

立法會
Legislative Council

LC Paper No. CB(2)511/99-00

(These minutes have been
seen by the Administration)

Ref : CB2/BC/10/98

Legislative Council
Bills Committee on Theft (Amendment) Bill 1998

Minutes of meeting
held on Wednesday, 9 June 1999 at 8:30 am
in Conference Room B of the Legislative Council Building

- Members Present** : Hon Mrs Miriam LAU Kin-ye, JP (Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Jasper TSANG Yok-sing, JP
- Member Absent** : Hon Ambrose LAU Hon-chuen, JP
- Public Officers Attending** : Mr John READING
Senior Assistant Director of Public Prosecutions
- Ms Sherman CHAN
Senior Assistant Law Draftsman
- Mr Llewellyn MUI
Senior Assistant Solicitor General (Acting)
- Clerk in Attendance** : Mrs Percy MA
Chief Assistant Secretary (2)3
- Staff in Attendance** : Mr LEE Yu-sung
Senior Assistant Legal Adviser
- Mr Paul WOO
Senior Assistant Secretary (2)3

I. Confirmation of minutes of meeting held on 9 March 1999
(LC Paper No. CB(2)2218/98-99)

The minutes of the above meeting were confirmed.

II. Meeting with the Administration
(LC Paper No. CB(2)2214/98-99(01))

Discussion

Inclusion of the term "opinions" in the definition of "deceit" (Clause 3)

2. The Chairman advised that the meeting aimed primarily at dealing with the only outstanding issue for the Bills Committee, i.e. to consider whether the definition of "deceit" in clause 3 of the Bill should include "a deceit as to the intentions or opinions of the person practising the deceit or any other person". The proposed definition in clause 3 departed from that proposed by the Law Reform Commission (LRC) in that the latter made no reference to "opinions". According to the LRC, it was clear from the case law in Scotland and South Africa that the deceit which formed the basis of the offence of fraud did not extend to mere expressions of opinion or commercial exaggerations.

3. Members noted the paper prepared by the Administration (LC Paper No. CB(2)2214/98-99(01)) which was in response to the queries raised by members at the last meeting about the justifications to include the term "opinions" in the proposed definition of "deceit". As set out in the paper, the Administration maintained its view that the definition of "deceit" in clause 3 of the Bill should remain intact because it mirrored the existing definition of "deception" in section 17 of the principal Ordinance (Theft Ordinance (Cap.210)) and it also reflected the community needs.

4. Miss Margaret NG referred to the example given by the Administration in the paper of a diamond merchant who deliberately misrepresented the quality of his merchandise. Miss NG said that she could not accept the arguments put forward by the Administration, particularly the point made in paragraph 3 of the paper that "...the prospective customer of a diamond merchant, who is told that the diamonds he is being shown are of the best quality, may have little choice but to rely on the veracity of the statement made to him,...." She considered that this could not be the case in the actual trading or buying and selling of expensive items such as diamonds, because any prospective buyer of such valuable goods would hardly be taking the merchant on total trust. Furthermore, this example given by the Administration was in essence a case of misrepresentation of fact rather than a misrepresentation as to opinion. In Miss NG's view, a representation of quality was a representation of fact.

5. Miss Margaret NG further pointed out that in the example of HKSAR v. LEUNG Yuen-keung referred to in the same paper, the charges were obtaining property by deception and evasion of liability by deception. The offence in the case involved deceitful conduct practised by the defendant in diamond trading, rather than a misrepresentation of opinion as to the quality of the diamonds being traded.

6. Miss Margaret NG said that it might be difficult, as pointed out by the Administration, to distinguish between misrepresentation of fact and misrepresentation of opinion. Yet, it would be highly undesirable, if only for the difficulty to "draw the line", to widen the scope of "deceit" to include "opinions" to the effect that conduct which was mere expressions of opinion could be caught by the new offence of fraud and criminally punished. She emphasized that the law should not be broadened so as to make it easier for the prosecution to charge and secure a conviction. As the proposed legislation dealt with the creation of a new criminal offence, it must be made extremely clear as to what the new offence of fraud was intended to cover. She disagreed to the suggestion made at the last meeting that both the Administration and members could make clear the legislative intent in the speeches to be made on resumption of Second Reading debate on the Bill.

7. Mr Martin LEE referred to the case of Bryan [1857] which had been discussed at the last meeting. In that case, the original conviction of the defendant for false pretence was quashed because the judges at the time held that the falsehood in question was a misrepresentation of what was more a matter of opinion than a definite matter of fact, and misrepresentation of opinion was not covered by the law then in force. Mr LEE pointed out that the case was ruled over a hundred years ago. Whether or not misrepresentation of opinion was capable of being prosecuted criminally remained untested because of the absence of decided cases since then. He agreed with Miss Margaret NG that the law should be certain as to the conduct which it was intended to punish, in order to avoid having to refer to the legislative intent by other means when ambiguity in interpretation of the law arose.

8. Mr Martin LEE added that if the Bill was passed unamended, it was permissible to charge someone for "traders puff". He said that at this time of political climate, he had reservation about leaving prosecution of offences of a trivial nature to the discretion of prosecuting authorities.

9. In response to the points raised by members, Senior Assistant Director of Public Prosecutions (SADPP) said that the Administration was of the view that the reference to "opinions" should remain intact in the proposed definition of "deceit" to ensure that people were left in no doubt that false opinion made knowingly and which caused harm to others should be punished criminally. False casual opinions, or representations which amounted to mere "traders puff", if they were made in good faith, would not be caught by the new offence of fraud. In any case, the onus would be on the prosecuting authorities to prove beyond reasonable doubt that the erroneous opinion

was made with a dishonest intent, in the knowledge that it was false. He said that it would be unwise for prosecutors to prosecute unless there was compelling evidence to prove the intent to misrepresent in a situation where an opinion was given.

10. SADPP added that the Administration had taken into consideration members' concern about the implications of including the term "opinions" in the definition of "deceit" but found it difficult to define the term "opinion".

11. Members discussed whether the following scenarios could be caught by the proposed definition of "deceit" which contained the reference to "opinions" -

- (a) A solicitor or his clerk, or a legal counsel, falsely representing to a client that in his opinion the client had a very good case; and
- (b) A stock-broker advising his client on how he believed the market would perform in the short-term, which turned out to be wrong.

12. SADPP advised that both instances might be caught if the parties concerned made the representation with an intention to defraud, knowing that the representation was false and would be relied and acted upon. He said that if the word "opinions" was removed from the definition, both of the above cases could be defended on the basis that the misrepresentation was one of opinion and the offending parties might be let off. However, SADPP admitted that there had been no precedent cases in which similar issues had been determined.

13. Miss Margaret NG said that it was important to have regard to the fundamental and stringent standards of criminal law, which punished conduct by virtue of its nature rather than its consequence. Referring to the point made by the Administration that it was necessary for the criminal law to intervene to protect the interests of people who had to rely on the opinion of others because of their own lack of knowledge, Miss NG opined that such intervention should only apply in the case of opinion of people with expert knowledge in a particular field. She said that the criminal law should not be concerned with mere expressions of opinion by people in ordinary daily encounter, albeit falsely made. The common law, on the other hand, assumed people to be capable of exercising their own judgment to guard against influence of careless or reckless opinions of that sort.

14. Miss Margaret NG further remarked that the examples described in paragraph 11 above, as well as other cases of professional negligence by people who were paid for their advice, could be dealt with under the remedies and disciplinary provisions available in the relevant specific legislation and codes of professional conduct. Whether or not fraudulent expert opinions should be criminalized would be a matter for the Administration to determine in conjunction with the professional bodies concerned.

15. Members discussed the need for including the term "opinions" in the definition of "deceit" in order to achieve consistency with the definition of "deception" in section 17 of the same Ordinance.

16. The Chairman asked whether there had been precedent cases in which prosecution would not have proceeded with had the term "or opinions" been taken out from the definition of "deception" in section 17. SADPP replied in the negative.

17. Miss Margaret NG said that if the reference to "opinions" was not necessary in the definition of "deception" in section 17, it would be compounding the error by including the same reference in the definition of "deceit" in clause 3.

Conclusion

18. Members generally shared the view that the Administration had not made out a justifiable case for the necessity to include the words "or opinions" in the definition of "deceit", especially when the Administration had failed to demonstrate to the satisfaction of members how it would be handicapped in prosecuting worthy cases if the reference to "opinions" was omitted from the definition. Members considered that so far as the case examples put forward by the Administration were concerned, such cases could be adequately dealt with by the offence of fraud, with the reference to "opinions" removed from the definition of "deceit". Members concluded that it was not necessary for the words "or opinions" to be included in the definition of "deceit".

19. Members agreed that should the Administration maintain its position against removing the reference to "opinions" in the definition of "deceit", the Chairman would introduce a Committee Stage amendment (CSA) on behalf of the Bills Committee to delete the said reference.

(Post-meeting note : In a reply given by the Administration which has been circulated to members vide LC Paper No. CB(2)2486/98-99(01) dated 5 July 1999, the Administration advised that it remained opposed to the deletion of the words "or opinions" from the definition of "deceit" in clause 3 of the Bill. The Chairman introduced a CSA to amend the definition of "deceit" as agreed by the Bills Committee in paragraph 19 above. The Bill, as amended, was passed by the Council on 7 July 1999.)

20. Members also discussed whether it was desirable to review section 17 of the Theft Ordinance to see if the reference to "opinions" in the definition of "deception" was necessary. Taking into consideration the fact that section 17 did not fall within the ambit of the Bill, members decided that the matter should be referred to the Panel on Administration of Justice and Legal Services for follow-up action as it deemed appropriate.

Action
Column

Legislative timetable

21. The Chairman advised that a report on the deliberations of the Bills Committee would be made to the House Committee on 25 June 1999 to recommend that the Second Reading debate on the Bill be resumed on 7 July 1999. The deadlines for notice of resumption and notice of CSAs were 21 June and 26 June 1999 respectively.

22. The meeting ended at 9:40 am.

Legislative Council Secretariat

20 October 1999