of bespoke essays effectively beyond its reach. It is unclear the extent to which such essays are actually submitted by students but press reports suggest that for those operating these services, it is a lucrative business<sup>3</sup>.

In some circumstances, the severity of student academic misconduct may take it beyond an issue of purely institutional regulation. Following incidents at The University of York in 2007, four individuals were charged and subsequently pleaded guilty to fraud offences as a result of impersonating students in exams.<sup>4</sup> It could be argued that any student who purchases and submits a custom written essay for assessment falls into a similar category.

This paper examines the possibilities for wider legal regulation of the bespoke essay writing services market and the extent to which this is desirable. Analysis will focus on the applicability of current legal provisions such as the Fraud Act 2006, areas for potential reform and the possible engagement of the essay providers in this process.

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<sup>1</sup> <http://www.coursework4you.co.uk/>

<sup>2</sup> <http://www.academicanswers.co.uk/about.htm>

<sup>3</sup> <http://www.guardian.co.uk/uk/2006/jul/29/highereducation.education>

<sup>4</sup> <http://www.guardian.co.uk/uk/2008/jan/22/highereducation.students>

"This conduct, and your conduct in particular, must be deeply offensive to the thousands of diligent students who do work hard,"

In the context of an instance of academic dishonesty, these words could conceivably have been uttered by a tutor, a Department Head or on behalf of a Disciplinary Committee charged with investigating the matter. The words in fact belong to Judge Stephen Ashurst during the sentencing of two men at York Crown Court in February (BBC 2008).

Elnar Askerov, a student at The University of York, paid Jerome Drean to sit exams for him during a seventeen month period. The pair had pleaded guilty to charges of conspiracy to defraud at an earlier hearing and they were both sentenced to a period of nine months detention suspended for two years. What is interesting about this case is not the cheating itself but the approach of the University to involve the police and ultimately the willingness of the criminal justice system to involve itself and deal with a matter of academic dishonesty. The Regulations on Assessment at York are clear. Academic Dishonesty is defined to include personation,

"i.e. act, appear, or produce work on behalf of another candidate in order to deceive the examiners, or solicit another individual to act, appear or produce work on their own behalf;"

Mr Askerov would have faced the consequential disciplinary penalties lowering his marks to zero in the affected assessments and given the gravity of the offences may have faced any of the following University punishments:

- i. suspension or exclusion from the University;
- ii. a lowering of the class of degree to be awarded;
- iii. failure of the degree;
- iv. in relation to (d)(iii) above, withdrawal of any entitlement to redeem the failure. (University of York Reg 5.4)

The rationale for the University to move beyond a purely in-house determination of the issues is not entirely clear. Perhaps it was because Mr Drean had received £20000 during the course of his activities coupled with the fact that he was effectively beyond the reach of University discipline that the decision was made to involve the police. The degree of remuneration may not, however, have been the overriding factor. In May 2007, two Chinese students were arrested, charged and pleaded guilty to fraud related offences following another incident at the York campus. Qiu Shi Zhang had persuaded his friend, Xin Zhang, to sit one exam for him as a favour (Norfolk 2007). Clearly, his was a less severe case than Askerov, yet the decision to involve the police was taken at such an early stage that officers arrived at the examination hall to arrest Xin Zhang at the end of the exam.

Whatever the motivations of the University of York, the principle that academic dishonesty can be dealt with as a matter of fraud in the criminal courts has been established. In commenting on the Askerov case, Detective Inspector Adam Harland reaffirmed:

"North Yorkshire Police take a pro-active stance in any criminal offence where a benefit has been made from crime and we will actively pursue cases against defendants in order to remove the benefit of that criminal activity." (Rychlikova 2008)

The potential economic gain for the student defendants in both cases is articulated in the recent PriceWaterhouseCoopers Research Report for Universities UK. The gross additional lifetime earnings of a graduate have been calculated to be £160000 with an additional £70-80000 for a postgraduate degree (Universities UK 2006). Of course, in assisting Askerov towards such gains, Drean's benefit from the criminal activity is directly quantifiable.

The question which this paper seeks to explore is whether, in the light of events in York, there is a possibility that the criminal justice system might be used in future to deal with some cases of plagiarism. At its heart is an examination of the applicability of the law relating to fraud. It

will focus on the law in England and Wales which has recently undergone significant legislative change following the enactment of the Fraud Act 2006. Unfortunately, it is not possible to consider the position across the whole of the UK within the constraints of this paper.

It is recognised that there is a broad spectrum of activity which might fall within any definition of plagiarism. This analysis will, however, confine itself to the most serious cases of intentional plagiarism, ostensibly those where a student submits work for assessment which has been written by another. In such cases there would probably be little need to consider wider factors such as poor academic practice, referencing, cultural issues and the teaching and learning environment to which the student has been exposed. It is also an activity where parallels might be drawn with the cases in York. It is doubtful whether the police would have become involved in York if the exam infraction had been of a more minor nature such as crib notes written on the back of the student's hand.

The submission of essays written by third parties is one which potentially causes the academic community real problems. If the essay provided by the third party to the student for submission is an original piece of work devoid, for example, of inappropriate cut and paste sources, then it will not be flagged up by plagiarism detection software such as Turnitin. Also, if the third party provides the essay to just one student then again Turnitin will, at most, only ever have that copy in its database and it will not be flagged up. It is unlikely that there are many charitable third parties who would be prepared to commit the time and effort to produce such essays for free but a well-established and growing market of essays for payment does exist.

The market for such essays has matured over the last decade. Whereas ten years ago websites would offer students copies of essays from a database, today the emphasis is on the production of bespoke essays often with a guarantee that they will not fall foul of plagiarism detection software. The business model is simple, low cost but effective. The provider acts as an intermediary between the student and a bank of retained freelance essay writers. There are a range of providers such as [ukessays.com](http://ukessays.com) or [topcustomessays.co.uk](http://topcustomessays.co.uk) in a market which, in 2006 was worth in the region of £200 million (Taylor & Butt 2006). Concern has been expressed in Parliament by Dr. Blackman-Woods MP who asked the Secretary of State for Education what action was being taken in relation to customised essay websites (Hansard 26/06/06)

While most providers emphasise that the provision of essays are for research purposes and should not be submitted for assessment, this paper is based on the premise that it is likely that some students will be tempted. In the following legal analysis, the potential criminal liability of the student and the essay providers will be considered both individually and in concert.

### **The Student & Fraud**

It is necessary to consider the actions of the student who submits an essay written by another in the context of The Fraud Act 2006. This was enacted following a Law Commission examination of this area of criminal law and a lengthy consultation. The Act became law on 15<sup>th</sup> January 2007. It replaced a range of provisions from The Theft Acts of 1968 and 1978 to focus on the single s.1 offence of fraud. One key difference between the old and the new regime is that it is no longer necessary to show that a person has been deceived. Therefore, in the context of an assignment submission, it is necessary to focus on whether the student has submitted the essay and not on whether some form of benefit accrued from that action i.e. was the tutor fooled by the submission.

Although the Act creates a single offence under section 1, there are three ways in which this might be committed which are set out in the subsequent three sections. The relevant provision for consideration is probably section 2 which creates the offence of fraud by false representation:

“A person is in breach of this section if he—

- (a) dishonestly makes a false representation, and
- (b) intends, by making the representation—
  - (i) to make a gain for himself or another,
  - (ii) or to cause loss to another or to expose another to a risk of loss.”

In order for the student to commit the offence, there must at the centre of the action be a false representation. The representation in this case would be committed during the submission of the essay itself. This might, following s.2(4), be expressed in writing through the signing of a declaration that the work is his own on a standardised frontsheet or be implied through conduct when handing in the paper with the student’s name or matriculation number on it. In any event, the representation must be considered to be false.

Section 2(2) states in this regard that:

“A representation is false if—

- (a) it is untrue or misleading, and
- (b) the person making it knows that it is, or might be, untrue or misleading.”

In the circumstances where the student has obtained an essay from a third party and submitted it for assessment, it is difficult to conceive that this provision would prove to be problematic. In all cases, it will be required to consider the state of mind of the defendant when making the false representation. Section 2 requires ‘dishonesty’ on the part of the defendant. Guidance from the Crown Prosecution Service on this point suggests that previous caselaw will be used as a test. The leading case on the issue of dishonest is *R v Ghosh* [1982] Q.B. 1053

The test articulated in that decision is in two stages. The first being based on the objective standards by the jury and the second examining the beliefs of the defendant himself.

“In determining whether the prosecution has proved that the defendant was acting dishonestly, 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.(per Lord Lane at page 1064)”

The final element in the section 2(1) offence is that the defendant should intend as a result of the false representation to make a gain for himself or cause a loss to another. It is important to stress that the intended result may never come to pass but the intention to cause it is sufficient. Section 5 elaborates on this point, stating:

“(1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.

(2) ‘Gain’ and ‘loss’—

- (a) extend only to gain or loss in money or other property;

(b) include any such gain or loss whether temporary or permanent;

and 'property' means any property whether real or personal (including things in action and other intangible property)."

Fraud, according to the Law Commission is essentially an economic crime,

"we do not think the new offence should extend to conduct which has no financial dimension" (Law Commission 2002 p.70)

Establishing a gain or loss following an essay submission may present difficulties. It is worthwhile pausing here to consider what the ulterior intent of the defendant might be when submitting an essay written by somebody else. There would be an immediate gain (if the essay was of a sufficient standard) in passing the module assessment. Ultimately, completion of this part of the assessment matrix would facilitate the completion of the degree programme. The Act through section 5 requires that any 'gains' are quantifiable in terms of money or other property. Although evidence to support the enhanced earning power of graduates has been indicated earlier in this paper, it might not be strictly relevant to the individual case under consideration here. It might be possible to argue more generally, that the intended gain is linked to the subsequent acquisition of a salary from any job where the defendant uses the degree in the application process. This may be considered to be a remote prospect when considering the issues of intended causation which need to be proved.

Alternatively, it might be possible to argue that the 'gain' is the subsequent acquisition of the certificate from the University attesting to the defendant's academic achievement. An interesting question is whether this could be considered to be a property gain. The nature and classification of the degree parchment as property could be a matter of debate and may make any prosecution difficult. The paper on which it is printed would, at the very least, be considered tangible personal property (albeit of low value) but this does not perhaps address the true nature of a degree parchment as property. Arguably, it is further complicated by a potential intangible function. There is well-established authority in English law that information printed on paper cannot amount to property for the purposes of criminal law. In *Oxford v Moss* (1978) 68 Cr App R 183 a student was acquitted on a charge of theft of an exam paper which he had copied and returned prior to the examination date. The words printed on a degree parchment arguably amount to something more than mere information. They do attest to the level of student achievement but the awarding institution potentially retains an interest in those words because it is possible at many institutions for an award to be rescinded. There is no case in point to support this rather speculative view but legal writers such as in the USA have in the past referred to the property nature of a degree parchment:

"But the greater property interests represented by such a degree are those of an intangible nature represented by the contents written or engraved thereon" (Scheffel 1931, p.233)

The above analysis has considered the situation where a student submits an essay procured from a third party. There could be circumstances where even the mere possession of an essay procured by the student from a third party might be construed as an offence under The Fraud Act 2006. Section 6(1) creates a new form of possession offence:

"A person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud."

Commentators such as Ormerod and Williams (2007) have remarked upon the potential breadth of this provision. An article in this context could be something as mundane as a pen which might be later used in a cheque fraud but the legislators would clearly not be seeking to criminalise the possession of such an item. The key question is what the defendant seeks to do with the article yet the required mental element is not made entirely clear in the legislation. The view of Ormerod and Williams (2007) is that a general intention to use the article in

question for a fraudulent purpose is all that is required and not an intention to use the article for a particular fraud. In the context of a student who has obtained an essay from a third party it might not be necessary that the student intends to submit the essay verbatim in the form that it was obtained. There might be other more subtle ways in which the student might intend to use the material which could still be considered fraudulent.

In all probability, if a student has purchased an essay from a third party, the essay will be delivered by email to the student. This creates no bar to prosecution. Under s.8, an article is said to encompass “any program or data held in electronic form.”

### **The Supplier & Fraud**

It might be assumed that those providing the essay either charitably or for gain are at arms length from any potential fraud being committed on campus. The Fraud Act 2006 creates a specific offence for those involved in the production of items which could be used to facilitate a fraud. The new section 7 offence states:

“1) A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article—

(a) knowing that it is designed or adapted for use in the course of or in connection with fraud, or

(b) intending it to be used to commit, or assist in the commission of, fraud.”

As with s.6, ‘article’ in this context extends to include anything in electronic format and it would therefore apply to a word processed file sent by email. The question is whether the purpose of making, adapting, supplying or offering an essay to a student is one which the supplier knows will ultimately be fraudulent or one which he intends to be fraudulent.

The section therefore offers two approaches to the mental element required. First, the defendant must know that the article is designed or adapted to be used in connection with fraud. Alternatively, the defendant may intend that the article be used in fraud. The explanatory notes to the Act refer to a situation where a device might be sold enabling electricity customers to rig their meters. In these circumstances, there is no conceivable lawful use for such a device. The view of the Crown Prosecution Service is that the possible use for the article in question will be a likely determinant of the defendant’s state of mind (CPS 2006). If student A says to B that he will pay B £200 for writing an essay because he does not have the time to do it before the deadline, then there can be little doubt that B will have knowledge of the use to which it will be put. The supply of essays from most web-based companies is more opaque. For example, the terms and conditions of ukessays.com states:

“The Customer undertakes to check their university guidelines and regulations before ordering and to fully satisfy themselves of their individual institute or universities rules, regulations and guidelines. The Customer acknowledges that any decision to use the Agency’s research services is made on their own initiative and agrees that the Agency is in no way to be held liable for any decision to use its services that may be in contrary or in breach of the Customer’s institution or university rules, regulations or guidelines.”

A similar approach is adopted by [topcustomessays.co.uk](http://topcustomessays.co.uk):

"All the custom essays and written assignments provided by TopCustomEssays.co.uk are solely for research and reference purposes, and should be used with proper reference."

Some websites such as lawteacher.net seek to distance the provider more explicitly from any potential fraudulent activity by stating:

**"Please Remember:** the essays we provide are only to be used as a great starting reference point - they are not to be handed in as your own, paraphrased or edited and submitted!"

It is unclear whether the supply of a model answer to an assessed essay before the deadline of an assessment period would be construed as having a more innocent research purpose and thus rendering a conviction less certain. The CPS has pointed out that where an article has been made specifically for a fraudulent use, an ambivalence on the part of the maker as to whether it will be so used will fall foul of s.7(1)(a) only. In other areas of criminal law, the issue of the defendant's knowledge can include an examination as to whether a blind eye was turned. This is an area of law which is far from clear and settled and its application in the context of the Act is uncertain but it could have an impact on the application of this section. Williams outlines the concept as follows:

"A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge." (Williams 1961, p.159)

If, on the other hand, the essay is considered to have an innocent as well as a possible fraudulent use, it will be necessary to prove an intention on the part of the maker/supplier that it would be used in a fraud. This may be more difficult to prove, particularly given the typical disclaimers and advice to students found on the websites but Ormerod takes the view that the requirement will, however, encompass oblique intention

"..where D foresees the use of the article for fraud as virtually certain" (Ormerod 2007 p.213)

Perhaps if an essay provider were to make a copy of the supplied essay available to the Turnitin database this would be sufficient to show an innocent intention on their part. It must, however, be stressed that in the context of both s.6 and s.7 offences, any conviction will have to be fundamentally built upon an acceptance of the principle that the submission of an essay supplied by another is a fraud in an economic sense. For this and for the other reasons stated above it may mean any prosecution might be difficult.

### **Essay Supply as Obscenity?**

If the criminal law is to be used to control the sale of essays to students, another avenue to consider and perhaps one that is more surprising is The Obscene Publications Act 1959. The main offence is, in essence, a distribution offence:

"s.2(1) Subject as hereinafter provided, any person who, whether for gain or not, publishes an obscene article or who has an obscene article for publication for gain (whether gain to himself or gain to another) shall be liable"

It will be necessary for the prosecution to show that the article in question is obscene which is defined in s.(1):

"For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken

as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”

Although the most famous cases focused on matters of sex, it is clear from the caselaw that the Act deals with wider issues. When considering a book concerning drug taking, Lord Parker C.J. indicated:

“In my judgment there is no reason whatever to confine obscenity and depravity to sex,” (*John Calder (Publications) Ltd v Powell* [1965] 1 Q.B. 509 at page 515)

For a s.2 offence it will be a matter for the jury to decide whether the matter tends to deprave and corrupt. There is an emphasis on the ordinary meaning of those words and any application of them by the jury will be a reflection of a particular age. For example the trial judge in *R v Calder and Boyars Ltd* [1969] 1 QB 151 stated:

“‘Deprave’ is defined in some dictionaries, as you heard, as ‘to make morally bad; to pervert or to corrupt morally.’ ... The essence of the matter, you may think, is moral corruption”

In the supply of an essay to a student prior to a submission deadline, the issue would be whether such a publication would tend to deprave and corrupt those who were likely to read it i.e. the student who ordered it with the looming deadline. Publication under s.1 includes the transmission of electronic data.

Even if a jury decides that a matter is obscene, there is a defence under s.4(1) for the public good which may be relevant.

“Subject to subsection (1A) of this section a person shall not be convicted of an offence against section 2 of this Act ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.”

No doubt, if there were ever to be a prosecution of an essay provider, the wider benefits to the students learning that such exemplar material promotes would be brought very much to the fore.

### **The Conspiracy Perspective**

So far, this paper has considered the potential criminal liability of the providers and the recipients of essays individually. Where there is an agreement between the parties, it is necessary to consider whether the conduct in question will amount to a conspiracy for the purposes of criminal law. Conspiracy exists as a statutory offence and also survives as a common law offence.

The statutory offence under s.1 Criminal Law Act 1977 focuses on the fact that an agreement is made between the parties to embark on a course of conduct leading to the commission of an offence. At common law, a conspiracy to defraud does not have to necessarily lead to an act which is criminal. In that sense, it has a potentially broader application than statutory conspiracy and may address an activity which, if it had been committed individually, would not have led to a prosecution. Given the potential difficulties previously outlined in utilising the statute based fraud offences against the individuals concerned, this approach might prove to be more attractive to a prosecutor. Indeed, Askerov and Drean were both charged with conspiracy to defraud following the exam irregularities at the University of York.

Following the legislative reforms of The Fraud Act 2006, the offence of conspiracy to defraud was retained despite the Law Commission’s recommendation that it should be abolished (Law Commission 2002).



The conspiracy might be formed between the student and the provider of the essay or it might be wider where the provider acts as an intermediary by engaging another party to actually write the essay. For there to be a conspiracy to defraud at common law, the parties to the agreement must have a dishonest intent to defraud. In this context 'defraud' has a potentially wider meaning than the economic standard which applies to The Fraud Act offences considered above. Although there might commonly be an economic element to the conspiracy such as the private sale of refreshments to passengers by rail staff (*R v Cooke* [1986] AC 909) this is not of itself a requirement of fraud here. In *Scott*, Lord Diplock took the view that:

"Where the intended victim of a "conspiracy to defraud" is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone."  
(*Scott v Metropolitan Police Commissioner* [1975] A.C. 819 at page 84)

A university tutor might be considered to be acting contrary to his public duty by awarding marks to student work that has been written by another. In all cases, it must be shown that the defendants had acted with a dishonest intent. It will therefore be necessary to apply the test in *Ghosh* discussed earlier. Where A pays B to sit an exam on his behalf, it does not cause too much difficulty. Equally if A pays B to write an essay for submission because A indicates that he has no time to write it, there should be few problems. It may be more difficult in cases where the web site providing the essay employs disclaimers of the type referred to earlier because the intention to defraud the victim university becomes more questionable. In the case of *R v Hollinshead* [1985] A.C. 975, however, the makers of devices enabling electricity meters to be altered were nonetheless convicted of conspiracy at common law because there was only one conceivable use to which they could be put.

Finally, there is another form of potential conspiracy at common law but one where there has not been a single prosecution for over thirty years and one where its continued existence is in some doubt. The crime of conspiracy to corrupt public morals should be considered in the context of the relationship between the web based intermediary providers and their bank of freelance writers who produce the essays. The offence is rooted in the controversial House of Lords decision of *Shaw v DPP* [1962] A.C. 220. The defendant had published a book containing lists of prostitutes. As with the earlier obscenity issue, the standards to be applied would be that of the ordinary person reflected through a jury's decision and there is little certainty as to what that precisely may be. Viscount Simonds:

"So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them." (*Shaw v DPP* [1962] A.C. 220 at page 269)

The case is controversial in that it reflects a certain judicial activism to create law which was justified by Viscount Simonds in that:

".....there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society" (*Shaw v DPP* [1962] A.C. 220 at page 268)

It is clear from subsequent authority that the behaviour in question does not have to be illegal. In *Knulier v DPP* [1973] AC 435, the decision in *Shaw* was followed although some attempt was made to clarify its meaning. Lord Simon suggested that the conduct in question would be one:

“which a jury might find to be destructive of the very fabric of society” (*Knulier v DPP* [1973] AC 435 at page 491)

### **Concluding Remarks**

This paper has illustrated the potential difficulties in using the criminal law as a means of controlling the behaviour of students who submit work for assessment which has been prepared by others. Utilising the Fraud Act 2006 either against the student or against the third party supplier will require an acceptance that any submission is a fraud in an economic sense. Even if this were to be overcome, the possibility of pursuing the supplier is complicated by the fact that most seek to distance themselves from the situation where a student is tempted to submit the work as his own. No reliable evidence exists to indicate precisely how students are using these supplied essays and therefore how a supplied essay is likely to be used. Other approaches utilise seldom used criminal provisions which will rely upon convincing a jury that the supply of essays in these circumstances is inherently immoral and there is little certainty in such an approach.

Ultimately, it would be for the Crown Prosecution Service to consider both, if a prosecution would be likely to end in conviction or if the public interest was being served by such a course of action. In the past, where legislation has been stretched in an attempt to address what is considered a novel form of criminality, there have often been high profile failures. For example, in *R v Gold* [1988] AC 1063, The Forgery and Counterfeiting Act 1981 was used in an attempted prosecution of computer hackers. If the supply and fraudulent use of essays is one which requires to be controlled, then, for the sake of clarity, it might be better for Parliament to specifically legislate on the matter.

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