

FRAUD ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 2: Fraud by false representation

10. **Section 2** makes it an offence to commit fraud by false representation. **Subsection (1)(a)** makes clear that the representation must be made dishonestly. This test applies also to sections 3 and 4. The current definition of dishonesty was established in *R v Ghosh* [1982] Q.B.1053. That judgment sets a two-stage test. The first question is whether a defendant's behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people. If answered positively, the second question is whether the defendant was aware that his conduct was dishonest and would be regarded as dishonest by reasonable and honest people.
11. **Subsection (1)(b)** requires that the person must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place. The same requirement applies to conduct criminalised by sections 3 and 4.
12. **Subsection (2)** defines the meaning of "false" in this context and **subsection (3)** defines the meaning of "representation". A representation is defined as false if it is untrue or misleading and the person making it knows that it is, or might be, untrue or misleading.
13. **Subsection (3)** provides that a representation means any representation as to fact or law, including a representation as to a person's state of mind.
14. **Subsection (4)** provides that a representation may be express or implied. It can be stated in words or communicated by conduct. There is no limitation on the way in which the representation must be expressed. So it could be written or spoken or posted on a website.
15. A representation may also be implied by conduct. An example of a representation by conduct is where a person dishonestly misuses a credit card to pay for items. By tendering the card, he is falsely representing that he has the authority to use it for that transaction. It is immaterial whether the merchant accepting the card for payment is deceived by the representation.
16. This offence would also be committed by someone who engages in "phishing": i.e. where a person disseminates an email to large groups of people falsely representing that the email has been sent by a legitimate financial institution. The email prompts the reader to provide information such as credit card and bank account numbers so that the "phisher" can gain access to others' assets.
17. **Subsection (5)** provides that a representation may be regarded as being made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention). The main purpose of this provision is to ensure that fraud can be committed where a person makes a representation to a machine and a response can be produced without any need for human involvement. (An example is where a person enters a number into a

*These notes refer to the Fraud Act 2006 (c.35)
which received Royal Assent on 8 November 2006*

“CHIP and PIN” machine.) The Law Commission had concluded that, although it was not clear whether a representation could be made to a machine, such a provision was unnecessary (see paragraph 8.4 of their report). But subsection (5) is expressed in fairly general terms because it would be artificial to distinguish situations involving modern technology, where it is doubtful whether there has been a “representation”, because the only recipient of the false statement is a machine or a piece of software, from other situations not involving modern technology where a false statement is submitted to a system for dealing with communications but is not in fact communicated to a human being (e.g., postal or messenger systems).