

**Extract from the report of the Bills Committee on Theft (Amendment) Bill 1998
the House Committee meeting on 25 June 1999**

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Definition of "deceit"

28. Members have had detailed discussion on the term "deceit" which is defined in proposed section 16A to mean "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". Noting that the definition of "deceit" proposed in the LRC's Report made no reference to "the past, the present or the future" and "opinions", members question the necessity to include such references in the proposed definition.

29. The Administration considers that the references to "the past, the present or the future" and "opinions" should remain intact for several reasons. Firstly, there is a need for consistency in legislation. The proposed definition of "deceit" mirrors the definition of "deception" in section 17 of the Theft Ordinance. Secondly, the law has to be abundantly clear. Although there is no reference to "the past or the future" or "opinions" in the definition of "deception" in the English Theft Act 1968, an examination of some old departmental files relating to the 1970 Theft Bill and the Hansard reveals that it was the intention of the legislature that the definition should incorporate the best of the English definition whilst at the same time retaining provisions derived from the definition of "false pretence" in the Larceny Ordinance (the predecessor to the Theft Ordinance) which includes "...a false pretence or false representation relating to the past, the present or the future and a false statement or false representation of intention or opinion..". Thirdly, the word "opinions" should be left intact so that persons concerned (e.g. retailers or experts in a particular field) are left in no doubt that if they falsely or recklessly express an opinion, then such conduct will not be tolerated.

30. While members have no objection to including the reference to "the past, the present or the future" in the definition of "deceit", some members have expressed grave concern about the need to include the word "opinions" in the definition.

31. Members have noted that according to the LRC Report, it is clear from the case law in Scotland and South Africa that the deceit which forms the basis of the fraud offence does not extend to mere expressions of opinion nor to commercial exaggerations. It is the view of the LRC that commercial claims that a particular product is "the best" are matters better left to customer protection measures and that such conduct should not fall within the proposed offence of fraud. On members'

concern about whether "trader's puff" may be prosecuted for the offence of fraud, the Administration agrees that it is difficult to draw a line. It has cited examples of misrepresentation of the true quality and value of goods by a fruit vendor selling rotten apples and a merchant selling poor quality diamonds. Although both are equally liable to be prosecuted for the offence of obtaining property by deception under section 17 of the Theft Ordinance, the Administration is of the view that the fruit vendor is unlikely to be prosecuted because of the trivial nature of the offence, and that it would be encumbent upon the prosecution to prove beyond a reasonable doubt that the misrepresentation made by the diamond merchant was intentional. The Administration supplements that the proposed offence of fraud is intended to focus on organised schemes of fraud rather than isolated, one-off type of deceptive acts.

32. On members' request for information on cases which would not have proceeded with if the word "opinion" was not included in the definition of "deception" in section 17 of the Theft Ordinance, the Administration has not been able to provide any such cases. However, it has referred members to a leading case called *Bryan* which was decided in U.K. in 1857. In that case, the accused was found guilty by the jury for obtaining money from pawnbrokers by false pretences that the quality of certain spoons were equal to that of a specified brand, but the conviction was subsequently quashed by the judges who held the view that the misrepresentation merely amounted to puffing of goods which was a matter of opinion than a false pretence. The Administration advises that two eminent academics have expressed the view that facts similar to those in the *Bryan* case would support a prosecution, although the concept does not appear to have been tested in Court as to date.

33. A member considers it undesirable to criminalise mere expressions of opinion or commercial exaggerations. If it was intended that such conduct should fall within the proposed offence of fraud, she considers that a public consultation on the proposal should be conducted by the Administration before the Bill is taken any further. Members in general agree that criminal law must be clear as to what the new offence of fraud is intended to cover, and they have reservation to leave this to the discretion of the prosecution authorities. They also question the necessity to include the word "opinions" in the definition of "deceit", especially when the Administration has failed to demonstrate to the satisfaction of members how it would be handicapped in taking prosecution action if the word is taken out from the definition. After deliberation and having regard to the Administration's position, members agree that the Chairman should, on behalf of the Bills Committee, move an amendment to delete the words "or opinions" from the definition of "deceit" in clause 3 of the Bill.

34. Members have considered whether a similar amendment could be proposed to the definition of "deception" in section 17 of the Theft Ordinance for the sake of consistency. Members agree that it is not appropriate for the Bills Committee to do so as the amendment falls outside the scope of the Bill. However, they recommend that the Panel on Administration of Justice and Legal Services to look into the need to retain the word "opinions" in the definition of "deception" in section 17 of the Theft

Ordinance as a separate issue.

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