

THE LAW COMMISSION
LEGISLATING THE CRIMINAL CODE:
CORRUPTION
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ABBREVIATIONS

IN THIS REPORT WE USE THE FOLLOWING ABBREVIATIONS:

ACPO: the Association of Chief Police Officers

the 1889 Act: the Public Bodies Corrupt Practices Act 1889

the 1906 Act: the Prevention of Corruption Act 1906

the 1916 Act: the Prevention of Corruption Act 1916

Archbold: Archbold – Criminal Pleading, Evidence and Practice (1997 ed, ed P J Richardson)

the CBI: the Confederation of British Industry

the CJA 1987: the Criminal Justice Act 1987

the CJA 1993: the Criminal Justice Act 1993

the CJPOA: the Criminal Justice and Public Order Act 1994

CIPFA: the Chartered Institute of Public Finance and Accountancy

the CPS: the Crown Prosecution Service

the Convention: the European Convention on Human Rights

the DPP: the Director of Public Prosecutions

the DTI: the Department of Trade and Industry

the ECHR: the European Convention on Human Rights

the FLP: the Financial Law Panel

the Home Office consultation paper: *The Prevention of Corruption – Consolidation and Amendment of the Prevention of Corruption Acts 1889–1916: A Government Statement* (June 1997)

ILEX: the Institute of Legal Executives

the MCCOC: the Model Criminal Code Officers Committee established by the Standing Committee of Attorneys-General of Australia

the MCCOC Report: the final report of the MCCOC, Chapter 3: *Theft, Fraud, Bribery and Related Offences* (1995)

the Neill Committee: the Committee on Standards in Public Life, formerly the Nolan Committee (Chairman: Lord Neill of Bladen QC)

the Nolan Committee: the Committee on Standards in Public Life, now the Neill Committee (Chairman: the Rt Hon the Lord Nolan)

the Nolan Report: *Standards in Public Life*, the first report of the Nolan Committee (1995) Cm 2850

the OECD: the Organisation for Economic Co-operation and Development

PACE: the Police and Criminal Evidence Act 1984

the Redcliffe-Maud Committee: the Prime Minister's Committee on Local Government Rules of Conduct (Chairman: the Rt Hon the Lord Redcliffe-Maud GCB CBE)

the Redcliffe-Maud Report: *Conduct in Local Government*, the report of the Redcliffe-Maud Committee (1974) Cmnd 5636

the SFO: the Serious Fraud Office

the SIB: the Securities and Investments Board

the Salmon Commission: the Royal Commission on Standards of Conduct in Public Life (Chairman: the Rt Hon the Lord Salmon)

the Salmon Report: the report of the Salmon Commission (1976) Cmnd 6524

the Strasbourg Commission: the European Commission of Human Rights

the Strasbourg Court: the European Court of Human Rights

TI (UK): Transparency International (UK)

THE LAW COMMISSION

Item 11 of the Sixth Programme of Law Reform: Criminal Law

LEGISLATING THE CRIMINAL CODE: CORRUPTION

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I INTRODUCTION

THE BACKGROUND TO THIS REPORT

- 1.1 In this report we make recommendations for the reform of the criminal law of corruption. We carried out this work in response to calls from two prestigious bodies for a review of this area of the law.¹ We were also very conscious of the consequences of corruption, which strikes at the root of our commercial life and of democracy itself. If public servants require to be bribed, or make decisions in response to bribes, the government is not democratic, and the citizen cannot rely on a principle which we take for granted, namely that those in positions of power will take their decisions in accordance with the law. As a recently published Home Office consultation document says, “corruption is regarded as a more serious crime than simple dishonesty and the international concern about this kind of crime and the difficulty of investigating this offence may justify exceptional measures.”²
- 1.2 In the consultation paper on which the recommendations in this report are based,³ we drew attention to four major defects of the present law. First, we explained that the present law is drawn from a multiplicity of sources, including many overlapping common law offences⁴ and at least 11 statutes.⁵ We pointed out that much of the legislation was a hasty response to a contemporary problem and, in consequence, was neither comprehensive, clear nor consistent. Therefore, it was not surprising

¹ The Salmon Commission and the Nolan Committee.

² *The Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889–1916*: A Government Statement (June 1997), para 3.15. See para 1.14 below.

³ *Legislating the Criminal Code: Corruption* (1997) Consultation Paper No 145.

⁴ These include misconduct in public office (*Llewellyn-Jones* [1968] 1 QB 429) and specific bribery offences (see para 2.2 below) such as embracery (bribing of jurors) (*Pomfriet v Brownsal* (1600) Cro Eliz 736; 78 ER 968); attempts to bribe a privy councillor (*Vaughan* (1769) 4 Burr 2495; 98 ER 308); attempts to bribe a police constable (*Richardson* 111 Cent Crim Ct Sess Pap 612); and the taking of a bribe by a coroner not to hold an inquest (*Harrison* (1800) 1 East PC 383).

⁵ Sale of Offices Act 1551; Sale of Offices Act 1809; Public Bodies Corrupt Practices Act 1889; Prevention of Corruption Act 1906; Prevention of Corruption Act 1916; Honours (Prevention of Abuses) Act 1925; Licensing Act 1964, s 178; Criminal Law Act 1967, s 5; Local Government Act 1972, s 117(2); Customs and Excise Management Act 1979, s 15; Representation of the People Act 1983, ss 107, 109 and 111–115.

that the Salmon Commission recommended the rationalisation of the statute law on bribery,⁶ while the Nolan Committee pointed out that since the Government had accepted, but not implemented, that recommendation, it might be a task which this Commission could take forward.⁷ In this project we have done so.

- 1.3 Secondly, we pointed out that another problem with the present law is that it is dependent on a distinction between *public* and *non-public* bodies.⁸ The Public Bodies Corrupt Practices Act 1889 (“the 1889 Act”) is concerned only with corruption in *public* bodies, while the more narrowly drafted Prevention of Corruption Act 1906 (“the 1906 Act”) extends the law of corruption to *all* agents. Significantly, the presumption of corruption under section 2 of the Prevention of Corruption Act 1916 (“the 1916 Act”) is similarly limited, applying only to persons “in the employment of [Her] Majesty or any Government Department or a public body”.⁹ The distinction between public and non-public bodies causes difficulty because of uncertainty as to what constitutes a public body. Many former public bodies have now been privatised, and it is uncertain which of them, if any, can still be regarded as public bodies. An important question which we address in this report is whether this distinction is still justified.
- 1.4 Thirdly, we drew attention to the difficulty in ascertaining to whom the present legislation applies. For example, it is uncertain whether certain categories of individuals, such as judges, fall within the definition of an agent. It appears that the 1906 Act, unlike the 1889 Act, does not extend to those who accept bribes before or after the currency of their agency, or to third party recipients.¹⁰
- 1.5 Fourthly, we discussed whether the rebuttable presumption of corruption under section 2 of the 1916 Act¹¹ is still justified in the light of sections 34 and 35 of the Criminal Justice and Public Order Act 1994 (“the CJPOA”),¹² which allow adverse inferences to be drawn from a defendant’s silence in the course of an investigation or trial. Conversely, we also considered whether the presumption should be not only retained but *extended*, as suggested in the Salmon Report.¹³ Furthermore, there is a very significant question whether, in the light of the CJPOA, the presumption is compatible with the European Convention on Human Rights.

⁶ Salmon Report, para 87.

⁷ Nolan Report, para 2.104.

⁸ See Part VI of Consultation Paper No 145, and Part III below.

⁹ 1916 Act, s 2. See also Part V below. Less significantly, the 1906 Act distinguishes between a person serving under a public body and a person serving under a non-public body: whereas the former is an “agent” for the purpose of the 1906 Act, the latter is not unless he or she falls into the definition of “agent” for some other reason, namely that he or she is “employed by” or “acting for” the non-public body (1906 Act, s 1).

¹⁰ See paras 5.110 and 5.47 respectively.

¹¹ This rebuttable presumption arises where payment is made to an employee of the Crown, a Government department or a public body by a person holding or seeking to obtain a contract with the Crown, a Government department or a public body (see para 4.6 below).

¹² Paras 4.31 – 4.36 below.

¹³ Para 4.15 below.

- 1.6 All these matters appear to us to call for a review of the law of corruption. We were fortified in this conclusion not only by the wishes of the Salmon Commission and the Nolan Committee¹⁴ but also by encouragement received from many other sources. In answer to a Parliamentary question asking what action he proposed to take to reform and consolidate the law of corruption (with particular reference to bribery of Members of Parliament), the Home Secretary stated on 9 June 1997 that the Government was committed to tackling corruption in all areas of public and private life, including the bribery of Members of Parliament.¹⁵ He announced that he was publishing on that day a statement on reform of the corruption statutes and that he would consider carefully the results not only of that consultation exercise but also of that conducted by this Commission in Consultation Paper No 145, together with any further recommendations which the Nolan Committee (now the Neill Committee) might make in relation to the criminal law. He expected to make a further statement on the reform of the law early in 1998.¹⁶ These statements confirm our view of the importance of this project.
- 1.7 We are also mindful of our statutory duty to keep the whole of the law under review “with a view to its systematic development and reform, including ... generally the simplification and modernisation of the law”.¹⁷ During the course of this project we have kept in mind the long-held aim of this Commission to make the criminal law more accessible, comprehensible, consistent and certain,¹⁸ an aim which we believe would be furthered by the implementation of our recommendations.

THE SIGNIFICANCE OF THIS PROJECT TO THE OBJECTIVE OF CODIFICATION OF THE LAW

- 1.8 The Law Commission is charged with the duty to keep the law under review “with a view to its systematic development and reform, including in particular the codification of [the] law”.¹⁹ In 1989 we produced a draft Criminal Code,²⁰ but it was in many respects a statement of the existing law or of fairly recent proposals for reform which were open to criticism. Accordingly, we subsequently adopted a policy of reviewing areas of criminal law so that one by one they would be modernised (where appropriate) before being assembled into a code.²¹ In the course of our code project we have completed reports on offences against the

¹⁴ See nn 6 and 7 above.

¹⁵ Written Answers, *Hansard* (HC) 9 June 1997, vol 295, col 346.

¹⁶ On 27 October 1997, the Minister of State for the Home Office said, in answer to a written Parliamentary question, that the Home Secretary was expected to make a further statement on reform early in 1998: Written Answers, *Hansard* (HC) 27 October 1997, vol 299, col 739.

¹⁷ Law Commissions Act 1965, s 3(1).

¹⁸ Codification of the Criminal Law (1985) Law Com No 143, paras 1.3 – 1.9.

¹⁹ Law Commissions Act 1965, s 3(1).

²⁰ Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177.

²¹ Law Commission Twenty-Seventh Annual Report (1992) Law Com No 210, p 10.

person and general principles,²² involuntary manslaughter,²³ the year and a day rule in homicide,²⁴ money transfers,²⁵ rape within marriage,²⁶ computer misuse,²⁷ intoxication,²⁸ and hearsay.²⁹

- 1.9 It is important to stress the main reasons for having a modern criminal code. First, such a code would lead to a substantial saving of both time and money. Secondly, it would ensure compliance with the European Convention on Human Rights. Article 7 of that Convention, as applied by the European Court of Human Rights, requires criminal offences to be defined with reasonable precision. The European Commission of Human Rights has pointed out that such offences must be “adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct”.³⁰
- 1.10 Thirdly, since criminal law is arguably the most direct expression of the relationship between a State and a citizen and is a matter of constitutional principle, that relationship should be clearly stated in a code laid down by Parliament. Fourthly, the adoption of a policy of codification provides a framework for fundamental and continuing review aimed at modernisation of the criminal law. The existence of a code shows clearly the seriousness with which society regards the control and punishment of crime: a nation whose basic rules of criminal law are muddled is sending the wrong messages to criminals and potential criminals. Finally, a modern criminal code would ensure that the users of the criminal justice system are provided with accessible and comprehensible criminal law.

PREVIOUS REFORM PROPOSALS

- 1.11 The Redcliffe-Maud Committee reported³¹ in 1974 in response to widespread public disquiet about conduct in local government following several prosecutions for offences of corruption. Its terms of reference were to examine local government law and practice and how it might affect the conduct of members and officers in situations involving a conflict of interest between their public functions and private interests.³² The Committee made several recommendations for law

²² Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218.

²³ Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237.

²⁴ Legislating the Criminal Code: The Year and a Day Rule in Homicide (1995) Law Com No 230: implemented by the Law Reform (Year and a Day Rule) Act 1996.

²⁵ Offences of Dishonesty: Money Transfers (1996) Law Com No 243: implemented by the Theft (Amendment) Act 1996.

²⁶ Criminal Law: Rape within Marriage (1992) Law Com No 205: implemented by s 142 of the Criminal Justice and Public Order Act 1994.

²⁷ Criminal Law: Computer Misuse (1989) Law Com No 186: implemented by the Computer Misuse Act 1990.

²⁸ Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

²⁹ Evidence in Criminal Proceedings: Hearsay and Related Topics (1997) Law Com No 245.

³⁰ *G v Federal Republic of Germany*, 6 March 1989 (1989) 60 DR 256, 262.

³¹ Under the appointment in 1973 of the then Prime Minister, the Rt Hon Edward Heath MP.

³² Redcliffe-Maud Report, para 2.

reform. These included the extension of the presumption of corruption under the 1916 Act. The Government of the time welcomed the report³³ but took little action with regard to it.³⁴

- 1.12 Following the Poulson³⁵ affair, the Salmon Commission was established in 1974. It reported two years later. Its terms of reference were to examine standards of conduct in central and local government in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body, and to recommend further safeguards to ensure the highest standard of probity in public life. The Commission examined the law of corruption and recommended that the Prevention of Corruption Acts 1889 to 1916, insofar as they applied to the public sector, ought to be consolidated and amended. However, no further action was taken by the Government.³⁶
- 1.13 More recent public corruption scandals led to the First Report of the Committee on Standards in Public Life in May 1995.³⁷ Its terms of reference were to examine current concerns about standards of conduct of all holders of public office and to make recommendations to ensure the highest standards of propriety in public life.³⁸ The Report concentrated on three main areas: issues relating to Members of Parliament; ministers and civil servants; and quangos. In making its recommendations, the Committee thought it important that the general principles of public life be restated; namely, selflessness, integrity, objectivity, accountability, openness, honesty and leadership.³⁹ The main recommendation that the Committee made in regard to the law of corruption was to request that steps be taken to clarify the law on bribery in relation to the receipt of a bribe by an MP, as recommended by the Salmon Commission, combined with consolidation of the statute law on bribery.⁴⁰ These recommendations also led to the Select Committee on Standards in Public Life, charged with considering the Nolan Report, recommending a review of the law on bribery in similar terms.

³³ See, eg, Written Answers, *Hansard* (HC) 23 May 1974, vol 874, cols 236–237.

³⁴ This may have been because by the time the Redcliffe-Maud Report was being debated, publication of the Salmon Report was already anticipated: see *Hansard* (HC) 27 June 1974, vol 875, cols 1719–1720.

³⁵ Poulson, an architect, had used corrupt methods to obtain work, by bribing councillors and local authorities.

³⁶ The report was not discussed in the House of Commons, but was fully debated in the House of Lords where it received a mixed response: see *Hansard* (HL) 8 December 1976, vol 378, cols 585–604 and 611–674.

³⁷ The Committee was appointed by the then Prime Minister, the Rt Hon John Major MP and reported under the charge of the (then) Chairman, the Rt Hon the Lord Nolan. Since 10 November 1997, the Chairman of the Committee has been Lord Neill of Bladen QC.

³⁸ First Report of the Committee on Standards in Public Life (“the Nolan Report”).

³⁹ Nolan Report, p 14.

⁴⁰ Nolan Report, para 2.104.

THE HOME OFFICE CONSULTATION DOCUMENT

- 1.14 The Home Office produced a consultation document on the prevention of corruption in June 1997.⁴¹ It contained a number of interesting and useful statements concerning the Government's approach. It stated that there may be some justification in having a single offence of corruption,⁴² and that there was a case for extending the existing statutes to cover trustees and all situations where a person has a duty, whether express or implied, to use his or her impartial judgment on an issue.⁴³ It suggested that it was right to consider carefully an extension to the presumption of corruption.⁴⁴
- 1.15 In the consultation document it was also suggested that a corruption offence should be a serious arrestable offence.⁴⁵ It was pointed out that offences under the 1889 and 1906 Act are arrestable under the provisions of section 24 of Police and Criminal Evidence Act 1984 ("PACE"); and they fall within the definition of a "serious arrestable offence" only if it can be shown that the offence in question would lead to substantial financial gain or serious financial loss to any person. That this consequence might follow is not clear at the beginning of an investigation and the purpose of the recommendation would be to ensure that corruption offences were always serious arrestable offences. The Home Office consultation document raised the question of the jurisdiction of the courts to deal with acts of corruption which arise outside the jurisdiction.⁴⁶ Finally, it drew attention to the issues that will have to be addressed with regard to the mental element of a corruption offence.⁴⁷

INTERNATIONAL INITIATIVES

- 1.16 As we have seen, there are a number of initiatives taking place at home aimed at countering corruption, in particular corruption in the public sector. We are aware also of efforts to counter corruption undertaken in a range of international fora such as, for example, the European Union, the Council of Europe, the Organisation for Economic Co-operation and Development ("the OECD"), the Commonwealth Law Ministers, the G7, the United Nations, the World Trade Organisation, the International Monetary Fund⁴⁸ and the Organisation of American States.
- 1.17 In May 1994, the OECD Ministerial Council adopted a recommendation on bribery in international business transactions: "that Member countries take effective measures to deter, prevent and combat the bribery of foreign public

⁴¹ *The Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889–1916*: A Government Statement (June 1997).

⁴² *Ibid*, para 3.6.

⁴³ *Ibid*, para 3.10.

⁴⁴ *Ibid*, para 3.12.

⁴⁵ *Ibid*, para 3.14.

⁴⁶ *Ibid*, paras 3.16 – 3.19.

⁴⁷ *Ibid*, paras 4.1 – 4.9.

⁴⁸ See, eg, a publication by the International Monetary Fund, published in February 1997, entitled *Why Worry About Corruption?*

officials in connection with international business transactions". On 17 December 1997, an OECD convention was signed,⁴⁹ the purpose of which was "to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials".⁵⁰ Paragraph 1 of Article 1 states:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

- 1.18 In September 1994, the Committee of Ministers of the Council of Europe set up the Multidisciplinary Group on Corruption ("GMC") with the purpose of examining "what measures might be suitable to be included in a programme of action at international level against corruption".⁵¹ A working group of the GMC dealing with penal law matters has drawn up a draft convention on corruption which is currently before the relevant committees. As presently drafted, the convention would require parties to criminalise amongst other things corruption of domestic public officials, of foreign officials and of officials working in international organisations and corruption in the business sector.
- 1.19 In June 1995, a convention was signed in the European Union requiring Member States to criminalise acts of fraud committed by their national officials where they affect the Communities' budget. The First Protocol of the convention was adopted in September 1996. It was directed at criminalising acts of *corruption* involving national officials which damage or are likely to damage the Communities' financial interests.⁵² Another convention, signed last year, reflected the European Union's concern to combat corruption of public officials whether or not that corruption damaged the Communities' financial interests.⁵³
- 1.20 In addition to these intergovernmental initiatives, there has been, for example, the Lima Declaration in 1997, a result of an international conference against corruption representing the citizens of 93 countries, which called for a concerted

⁴⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

⁵⁰ Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para 1.

⁵¹ Progress Report on the work of the Multidisciplinary Group on Corruption (GMC) for the attention of the 21st Conference of European Ministers of Justice, Prague, 10-11 June 1997.

⁵² The Convention on the Protection of the European Communities' Financial Interests. It has yet to be ratified. The target date for ratification of the convention and its protocols is mid-1998.

⁵³ The Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union. It has yet to be ratified.

effort by all international organisations, national governments and others to combat corruption.⁵⁴

SCOPE OF THE PROJECT

Members of Parliament

- 1.21 We explained in the consultation paper that the Government was taking steps to clarify the law relating to the bribery of, or the receipt of a bribe by, a Member of Parliament. In December 1996 the Home Office published a document to achieve this aim. The document, entitled *Clarification of the Law Relating to the Bribery of Members of Parliament*, was addressed to the Select Committee on Standards and Privileges in the House of Commons and the Committee for Privileges in the House of Lords. The Committees were invited to consider four broad options⁵⁵ but had not reported by the end of the last Parliament. The matter has now been taken up by the Joint Committee on Parliamentary Privilege.⁵⁶
- 1.22 We therefore took the view that it would be inappropriate and a waste of our resources for us to look into the position of members of both Houses of Parliament at that stage. We also considered that similar considerations apply to Ministers of the Crown, who are members of either the Commons or the Lords. We believed that the position of Ministers might well be affected by the Home Office review, and therefore did not deal with them in the consultation paper. We have assumed, and continue to assume, that the position of members of either House and of Ministers will be clarified by the Home Office review, and appropriate steps taken. For this reason, the draft Bill annexed to this report does not expressly refer to MPs or Ministers: if our recommendations are accepted, we would expect the draft Bill to be amended in accordance with the conclusions of the current review, and express provision made.

Scotland

- 1.23 The remit of the Law Commission of course only covers the law of England and Wales, and it is that law that we have had under consideration for possible reform, not that of Scotland as well. The Prevention of Corruption Acts apply in Scotland as in England and Wales, with only very minor differences. However, there are major differences between the relevant rules of evidence and procedure in the two jurisdictions, and the common law is also rather different.

⁵⁴ It took place during 7–11 September 1997.

⁵⁵ Para 9 sets out the four broad options:

- (1) to rely solely on Parliamentary privilege to deal with accusations of the bribery of Members of Parliament;
- (2) subject Members of Parliament to the present corruption statutes in full;
- (3) distinguish between conduct which should be dealt with by the criminal law and that which should be left to Parliament itself;
- (4) make criminal proceedings subject to the approval of the relevant House of Parliament.

⁵⁶ Under the chairmanship of the Rt Hon the Lord Nicholls of Birkenhead.

False documents

- 1.24 Section 1(1) of the 1906 Act contains three paragraphs. The first two paragraphs set out the offences of accepting (or obtaining, or agreeing to accept or attempting to obtain) a bribe and giving (or agreeing to give or offering) a bribe. The third paragraph of section 1 of the 1906 Act provides:

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty [of an offence].

- 1.25 This offence differs from the offences of bribery contained in the first two paragraphs in that, despite its presence in a statute concerned with corrupt practices, the offence created by this paragraph is not in fact one of corruption at all. This point was established by the Divisional Court in *Sage v Eicholz*⁵⁷ where the provision was literally construed. We therefore took the view in the consultation paper⁵⁸ that this offence, although it appears in the 1906 Act, is not in fact an offence of corruption at all, but one of fraud; and, having concluded that fraud, although a common feature of corruption, was not an essential element of corruption offences, we further concluded that the false documents offence lay outside the scope of this project. We remain of this view.

THE STRUCTURE OF THE REPORT

- 1.26 In Part II we consider whether there is a need to reform the present law. We proceed in Part III to consider the desirability of distinguishing, as the present law does, between public bodies and others in the law of corruption. We then consider in Part IV whether the reformed law should contain any form of presumption. In Part V we deal with the formulation of modern offences of corruption. In Part VI we look at the investigation of corruption, and in Part VII at the territorial jurisdiction of the new offences and whether there is a need for consent to prosecutions by the Attorney-General or any other person. Also included in this part is discussion of various ancillary matters. Part VIII looks at the possibility of introducing new offences of corruption by means of threats or deception. In Part IX we set out our recommendations in full. A copy of a draft Bill embodying our

⁵⁷ [1919] 2 KB 171. The defendant made a fraudulent representation in a claim handed to the agent of a water board, so that the defendant could obtain a rebate on his water rates. The agent was not aware that the claim was false, so there was no corruption of the agent. However, the defendant's actions fell squarely within the wording of the third paragraph. He knowingly gave the agent a document in which the agent's principal was interested. That document contained a false statement and was intended to mislead the principal. All the necessary ingredients for liability were therefore present. The Divisional Court considered that the word "corruptly" was deliberately absent from the third paragraph and that the word "knowingly", with which it is replaced, imports no element of *corruption*. In short, the approach in *Sage* was that if Parliament had wanted to confine the offence to the corruption of agents or those who corrupt them, the word "corruptly" would have appeared therein as it does in the earlier paragraphs.

⁵⁸ See paras 10.20 – 10.22.

recommendations is set out in Appendix A, with an index. Appendix B contains various statutory provisions and Appendix C is a list of all those who commented on the consultation paper.

- 1.27 We received a large number of very helpful responses to the consultation paper and we are grateful to those who took the time and trouble to respond. We must also record our gratitude for the help that we have received from the Committee on Standards in Public Life which has been of great value to us; and we are pleased that Lord Nolan, former chairman of that committee, felt able recently to make the following comment to the House of Lords Select Committee on the Public Service:

We have called for the corruption statutes to be brought up to date and clarified, and the Law Commission, with our support, has produced an excellent consultation paper on this.⁵⁹

- 1.28 We must also express our gratitude to Professor Sir John Smith CBE, QC, LLD, FBA, Emeritus Professor of Law at the University of Nottingham, who gave us much assistance with this project.

⁵⁹ These comments were made by Lord Nolan, in his capacity as Chairman of the Committee on Standards in Public Life, to the Select Committee on 28 October 1997.

PART II

THE PRESENT LAW AND THE NEED FOR CHANGE

- 2.1 In the consultation paper, we considered whether there was a need for a change in the present law.¹ As we have already said, many of the statutory offences were introduced as impulsive reactions to particular problems and scandals² and, therefore, not surprisingly, this has led to an uncertain and inconsistent law. In this part we will briefly describe the present law. We shall then summarise the difficulties with the present law which we highlighted in the consultation paper, difficulties which we believe justify the view we took provisionally that the law of corruption is in an unsatisfactory condition and that the common law and statutory offences of corruption should be re-stated in a modern statute.³ We will then consider the responses that we received on consultation before stating our conclusion.

THE PRESENT LAW

The common law offence of bribery

- 2.2 Bribery at common law has evolved over time, and opinions differ as to whether it is to be regarded as a general offence (applying to a range of different offices or functions) or whether the common law is comprised of a number of offences of bribery (distinguished by the office or function to which a particular offence applies).⁴ *Russell on Crime*, however, provides the following general statement of the offence:

Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.⁵

¹ Part IV of the consultation paper.

² See para 1.2 above.

³ Consultation Paper No 145, para 4.18.

⁴ “[T]he offence underwent a development over the centuries and is often described in terms of a number of individual offences rather than a single offence”: D Lanham, “Bribery and Corruption” in *Criminal Law: Essays in Honour of J C Smith* (1987) 92, 92–93. Examples of specific offences, or specific instances of the offence, are bribery of a privy councillor (*Vaughan* (1769) 4 Burr 2494; 98 ER 308) and bribery of a coroner (*Harrison* (1800) 1 East PC 382). See also *Archbold*, para 31–129.

⁵ *Russell on Crime* (12th ed 1964) p 381.

2.3 The most widely cited definition of who is to be regarded as a public officer for the purposes of common law bribery is taken from the early twentieth century case of *Whitaker*,⁶ in which “a public officer” was defined as

an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.⁷

2.4 One commentator⁸ has argued that the common law is not confined to public officers holding some sort of *permanent* public office but extends also to those who discharge an *ad hoc* public duty. In *Pitt and Mead*,⁹ for example, bribing electors at a parliamentary election was held to be a common law offence. In *Lancaster and Worrall*¹⁰ the same decision was reached in respect of the bribery of local government electors. Embracery (the bribery of jurors) is a common law offence, though it is now considered obsolete.¹¹

2.5 As for the nature of the bribe, Russell defines a bribe as “any undue reward”.¹² However, the benefit conferred in a particular case may be so small that it cannot be considered a reward at all. For example, in the *Bodmin Case*¹³ Willes J mentioned that he had been required to swear that he would not take any gift from a man who had a plea pending, unless it was “meat or drink, and that of small value”. Russell describes the mental element of common law bribery in terms of a briber intending to influence the behaviour of a public officer with a view to that officer “act[ing] contrary to the known rules of honesty and integrity”;¹⁴ it appears, however, from the case law that it is not a necessary feature of the offence that the briber should intend the bribee to commit a *breach* of duty.¹⁵

⁶ [1914] 3 KB 1283, pp 1296–7. The defendant, a colonel, had accepted money from a firm of caterers in return for giving the firm the tenancy of the regiment’s canteen. It was argued that the law of bribery applied to “judicial and ministerial officers” and that the colonel belonged to neither category. The Court of Appeal disagreed, holding that every public officer who was not a judicial officer was a ministerial officer.

⁷ *Ibid*, at p 1296, *per* Lawrence J.

⁸ D Lanham, *op cit*, pp 93–94.

⁹ (1762) 3 Burr 1335; 97 ER 861.

¹⁰ (1890) 16 Cox CC 737.

¹¹ *Owen* [1976] 1 WLR 840.

¹² See para 2.2 above.

¹³ (1869) 1 O’M & H 121.

¹⁴ See para 2.2 above.

¹⁵ See, eg, *Gurney* (1867) 10 Cox CC 550. The defendant was charged with attempting to bribe a justice of the peace. The jury was told that if the defendant had an intention to produce *any effect at all* on the justice’s decision, that was an attempt to corrupt.

The statutory offences

- 2.6 As we noted in Part I above,¹⁶ offences of corruption can be found in a variety of legislative sources. We have confined our attention, however, to the principal corruption statutes, namely the Prevention of Corruption Acts 1889 to 1916.

The 1889 Act

- 2.7 The 1889 Act was introduced following revelations of malpractice made before a Royal Commission appointed to inquire into the affairs of the Metropolitan Board of Works, the body exercising the powers of local government in London at that time.¹⁷ Section 1 of the Act, closely following the Commission's recommendation,¹⁸ provides:

- (1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of an offence.
- (2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of an offence.

- 2.8 As originally enacted, the 1889 Act was concerned only with *local* public bodies in the United Kingdom. Section 7 provides, in part, that the expression "public body" means

any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.

Section 4(2) of the 1916 Act extended the definition of "public body" to include "local and public authorities of all descriptions". A further extension is provided for under the Local Government and Housing Act 1989, so that it would include

¹⁶ See para 1.2 above.

¹⁷ P Fennell and P A Thomas, "Corruption in England and Wales: An Historical Analysis" (1983) 11 Int J Soc L 167, 172.

¹⁸ Salmon Report, para 44.

companies which, in accordance with Part V of that Act, are “under the control of one or more local authorities”.¹⁹ This provision is not, however, in force.

- 2.9 The bribe must take the form of “a gift, loan, fee, reward, or advantage”. The expression “advantage” includes

any office or dignity, and any forbearance to demand any money or money’s worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.²⁰

- 2.10 The advantage must be given or received as an *inducement* to, or a *reward* for, or *otherwise on account of*, any member, officer or servant of a public body doing or forbearing to do something in respect of any matter or transaction in which the body is concerned.

The 1906 Act

- 2.11 In 1898 a report was published by the Secret Commissions Committee of the London Chamber of Commerce calling for the criminal law of corruption to be extended into the private sector.²¹ Following a number of unsuccessful attempts at legislation,²² the 1906 Act was passed. The 1906 Act applies to all “agents”, whether in the public or the private sector. Section 1(1) provides in part:

If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business

... he shall be guilty [of an offence].

- 2.12 “Agent” is defined as including “any person employed by or acting for another”²³ and a person serving under the Crown²⁴ or any local or public authority.²⁵ The

¹⁹ Local Government and Housing Act 1989, Sched 11, para 3.

²⁰ 1889 Act, s 7.

²¹ P Fennell and P A Thomas, *op cit*, p 174.

²² Salmon Report, para 45.

²³ 1906 Act, s 1(2).

²⁴ 1906 Act, s 1(3).

term “serving under the Crown” does not require *employment* by the Crown. In *Barrett*²⁶ the Court of Appeal held that, for the purposes of the Act, a superintendent registrar of births, deaths and marriages was serving under the Crown, although he was not appointed, paid or liable to dismissal by it.

- 2.13 Whereas the 1889 Act describes a bribe as a “gift, loan, fee, reward or advantage”, the 1906 Act uses the expression “gift or consideration”;²⁷ and “consideration” is defined as including “valuable consideration of any kind”.²⁸ As under the 1889 Act, the putative bribe must be given or received as a *reward* or *inducement*; but, whereas under the 1889 Act it must be connected to a particular “matter or transaction”, under the 1906 Act it may be a general “sweetener” designed to secure *generally* more favourable treatment.
- 2.14 An ingredient common to the offences under both the 1889 and the 1906 Acts is that the putative bribe should be given or received *corruptly*.²⁹ The term is not defined in the legislation and has, as a result, been construed through case law.³⁰

The 1916 Act

- 2.15 The 1916 Act was prompted by wartime scandals involving contracts with the War Office,³¹ and was passed rapidly through Parliament as an emergency measure. Aside from increasing the maximum sentence for bribery in relation to contracts with the Government or public bodies,³² and broadening the definition of “public body”,³³ it also introduced the presumption of corruption. Section 2 of the 1916 Act provides:

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of [Her] Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from [Her] Majesty or any Government

²⁵ 1906 Act, s 1(3), as amended by 1916 Act, ss 4(2), (3).

²⁶ [1976] 1 WLR 946.

²⁷ 1906 Act, s 1(1).

²⁸ 1906 Act, s 1(2).

²⁹ A third offence created by the 1906 Act, s 1(1), is the offence of using a false document with the intent to mislead a principal. *This* offence does not require the agent to have acted corruptly (*Sage v Eicholz* [1919] 2 KB 171). See paras 1.24 – 1.25 above.

³⁰ See paras 2.29 – 2.30 below.

³¹ P Fennell and P A Thomas, *op cit*, pp 174 and 185–186. Particularly influential were the comments made by Low J, who presided over two of the War Office cases (*Asseling*, *The Times* 10 September 1916, and *Montague*, *The Times* 18 September 1916). See also the Salmon Report, para 46.

³² The maximum penalty at the time was 2 years’ hard labour, and the effect of the 1916 Act was to increase it to 7 years in cases to which the 1916 Act applied. The disparity in sentencing between the 1889 and 1906 Acts was removed by s 47 of the Criminal Justice Act 1988.

³³ See para 2.17 below.

Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

- 2.16 The presumption shifts the burden of proof, so that it is for the defence to prove (on the balance of probabilities)³⁴ that a given payment was not corrupt. It applies only to payments made to employees of public bodies, and only to cases involving contracts.

PROBLEMS WITH THE PRESENT LAW

“Public bodies”

- 2.17 As we have seen, the present law distinguishes between “public bodies” and others. Initially the law applied only to public bodies;³⁵ it was then extended to the private sector³⁶ (although that extension was not reflected in the application of the presumption of corruption³⁷ which was again confined to public bodies). The rationale for this distinction appears to be the assumption that higher standards of conduct are required in the public sector than in the private sector. We commented in the consultation paper that this justification would be more convincing if the distinction were on the basis of rules requiring higher standards in the public sector,³⁸ but it is not. It has no direct bearing on the question of which conduct is corrupt but only affects the ease of proving corruption.

The presumption

- 2.18 The presumption of corruption applies only to employees of public bodies, and only where they receive a benefit from a person holding or seeking a contract with such a body. There are substantial difficulties in practice in defining “public body” which have been compounded by the recent trend towards privatising public bodies and contracting out of work by public bodies to the private sector.
- 2.19 Furthermore, two important developments have occurred since the enactment of the 1916 Act which together call into question the need for and legality of the presumption: first, the enactment of the CJPOA and, in particular, sections 34 and 35 which allow inferences to be drawn from the silence of a defendant in interview, on being charged or at trial; second, the fact that the United Kingdom is a signatory to the European Convention on Human Rights (“the ECHR”) and intends to incorporate the convention into domestic law.

³⁴ *Carr-Briant* [1943] KB 607.

³⁵ Under the 1889 Act.

³⁶ Under the 1906 Act.

³⁷ Under the 1916 Act.

³⁸ Consultation Paper No 145, para 4.3.

Agents

- 2.20 As we have seen,³⁹ the 1906 Act is concerned with the corruption of “agents”, defined in the Act as including any person “employed by or acting for another”⁴⁰ or any person serving under the Crown or any public body.⁴¹ There has been criticism about the uncertainty of the meaning of the word “agent”.
- 2.21 We drew attention to three main areas in which problems arise:
- (1) the inapplicability of the presumption to agents (of public bodies) who are not classifiable as employees (of public bodies);⁴²
 - (2) the inconsistency of the law as regards
 - (a) persons connected with agents,⁴³
 - (b) persons who have been, or are to become, agents,⁴⁴ and
 - (c) purported agents;⁴⁵ and
 - (3) the uncertainty of the law as regards
 - (a) police officers,⁴⁶
 - (b) judges,⁴⁷ and
 - (c) local councillors.⁴⁸

The inapplicability of the presumption

- 2.22 We were concerned that the presumption of corruption under section 2 of the 1916 Act affects only *employees* of the Crown, Government department or public body. The presumption, therefore, will not arise where the individual concerned is an agent who cannot be classified as an employee. This category might include employees of firms engaged in contracted-out work and private sector secondees to Government departments. Our provisional view was that whatever view was taken of the presumption it was clear that if it was to be retained, it should be applied consistently.⁴⁹

³⁹ See paras 2.11 and 2.12 above.

⁴⁰ 1906 Act, s 1(2).

⁴¹ 1906 Act, s 1(3) and 1916 Act, ss 4(2), (3).

⁴² See para 2.22 below.

⁴³ See para 2.23 below.

⁴⁴ See para 2.24 below.

⁴⁵ See para 2.25 below.

⁴⁶ See para 2.26 below.

⁴⁷ See para 2.27 below.

⁴⁸ See para 2.28 below.

⁴⁹ Consultation Paper No 145, para 4.8.

Persons connected with agents

- 2.23 We also noted that whereas the 1889 Act does not require that the person being tempted to act in breach of duty should also be the recipient of the bribe, the 1906 Act requires those roles to be played by the same person. So, under the 1889 Act, in a transaction in which A pays a third party, D, who is distinct from B, the member, officer or servant of a public body whose conduct is sought to be influenced, D may be guilty of an offence if the receipt can be shown to have been an “inducement to” or “reward for” or “otherwise on account of” B’s acting (or refraining from acting) in his or her capacity as member, officer or servant of a public body. Under the 1906 Act, on the other hand, in the circumstance where A pays a third party, D, with a view to influencing or rewarding an agent, B, none of the parties would be guilty.⁵⁰ In this respect the 1906 Act is more limited than the 1889 Act, and, as a result, although third-party transactions involving those associated with public bodies fall foul of the 1889 Act, the 1906 Act will not bite on similar transactions in the private sector.

Persons who have been, or are to become, an agent

- 2.24 We drew attention to another example of the inconsistency between the 1889 and 1906 Acts: whereas the 1906 Act appears to require that the bribe be received by the agent during the *currency* of the agency (or that the agreement to receive the bribe should be during the currency of the agency), the 1889 Act applies to circumstances in which the public officer is *no longer* in office at the time of receipt of the bribe (or at the time of the agreement to receive the bribe) or has *yet* to assume office.⁵¹

Purported agents

- 2.25 Where a person *purports* to be, but is not in fact, an agent it is doubtful whether that person can be guilty if he or she obtains a corrupt payment.⁵² Professor A T H Smith has commented on the balance of the argument as to whether the law *ought* to extend to “purported” agents:

It is unclear whether a person who merely purports to hold a public office – as opposed to an actual office holder – might be guilty of the offence by receiving a “bribe”. One view is that he does, but the conclusion must be open to argument. It is outside the mischief at which the offence, even at its broadest, seems to be aimed, since the recipient of the bribe is in no sense in any position to exploit an office that he does not actually hold. On the other hand, the person handing over the bribe believes that recipient will be influenced by it and is in a position to affect his affairs favourably, and the recipient knows that this is his belief, and it might be said that this should suffice.⁵³

⁵⁰ If, however, D passed A’s “bribe” on to B, both B and D would be guilty under the 1906 Act, since D would then be an offeror and B the recipient agent.

⁵¹ Consultation Paper No 145, para 4.10.

⁵² Consultation Paper No 145, para 4.11.

⁵³ A T H Smith, *Property Offences* (1994) pp 792–793, para 25-04 (footnotes omitted).

Applicability of corruption laws to police officers, judges and local councillors

- 2.26 It is uncertain whether a police officer is an agent for the purposes of the 1906 Act: an English case suggests that a police officer is a servant of the State⁵⁴ but a Scottish case decided that the police officer was held to be an agent of the Chief Constable.⁵⁵
- 2.27 Although it is an offence at common law to give a judge, magistrate or other judicial officer any gift or reward intended to influence his or her behaviour,⁵⁶ it appears that the statutory offence of corruption might not apply to judicial officers.⁵⁷ Any attempt to bribe a judicial officer may, of course, be dealt with either as a contempt of court or an attempt to pervert the course of justice.
- 2.28 Local councillors are unlikely to be covered by the 1906 Act although they are likely to fall within the common law of corruption and the 1889 Act.⁵⁸

The meaning of “corruptly”

- 2.29 Each of the principal corruption Acts uses the term “corruptly” but its meaning is by no means clear. In the consultation paper,⁵⁹ we set out the two competing strands of judicial interpretation of “corruptly”: on the one hand, it describes an act which the law forbids as tending to corrupt,⁶⁰ and on the other, a dishonest intention to weaken the loyalty of an agent to his or her principal.⁶¹ We noted Lanham’s conclusion that the authorities on this point are in “impressive disarray”.⁶²
- 2.30 The reason why the cases are in this state is principally because of the approach of the House of Lords in the leading case of *Cooper v Slade*⁶³ in which the majority view was that “corruptly” meant “purposely doing an act which the law forbids as intending to corrupt”.⁶⁴ Professor A T H Smith suggests that such an interpretation would leave the word “devoid of any functional significance”.⁶⁵ In other cases it has been suggested that the word “corruptly” was akin to an evil mind,⁶⁶ while it has also been suggested that the defendant must have *dishonestly*

⁵⁴ *Fisher v Oldam Corporation* [1930] 2 KB 364 (a civil case).

⁵⁵ *Graham v Hart* 1908 SC (J) 26.

⁵⁶ See *Gurney* (1867) 10 Cox CC 550 and n 15 above.

⁵⁷ Consultation Paper No 145, para 4.13.

⁵⁸ Consultation Paper No 145, para 4.14.

⁵⁹ Consultation Paper No 145, paras 2.24 – 2.28, and para 5.65 below.

⁶⁰ *Cooper v Slade* (1857) 6 HL Cas 746; 10 ER 1488, and *Wellburn* (1979) 69 Cr App R 254.

⁶¹ *Lindley* [1957] Crim LR 321 and *Callard* [1967] Crim LR 236.

⁶² Consultation Paper No 145, para 4.15.

⁶³ (1857) 6 HL Cas 746; 10 ER 1488.

⁶⁴ (1857) 6 HL Cas 746, 773; 10 ER 1488, at 1499 per Wills J.

⁶⁵ A T H Smith, *op cit*, para 25-26.

⁶⁶ *Per Martin B in Bradford Election Case (No 2)* (1869) 19 LT 723, 728.

intended to weaken the loyalty of servants to their master and to transfer that loyalty to himself or herself.⁶⁷ In the consultation paper we provisionally agreed with Lanham that “the position in English law is hardly satisfactory”.⁶⁸

OUR PROVISIONAL CONCLUSION, THE RESPONSE ON CONSULTATION AND OUR RECOMMENDATION

- 2.31 For all these reasons, we provisionally concluded in our consultation paper that the law of corruption was in an unsatisfactory state and that the common law and statutory offences of bribery should be re-stated in a modern statute.⁶⁹ The great majority of those respondents who commented on this topic agreed with our conclusions.
- 2.32 Of those who disagreed, the Financial Law Panel was concerned that the new offence would have no practical effect if applied to the financial sector, which was already subject to a substantial degree of regulation. Significantly, however, it did not disagree with our view about the unsatisfactory state of the present law and the difficulties that arise outside the financial sector. The Securities and Investments Board (“the SIB”) did not think that the present law caused many difficulties but conceded that there was an attraction in restating the common law and statutory offences in a modern statute. We have reconsidered our provisional view. We have received no arguments which persuade us that it is wrong.
- 2.33 We conclude that the present law is in an unsatisfactory state and **we recommend that the common law offence of bribery and statutory offences of corruption should be replaced by a modern statute.**

(Recommendation 1)

⁶⁷ *Lindley* [1957] Crim LR 321, followed in *Callard* [1967] Crim LR 236.

⁶⁸ D Lanham, *op cit*, p 106.

⁶⁹ Consultation Paper No 145, para 4.18.

PART III

THE DISTINCTION BETWEEN PUBLIC BODIES AND OTHERS

- 3.1 An important feature of the present law is the distinction between corruption involving public and non-public bodies. As we explained in the consultation paper, the shape of a reformed law of corruption will depend on whether this distinction is to be retained or altered in any way.¹
- 3.2 In this part we will explain the significance of the present law and the reasons for our provisional view that the distinction should be abolished. We will then consider the responses and our final view.

THE SIGNIFICANCE OF THE DISTINCTION IN THE PRESENT LAW

- 3.3 The distinction is important in two main respects. First, the 1889 Act applies only to corruption in public bodies. Second, under section 2 of the 1916 Act there is a presumption of corruption in certain cases where a public body is concerned. A third, less important, consequence is that there is a distinction between a person *servicing under* a public body and a person serving under a non-public body.

The 1889 Act

- 3.4 The 1889 Act only covers corruption in public bodies: the bribe must relate to the conduct of a member, officer or servant of the public body. Although there is a substantial overlap between the 1889 and 1906 Acts, the earlier Act has certain advantages (for the prosecution) in relation to both the scope of the offences and the penalties available on conviction.

The scope of the offences

THIRD PARTIES

- 3.5 The first advantage is that, whereas the 1906 Act affects only agents and does not extend to third parties, the 1889 Act, in contrast, sets no limits on the category of persons who may be charged with soliciting or receiving a bribe – it embraces not only a member, officer, or servant of a public body but also *any third party* who solicits or receives a bribe in respect of the conduct of a member, officer, or servant of a public body. Therefore the 1889 Act, but not the 1906 Act, would apply, for example, to a spouse of an employee of a public body who accepts a bribe in return for persuading that employee to commit a breach of duty.

PEOPLE WHO HAVE BEEN, OR ARE TO BECOME, AGENTS

- 3.6 Secondly, the 1906 Act only applies to acts done by agents or people having dealings with *existing* agents. In contrast, under the 1889 Act, it is possible to prosecute although the agreement to receive the reward or receipt of the reward

¹ Consultation Paper No 145, para 6.1.

itself was not until after the relevant agency had terminated.² So if the person at the time of the receipt of the reward or at the time he or she agreed to receive the reward is not an agent – either because he or she has not taken office or has ceased to take office – an offence may have been committed under the 1889 Act but not under the 1906 Act.

Penalties

- 3.7 The powers of the court following conviction under the 1889 Act are far more extensive than the penalties available under the 1906 Act. In addition to imprisonment or a fine (or both), the court may, for example, order a defendant to pay to the public body concerned the amount, or value of the gift, loan, fee or reward received. The court may also disqualify the defendant from public office or order his or her forfeiture of office.³

The presumption

- 3.8 The presumption under section 2 of the 1916 Act, which has the effect that any money, gift or consideration is *deemed* to have been paid or given and received corruptly as an inducement or a reward *unless the contrary is proved*, applies only where the employer of the putative bribee or the body with which the putative briber holds or seeks to hold a contract is the Crown, a Government department or a public body. The presumption applies not only to the 1889 Act, which is itself confined to public bodies, but also to the 1906 Act, which is not.
- 3.9 Clearly, it will often be of crucial importance to determine whether or not a particular body is a public body as this will decide who bears the burden of proof concerning what will often be the only live issue at the trial.

The distinction between a person serving under a public body and a person serving under a non-public body

- 3.10 A further, somewhat theoretical, point is that a person serving under a public body counts as an “agent” for the purpose of the 1916 Act⁴ whereas a person serving under any other body is an agent only *if employed by or acting for* the body in question. As we pointed out in the consultation paper⁵ we found it hard to think of any examples of a person who would be “serving under” a public body although neither “employed by” it nor “acting for” it – in which case the person would be an agent within the definition of the 1906 Act, even *without* the extension in the 1916 Act. If such a case exists, the person in question is an “agent” within the meaning of the Acts *solely* because the body under which he or she serves happens to be a “public body”. In other words, whether or not a body is a public body is to this extent relevant to the distinction between persons who are and are not “agents” within the meaning of the Acts.

² *Andrews Weatherfoil Ltd* [1972] 1 WLR 118.

³ 1889 Act, s 2. See para 7.30 below.

⁴ 1916 Act, s 4(3).

⁵ Consultation Paper No 145, para 6.9.

THE DEFINITION OF A PUBLIC BODY

3.11 Under the 1889 Act, the phrase “public body” is defined as follows:

The expression “public body” means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.⁶

3.12 It has been said that the definition is “clearly ... confined to local authorities”.⁷ It consists of a list of various types of local authorities which existed when the 1889 Act was passed, but this list proved too restrictive since some public bodies were not included.⁸ Section 4(2) of the 1916 Act extended the term “public body” to include “local and public authorities of all descriptions”. Regrettably, there have been serious doubts as to what this means.

3.13 In *Newbould*⁹ Winn J cast doubt on the effectiveness of the 1916 amendment by holding that the National Coal Board was not a public body within the meaning of section 4(2). However, this view was expressly overruled by the House of Lords in *DPP v Holly and Manners*,¹⁰ where it was held that the North Thames Gas Board was a public body. That expression included

bodies which have public or statutory duties to perform and which perform those duties and carry out their transactions for the benefit of the public and not for private profit.¹¹

Lord Edmund-Davies said it was difficult to imagine wording that could have been wider than that of section 4(2).¹²

3.14 This decision appeared for a time to clarify matters. It became clear that a public body need not be one established by statute. Thus the Criminal Injuries Compensation Board, established by royal prerogative, was a public body within the meaning of the Act¹³ because it had public duties to perform.¹⁴ The *Holly* test

⁶ 1889 Act, s 7.

⁷ *Joy and Emmony* (1974) 60 Cr App R 132, 133, *per* Judge Rigg.

⁸ Eg, the Port of London Authority and the Water Board: see Lord Buckmaster LC in the debate on what became s 4(2) of the 1916 Act (*Hansard* (HL) 19 December 1916, vol 23, col 987).

⁹ [1962] 2 QB 102.

¹⁰ [1978] AC 43.

¹¹ [1978] AC 43, 53, *per* Lord Diplock.

¹² [1978] AC 43, 54, citing with approval the words of Judge Rigg in *Joy and Emmony* (see n 7 above).

¹³ See generally J F Garner, “Public Bodies” (1977) 121 SJ 785. Other examples of public bodies cited in this article were the British Gas Council, the British Airways Board, the National Coal Board and the Post Office.

¹⁴ See *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864.

was simple: did the body carry out its business for the benefit of the public, or for private profit?

The Local Government and Housing Act 1989 amendment

- 3.15 The concept of a public body will be further widened if paragraph 3 of Schedule 11 to the Local Government and Housing Act 1989 comes into force.¹⁵ That provision adds the following words to section 4(2) of the 1916 Act:

... and companies which, in accordance with Part V of the Local Government and Housing Act 1989, are under the control of one or more local authorities.

- 3.16 Section 68 of the same Act defines a company “under the control of” a local authority. Limited companies which are subsidiaries of local authorities, or the majority of whose shares are owned or controlled by a local authority, will themselves be “public bodies” within the meaning of the Prevention of Corruption Acts.

Public bodies outside the United Kingdom

- 3.17 It is not entirely clear whether a public body existing outside the United Kingdom is a “public body” within the meaning of the Acts. Section 7 of the 1889 Act expressly excludes such bodies from the definition. Section 4(2) of the 1916 Act extends the definition so as to include “local and public authorities of all descriptions”; but this appears to have been intended only to include certain British bodies which fell outside the original definition. Had Parliament intended to remove the exception for bodies existing outside the United Kingdom, it would surely have done so expressly. We therefore provisionally concluded that the bribery of an employee of a foreign public body would not be an offence under the 1889 Act, and that the presumption under section 2 of the 1916 Act would not apply.
- 3.18 It has been suggested¹⁶ that, if our interpretation is correct,¹⁷ it creates a “singular anomaly” as regards those who qualify as agents: “neither private agents nor Crown Servants enjoy any similar exemption”. However, the anomaly arises only where the official in question, though *serving under* a public body existing outside the United Kingdom, is neither *employed by* nor *acting for* that body. If the official were employed by it or acting for it, he or she would be an agent within the original definition in section 1(2) of the 1906 Act, and the question of whether the body qualified as a public body would for this purpose be immaterial.

¹⁵ Although Commencement Order No 8 (SI 1990 No 1274) was drafted so that this provision would come into force on 1 July 1990, that order was amended by an order made on 28 June 1990 (SI 1990 No 1335) which omitted reference to Paragraph 3 of Sched 11.

¹⁶ D Lanham, “Bribery and Corruption”, *Criminal Law: Essays in Honour of J C Smith* (1987) 92, 101.

¹⁷ Lanham thinks it is arguable that s 4(2) of the 1916 Act removes the exception for foreign bodies in s 7 of the 1889 Act, though “[a]s the exception works in favour of the liberty of the subject” it would probably be held that the exception survives: *ibid*. In our view it was clearly intended to survive.

SHOULD THE DISTINCTION BE RETAINED?

The diminishing importance of the distinction

- 3.19 As we have explained,¹⁸ in *Holly* it was said that a body is a public body only if it performs public or statutory duties for the benefit of the public and not for private profit. This rule has become increasingly arbitrary as a result of developments since that case was decided.
- 3.20 For example, more and more functions previously performed by organisations of national or local government are being sub-contracted to private companies. In addition, there are an increasing number of joint ventures between local and central government and private companies. Private Finance Initiatives are used to finance projects which had previously been undertaken at public expense. Another major development is that formerly nationalised utilities – such as the water boards, British Gas and electricity generators – have been privatised. These bodies have continued to provide the same service, which had previously been “for the benefit of the public”, but now do so for their shareholders’ profit.
- 3.21 The matter is further confused because in some cases the state has retained a controlling influence in those companies through a “golden share”. In other cases, they have statutory duties to perform and are regulated by “quangos” answerable to Parliament.¹⁹
- 3.22 In the consultation paper we drew attention to the effect of the distinction drawn in *Holly* that an agent of a nationalised industry who accepts a bribe is committing an offence under the 1889 Act and, if prosecuted, must prove that the transaction was not corrupt; but an agent who did the same thing after the industry had been privatised would be committing an offence under the 1906 Act only and the burden of proof would rest entirely on the prosecution.²⁰ We found it difficult to justify the determining factor as being whether the organisation was acting for profit or not. We are not alone in taking this view. The MCCOC Report concluded:
- Given that the distinction between the functions to be privatised are based primarily on economic criteria, linking the offence of bribery to functions which *happen* to be performed in the public sector for the time being is arbitrary.²¹
- 3.23 The Home Office in its consultation document took an identical view and thought that the distinction was no longer valid.²²
- 3.24 In defence of the present position it may be argued that the *Holly* test was not in fact formulated against the background of the industrial scene in 1978, which was perhaps the high-water mark of state ownership. Not only were nearly all “public”

¹⁸ See para 3.13 above.

¹⁹ Eg, OFGAS and the Office of the Rail Regulator.

²⁰ Consultation Paper No 145, para 6.28.

²¹ MCCOC Report, p 271.

²² Home Office consultation paper, paras 3.4 and 3.5.

enterprises then owned by the state, but so were some of a wholly *private* character.²³ The conditions that prevailed between 1889 and 1916 are, in this respect, more like the present than those of 1978. It would have been quite wrong to construe the legislation with 1978 spectacles, and the House of Lords did not do so: it merely confirmed the correctness of a test laid down in 1907,²⁴ which Parliament must be taken to have had in mind in 1916. Arguably it follows that that test may have become inappropriate by 1978, but has become *less* inappropriate since then.

3.25 There is force in this argument. But the real question, we believe, is not whether developments since 1978 have undermined the reasoning in *Holly*. It is whether, in the light of the experience of the last fifty years, it still seems sensible to apply different rules of criminal law to an enterprise which is currently in state hands and to one which currently is not. With the benefit of that experience, the difference between the two forms of enterprise now seems far less significant than it must have seemed to the legislators of 1889 and 1916. In our view the distinction between public and private can no longer be regarded as a simple dichotomy: rather, it is a spectrum. At one extreme there are quintessentially public bodies, the privatisation of which is scarcely conceivable; at the other, firms which exist to make profits for their owners and for no other purpose. In between, there is a grey area. The bodies in this area may or may not earn profits for shareholders, but their functions are such that it is a matter of public concern that they should be properly run.

3.26 Bearing in mind the difficulty in distinguishing between public bodies and others, we now consider the possible arguments in favour of the retention of the distinction.

Possible arguments in favour of the distinction

3.27 We considered a number of issues relevant to the important question of whether the distinction between public bodies and others is one which should continue to play a crucial part in the law of corruption.

Is public sector corruption more serious than private sector corruption?

3.28 Our provisional view was that, in general, corruption on the part of a public servant was likely to be more damaging to the public interest, and therefore a more serious offence, than corruption in the private sector. However, we did not accept that this was an adequate justification for a *rigid* distinction between the two.²⁵ We explained that some private sector corruption is very serious whilst some public sector corruption might be trivial, and we thought that the seriousness of the offence was a matter more appropriately to be considered at the sentencing stage.²⁶

²³ Eg Rover and Rolls Royce.

²⁴ In *The Johannesburg* [1907] P 65.

²⁵ Consultation Paper No 145, para 6.20.

²⁶ The MCCOC took a similar view. In their report, pp 271–273, they wrote:

Confining bribery to the public sector assumes that public sector corruption does more harm to the community than private sector corruption. That assumption is

Is the public more in need of protection than the private sector?

- 3.29 It is arguable that public bodies are more vulnerable to corruption than private bodies because private bodies are more able to look after themselves. Lord Randolph Churchill, the sponsor of the 1889 Bill, said, in response to criticism that it should extend to private bodies:

There is an essential difference between a private body and a public one. A private body has a direct interest in looking after its servants, but in the case of a public body what is everybody's business is nobody's business.²⁷

- 3.30 However, it must be remembered that this was said at a time when private sector corruption was not a statutory offence at all. Parliament decided in 1906 that the availability of civil remedies was insufficient reason for allowing such corruption to remain outside the criminal law. Nowadays, it is universally accepted that private sector corruption should be criminal and it seems that the point made by Lord Randolph Churchill is not relevant to the issue of whether private sector corruption should continue to be governed by *different rules*.

Is there a need for higher standards of conduct in the public sector?

- 3.31 There is a long-standing argument that different and higher standards are required and expected of those who work in the public sector. The Redcliffe-Maud Committee, for example, explained that “public life requires a standard of its own and those entering public office for the first time must be made aware of this from the outset”.²⁸
- 3.32 We provisionally concluded that this point is irrelevant to the question under consideration.²⁹ We believed that the distinction between public bodies and others was not an attempt to reflect the view that public life requires higher standards of conduct than private activities.
- 3.33 As we have noted,³⁰ the distinction made by the Prevention of Corruption Acts between public bodies and others is significant for three reasons. First, the 1889 Act applies only to corruption in public bodies. Second, under section 2 of the 1916 Act there is a presumption of corruption in certain cases where a public body is concerned. A third, less important, consequence is that there is a

questionable. The secret commissions paid to Johns in the Tricontinental Bank case amounted to \$2 million. The corrupting effect of a secret commission of that amount on confidence in the *general* commerce and finances of the community were very serious and more harmful than many instances of bribery in the public sector ... The public needs to be able to have confidence in the integrity of both the public and the private sector. It should not be statutorily presumed that corrupt payments in the public sector do more harm than corrupt payments in the private sector. The amount of damage in a particular case should be a question for sentencing rather than the subject of a separate offence.

²⁷ *Hansard* (HL) 25 March 1889, vol 334, col 810.

²⁸ Redcliffe-Maud Report, para 76.

²⁹ Consultation Paper No 145, para 6.25.

³⁰ At paragraph 3.3 above.

distinction between a person serving under a public body and a person serving under a non-public body. None of these reasons relates to the standard of conduct required of agents in the public and private sectors.

OUR PROVISIONAL PROPOSALS AND THE RESPONSE ON CONSULTATION

3.34 Against that background, our provisional views were:

- (1) that the existence of the distinction between public bodies and others, and the various different effects of that distinction, render the law complex and confusing;
- (2) that there would therefore be substantial advantages in abandoning it;
- (3) that the arguments for retaining the distinction *in principle* are outweighed by the advantages of abandoning it;
- (4) that it should therefore be retained *only* if it is necessary to do so for any of the three purposes we have identified;³¹ and
- (5) that it is not necessary to retain it for the purpose of determining the scope of
 - (a) certain of the individual offences (in the sense that they can be committed only where a public body is involved) or
 - (b) the concept of an “agent”.³²

3.35 Of those who responded on this point, about two-thirds were in favour of abandoning the distinction between public and private bodies.

3.36 Those in favour of abandoning the distinction supported our reasoning. They included the CPS who took the view that the law is rendered complex and confusing by the distinction and no persuasive reason in favour of its retention could be found.

3.37 Those who took a different view were generally concerned that a particularly high standard should be expected of those in public life. We have much sympathy for this concern but believe that the appropriate stage at which to mark it is in sentencing. We have not found anything in the minority view which persuades us to abandon or amend our provisional view that the distinction between public and private bodies is unnecessary *unless* it is still needed for the purpose of the presumption of corruption created by section 2 of the 1916 Act. In order to decide whether we can recommend that it should be discarded, we must therefore turn to the question of whether the presumption should be retained in its present form. We consider this question in Part IV.

³¹ Consultation Paper No 145, paras 6.2 – 6.9.

³² Consultation Paper No 145, para 6.32.

PART IV

THE PRESUMPTION OF CORRUPTION

- 4.1 Corruption is a difficult crime to prove: it tends by its very nature to be carried out in secret, and its “victims” may never be aware of it. As we have said,¹ in certain circumstances section 2 of the 1916 Act creates a *presumption* of corruption which can simplify the prosecution’s task. However, it applies only to cases involving public bodies. In the previous part we concluded that the distinction between public and private bodies is not worth retaining *unless* it is necessary to keep it for the purpose of the presumption. We therefore consider next whether the presumption should be retained in its present form, extended to private bodies or abolished altogether. Only in the first case would it require the preservation of the distinction between public and private bodies.
- 4.2 Since the presumption was introduced there have been two major developments: first, the United Kingdom has become a signatory to the ECHR; and second, there has been significant change in the law relating to the “right of silence”.² These developments together raise the question whether the presumption is still justified, or whether it is in breach of the ECHR.
- 4.3 A third development which will highlight this latter point is the decision of the present Government to incorporate into domestic law the rights and freedoms guaranteed under the ECHR. Under the recently published Human Rights Bill, a Minister of the Crown taking a piece of legislation through Parliament must, before Second Reading, make a statement to the effect that in his or her view the provisions of the new Bill are compatible with the Convention rights set out in that Bill,³ or make a statement to the effect that, although he or she is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill.⁴ We are therefore particularly aware of the need to ensure that our recommendations are compatible with the ECHR. In the light of its significance, we shall deal with this matter in some detail.
- 4.4 Our first step must be to see whether the presumption is consistent with the ECHR. This entails considering the *combined* effect of the presumption and of those provisions of the Criminal Justice and Public Order Act 1994 (“CJPOA”) which enable inferences to be drawn from a defendant’s silence. We shall then

¹ See paras 1.3 and 3.3 above.

² See para 4.31 below.

³ Under cl 1(1) those rights are defined as being those set out in Articles 2 to 12 and 14 of the ECHR and Articles 1 to 3 of the First Protocol of the ECHR agreed in Paris on 20 March 1952 as read with Articles 16 to 18 of the ECHR. The statement has to be in writing and published in such a manner as the Minister making it considers appropriate (cl 19(2)).

⁴ Clause 19(1)(b).

consider whether the presumption remains necessary in the light of the CJPOA, and revisit the options for reform which we set out in the consultation paper.⁵

THE PRESUMPTION

4.5 Section 2 of the 1916 Act provides:

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration⁶ has been paid or given to or received by a person in the employment of [Her] Majesty or any other Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from [Her] Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.⁷

4.6 The prosecution must therefore establish to the usual criminal standard of proof (that is, beyond reasonable doubt)

- (1) that some “money, gift, or other consideration” was paid or given to, or received by, an employee of Her Majesty, a Government department or a public body;⁸ and
- (2) that the person providing it (or the person whose agent provided it) was holding, or seeking to obtain, a contract from Her Majesty, a Government department or a public body.

Only when these two requirements are satisfied will the presumption come into effect.

4.7 Section 2 applies even if the charge is brought under the 1906 Act and therefore does not itself require that the payment should have been made to an employee of a public body. But, significantly, it applies only to employees, not members (such as local councillors), and only where a contract is involved rather than the exercise of a discretion (such as a grant of planning permission).⁹

4.8 The effect of the presumption is that

when the matters in that section have been fulfilled, the burden of proof is lifted from the shoulders of the prosecution and descends on

⁵ Consultation Paper No 145, paras 11.48 – 11.66.

⁶ The word “consideration” has its legal meaning and connotes the existence of some sort of contract or bargain: see *Braithwaite* [1983] 1 WLR 385, and also *Beaton v HM Advocate* [1993] SCCR 48.

⁷ On the balance of probabilities; see *Carr-Briant* [1943] KB 607; *Dunbar* [1958] 1 QB 1; *Hudson* [1966] 1 QB 448.

⁸ As defined by the 1889 Act, s 7, and the 1916 Act, s 4(2).

⁹ *Dickinson* (1948) 33 Cr App R 5.

the shoulders of the defence. It then becomes necessary for the defendant to show, on the balance of probabilities, that what was going on was not reception corruptly as inducement or reward. In an appropriate case it is the judge's duty to direct the jury first of all that they must decide whether they are satisfied so they are sure that the defendant received money or a gift or consideration, and then to go on to direct them that if they are so satisfied, then under section 2 of the 1916 Act the burden of proof shifts.¹⁰

- 4.9 The presumption can be rebutted only by evidence of an innocent explanation, established on the balance of probabilities, and not merely by the unsupported assertion of the defendant that such an explanation exists.¹¹

HISTORICAL REASONS FOR THE CREATION OF THE PRESUMPTION

- 4.10 Because of the general rule that the burden of proof in a criminal trial is on the prosecution, Parliament and the courts have always been rightly wary about placing a burden of proof on the defence: such burdens can often make the difference between a conviction and an acquittal. We must consider why Parliament thought such a burden to be appropriate in the case of corruption, albeit only in the circumstances described in section 2.
- 4.11 The 1916 Act was passed in the wake of scandals regarding the Clothing Department of the War Office, which involved the taking of bribes by viewers and inspectors of merchandise. It was presented to Parliament as an emergency wartime measure to deal with the burgeoning number of large government contracts and the resulting opportunities for corruption. Corruption in relation to these wartime contracts was viewed at the time as being particularly serious.
- 4.12 The immediate cause for the enactment of these provisions was the criticism made by a judge¹² who had presided over two cases¹³ of corruption in quick succession. In the first case, the judge had considered it impossible to prosecute a civil servant found to be in possession of banknotes which had been traced to a contractor with whom he had official dealings. This was because the prosecution was unable to prove *why* the money was paid. It was as a result of the particular circumstances of this case that section 2 addressed only the issue of transactions involving contracts, and extended *only* to employees. As the Salmon Commission remarked, "These anomalies doubtless reflect the haste with which the legislation was prepared."¹⁴
- 4.13 The reasons given in Parliament for the introduction of the presumption were that it was necessary "to remedy an obvious defect in the law"¹⁵ and would cause no injustice to an accused, as it should be easy for the accused to discharge the

¹⁰ *Braithwaite* [1983] 1 WLR 385, 389, *per* Lord Lane CJ.

¹¹ *Mills* (1978) 68 Cr App R 154.

¹² Low J.

¹³ *Asseling*, *The Times* 10 September 1916; *Montague*, *The Times* 18 September 1916.

¹⁴ Salmon Report, para 59.

¹⁵ *Hansard* (HC) 31 October 1916, vol 86, col 1635 (the Home Secretary, Mr H Samuel).

burden of proof if he or she was indeed innocent.¹⁶ The Lord Chancellor, Lord Buckmaster, said in the House of Lords:

I feel satisfied that you will agree with me in thinking that, short of high treason, it is almost impossible to imagine an offence more grave than to corrupt one of these public servants and cause the neglect of his duty.¹⁷

- 4.14 Attempts were made to widen the ambit of the Bill, but these were thwarted by a Government preoccupied by war and bent on filling a perceived loophole, rather than reconsidering the law of corruption as a whole. This was admitted by the Government:

If the times were opportune for a meticulous reconsideration of the whole law relating to corruption, I think the long series of amendments which stand [presented] would deserve the attention of the House. But this is by general agreement a war measure which is rendered necessary by the very large number of Government contracts which have come into existence and by the scandals which were exposed in a recent criminal trial.¹⁸

JUSTIFICATIONS FOR THE PRESUMPTION

- 4.15 Both the Redcliffe-Maud Committee and the Salmon Commission thought that the presumption was not only *justified* but should be *extended*.¹⁹

The Redcliffe-Maud Committee

- 4.16 The task of the Redcliffe-Maud Committee, appointed in 1973, was to examine local government law and practice following widespread disquiet about the standards of conduct in local government.²⁰ The Committee concluded that although the standards of conduct were “generally high”,²¹ it was right to be concerned that corruption exists, bearing in mind the fact that “unless corruption is stopped, it spreads”.²² It made a number of recommendations aimed at safeguarding standards in local government, some of which involved reform of the law. Taking the view that “the need to deal firmly with corruption ... justify[d]

¹⁶ *Hansard* (HL) 23 November 1916, vol 23, col 654 (the Lord Chancellor, Lord Buckmaster). Similarly the Home Secretary said:

I am sure this House will agree that it is both reasonable and equitable to put the burden of proof on the person charged. If the payment was innocently made ... it would be easy to prove in Court ... and there would be no risk of innocent men being unjustly convicted.

Hansard (HC) 31 October 1916, vol 86, col 1636.

¹⁷ *Hansard* (HL) 23 November 1916, vol 23, col 653.

¹⁸ *Hansard* (HC) 9 November 1916, vol 87, col 467 (the Attorney-General, Sir F E Smith QC, MP).

¹⁹ For the possibility of extending it, see paras 4.52 – 4.54 below.

²⁰ See para 1.11 above.

²¹ Redcliffe-Maud Report, para 15.

²² Redcliffe-Maud Report, para 15.

strengthening the provisions of the Prevention of Corruption Acts”,²³ the Committee recommended that section 2 of the 1916 Act should be extended to include not only contracts but “other exercises of discretion such as the grant of planning permission or the allocation of a council house; and ... elected members as well as employees of local authorities”.²⁴

The Salmon Commission

- 4.17 The Salmon Commission, appointed only a few months after the publication of the Redcliffe-Maud Report, had wider terms of reference than the Redcliffe-Maud Committee. It was charged with enquiring into

standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body.²⁵

- 4.18 Whilst acknowledging that placing the burden of proof on the defence could be justified only for “compelling reasons”,²⁶ the Commission concluded that, as regards corruption, there were such reasons. It was argued that, without the presumption, corruption would be very difficult to prove because bribes were seldom paid in the presence of witnesses;²⁷ there was often little documentary evidence because those involved in a corrupt transaction would inevitably tend to act secretly;²⁸ and if there were an innocent explanation for the receipt of a gift by a public servant, it would be easy for the recipient to furnish it.²⁹
- 4.19 The Salmon Commission was “satisfied that a burden of proof on the defence is in the public interest and causes no injustice”.³⁰ Agreeing with the recommendations of the Redcliffe-Maud Committee, it recommended that, for consistency, the presumption should be extended to include members of public bodies as well as employees, and to all official transactions, whether or not they involved contracts.³¹

THE PRESUMPTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

- 4.20 Both the Redcliffe-Maud Committee and the Salmon Commission recommended an extension of the scope of the presumption. Since the time that those

²³ Redcliffe-Maud Report, para 161.

²⁴ Redcliffe-Maud Report, para 162.

²⁵ Salmon Report, para 6.

²⁶ Salmon Report, para 60.

²⁷ Any witnesses that are available are likely to be accomplices and unwilling to co-operate.

²⁸ “Corruption in the public service is a grave social event which is difficult to detect, for those who take part in it will be at pains to cover their tracks”: *Public Prosecutor v Yuvaraj* [1970] AC 913, 922E-F, *per* Diplock LJ. This was an appeal from the Federal Court of Malaysia to the Privy Council, and Diplock LJ’s comments were made in respect of s 4 of the Prevention of Corruption Act 1961, the equivalent of s 2 of the 1916 Act.

²⁹ Salmon Report, para 60.

³⁰ Salmon Report, para 61.

³¹ Salmon Report, para 62.

recommendations were made, however, the ECHR has gained in prominence, with legislation incorporating the ECHR into domestic law presently before Parliament.³² We therefore turn now to the relationship between the presumption and the right to a fair trial (including the presumption of innocence) guaranteed under the ECHR, taking into account the implications of the CJPOA.

Does the presumption infringe the ECHR?

- 4.21 As a State party to the ECHR, the United Kingdom has an obligation in international law to conform its domestic law to the Convention's requirements.³³ United Kingdom citizens have an individual right of petition³⁴ to the Strasbourg Commission and from there, if their petition is declared admissible, to the Strasbourg Court.³⁵ Any law reform proposals which we consider must be assessed in the light of the ECHR.

The presumption of innocence

- 4.22 Our starting point is Article 6 of the ECHR, which guarantees the right to a fair trial. Article 6(2) provides:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.³⁶

- 4.23 The presumption of innocence is, like the rights of the defence contained in Article 6(3),³⁷ a component of the *general* right to a fair trial.³⁸ It applies only to

³² See para 4.3 above.

³³ "The contracting Parties have undertaken ... to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end.": European Commission of Human Rights, *Yearbook*, vol 2, 234. In *Ireland v UK* (1978) 2 EHRR 25 the Court said, at p 103 (para 239): "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of a contracting State."

³⁴ Under Article 25 of the ECHR. Article 26 of the ECHR states that the Commission will only deal with a matter after all domestic remedies have been exhausted. These rights will remain intact following the changes on 1 November 1998, when the formal structure of the ECHR institutions will change. An applicant will have an individual right of petition to a Court Committee which will consider the admissibility of the case. If this is successful, the case will go before a Chamber of the Court for a decision on both admissibility and merits.

³⁵ Under Article 45 of the ECHR, the Strasbourg Court has jurisdiction over all cases concerning "the interpretation and application" of the ECHR. A similar procedure will be adopted after 1 November 1998 in relation to cases going before the full Grand Chamber of the Court.

³⁶ The presumption of innocence can also be found in Article 11 of the Universal Declaration of Human Rights.

³⁷ Article 6(3) provides:

Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;

criminal proceedings. The Strasbourg Court has recently reaffirmed the principle that Article 6(2), like the other elements of the ECHR, must be interpreted in such a way as to guarantee rights which are practical and effective, rather than theoretical and illusory.³⁹

4.24 In *X v United Kingdom*⁴⁰ the Strasbourg Commission had to decide whether reverse onus clauses of the kind found in section 2 of the 1916 Act violate Article 6(2). The case involved a United Kingdom applicant who had been convicted of the offence of living on the immoral earnings of prostitutes. The legislation creating this offence contains a reverse onus provision to the effect that a person who is proved to be living with a prostitute, or who is, at the material time, proved to be in the company of a prostitute, or who is proved to have exercised control over the movements of a prostitute, so as to assist or encourage the prostitution, is presumed to have committed the offence of living on the earnings of prostitution *unless the contrary is proved*.⁴¹

4.25 The Commission held⁴² that a reverse onus clause of this kind will not violate Article 6(2) if it creates only a *rebuttable* presumption of fact, which the defence may disprove,⁴³ and is not unreasonable. However, the Commission went on to recognise that

this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt. It is not, therefore, sufficient

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

³⁸ See, inter alia, *De Weer v Belgium* (1979-80) 2 EHRR 439; *Allen de Ribemont v France* (1995) 20 EHRR 557, 574 (para 35).

³⁹ *Allen de Ribemont v France* (1995) 20 EHRR 557, 574 (para 35).

⁴⁰ App 5124/71, (1972) 42 Collection of Decisions 135.

⁴¹ Sexual Offences Act 1956, s 30(2).

⁴² After this finding the case did not proceed to the Strasbourg Court. A case cannot be heard by the Court without having been forwarded by the Commission, which had refused the application in this case.

⁴³ In *X v UK* App 5124/71, (1972) 42 Collection of Decisions 135, the Commission stated:

The Commission has, *ex officio* examined this complaint under Art 6(2) of the Convention ... The Commission has also studied the statutory provision under which the applicant was convicted. This statutory provision states that, when certain facts are proved by the prosecution, certain other facts shall be presumed. This creates a rebuttable presumption of fact which the defence may, in turn, disprove. The provision in question is not, therefore, as such, a presumption of guilt.

to examine only the form in which the presumption is drafted. It is necessary to examine its substance and its effect.⁴⁴

4.26 In *Salabiaku v France*⁴⁵ the Strasbourg Court⁴⁶ affirmed the approach taken by the Commission in *X v United Kingdom*. It emphasised the importance of confining reverse onus clauses within “reasonable limits which take into account ... what is at stake and maintain the rights of the defence”.⁴⁷

4.27 The Commission in *X v United Kingdom* also stated, as an alternative ground for its opinion, that it would be extremely difficult for the prosecution to obtain evidence capable of satisfying the criminal standard of proof on the question of whether the applicant was living on immoral earnings.⁴⁸ Thus a reverse onus clause may be justified if it relates to matters which are difficult for the prosecution to prove because they are peculiarly within the defendant’s own knowledge,⁴⁹ provided that it creates only a rebuttable presumption of fact and is restrictively worded.⁵⁰

4.28 One commentator has summarised the issue as follows:

The question seems to be one of whether there is an alternative route of investigation open to the government. If the answer is negative, the presumption would be reasonable. ... [C]orruption can be such an

⁴⁴ App 5124/71, (1972) 42 Collection of Decisions 135.

⁴⁵ (1988) 13 EHRR 379.

⁴⁶ The Court is a superior tribunal to the Commission, which is responsible for vetting applications and making references. If the Commission, having accepted an application, fails to reach a friendly settlement, it prepares a report stating its opinion as to whether there has been a breach of the Convention. This report goes to the Committee of Ministers and the case may then be brought before the Court within three months. See J G Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed 1993) pp 2–5.

⁴⁷ (1988) 13 EHRR 379, 388 (para 28). See also *Hoang v France* (1992) 16 EHRR 53 and *Bullock v United Kingdom* (1996) 21 EHRR CD 85. In the latter case, a statement of the law included the following passage:

The Commission also recalls that the Court, in the *Salabiaku* judgement and more recently in the *Pham Hoang* judgment, stated that the Convention does not prohibit presumptions of fact or law in principle, but does require Contracting States to remain within certain reasonable limits as regards criminal law which limits take into account the importance of what is at stake and maintain the rights of the defence.

⁴⁸ App 5124/71, (1972) 42 Collection of Decisions 135.

⁴⁹ See the Salmon Report, para 60: “It is difficult enough to prove the passing of a gift to a public servant from an interested party but, when it occurs, it is normally strong *prima facie* evidence of corruption. If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it; the facts relating to the gift are peculiarly within their own personal knowledge.”

⁵⁰ The Court’s assessment of the reasonableness of a clause may, it is suggested, be affected by the standard of proof which is borne by a defendant. The fact that, in this jurisdiction, the defendant who bears a legal burden will have only to satisfy the court on the balance of probabilities may suggest that a reverse onus clause is reasonable. It should be noted, however, that neither the Commission (in *X v UK*), nor the Court (in *Salabiaku*) considered the standard of proof issue.

elusive crime that it is next to impossible for the Crown to adduce evidence with respect to the corrupt source of the moneys involved. ... Thus, it seems that the non-existence of a viable alternative would make that presumption of fact not unreasonable.⁵¹

- 4.29 It seems that by itself section 2 of the 1916 Act would satisfy this criterion in the same way that the statutory provision considered in *X v United Kingdom* did. Support for this view may be taken from the fact that (to the best of our knowledge) no reference has been made to the Strasbourg Court in relation to section 2. We also note the comments of Lord Woolf in the recent case of *Attorney-General of Hong Kong v Lee Kwong-Kut*,⁵² where the Privy Council was asked to consider the compatibility of a reverse onus clause with article 11(1) of the Hong Kong Bill of Rights, which guarantees the right to be presumed innocent until proved guilty. Lord Woolf, giving judgment, considered *Salabiaku v France* and then said:

There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. ...

Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. ... If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 L Ed 2d 57, 82, "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".⁵³

- 4.30 The position may, however, be affected by a subsequent significant development to be found in the provisions of the CJPOA, which we now consider.

Possible implications of the CJPOA

- 4.31 A person suspected or accused of a criminal offence has traditionally been accorded a "right of silence", which means that there is no obligation to answer questions, either before or during the trial. At common law this right has been supplemented by a further rule that the fact-finders may not be invited to draw any adverse inference from the failure of a defendant to assist the police or to give evidence at trial. Under the CJPOA the accused remains free to maintain silence

⁵¹ Lyy Ma, "Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bill of Rights" (1991) 21 HKLJ 289, 328-329.

⁵² [1993] AC 951.

⁵³ [1993] AC 953, 969-970.

under interrogation and at trial;⁵⁴ but the supplementary rule against the drawing of adverse *inferences* has been abolished, and the Act sets out the circumstances in which “proper” inferences may be drawn.

- 4.32 Under section 34 of the CJPOA,⁵⁵ where the defendant relies on a fact in his or her defence at trial which was not put forward when he or she was questioned or charged, or informed that he or she might be prosecuted, the court or jury “may draw such inferences ... as appear proper” in determining whether there is a case to answer or whether the defendant is guilty of the offence charged.
- 4.33 Potentially more important in relation to the presumption is section 35, which allows the court or the jury to “draw such inferences as appear proper” from a defendant’s failure to testify or to answer any particular question.⁵⁶ In *Cowan*⁵⁷ the Court of Appeal rejected an argument that section 35 should be permitted to operate in exceptional cases only, but stressed that silence cannot be the *only* factor on which a conviction is based,⁵⁸ and that the jury must be satisfied that the prosecution has established a case to answer before they can draw inferences from silence. The court took this to mean not only that the case should be fit to be left to the jury, but also that the judge should make clear to the jury that they must be convinced of the existence of a *prima facie* case before drawing an *adverse* inference from silence. It would require “some evidential basis ... or some exceptional factors in the case”⁵⁹ for a judge to advise a jury *against* drawing an inference from silence.
- 4.34 These developments raise the question whether the effect of sections 34 and 35 is to render unnecessary the presumption created by section 2 of the 1916 Act. If so, the Strasbourg Court⁶⁰ might take the view that the burden imposed by the presumption cannot be justified under Article 6 of the ECHR. Predicting the decisions of the Strasbourg Court, however, is difficult, given “its disparate composition and the fluid nature of some of its jurisprudence”.⁶¹ It is also important to bear in mind that “the court does not see its function as being to judge of the constitutionality of a signatory state’s legislation”,⁶² but rather to

⁵⁴ See *Cowan* [1996] QB 373, 378, *per* Lord Taylor of Gosforth CJ: “It should be made clear that the right of silence remains.”

⁵⁵ Section 34 is set out in Appendix B below.

⁵⁶ Section 35 is set out in Appendix B below.

⁵⁷ [1996] QB 373.

⁵⁸ CJPOA, s 38(3).

⁵⁹ See *Cowan* [1996] QB 373, 380.

⁶⁰ In *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) Law Com No 245, at para 5.2, we noted the difficulty in attempting to judge the compatibility of domestic legislation with the Convention: “because the Strasbourg Court aims to interpret the Convention as a ‘living, developing document’, the doctrine of precedent weighs less heavily with the Strasbourg Court than it does in English law”.

⁶¹ R Munday, “Inferences from Silence and the European Human Rights Law” [1996] Crim LR 370.

⁶² *Ibid*, p 371, where the author cites *Klass v Germany* (A/28) (1978) 2 EHRR 214, para 33. In that case, the Strasbourg Court said:

consider the effect of the legislation being challenged in the particular circumstances of the case before it.

- 4.35 In relation to sections 34 and 35, some indication of the view likely to be taken was made apparent in *Murray v United Kingdom*⁶³ (a decision concerning equivalent provisions contained in the Criminal Evidence (Northern Ireland) Order 1988), where the Court stated:

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.⁶⁴

- 4.36 It is difficult to be sure whether, in the light of the CJPOA, the section 2 presumption is likely to be regarded as a breach of Article 6. The most important consideration, it would seem, is how much more difficult it would be to prove corruption if the presumption did not exist. Clearly the increased difficulty that prosecutors would face is now less than it would have been before the enactment of the CJPOA, since there is now greater pressure on the defence to offer an explanation where prima facie evidence of an offence is adduced. The question is now whether the presumption is still necessary in spite of these new provisions.

The effects of the presumption and the CJPOA compared

- 4.37 In the consultation paper, we distinguished two issues. First, how much harder would it be to establish *a case to answer* on a corruption charge if the presumption were abolished? And second, once it has been established that there is a case to answer, how much harder would it be to secure a *conviction*? In the second case, we have to consider separately the defendant who adduces no evidence at all, the defendant who does not testify in person but adduces other evidence, and the defendant who does testify. In each case we shall assume that the prosecution has proved the facts necessary to trigger the presumption, namely that some "money,

Article 25 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention ... [I]t is necessary that the law should have been applied to (their) detriment.

See also *McCann v UK* (A/324) (1996) 21 EHRR 97, para 153.

⁶³ (1996) 22 EHRR 29, para 47.

⁶⁴ Although in *Murray* the CJPOA silence provisions survived a challenge in the Strasbourg Court, there is no certainty about the outcome of any future challenges. Despite the Court recognising that in this particular case the prosecution case was very strong indeed, nonetheless five of the 19 judges dissented. One commentator concluded:

The truth is that no-one can really tell whither the ECHR's peculiar collective mind will move. The only certainty is that the court has a sense of its own destiny that impels it to expand its repertoire of human rights concepts with bewildering rapidity. To the extent that it can be teased out of the judgments in *Murray v United Kingdom*, the ECHR's response to the Northern Ireland Order is one of only qualified approval. (R Munday, *op cit*, p 385. Footnotes omitted.)

gift, or other consideration” was paid or given to, or received by, an employee of Her Majesty, a Government department or a public body,⁶⁵ and that the person providing it (or the person whose agent provided it) was holding, or seeking to obtain, a contract from Her Majesty, a Government department or a public body. If these “basic facts” are not proved, the presumption has no application in any event. We believe that it is worthwhile to repeat the exercise.

ESTABLISHING A CASE TO ANSWER

The existing law

- 4.38 At present, the benefit received by the public servant is deemed to have been a corrupt inducement or reward unless the contrary is proved on the balance of probabilities. It follows that under the existing law there would inevitably be a case to answer once the basic facts are proved, because in the event of the defence tendering no evidence the presumption would not have been rebutted.

If section 2 were repealed

- 4.39 In deciding whether the prosecution have established a case to answer, the court will follow the principles laid down in *Galbraith*.⁶⁶

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

- 4.40 Whether a case to answer can be established in the absence of the presumption depends on whether the basic facts amount to a prima facie case. Proof of the basic facts is not *in itself* proof that the transaction involved a corrupt inducement or reward. However, it seems likely that a prima facie case would be held to exist where the basic facts are proved, given that corporate largesse is very much less prevalent in the public sector. This factor, coupled with other evidence which the prosecution can ordinarily be expected to adduce (such as the fact that the agent acted without his or her employer's consent), will often be sufficient to enable the case to be left to the jury.
- 4.41 Moreover, by virtue of section 34 of the CJPOA, if a defendant exercises the right to silence in the face of police questioning and fails to mention any fact relied

⁶⁵ As defined by the 1889 Act, s 7 and the 1916 Act, s 4(2).

⁶⁶ [1981] 1 WLR 1039, 1042, *per* Lord Lane CJ.

upon in his or her defence, the court may draw such inferences as appear proper in determining whether there is a case to answer.⁶⁷

- 4.42 We believe that the repeal of section 2 would probably not, in practice, make it significantly more difficult for the prosecution to establish a case to answer.

WHERE THE DEFENDANT ADDUCES NO EVIDENCE

The existing law

- 4.43 If the basic facts are proved and the defendant adduces no evidence, a conviction should in theory be inevitable: the presumption will not have been rebutted.

If section 2 were repealed

- 4.44 If the presumption were abolished, it would be for the jury to determine whether the basic facts amounted to proof of corruption beyond reasonable doubt. Under section 35 of the CJPOA, however, the jury could take into account any inference that they thought it proper to draw from the defendant's failure to testify. This might amount to an inference of guilt. In *Murray v DPP*,⁶⁸ a House of Lords decision dealing with the analogous Northern Ireland provisions, Lord Slynn explained:

[I]f aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.⁶⁹

In practice we think it likely that a conviction would result.

WHERE THE DEFENDANT DOES NOT TESTIFY BUT ADDUCES OTHER EVIDENCE

The existing law

- 4.45 If the basic facts are proved, and the defendant does not testify but adduces other evidence, the position at present is that a conviction should result unless the evidence adduced shows, on the balance of probabilities, that the transaction was not corrupt. Moreover, in deciding whether the defence has proved this, the jury would be entitled under section 35 of the CJPOA to draw appropriate inferences from the defendant's failure to testify.

If section 2 were repealed

- 4.46 If the presumption did not exist, an acquittal should result not only (as at present) if the evidence adduced were such as to show, on the balance of probabilities, that

⁶⁷ Although specific provision is made for this circumstance in the CJPOA, s 34(2)(c), it is suggested in *Archbold* at para 15-404 that it is a provision which will be rarely used: "it is difficult to see how reliance upon a fact in the accused's defence can arise before he testifies or calls evidence".

⁶⁸ [1994] 1 WLR 1. This is the same case that was eventually taken to the Strasbourg Court under the name *Murray v UK*, see para 4.35 above.

⁶⁹ [1994] 1 WLR 1, 11G.

the transaction was not corrupt, but also if it appeared that the transaction probably was corrupt but the evidence was sufficient to raise a reasonable doubt. The jury's verdict would depend on the cogency of the evidence adduced, plus any inferences that the jury thought it proper to draw from the defendant's failure to testify. Obviously, in some cases the adverse inference drawn would be sufficiently strong (and the evidence adduced by the defendant sufficiently weak) as to lead to a conviction. In other cases, the evidence adduced by the defence might be such as to persuade the jury that the Crown had not made out its case beyond reasonable doubt – notwithstanding any inferences that they might choose to draw from the defendant's failure to testify.

WHERE THE DEFENDANT TESTIFIES

The existing law

- 4.47 Under the present law, a conviction should result unless the evidence adduced by the defence (including the defendant's own evidence) shows, on the balance of probabilities, that the transaction was not corrupt. Section 35 of the CJPOA has no application in this case unless the defendant refuses, without good cause, to answer a question; it will normally therefore be somewhat easier to discharge this burden than if the defendant did not testify. However, appropriate inferences might be drawn under section 34 of the CJPOA if the defendant raises matters in evidence which had not previously been mentioned and which the defendant might reasonably have been expected to mention.

If section 2 were repealed

- 4.48 In the absence of the presumption, it would be the jury's duty to acquit unless the prosecution had proved corruption beyond reasonable doubt. The jury would have to evaluate the cogency and relevance of the evidence adduced by the defendant and consider whether it was sufficient to raise a reasonable doubt. For this purpose, as at present, they could take account of the defendant's refusal, without good cause, to answer any question,⁷⁰ or of the raising in evidence of matters that the defendant might reasonably have been expected to mention previously.⁷¹

OPTIONS FOR REFORM, OUR PROVISIONAL PROPOSAL AND THE RESPONSE ON CONSULTATION

- 4.49 In the consultation paper, we pointed out that a consequence of the provisions of sections 34 and 35 of the CJPOA was greatly to reduce the need for a presumption. Before those provisions were enacted, neither the prosecution nor the judge could invite the jury to draw any inferences from the failure of a defendant to give evidence, to answer a particular question, or to mention a relevant fact when questioned or charged. We explained in the consultation paper⁷² that, although it is difficult to predict the approach of the Strasbourg Court, we thought there were grounds for believing, especially in the light of sections 34 and 35 of the CJPOA, that it might regard the presumption as going further than was

⁷⁰ CJPOA, s 35(3).

⁷¹ CJPOA, s 34(2).

⁷² Consultation Paper No 145, para 11.44.

necessary. The consequence of that view, we pointed out, was that the Court might well find that Article 6 of the ECHR had been contravened.

- 4.50 We took the view that, given the seriousness of reverse onus provisions and the need to reconcile them with Article 6(2) of the ECHR, it was for those who advocated the retention of the presumption to justify it. We bore in mind the limited scope of section 2 – a reflection of the wartime conditions in which it was enacted – and challenged the view that the evidential strains of proving corruption were so much greater than those involved in proving other offences (such as conspiracy) as to justify reversing the onus of proof. We concluded that, even if proving corruption were so difficult as to require some sort of assistance to the prosecution, such assistance is now provided by the CJPOA. We provisionally concluded, therefore, that the presumption should be abolished.
- 4.51 However, we also put forward three other options for comment – namely, the retention and extension of the presumption, the “Hong Kong option”, and a reduction in the weight of the burden placed on the defendant. We now revisit these options in the light of the views expressed on consultation, before returning to our provisional proposal that the presumption should be abolished altogether.

Option 1: extend the presumption

- 4.52 It seems to be largely historical accident that the presumption covers some situations and not others.⁷³ In the Salmon Report it is suggested that “if a burden on the defence is to be retained ... it needs to be extended to ensure that it applies consistently”.⁷⁴ Whereas the Salmon Commission’s recommendation was intended to ensure consistency *in the public sector*, our concern ranges over *all* corrupt transactions, in the public and private sectors alike. We suggested a number of different ways in which the presumption might be extended.⁷⁵
- (a) Include *all* transactions in which the putative briber seeks a benefit, not only those involving contracts. Both the Salmon Commission⁷⁶ and the Redcliffe-Maud Committee⁷⁷ recommended that the presumption should apply to the exercise of discretionary powers by local authorities as well as the award of contracts.
 - (b) Include any *member or agent* (as well as employees) of the Crown, a Government department or a public body who accepts any gift or consideration from a person seeking any benefit from such a body. This

⁷³ See paras 4.10 – 4.14 above.

⁷⁴ Salmon Report, para 62. Because the scope of the Salmon Commission’s inquiry was limited to the public sector, this call for consistency was perhaps less radical than at first appears. Whereas justifying a distinction between contracts and discretions might prove difficult, recommending the extension of the presumption to the private sector would inevitably be controversial.

⁷⁵ Consultation Paper No 145, para 11.49.

⁷⁶ Salmon Report, para 62.

⁷⁷ Redcliffe-Maud Report, para 162.

extension was recommended by the Redcliffe-Maud Committee⁷⁸ and supported by the Salmon Commission.⁷⁹

- (c) Include any agent, whether acting for a public body *or on behalf of a private principal*. This option would have the advantage that it would remove the need to distinguish between public bodies and others. It would also recognise that, as a result of the growing number of “private” bodies performing “public” functions, the number of bodies to which the presumption applies is decreasing for reasons which cannot be justified in principle.
- (d) Include any gift or consideration received in connection with the employee’s public functions, whether or not made during the period of his or her employment. At present, the presumption applies only to a person who is an employee of a public body at the time when a gift or consideration is received. It is possible to envisage a situation in which a reward for action taken during the currency of a person’s employment is given after that employment has terminated.⁸⁰
- (e) Apply the presumption to *conspiracy* to commit offences of corruption, as well as the substantive offences. It appears that a charge of conspiracy under section 1 of the Criminal Law Act 1977 to commit offences under the Prevention of Corruption Acts will not attract the presumption, since section 2 applies only to proceedings against a person for an offence under the 1889 Act or the 1906 Act.⁸¹

4.53 In view of our provisional conclusion that there were no adequate reasons to retain the presumption at all, we did not consider the relative merits of the various ways of extending it.

4.54 This option received a small amount of support. ACPO, in its collective response,⁸² argued that, within the range of offences which deal with non-violent behaviour, there can be no more serious offence than corruption as “it erodes and finally destroys public confidence in individuals and institutions”, and concluded that “corruption is an exceptional offence and requires exceptional measures to deal with it”. A similar approach was adopted by the Metropolitan Police Company Fraud Department.

⁷⁸ Redcliffe-Maud Report, vol 1, recommendation 26(ii)(b).

⁷⁹ Salmon Report, para 62.

⁸⁰ As to whether the present law covers former agents, see paras 5.10 – 5.11 below.

⁸¹ Support for this argument may be found in the reasoning in *McGowan* [1990] Crim LR 399. Section 28 of the Misuse of Drugs Act 1971 normally has the effect of reversing the usual burden of proof so that it falls upon defendants to prove their lack of knowledge or suspicion that articles found under their control were controlled drugs. However, since s 28(1) listed the offences to which the section applied and conspiracy was not one of them, this burden would not apply to counts of conspiracy. Accordingly, the burden remained upon the prosecution throughout.

⁸² Individual contributors to the ACPO response held a variety of views, some agreeing that the presumption should be retained and extended and others arguing that it should either be retained in its present form or abolished.

Option 2: the Hong Kong option

- 4.55 Under section 10(1) of the Hong Kong Prevention of Bribery Ordinance 1970, a person who is or has been a Crown servant is guilty of an offence if he or she maintains a standard of living above that which is commensurate with his or her present or past official emoluments, or is in control of pecuniary resources or property disproportionate to those emoluments, and is unable (in either case) to give a satisfactory explanation to the court. The Hong Kong Court of Appeal has held that the value of section 10 in the fight against serious corruption is well established, and that the reversal of the normal burden of proof is justified because the primary facts on which the defendant's explanation would be based would be matters peculiarly within his or her own knowledge.⁸³
- 4.56 In the consultation paper we doubted whether an English equivalent to the Hong Kong provision would survive a challenge before the Strasbourg Court on the ground that it was unreasonable or out of proportion to the mischief prevented. We therefore rejected this option.
- 4.57 On consultation, very few respondents disagreed with us. Of those who did, Mr R White, the Assistant Chief Constable of the Royal Ulster Constabulary, favoured this option on the grounds that "experience suggests that there are cases in which a public servant is living beyond his apparent means and suspected of corruption but in the absence of evidence of corruption nothing can be done." The Institute of Legal Executives thought it justified because "corruption strikes at the very heart of society itself".
- 4.58 Among those who agreed that the Hong Kong option should not be adopted was the SFO, which was not convinced that there is presently a need for such a provision. We attach great importance to the SFO's opinion in view of its experience of corruption cases. No arguments were put forward to undermine our view that the Hong Kong approach would fall foul of the ECHR. We therefore reject this option.

Option 3: reduce the weight of the burden imposed by the presumption

- 4.59 Under this option, the burden on the defendant would be less onerous than the present requirement to prove the absence of corruption, but more so than that imposed by the prospect of comment on a failure to testify and of the drawing of appropriate inferences. The presumption might take a form similar to that raised by the possession of recently stolen goods:⁸⁴ on proof or admission of the basic facts, the jury would be directed that those facts call for an explanation, and if none is given (or one is given which they are convinced is untrue) they would, in appropriate circumstances, be entitled to convict. Our provisional view was that this compromise offered little advantage, since under the CJPOA the defendant will in practice be obliged to offer an explanation in any event.
- 4.60 On consultation, only one respondent, Lord Davidson, supported this option. He thought we had underestimated the importance of the presumption, and argued

⁸³ *A-G v Hui Kin Hong* [1995] 1 HKCLR 227.

⁸⁴ See *Cash* [1985] QB 801.

that it was justified “because in broad terms corruption is concerned with agency or something closely analogous to agency [and] a stage should come when the ‘agent’ has to account for his action”.

Option 4: abolish the presumption

- 4.61 Approximately two-thirds of those who considered the issue of the presumption supported our provisional proposal that it should be abolished. Many different reasons were put forward for this view. We shall now examine in greater detail the arguments for and against it.

Arguments against the presumption

- 4.62 There are essentially two kinds of argument that can be levelled against the presumption: arguments from principle, and practical considerations.

ARGUMENTS FROM PRINCIPLE

- 4.63 The effect of the presumption is profound. When it applies, the defendant is required to prove, on the balance of probabilities, that the transaction was not corrupt. It follows that the jury may properly be directed to convict if they are left in doubt.⁸⁵ It is possible, therefore, for a defendant to be convicted although the jury think that his or her explanation may well be true, and indeed is just as likely to be true as the prosecution’s.

- 4.64 Professor Sir John Smith expressed the same concern:

It is wrong in principle that a person should be found guilty of a serious offence and labelled “corrupt” when a jury has found that, as likely as not, he is completely innocent.

- 4.65 Sheriff Iain McPhail QC agreed.

I do not rely on sections 34 and 35 of the CJPOA, since there are no equivalent provisions in Scotland. In my view the presumption is objectionable because it requires the jury to convict even if they entertain a reasonable doubt as to whether the money (etc) was given (etc) corruptly. A juror who believes that the chances are 55:45 that the money *was* given corruptly may be satisfied on a balance of probabilities, but not beyond reasonable doubt: yet in that situation, and even in a situation where he regards the probabilities as only 50:50, the law requires him to vote for conviction. If the jury went back to the court and told the judge they were agreed that the probabilities were only 50:50 and asked for further directions, the judge would be obliged to direct them that, if they could not decide on the evidence whether the defence case that the money was not given corruptly was more probable than not, they should convict. In other words, if the defence evidence leaves them in a state of mind in which they entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely whether the money was given corruptly, they must nevertheless convict. I would suggest that such a situation, which

⁸⁵ *Evans-Jones* (1923) 17 Cr App R 121.

may arise wherever a legal or persuasive burden of proof is placed upon the accused, can only be justified by weighty considerations. It is possible, for example, to justify the Scottish rule that the defence has the burden of proving insanity or diminished responsibility. My own view is that the reasons advanced in favour of the presumption created by section 2 are not strong enough to justify its retention.

- 4.66 It is arguable that an agent (especially a public servant)⁸⁶ who accepts a personal benefit should be prepared to give an explanation, and that for that reason the presumption is justified. But the presumption cannot be rebutted merely by *offering* an innocent explanation: there must be *evidence* of it,⁸⁷ sufficient to prove that it is more likely to be true than the prosecution's explanation.

PRACTICAL CONSIDERATIONS

The shortcomings of the presumption in its present form

- 4.67 The present presumption applies only to public bodies, and only to benefits received from persons holding or seeking contracts with such bodies. If the presumption were to be retained, it would be necessary to decide whether it should continue to be confined to public bodies or should be extended to the private sector as well. In the former case there would be substantial difficulties in defining a "public body", difficulties compounded by the recent trend towards privatising public bodies and contracting out of work to the private sector. The latter alternative would mean that any employee attending a function held by a company seeking business from his or her employer would, if charged, have to prove that his or her attendance was not corrupt. We do not think this would be acceptable to the business community.

The CJPOA

- 4.68 Even if the view were taken that the prosecution needs some degree of assistance in proving corruption, there was a measure of support for the argument advanced in the consultation paper that the CJPOA was an adequate safeguard. In their joint response, the Bar Council and the Criminal Bar Association said that

the establishment of basic facts by the prosecution and the subsequent failure of a defendant to give evidence, in the absence of a cogent explanation at the police interview stage, would almost invariably lead a properly directed, reasonable jury to convict.

- 4.69 Some respondents, such as the CPS and the Metropolitan Police Company Fraud Department, disputed the importance of the CJPOA. However, while we suspect that it is premature to come to a definite and final view on the effect of the Act, we believe that it is likely to make a realistic difference in easing the task of the prosecution.

⁸⁶ Bearing in mind the Nolan Committee's Seven Principles of Public Life which include the principles of integrity, accountability, openness and honesty.

⁸⁷ *Mills* (1978) 68 Cr App R 154.

4.70 The London Criminal Courts Solicitors' Association also made the point that, under Part I of the Criminal Procedure and Investigations Act 1996, a defendant's failure to make proper disclosure may justify further inferences, similar to those that may arise under the CJPOA. Under section 5, once primary prosecution disclosure has taken place, the accused must give a defence statement to the prosecutor. This will be a written statement which will set out the general nature of the defence, the matters on which the accused takes issue with the prosecution and the reasons for this. If the defence fails to make disclosure, not only will the prosecution not be obliged to make secondary disclosure, but the Act provides for additional sanctions. Under section 11, deficiencies in the defence's disclosure may be commented upon by the court (or, with the court's leave, by a party) and such inferences may be drawn "as appear proper in deciding on the accused's guilt."⁸⁸ This clearly strengthens our argument that the presumption is no longer necessary.

Arguments in favour of the presumption

CORRUPTION IS MORE DIFFICULT TO PROVE THAN OTHER OFFENCES

4.71 The Salmon Commission favoured the retention of the presumption because of the peculiar difficulty of proving corruption: it is a "clandestine offence".⁸⁹ This perception of corruption, as an offence which because of its intrinsic secrecy is particularly difficult to prove, is widespread. However, some respondents with great experience of criminal trials supported our provisional view that corruption is no harder to prove than some other offences. This was the view of the General Council of the Bar, the Criminal Bar Association and the SFO, which wrote:

We agree that the case for the retention of the presumption falls, once a case can no longer be made for regarding corruption in the public sector as inherently more difficult to investigate. Corruption of itself is no more or less difficult to investigate than other forms of financial crime.

4.72 The CPS, though taking the view that it would be preferable for the presumption to be retained and extended, conceded that "private sector corruption is regularly prosecuted without the benefit of the presumption". Furthermore, those prosecuting corruption cases will often rely on conspiracy to defraud or common law bribery, neither of which have the benefit of the presumption. One respondent pointed out that, almost by definition, "fraudsters are plausible liars, and those who engage in corrupt practices are much the same". We would infer that

⁸⁸ Section 11(3). For further comment on the provisions of this Act, see an article (in three parts) by David Corker, "Maximising Disclosure (1997) 147 NLJ 885, 961, 1063; see also an article by John Sprack, "The Criminal Procedure and Investigations Act 1996: (1) the Duty of Disclosure" [1997] Crim LR 308. Sprack comments at p 312:

Given that the court "may" comment and/or "may" draw inferences, the question arises when it is right to do so. The CPIA 1996 contains no general guidance on this point, although there is some assistance given as to the approach to be adopted where a defence different from that set out in the defence statement is put forward at trial (section 11(4)). In such a case, the court is told to have regard "to the extent of the difference in the defences and ... to whether there is any justification for it".

⁸⁹ Salmon Report, para 61.

prosecutions for (for example) theft, deception or conspiracy to defraud are likely to pose much the same evidential problems as those for corruption. After considering with care all the responses, we remain unconvinced that corruption is more in need of a reversed burden of proof than other offences are.

STANDARDS OF PROBITY SHOULD BE HIGHER IN THE PUBLIC SECTOR

- 4.73 It has been argued that the presumption should be retained in relation to the public sector, because the standards of probity that can reasonably be expected of public servants are particularly high. The Redcliffe-Maud Committee emphasised this.

It is common practice in the commercial world for the transaction of business to be accompanied by the giving of personal gifts or benefits, ranging from the Christmas bottle of whisky to much more elaborate and lavish provision. Public life requires a standard of its own; and those entering public office for the first time must be made aware of this from the outset.⁹⁰

- 4.74 In the consultation paper we agreed that “other things being equal, corruption on the part of a public servant is likely to be more damaging to the public interest, and therefore a more serious offence, than corruption in the private sector”.⁹¹ But, even if we could devise a satisfactory formulation of the distinction between public and private, we do not believe that the presumption is the proper way to reflect this view. Public sector corruption can sometimes be trivial, while private sector corruption can be very serious indeed. More importantly, high standards in the public sector cannot be achieved by adjusting the rules of evidence. The presumption does not require a *higher standard of conduct* in the public sector: the conduct prohibited is the same whether the agent involved is a public servant or not. Rather, the effect of the presumption is that it makes it *easier to prosecute* those accused of corruption if they are working in the public sector.

CONSISTENCY WITH SCOTLAND

- 4.75 It is arguable that the abolition of the presumption in England and Wales would create an undesirable inconsistency between the law of this jurisdiction and that of Scotland. We agree that in principle the prosecution should, if possible, be in the same position (that is, either with the benefit of the presumption or without) in both jurisdictions. However, the course of a corruption trial is in any event different in England and Wales from that in Scotland. The rules of evidence are quite different, and, crucially, sections 34 and 35 of the CJPOA do not apply in Scotland. We therefore believe that the abolition of the presumption in England and Wales would not cause the glaring discrepancy that might be feared.

OUR RECOMMENDATION

- 4.76 In the consultation paper, we said that our provisional approach was very similar to that adopted by the MCCOC, who stated:

⁹⁰ Redcliffe-Maud Report, para 76.

⁹¹ Consultation Paper No 145, para 6.20.

The argument for retention [of the presumption] is the difficulty of proving relevant matters which almost invariably will take place in private. On the other hand, it is difficult to accept that it is any more difficult to prove dishonesty in these cases than in theft or fraud, especially if it is established that the principal did not know about and consent to the payment.... MCCOC concludes that there should not be a reverse onus of proof in the secret commissions offences.⁹²

4.77 Having considered all the helpful points made to us, we conclude that there is no evidence that it is harder to obtain convictions for those corruption offences to which the presumption does not apply than for those to which it does. We do not feel able to state with certainty that the use of the presumption, together with the provisions of the CJPOA, would contravene the ECHR. However, for the reasons we have given, we take the view that no special reasons exist to justify the continued existence of the presumption with regard to corruption. And, given our conclusion in Part III that the distinction between public bodies and others is unnecessary for any purpose other than the presumption, it follows that the existence of that distinction is also no longer justified.

4.78 **We recommend that the new law of corruption**

- (1) should not include a presumption comparable to that created by section 2 of the 1916 Act (under which a transaction is in certain circumstances presumed to be corrupt unless the contrary is proved), and**
- (2) should not draw a distinction between public bodies and others.**

(Recommendation 2)

⁹² MCCOC Report, p 307.

PART V

FORMULATING A MODERN LAW OF CORRUPTION

5.1 In this part we consider how a modern law of corruption should be formulated. For the convenience of the reader we begin with an outline of the scheme of offences and definitions that we recommend.¹ We then attempt to analyse the essential character of corruption, and conclude that it involves things done in connection with the performance of an agent's functions as agent.² We then discuss who should qualify as an "agent" for this purpose,³ and how to define the central concept of an "advantage",⁴ before setting out the four offences that we recommend.⁵ Next we turn to the crucial and difficult question of how (if at all) the concept of doing something "corruptly" should be defined.⁶ Our provisional proposals on this matter were strongly contested and, as a result, our recommendations reflect a substantial change in our approach. We then discuss whether the new offences should be treated as, or defined as, offences of dishonesty.⁷ Finally we consider, but reject, a number of possible defences.⁸

AN OUTLINE OF THE SCHEME WE RECOMMEND

5.2 Our recommended scheme involves replacing the Prevention of Corruption Acts 1889 to 1916 and the common law of bribery with a modern statute creating four offences, namely:

- (1) corruptly conferring, or offering or agreeing to confer, an advantage;⁹
- (2) corruptly obtaining, soliciting or agreeing to obtain an advantage;¹⁰
- (3) corrupt performance by an agent of his or her functions as an agent;¹¹ and
- (4) receipt by an agent of a benefit which consists of, or is derived from, an advantage which the agent knows or believes to have been corruptly obtained.¹²

¹ Paras 5.2 – 5.3 below.

² Paras 5.4 – 5.14 below.

³ Paras 5.15 – 5.37 below.

⁴ Paras 5.38 – 5.43 below.

⁵ Paras 5.44 – 5.61 below.

⁶ Paras 5.62 – 5.122 below.

⁷ Paras 5.123 – 5.134 below.

⁸ Paras 5.135 – 5.152 below.

⁹ Paras 5.45 – 5.50 below.

¹⁰ Paras 5.51 – 5.53 below.

¹¹ Paras 5.54 – 5.58 below.

¹² Paras 5.59 – 5.61 below.

5.3 Concepts crucial to these offences are as follows:

- (1) the relationship of “agency” (which is given a specially extended meaning for this purpose)¹³ and the functions that an agent performs *as an agent*;¹⁴
- (2) “conferring an advantage”,¹⁵ and its mirror-image “obtaining an advantage”;¹⁶ and
- (3) conferring an advantage *corruptly*.¹⁷ Where a person confers an advantage, the question whether he or she does so *corruptly* would, under our recommendations, depend on his or her intention in respect of the conduct of the agent in question, and his or her assessment of the likelihood of the agent acting in the desired way (if at all) *primarily in return for* the advantage conferred.

The concepts of *obtaining* and *soliciting* an advantage corruptly, and corrupt performance of an agent’s functions, are defined by reference to the central concept of corruptly *conferring* an advantage.¹⁸ The offence of receiving a benefit derived from an advantage corruptly obtained is in turn defined by reference to the offence of corruptly obtaining an advantage.¹⁹

THE ESSENTIAL CHARACTER OF CORRUPTION

5.4 In the consultation paper we tried to analyse the essential character of corruption. We took as the paradigm of corrupt inducement a situation involving three parties – A, the briber; B, the recipient of the bribe (the “bribee”), and C, B’s principal. The purpose of A’s bribing B is, we suggested, to cause B to act in A’s interest, which in turn is likely to involve B acting against the interests of C, to whom B, as C’s agent, owes a duty of loyalty.²⁰ We described the mischief with which the law of corruption is concerned in terms of “the fundamental mischief” (B’s breach of duty), and “the mischief of temptation” (A’s temptation of B, by bribery, to breach B’s duty).

Breach of duty

5.5 At the heart of our conception of corruption, therefore, was the tendency of corrupt conduct to encourage *breach of duty* by agents. A number of respondents²¹ were critical of this approach. The SIB, for example, wrote:

¹³ Paras 5.15 – 5.37 below.

¹⁴ Paras 5.11 – 5.14 below.

¹⁵ Paras 5.45 – 5.50 below.

¹⁶ Paras 5.51 – 5.53 below.

¹⁷ Paras 5.62 – 5.122 below.

¹⁸ Paras 5.45 – 5.50 below.

¹⁹ Paras 5.51 – 5.53 below.

²⁰ Paras 1.12 – 1.15 of the consultation paper.

²¹ Including the Financial Law Panel, the Bar Council and the Criminal Bar Association, the SFO, SIB, Professor Sullivan and the Metropolitan Police Company Fraud Department.

Many commercial and public duties are unspecified and the introduction of these words is liable, in certain cases, to lead to protracted legal argument concerning whether a duty is owed and, if so, what constitutes a breach – matters which, as far as commercial relationships are concerned, are primarily the province of the civil law.

- 5.6 The Bar Council and the Criminal Bar Association suggested that our proposed approach would create “a major problem”:

In discharging their duty an agent will often have to consider a vast amount of material which may be of a highly technical nature, after which there may be a band of discretion within which two honest agents might arrive at different decisions. If the Crown are obliged to prove a breach of duty ... , a jury would have to re-visit all the considered material and second guess what may be highly complicated decisions.

- 5.7 We have considered trying to meet these objections by making the test subjective rather than objective. This would involve focusing not on whether the conduct in question would in fact be a breach of duty on the part of the agent, but on whether the agent would be doing something which he or she *believes* to be contrary to the interests of his or her principal.

- 5.8 However, this approach does nothing to meet a different, and more fundamental, objection: that an agent can act corruptly by doing something which is not, and which the agent knows is not, contrary to the principal’s interests – for example, by demanding a bribe for doing what the agent’s duty to the principal already requires the agent to do. In the consultation paper we argued that such conduct should fall within the offence.

It would be naive to suppose that there is no harm in A paying B to comply with B’s duty to C: if B is free to accept such payments, there is an obvious incentive to insist on them as a precondition for the performance of the duty – in other words, an incentive to act in breach of the duty if payment is not forthcoming. Indeed, it may be that the only reason why A is prepared to pay for the performance of B’s duty is that that is the only way to secure it.²²

Our proposal that this kind of conduct should be covered was generally accepted on consultation; but it does not sit happily with the emphasis placed by our other proposals on the need for a tendency to encourage breach of duty.

- 5.9 Another example of a bribe which is corrupt although the interests of the agent’s principal are not prejudiced is the case where, of a range of choices open to the agent, two or more appear equally advantageous to the principal, and the agent is bribed to choose one of these acceptable options rather than another. For example, where from the principal’s point of view there is nothing to choose between two tenders for a contract, the agent may be bribed to select one of them. The agent’s decision, though not clearly furthering the principal’s interests *better* than the alternatives, is not *contrary* to those interests either. But in our view it is

²² Consultation Paper No 145, para 8.13.

still corrupt, and should be criminal. For these reasons we have concluded that a definition couched in terms of breach of duty, or even in terms of the principal's best interests as the agent perceives them, would be too narrow.

- 5.10 Professor Sir John Smith proposed an alternative approach: that corrupt conduct should be defined in terms of an intention to influence the agent's conduct as agent. We can see the appeal of this approach on practical grounds: it uses straightforward concepts with which practitioners, magistrates and jurors will be familiar, and it would obviate the need to prove the existence of a duty and an intention to induce a breach of that duty. We have therefore decided to use it as the basis for our recommended definition, though we believe that it needs some qualification.²³

The functions of an agent *as an agent*

- 5.11 This approach differs somewhat from that of the existing legislation, in that it focuses on what an agent is intended to do *in his or her capacity as agent*. The 1889 Act refers to a public servant "doing ... anything in respect of any matter or transaction whatsoever ... in which the ... public body is concerned", and the 1906 Act to "any act in relation to [the agent's] principal's affairs or business". These expressions would appear to include the case where A pays B to do something in relation to C's affairs which, though it is B's position as C's agent that enables B to do it (or makes it easier for B to do it than for others), is not itself part of B's functions as C's agent. For example, A might pay B to steal documents belonging to C from the office of another of C's employees. Theft from colleagues' offices is no part of B's functions as C's agent: it is merely something that B is enabled to do by virtue of having access to C's premises in order to perform those functions. The opportunity to steal in this way is incidental to B's functions as agent, not directly conferred by them.
- 5.12 It is arguable that this situation *should* be caught by the law of corruption. In one sense, like the paradigm case where A bribes B to exercise in A's favour a discretion which B is paid to exercise impartially, it involves a breach of the trust placed in B by C. But in another way, and in our view a more significant one, it resembles the case where the thief paid by A is not C's agent but is for some other reason well placed to commit the theft – for example, a cleaner employed by C's landlord. This latter case seems not to be caught by the existing legislation, since theft from a tenant can hardly be described as an act in relation to the landlord's affairs or business; and it is hard to see why it should make any difference in principle that the thief is employed by the victim of the theft rather than by a third party, if the theft has nothing to do with the job that the thief is employed to do. The fact that B is betraying C's trust is a factor which can be taken into account at the sentencing stage if B is convicted of theft,²⁴ but we do not believe that it turns B's offence from one of theft into one of corruption.
- 5.13 It is also possible that B may be bribed to do an act in relation to C's business which is not itself an offence. For example, it is not an offence to take a *photograph*

²³ See para 5.74 below.

²⁴ *Barrick* (1985) 81 Cr App R 78; see also *Clark*, *The Times* 4 December 1997.

of a confidential document. This is not theft, because there is no intention permanently to deprive the document's owner of it, and the information contained in the document is not "property" within the meaning of the Theft Act;²⁵ and it makes no difference that it is done by an agent of the document's owner. But if the agent is *bribed* to do it, there appears to be an offence of corruption under the 1906 Act; and this is arguably right.²⁶ In our view it is strongly arguable that such conduct should be an offence in itself, whether or not the person who does it is an agent of the document's owner, and whether that person does it on his or her own account or is paid by a third party.²⁷ In that case, the law of corruption partially fills a gap in the criminal law. But if the law is to catch such conduct at all, in our view it should do so directly and not by a side wind. Whether it should do so directly, and if so how, is a matter to which we intend to return, particularly in the context of our review of the law of dishonesty. The proper concern of the law of *corruption*, we believe, is with agents who are tempted to do (or not to do) their jobs in particular ways, not with agents who are tempted to harm their principals in ways that have nothing to do with the proper performance of their jobs.

- 5.14 We have therefore concluded that the new offences should be defined in terms of things done in connection with an agent's performance of his or her functions *as an agent*. This does not imply that the prohibited conduct must relate to any *particular* person, or that, if it does, that person must in fact *be* an agent, let alone that he or she must in fact *perform* any particular functions as an agent: it refers solely to the intentions and expectations of the defendant. If A pays a bribe to B, believing that B knows one of the employees of a particular company and that that employee can be persuaded to show favour to A, A's conduct is no less corrupt merely because A has no particular employee in mind and B does not in fact know any of that company's employees.

THE AGENCY RELATIONSHIP

Terminology

- 5.15 In the consultation paper our starting point for our analysis of bribery was that it was essentially conduct which threatens the relationship of trust which exists between an agent and principal.²⁸ We suggested that "the paradigm situation with which we are concerned is one in which A acts in relation to B in such a way as to, and in order to, tempt B to act in breach of an obligation of loyalty which B owes to C",²⁹ but we recognised that a person could owe an obligation of loyalty not only to an identifiable principal but also (either additionally or solely) to the public

²⁵ *Oxford v Moss* (1979) 68 Cr App R 183.

²⁶ The Institute of Chartered Accountants, for example, was concerned at our provisional proposal (which we have now abandoned: see paras 5.48 – 5.49 below) to exclude intermediaries from liability for the full offence, on the ground that this would exclude the "information broker", who bribes company employees to provide information which can be sold to companies hoping to win a tender or negotiate an improved deal.

²⁷ See our Consultation Paper No 150 (1997) *Legislating the Criminal Code: Misuse of Trade Secrets*, Part VII.

²⁸ Parts I and V.

²⁹ Consultation Paper No 145, para 7.2.

interest.³⁰ And we took the view that offences of bribery should be concerned with both sorts of obligation. We noted that the term “agent” is used in the 1906 and 1916 Acts to describe the category of persons capable, in law, of being a bribee, and provisionally proposed that, although the term was not used in its strict sense,³¹ it was the “obvious choice”³² to describe those affected by bribery offences. Most of those respondents who expressed a view on this provisional proposal agreed with us.

- 5.16 We acknowledge that in referring to “the agency relationship” in the context of bribery offences we are relying on a meaning of that phrase which is extended in two ways. First, we intend that it should include private relationships of trust other than (but as well as) agency relationships in the strict sense normally understood by lawyers. Second, we intend that it should include relationships involving public duties as well as private ones. Although the phrase “agency relationship” may not be a natural description of a relationship where the “agent” owes a duty to an abstraction (namely the public) rather than an identifiable principal,³³ we still regard “agent” as a convenient term for a person in a position of trust, whether that position involves private or public duties.

Defining the agency relationship

- 5.17 The defining characteristic of the *private* relationships we sought to cover was, we suggested, that they were broadly fiduciary in nature: “agent”, in the extended sense we are using, shares the “distinguishing obligation of a fiduciary” identified by Millett LJ in *Bristol & West Building Society v Mothew (t/a Stapley & Co)*,³⁴ namely “the obligation of loyalty”. And drawing on the test for a fiduciary relationship set out in our consultation paper on fiduciary duties and regulatory rules,³⁵ we attempted to identify the circumstances in which an agency relationship would arise. We suggested that B should be regarded as an agent of C in circumstances where B has undertaken (expressly or impliedly) to act on behalf of C and that undertaking involves one or more of the following features: B exercising a discretion on C’s behalf, B having access to C’s assets (irrespective of whether B has been given a discretion by C to act in regard to those assets), or B having influence over C’s decisions (as regards C’s assets or any other interest of C’s). This description was not, however, appropriate to describe those persons whose duty of loyalty was not to an identifiable principal but to the *public*. We therefore proposed that B should also be regarded as an agent in circumstances where B has

³⁰ Consultation Paper No 145, para 7.7.

³¹ That is, agency as “the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties”: *Halsbury’s Laws of England* (4th ed 1990) vol 1(2), p 4, para 1 (footnote omitted).

³² MCCOC Report, p 297.

³³ As we shall see in para 5.91 below, the different character and capacities of a private principal compared with the public interest as principal – primarily the fact that a private principal has the capacity to consent – has a direct bearing on our recommendation that a defence of principal’s consent should be available.

³⁴ [1996] 4 All ER 698, 711j–712a.

³⁵ Fiduciary Duties and Regulatory Rules (1995) Law Com No 236.

undertaken to discharge a public duty. We called such individuals “*quasi-fiduciaries*”.

- 5.18 Having identified the broad circumstances in which an agency relationship would arise, we suggested that it would be unnecessarily burdensome for the prosecution, on every occasion, to be required to prove that a defendant charged with corruption falls within the general definition of an agent. We noted that there were a number of categories of persons which are “invariably characterised as fiduciary”:³⁶ trustee and beneficiary; agent and principal (in the strict sense understood by lawyers); partner and co-partner; director and company; employee and employer; legal practitioner and client. We therefore made a provisional list of uncontentious categories based on the “classic” examples of fiduciaries. As for quasi-fiduciaries, we suggested that judges, local councillors and police officers should be included.³⁷
- 5.19 A number of respondents were against our approach to describing the agency relationship. The SFO, for example, took the view that there was no need for further elaboration of the terms “agent” and “principal” beyond that provided by section 1(2) of the 1906 Act. Other respondents, such as the CPS, were critical of our proposal that there should be a list of examples, whilst others queried the contents of the list.

The general definition

- 5.20 Our provisional definition of the agency relationship was divided into two parts, corresponding to those who have a relationship with an identifiable principal and those charged with public duties. Each part consisted of a list of examples followed by a general description of circumstances in which an agency relationship would arise for the purposes of the new law of corruption.

PRIVATE AGENCY RELATIONSHIPS

- 5.21 Of those respondents who commented on the agency relationship generally, none directly commented on the terms of the definition. Nonetheless, we now take the view that our provisional description of the *private* agency relationship was too complex, and that a simpler approach can be applied. The approach adopted in the consultation paper was to identify a comprehensive set of circumstances which would give rise to the sort of relationship that we intended the new law of corruption to cover. This approach, although providing useful guidance by illustrating the meaning of the agency relationship, carries with it the risk that the list might be incomplete, or insufficiently flexible to accommodate changing circumstances.

³⁶ R Flannigan, “The Fiduciary Obligation” (1989) 9 OJLS 285, 291.

³⁷ In the consultation paper, paras 7.42 – 7.49, we set out the reasons why we had decided that it was not appropriate for us to consider the position of Members of Parliament or Ministers of the Crown. A number of respondents expressed regret that we had limited our remit in this way. We remain of the view, however, that, given the establishment of a joint committee of both Houses (under the chairmanship of the Rt Hon the Lord Nicholls of Birkenhead) which will investigate, amongst other things, bribery and Members of Parliament, we were right not to consider Members of Parliament. We shall, therefore, make no recommendations in respect of Members of Parliament.

- 5.22 An alternative approach is to describe the *essential character* of the agency relationship. Bearing in mind our original analysis of corruption in terms of tempting an agent to breach an obligation of loyalty to his or her principal, we took the view that central to the agency relationship is a relationship of *trust*, in which one person has *entrusted* another to undertake functions on his or her behalf.
- 5.23 We have considered whether that relationship of trust, for the purposes of a corruption offence, should necessarily involve an obligation that the person entrusted should act in the best interests of the person who has entrusted him or her. If this were the case, an agent could be defined as a person who has undertaken to perform functions on behalf of a principal, and to do so in the best interests of the principal. We took the view that, although it is likely that the bribed agent will, in return for the bribe, do some act which is contrary to the principal's best interests (or omit to do some act which, had it been done, would have been in the principal's best interests), there are circumstances in which an agent undertakes to perform functions on behalf of another but without a collateral undertaking that that function will be performed in the best interests of that other. Where, for example, a philanthropist employs an agent to distribute funds to a range of charities which the agent has a discretion to select, the agent will have a duty to act properly, but not necessarily to act in the philanthropist's own interests. Yet it should clearly be an offence of corruption for the agent to accept a bribe to show favour to a particular charity.
- 5.24 We have also considered whether the law of corruption should catch not only the agent who performs functions on behalf of another as a result of some sort of agreement or understanding between the parties that the agent should do so, but also a person who unilaterally performs functions for another without the other's agreement that he or she should do so. Bearing in mind our analysis of corruption in terms of the potential breach of a relationship of trust, it seems to us artificial to suggest that a relationship of any sort (let alone a relationship of trust) can exist in the absence of any mutual understanding to that effect.

QUASI-FIDUCIARY RELATIONSHIPS

- 5.25 In the consultation paper we provisionally proposed a general definition of the quasi-fiduciary along the lines that a person was an agent if he or she "has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function)". Although very few respondents expressed concern about the absence of any definition of "public duty" or "public function", we have considered whether it would be helpful (or indeed possible) to define those terms further. In the consultation paper we suggested that the law on judicial review would provide the basis for identifying those authorities charged with duties involving a public element.³⁸ But although it is possible to give guidance as to the sorts of characteristics which are likely to signify a public duty or public function, this is a far cry from identifying a set of necessary and sufficient characteristics. Lord Woolf has argued that the question of whether an issue involves public law depends not on whether the *body* concerned can be described as a public body but on whether the *function* being performed is a public function,

³⁸ Consultation Paper No 145, para 7.24.

and describes the boundary between public and private functions as “indistinct and evolving”.³⁹

- 5.26 The fluidity of the boundaries between public and private duties and functions raises the question whether it is, in fact, *appropriate* to define those terms (or terms like them) in more detail. Arguably, it is preferable not to define them further, on the ground that they may then have greater flexibility in dealing with a changing political and economic environment. Furthermore, as we have seen,⁴⁰ the United Kingdom is involved in a number of international initiatives on corruption. For example, in December 1997, an OECD convention⁴¹ was signed requiring each party to the convention to criminalise the bribery of public officials. The definition of “public official”, for the purposes of the convention, includes “any person exercising a public function for a foreign country”. Given that the signatories to the convention may well have different concepts of “public function”, it would seem preferable to retain a general definition of the term so as to enable the offences to accommodate international differences.
- 5.27 We are therefore inclined to the view that the concept of “public function” should not be defined, other than in the general terms used in our recommendation. We note that this approach was adopted in the Human Rights Bill introduced in the House of Lords late last year – giving effect to the European Convention on Human Rights by requiring public authorities to exercise their powers in a manner compatible with the Convention – where “public authority” is not exhaustively defined and is said to include “... any person certain of whose functions are functions of a public nature”.⁴²

MIXED RELATIONSHIPS

- 5.28 As we noted in the consultation paper, we recognise that a person may have both private and public functions, or a single function which has both private and public elements.⁴³ We take account of this in our recommendation.

The list of examples

- 5.29 We provisionally proposed that, in order to circumvent legal argument, the definition of “agent” should include a list of those categories of relationship which

³⁹ The Rt Hon Lord Woolf of Barnes, “Droit Public – English Style” (1995) PL 57, 64.

⁴⁰ See paras 1.16 – 1.20 above.

⁴¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

⁴² Clause 6(3)(c) and see also the White Paper on the Bill entitled Rights Brought Home: The Human Rights Bill (1997) Cm 3782, para 2.2, p 8.

⁴³ See the Rt Hon Lord Woolf of Barnes, *op cit*, p 62: “[E]ven governments ... are recognised by English law, if not the media, as having the capacity to perform private activities”. In *R v Lord Chancellor, ex p Hibbit and Saunders (a firm)* [1993] COD 326 it was decided that although the Lord Chancellor’s Department had acted unfairly in awarding a contract for court reporting services, its conduct was not amenable to judicial review because it lacked a sufficient public element: “[a] governmental body was free to negotiate contracts, and it would need something additional to the simple fact that the governmental body was negotiating the contract to impose on that authority any public law obligation in addition to any private law obligations or duties there might be.”

would invariably involve a relationship of agency for the purposes of the new offence. The list was intended to provide a short cut in ascertaining whether a particular person fell within the terms of the offence. Some respondents expressed concern about the inclusion of a list, warning that it would cause confusion because of any implication that might attach to a relationship being omitted from the list; that legal argument would not be circumvented but would simply shift from the meaning of the general definition to the meaning of the relationships described in the list; and that the list was unnecessary in any event, because of the presence of a general definition.

- 5.30 Although the list is intended as an illustration of the obvious categories of relationships falling within the general definition, and the general definition should therefore suffice as a description of private agency relationship for our purposes, nonetheless we remain of the view that the list provides a useful indication of what we mean by “agency relationship” in this context. This is particularly helpful given that we are using the labels “agent” and “principal” which have different, more restrictive meanings in other areas of law. In contrast, however, we would dispense with the list of categories in respect of those discharging public functions. Given that there is no risk of the restricted meaning of agency being applied in this case, we take the view that a list would be of little assistance. On the contrary, it might be read as restricting the meaning of the general definition.

Transnational agency relationships

Agents with private foreign principals

- 5.31 In the consultation paper, we identified two types of what we called “transnational agency relationship”: those where the relationship involves a private foreign principal, and those where the agent acts on behalf of the public interest of another country. We provisionally concluded that an agent of an identifiable foreign principal should be regarded as an “agent” for the purposes of a modern law of corruption.⁴⁴ This proved uncontroversial amongst those who responded on the issue, and we remain of the view that agents of foreign principals should not be exempted. Given the internationalisation of trade, to exclude them would encourage a climate of corruption in international business transactions. Furthermore, it would go against a developing resolve within the international community that international corruption, in both the public and private sectors, needs to be addressed. We are aware, for example, that efforts have been made in the European Union to secure agreement about the criminalisation of private sector corruption. In a document published in May 1997,⁴⁵ the Commission of the European Communities gave strong support for a comprehensive attack on

⁴⁴ Consultation Paper No 145, para 7.56.

⁴⁵ Communication from the Commission to the Council and the European Parliament, *A Union Policy Against Corruption*, COM(97) 192 final, Brussels, 21.05.1997:

One of the essential elements in combating corruption is to ensure that it is criminalised. In addition to its deterrent and repressive effect, criminalising corruption represents a clear and unequivocal statement that those practices are not acceptable and are against the public interest. Ideally the criminal law within the Union should address the bribery of EC officials, the bribery of officials of other member States, the bribery from states outside the Union and private sector corruption. (Para 9).

corruption, including private sector corruption. Similarly, the Council of Europe is also actively considering private sector corruption.

Agents acting for the public interest of another country

- 5.32 In the consultation paper, we had provisionally concluded that agents acting solely on behalf of the public interest of other countries should be exempted from the scope of the new offence. Not only has this conclusion met with significant criticism, but we have also been impressed by the international anti-corruption initiatives undertaken in a range of fora such as, for example, the European Union, the Council of Europe, the OECD, the Commonwealth Law Ministers, the G7, the United Nations, the World Trade Organisation, the International Monetary Fund and the Organisation of American States.⁴⁶
- 5.33 It is widely recognised that corruption can threaten economic development and the integrity of democratic institutions.⁴⁷ In the preamble to a draft⁴⁸ of the Council of Europe convention on corruption it is emphasised that “corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society”. In the preamble of the OECD convention on combating bribery of foreign public officials,⁴⁹ it is said that bribery in international business transactions “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions”. And in the recent Lima Declaration,⁵⁰ the view was expressed that corruption “erodes the moral fabric of every society; violates the social and economic rights of the poor and vulnerable; undermines democracy; subverts the rule of law which is the basis of every civilised society; retards development; and denies societies, and particularly the poor, the benefits of free and open competition.”
- 5.34 We are aware of the global nature of corruption and the importance of international efforts to combat corruption in both the public and private sectors, and we agree that exempting those who are required to act in the public interest of another country would run counter to those efforts. We shall be recommending, therefore, that “agent” should include a person acting on behalf of the public, whether the public of the United Kingdom (or any part of it) or of another country.

⁴⁶ See Part I, paras 1.16 - 1.20.

⁴⁷ In his response, Professor Sullivan commented on “the phenomenon of international commercial bribery, with its malign impact on the politics and economies of developing countries” (See G R Sullivan, “Reformulating the Corruption Laws – the Law Commission Proposals” [1997] Crim LR 730, 739).

⁴⁸ As approved by the Working Group on Criminal Law after a second reading of the draft at its 10th meeting (4–6 November 1997).

⁴⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997.

⁵⁰ A declaration of the 8th International Conference Against Corruption held in Lima, Peru from 7–11 September 1997. The conference represented the citizens of 93 countries.

Agents acting on behalf of international intergovernmental organisations

5.35 So far, as regards those agents who exercise *public* functions, we have concerned ourselves with those who act on behalf of the public, whether the public of this country or another. There is, however, a further category of public agent which we need to consider, namely the agent who acts not on behalf of a national public but on behalf of the interests of an international intergovernmental organisation.⁵¹ We have in mind an organisation such as the European Union, where it has an interest which cannot be described as the collectivity of the various national interests represented by Member States⁵² – even though, it is supposed, the purpose of the organisation will be to promote those national interests. We take the view that the extension of the law of corruption to the officials of particular intergovernmental organisations is not a matter best dealt with by the Law Commission. However, we shall be recommending that consideration should be given to the inclusion of such officials in the definition of “agent” in any future legislation governing offences of corruption.

Our recommendation

5.36 **We recommend that**

- (1) a person should be regarded as an agent, and another as a principal for whom he or she performs functions, if**
 - (a) the first is a trustee and the second is a beneficiary under the same trust;**
 - (b) the first is a director of a company and the second is the company;**
 - (c) each is a partner in the same partnership;**
 - (d) the first is a professional person (such as lawyer or accountant) and the second is his or her client;**
 - (e) the first is an agent and the second is his or her principal (taking agent and principal in the sense normally understood by lawyers); or**
 - (f) the first is the employee of the second;**
- (2) a person who does not fall within any of the categories above should be regarded as an agent, and another as a principal for whom he or she performs functions, if there is an agreement or understanding between them (express or implied) that the first is to perform the functions for the second; and**

⁵¹ The Council of Europe draft Convention makes specific reference to the criminalisation of bribery of officials and contracted employees of “any international or supranational intergovernmental organisation or body”.

⁵² Hence, for example, the First Protocol to the Convention on the Protection of the European Communities’ Financial Interests is directed at the damaging effect of corruption involving national and Community officials on the European Communities’ Financial Interests.

- (3) a person should be regarded as an agent performing functions for the public if the functions he or she performs are of a public nature (whether or not in relation to the United Kingdom).

(Recommendation 3)

- 5.37 We recommend that consideration should be given to extending the scope of the corruption offences to include officials of international intergovernmental organisations.

(Recommendation 4)

THE CONCEPT OF ADVANTAGE

- 5.38 A concept central to the existing law of corruption, and also to the new offences we recommend, is that of the benefit corruptly conferred, obtained, offered or solicited. Under the present legislation this benefit is variously described as a “gift, loan, fee, reward or advantage” (the 1889 Act) or a “gift or consideration” (the 1906 and 1916 Acts). We suggested that the former expression might be slightly wider than the latter, for example in relation to services as against property.
- 5.39 Our provisional view was that the new legislation should apply to anything done by one person (A) which another (B) wants A to do, or which is of benefit to B,⁵³ and also to an omission⁵⁴ by A to exercise a right to act to B’s disadvantage.⁵⁵ We described both kinds of benefit as the conferring of an “advantage” by A on B, and this approach won general approval.⁵⁶
- 5.40 However, we believe that the formulation we provisionally proposed can be improved upon in certain respects. In the first place, the reference to something done by A which *is of benefit* to B might be understood as excluding the case where A instructs or requests a third party, C, to confer a benefit on B: A’s instruction or request is not in itself of any benefit to B (because C might decline to act upon it), and the act done by C which benefits B is arguably done *only* by C, not by A. Our recommendation therefore makes it clear that it is sufficient if A’s act or omission *results* (directly or indirectly) in a benefit to B.
- 5.41 Secondly, our provisional proposal referred to A doing something that B wants A to do *or* which is *otherwise* of benefit to B. This might be thought to imply either that anything B wants A to do is inevitably of benefit to B (which arguably is not the case)⁵⁷ or that something which is not of benefit to B is not an advantage even if B wants A to do it (which was not our intention). Similarly, it would follow from our proposal that an omission by A to exercise a legal right, even at B’s request, would suffice *only* if it were shown that the exercise of the right would in fact have

⁵³ Consultation Paper No 145, para 8.62.

⁵⁴ The consultation paper followed the 1889 and 1906 Acts by referring to a “forbearance”, but the plainer word “omission” seems preferable.

⁵⁵ Consultation Paper No 145, para 8.64.

⁵⁶ But the SFO thought it unnecessary to define the word “advantage”.

⁵⁷ But, as Judge Rhys Davies QC pointed out, “even ‘gratification’ is an advantage.”

been disadvantageous to B. Our recommendation makes it clear that, if A's act or omission is in consequence of B's request, it is immaterial whether it *benefits* B.

5.42 Thirdly, the requirement of a *request* is slightly narrower than our original test of whether B *wants* A to act or omit to act: given that there is no additional requirement of benefit to B, we do not think it should be sufficient that B wants A to act or omit to act unless B has communicated that desire to A. But an *implied* request should clearly suffice. We think it should also be made clear that it is sufficient if B requests A to act or omit to act to B's advantage without specifying precisely how or when A is to do so, and A does in due course act or omit to act in accordance with that request.

5.43 **We recommend that**

- (1) a person should be regarded as conferring an advantage if**
 - (a) he or she does something or omits to do something which he or she has a right to do, and**
 - (b) the act or omission is done or made in consequence of another's request (express or implied) or with the result (direct or indirect) that another benefits; and**
- (2) a person should be regarded as obtaining an advantage if**
 - (a) another does something or omits to do something which he or she has a right to do, and**
 - (b) the act or omission is done or made in consequence of the first person's request (express or implied) or with the result (direct or indirect) that the first person benefits.**

(Recommendation 5)

THE OFFENCES

5.44 We now consider what kinds of conduct in relation to an "advantage" should be prohibited.

Corruptly conferring, or offering or agreeing to confer, an advantage

5.45 Under the 1889 Act a person may commit an offence by corruptly giving, offering or promising an advantage; under the 1906 Act, by giving, offering or agreeing to give it. In the consultation paper we provisionally preferred "promise" to "agree", on the ground that we saw no difference between the two terms except that "promise" seemed simpler.⁵⁸ The Employment Law Bar Association preferred "agree", which would be consistent with our proposal that it should be an offence to agree to *accept* a corrupt advantage.⁵⁹ On reflection we now think that "promise" is the wider term, because it does not imply a need for agreement on the part of the prospective *bribee*.

⁵⁸ Consultation Paper No 145, para 8.68.

⁵⁹ Consultation Paper No 145, para 8.67.

5.46 On the other hand there seems to be no need for a further expression to cover the situation where A promises a bribe which B does not agree to accept, because that would amount to an “offer”. Indeed, strictly speaking there seems no need to cover *any* conduct on A’s part other than conferring an advantage and offering to confer one: if B solicits an advantage and A agrees to confer it, both will be guilty of a conspiracy to confer and obtain it.⁶⁰ However, given that it is a substantive offence even to *propose* such an agreement (by offering or soliciting a corrupt advantage) it would be odd if the agreement itself were not a substantive offence but only a conspiracy to commit the offences involved in carrying it out. We have therefore concluded that it should be an offence to *agree* to confer a corrupt advantage.

Advantage conferred on a person other than the agent

5.47 The 1889 Act does not require that the agent it is sought to influence should be the person who receives the corrupt advantage; but the 1906 Act does not allow for such a separation of roles. Therefore, the existing law is limited in that it will only bite against third-party transactions involving those associated with *public* bodies.⁶¹ In the consultation paper we noted that the Salmon Report considered the wider approach of the 1889 Act to be the right one, and we provisionally agreed, considering that otherwise there is a gap in the law which could be exploited in circumstances where an agent has an interest in a third party (such as the agent’s spouse) receiving a benefit.⁶² This view was accepted on consultation, and our recommendation does not require that the person obtaining the advantage should be the agent whose conduct it is sought to influence or reward.

Intermediaries

5.48 The Salmon Report suggested that intermediaries were caught by the broad drafting of the 1889 Act, but by the 1906 Act only “to the extent that [the intermediary] actually gives or offers a corrupt gift or consideration to an agent.”⁶³ An intermediary may however be guilty of aiding and abetting the substantive offence.⁶⁴

5.49 Unlike the Salmon Committee, we think that the criminality of an intermediary’s conduct is less than that of the other parties to the corrupt transaction, and is adequately reflected by liability for aiding and abetting. We therefore provisionally proposed that an intermediary should not commit the offence *as a principal offender*.⁶⁵ A number of respondents agreed with this proposal. However, several others argued that, since the law makes no distinction between an accessory and a principal in the formulation of a charge, the distinction we proposed was artificial and unnecessary, if not positively undesirable. We are persuaded by this argument. If an intermediary actually confers a corrupt advantage, or offers or agrees to do

⁶⁰ Criminal Law Act 1977, s 1.

⁶¹ Consultation Paper No 145, para 8.71.

⁶² Consultation Paper No 145, para 8.73.

⁶³ Salmon Report, para 57.

⁶⁴ Consultation Paper No 145, para 8.78.

⁶⁵ Consultation Paper No 145, para 8.79.

so, there is no compelling reason why he or she should not be guilty as a principal offender rather than merely as an aider and abettor. The fact that he or she is only an intermediary may be taken into account in mitigation. We therefore make no recommendation for any specific provision regarding intermediaries.

Our recommendation

5.50 We recommend that a person should commit an offence if he or she

- (1) corruptly confers an advantage, or**
- (2) corruptly offers or agrees to confer an advantage.**

(Recommendation 6)

Corruptly obtaining, soliciting or agreeing to obtain an advantage

5.51 Under the 1889 Act a person may commit an offence by soliciting, receiving or agreeing to receive an advantage; under the 1906 Act, by accepting it or agreeing to do so, obtaining it or attempting to do so. In the consultation paper we suggested that “receive”, “accept” and “obtain” were interchangeable, and provisionally proposed that “accept” should be used. On further reflection we believe that “obtain” may be slightly more apt for willing acquiescence in the corrupt conferment of an advantage (for example, the payment of funds into a bank account, or of cash to a third party) as distinct from active co-operation;⁶⁶ and we believe that such acquiescence should suffice.

5.52 We also provisionally suggested that it was unnecessary to provide for an attempt to obtain an advantage, because it was hard to see how a person might attempt to obtain an advantage without soliciting one. No-one suggested that we were wrong.

5.53 We recommend that a person should commit an offence if he or she

- (1) corruptly obtains an advantage, or**
- (2) corruptly solicits or agrees to obtain an advantage.**

(Recommendation 7)

Corruptly performing functions as an agent

5.54 The existing legislation catches not only corrupt inducements to show favour in the future but also corrupt rewards for favour shown in the past,⁶⁷ and our recommendations would do the same. An agent who performs his or her functions as an agent with a view to obtaining a corrupt reward will be guilty of obtaining the reward corruptly, if he or she obtains it at all. But it would be illogical if the agent’s liability rested *solely* on the obtaining of the reward. The real criminality of the agent’s conduct lies in the fact that the agent has allowed his or her judgment to be influenced by the *hope* of obtaining a reward, not in the fact that he or she

⁶⁶ The House of Lords has held in the context of insider dealing that a person “obtains” information merely by coming into possession of it, without taking any active steps to acquire it: *A-G’s Reference (No 1 of 1988)* [1989] AC 971.

⁶⁷ See paras 2.10 and 2.13 above.

has actually obtained one. Morally, there is little to choose between an agent who acts in the hope of a reward and would gladly accept one if it were offered, but is disappointed, and an agent who acts in the hope of a reward and duly gets one.

- 5.55 Moreover, even where an agent *has* received a reward, it may be harder to prove this than to prove that the agent acted in the hope of one. There may be evidence of a breach of trust on the part of the agent, but evidence of the reward may be lacking. We see no reason in principle why this should preclude a conviction, since the agent's effort to *earn* a reward is corrupt in itself. Such a case can sometimes be successfully prosecuted as a conspiracy to defraud the agent's principal (or the public), and we have previously identified this possibility as one of the advantages for the prosecution of the continuing existence of conspiracy to defraud.⁶⁸ But if the allegation is essentially one of corruption, we think it wrong that the prosecution should be forced to lay the charge as a common law conspiracy, rather than as a substantive offence under the corruption legislation. The creation of such an offence would also eliminate one of the gaps in the substantive criminal law which are currently filled only by conspiracy to defraud. It would thus be a step towards our long-term objective of making it possible to recommend the abolition of that offence in its present form.⁶⁹
- 5.56 We therefore believe that it should be an offence in itself for an agent to perform his or her functions as an agent in the hope of obtaining a corrupt reward for doing so. If the agent does later obtain a reward, this would amount to a *further* offence; but this would be immaterial to the agent's liability for acting corruptly in the first place.
- 5.57 This conclusion has implications for the position of the agent whose conduct is influenced not by the hope of reward but by a previous inducement. It would be anomalous if the agent were guilty of an offence in the former case but not the latter. Admittedly there is less *need* for an offence in the latter case, because in that case there is no need to cater for the possibility that the agent may fail to get the advantage desired. But, if the corrupt performance of a duty were an offence *only* when done in the hope of later reward, there would be a practical difficulty: an agent charged with that offence would be entitled to an acquittal unless the prosecution could prove that the agent had acted in the hope of future reward, *as distinct from acting in return for a previous inducement*. This would be so even if it were clear that the agent had done one or the other – in other words, that he or she had acted corruptly.
- 5.58 We have therefore concluded that the corrupt performance of an agent's functions should be an offence in itself, whether it is done in the hope of later reward or in return for a previous inducement, or both. **We recommend that a person should commit an offence if he or she performs his or her functions as an agent corruptly.**

(Recommendation 8)

⁶⁸ Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, para 4.56.

⁶⁹ Criminal Law: Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, para 1.16.

Agent receiving benefit from corruption

5.59 Although the existing legislation is directed ultimately at misconduct on the part of agents in the performance of their duties, an agent commits an offence only if he or she solicits, receives or agrees to receive an advantage, aids and abets an offence by another party or is party to a conspiracy.⁷⁰ In the consultation paper we suggested that, where the advantage is initially conferred on someone other than the agent whose conduct it is sought to influence, and the agent later corruptly receives some of the proceeds or some other consequential benefit (for example, the remission of a debt), it may be debatable whether the agent commits an offence.⁷¹ We therefore provisionally proposed that there should be express provision for the liability of the agent in this situation, and there was substantial support for this proposal.

5.60 However, it could not be an offence for an agent *merely* to receive a benefit in the knowledge that it is derived from an advantage corruptly obtained, because the receipt of a benefit (like the obtaining of an advantage)⁷² need not involve the co-operation or even the consent of the receiver. The offence we recommend would therefore be committed only if the agent gives *consent* (express or implied) to the receipt of the benefit.

5.61 **We recommend that if**

- (1) an advantage is obtained corruptly by a person other than the agent concerned,**
- (2) the agent receives a benefit (in any form) which consists of or is derived (directly or indirectly) from all or part of the advantage,**
- (3) the agent knows or believes that the advantage was obtained corruptly and that the benefit consists of or is derived from all or part of the advantage, and**
- (4) the agent give his or her express or implied consent to receiving the benefit,**

the agent should commit an offence.

(Recommendation 9)

“CORRUPTLY”

5.62 We have so far been following the example of the existing legislation by referring to persons acting “corruptly” without explaining what we mean by that term. We now turn to the question of how corrupt transactions might be differentiated from those that are not corrupt.

⁷⁰ Consultation Paper No 145, para 8.74. Recommendation 14 would impose liability on an agent who performs his or her functions corruptly, whether or not he or she has personally obtained an advantage or hopes to do so: see paras 5.121 – 5.122 below.

⁷¹ Consultation Paper No 145, para 8.75.

⁷² See para 5.113 below.

Is a definition necessary?

- 5.63 At present, the prosecution is required only to prove that the defendant acted “corruptly” – a word which is not defined. We invited views on whether the meaning of the word is clear enough to make a definition unnecessary. Respondents were about equally divided on this question: some thought a definition was necessary, while others thought that “corruptly” is a word which fact-finders can readily recognise and apply.
- 5.64 Our task would be significantly easier if we were confident that the term “corruptly” would be readily understood in the way that we would want it understood; unfortunately, we do not feel able to adopt this line. For a term which is not statutorily defined to be included in the definition of an offence, we must be confident that its generally understood meaning is unequivocal and that that unequivocal meaning is the meaning we would like imported into the offence. We are in the fortunate position of being able to make an informed decision as to whether “corruptly” passes this test. We have two sources of empirical evidence: the interpretative history of the meaning of “corruptly” in existing corruption legislation, and the comments we received on the definition we provisionally put forward.
- 5.65 In the consultation paper we set out the two strands of judicial interpretation of “corruptly”: on the one hand, it describes an act which the law forbids as tending to corrupt,⁷³ and on the other, a dishonest intention to weaken the loyalty of an agent to his or her principal.⁷⁴ We noted Lanham’s conclusion that the authorities are in “impressive disarray”.⁷⁵ As for the responses, they ranged far and wide, and there was little consensus. The clear implication is that we were right to identify in the consultation paper the uncertainty of the meaning of the word “corruptly” as one of the most important defects in the present law. We take the view that this defect can only be remedied by a more precise description of the kind of conduct that falls within the offence, and we conclude that a definition is required.
- 5.66 We therefore turn to the question of how such a definition should be formulated. For convenience, we consider first how the approach we have now adopted might be developed into a workable test of a corrupt *inducement* to an agent to act (or omit to act) in a particular way in the future, and then how that test might be adapted for corrupt *rewards* to agents for having acted (or omitted to act) in a particular way in the past.

Corruptly conferring an advantage as an inducement

- 5.67 In the consultation paper, we provisionally concluded that an advantage is a corrupt inducement if it is an inducement to an agent to act or refrain from acting
- (1) in breach of duty (“the first limb”), or

⁷³ *Cooper v Slade* (1857) 6 HL Cas 746; 10 ER 1488, and *Wellburn* (1979) 69 Cr App R 254.

⁷⁴ *Lindley* [1957] Crim LR 321 and *Callard* [1967] Crim LR 236.

⁷⁵ Consultation Paper No 145, para 4.15. D Lanham, “Bribery and Corruption”, *Essays in Honour of J C Smith* (1987) 92, 104.

- (2) in any way, *provided* that the transaction has a substantial tendency to encourage that agent, or others in comparable positions, to act in breach of duty (“the second limb”).⁷⁶
- 5.68 As we have explained,⁷⁷ we have been persuaded that our provisional definition was too narrow in that it referred to agents being induced to act in *breach of duty*, rather than being influenced in the performance of their functions as agents.
- 5.69 We have also reconsidered the second limb of our provisional definition. We took the view in the consultation paper that the second limb was necessary on the ground that gifts not directly linked to a breach of duty can be potentially corruptive in that they “contribute to a climate in which ... inducements or rewards are expected or hoped for”.⁷⁸ Without the second limb, any circumstance in which an advantage is conferred by A on B, otherwise than as an inducement to B to breach a duty to C (or to refrain from so doing), would not be covered, even if it had a potentially corruptive effect.
- 5.70 Of those who responded on this issue, the majority criticised the second limb.⁷⁹ Some, taking a pragmatic standpoint, suggested that it would be very difficult to prove the “substantial tendency”; others were concerned that the criminality of a transaction would be determined by the presence or absence of circumstances “not intended by the actor and of which he may be unaware”;⁸⁰ and others were concerned that “substantial tendency” was too vague an expression.⁸¹
- 5.71 We are persuaded that the second limb of our provisional definition should be abandoned. We remain of the view that the conferring of an advantage on an agent by a person other than the agent’s principal can contribute to a climate of corruption even if *in the case of that particular agent and principal* no harm is done.⁸² On the other hand, we recognise the practical difficulties in criminalising conduct which is not *intrinsically* the sort of conduct we would wish to criminalise but is criminal because of an incidental effect, namely a “substantial tendency” to encourage certain kinds of conduct on the part of persons not directly involved.⁸³

⁷⁶ Consultation Paper No 145, para 8.19.

⁷⁷ Paras 5.5 – 5.10 above.

⁷⁸ Consultation Paper No 145, para 8.15.

⁷⁹ For example, it was Buxton LJ’s only concern.

⁸⁰ Buxton LJ.

⁸¹ Professor Sir John Smith, for example, commented: “It seems too uncertain – a question which might be the subject of elaborate sociological research but which will be decided by a jury or magistrate on a hunch.”

⁸² See para 1.25 of Consultation Paper No 145:

It is in the public interest that people should refrain from conduct which might encourage agents to act in breach of their duty – *whether or not anyone would be defrauded by such conduct*.

⁸³ Buxton LJ wrote:

While it would be naïf to suppose that there is *no* harm in A paying B to comply with B’s duty to C, the harm ... lies in what the parties may do in the future or in what others may infer from the payment. If this “innocent” payment creates a

- 5.72 Moreover, in the light of our decision to extend the *first* limb of our provisional definition so as to include the influencing of an agent in the performance of his or her functions as an agent, *whether or not the agent is intended to act in breach of duty*,⁸⁴ the need for the second limb is greatly diminished. It would be needed only for the case where an advantage is conferred on an agent and, though not conferred in connection with *that* agent's performance of his or her functions as an agent, it is conferred in such circumstances that it might influence *other* agents in the performance of *their* functions. It is hard to imagine how such a case might arise.
- 5.73 We have therefore concluded that our definition of corrupt conduct should not include an element corresponding to the second limb of our provisional definition. We are left with the first limb. As modified along the lines suggested by Professor Sir John Smith,⁸⁵ and in accordance with our conclusion that the fundamental mischief is not breach of duty by agents but the influencing of an agent's performance of his or her functions as an agent, the first limb may be restated as follows:

An advantage is a corrupt inducement if it is intended to influence an agent in the performance of his or her functions as an agent.

- 5.74 However, we believe that a definition in terms of an intention to influence an agent, without more, would be too wide. The difficulty is that most commercial enterprises are constantly trying to bring in business in a variety of ways, all of which involve "influencing" those agents of other firms whose job it is to decide where their firms' business should go. Some of these ways (such as advertising) are irrelevant for our purposes because they do not involve conferring any "advantage" on the agents of the target firms. Others, however, do carry such advantages.

Corporate hospitality

- 5.75 An obvious example is "corporate hospitality", which is often expensive to provide and (designedly) enjoyable for those who attend. The provision of such hospitality undeniably constitutes the conferring of an advantage on the agents for whom it is provided, and its purpose is normally to influence their conduct as agents of their employers;⁸⁶ but it is generally regarded as an acceptable business activity – or, at

temptation to corruption, is it not enough for the law to hold its hand until that temptation ripens into action?

Lord Davidson took a similar line:

I am not persuaded that an action which itself is not criminal can credibly be made the subject of prosecution on the ground that it tends to encourage others to commit criminal acts.

⁸⁴ See paras 5.5 – 5.10 above.

⁸⁵ See para 5.10 above.

⁸⁶ See *The Financial Times* 2 June 1997:

My diary this Season is one long blank. I had hoped for a corporate invitation to the Chelsea Flower Show, but no luck. Neither have there been any invitations to Wimbledon, Ascot or anywhere else. This enforced austerity has one advantage: it allows me to criticise those who are knocking back champagne at someone else's expense.

least, not so unacceptable as to be criminal. We believe that a definition wide enough to catch ordinary corporate hospitality would be too wide.

- 5.76 On the other hand we cannot simply exclude *all* corporate hospitality from the offence, because that would open the door to abuse: bribery would simply be dressed up as hospitality. It would be absurd if it were an offence to pay an agent a bribe, but not to provide the agent with an expensive holiday incorporating a few token business presentations.
- 5.77 We have therefore tried to exclude *acceptable* hospitality without also excluding activities which are truly corrupt. For this purpose we have asked ourselves what it is about “acceptable” hospitality that makes it acceptable. For example, suppose A Ltd, hoping to get business from B Ltd, arranges for B Ltd’s managing director to attend an important football match as the guest of A Ltd’s directors. The match is preceded by drinks and lunch, during which (among other things) A Ltd’s current and future activities are discussed. It is intended that the managing director shall enjoy the event – it is an “advantage” – and be influenced by it; yet most people would hesitate to conclude that the whole exercise is corrupt. Why is this?
- 5.78 The answer, we believe, lies in the *way* in which it is hoped to influence the agent. It is possible to identify various different ways in which an agent’s attendance at a corporate function may influence the agent to make decisions favouring the host company. For example,
- (1) the agent may acquire information about the host company which militates in that company’s favour when the agent comes to compare it with its rivals; or
 - (2) the agent’s existing relationships with employees of the host company may be cemented, and new ones formed, and the agent may have a natural preference for doing business with people he or she knows; or
 - (3) the agent may simply decide to favour the host company in return for an enjoyable occasion.
- 5.79 An intention to influence an agent in the first or second of these ways (or both) is clearly legitimate, and something done *solely* with such an intention is not corrupt. An intention to influence an agent in the third way is not legitimate, and something done solely with that intention *is* (we believe) corrupt. The host company’s purpose is of course to induce the agent to give it business, and, if the agent does so, it is unlikely to care much about his or her reasons. But if it knows that the agent would not give it business for any reason *except* the third, corrupt reason, then it intends the agent to be corruptly influenced.⁸⁷

For those of us outside the gates, the system of lavish corporate entertaining looks dodgy. The reason companies invite you to this sort of thing is not because they like you – if that is the only reason they should be fired for wasting their shareholder’s money. *They ask you because they want something in return. They are offering you an institutionalised, perfectly legal bribe.* (Italics added)

⁸⁷ Cf the definition of “intentionally” in cl 1 of the draft Bill annexed to our report *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, where it states that a person acts “intentionally” with respect to a result when –

- 5.80 In practice, however, it will rarely be clear that, if the agent did give business to the host company, it could *only* be for the third reason. It may be that, as far as the host company can predict, the agent might do so for any one of these three reasons, or for some other reason, or for a combination of any two or more reasons. In such a case, we think the right approach is to ask what the host company thinks the agent's *main* reason would be, if he or she did give the host company the business it wants. Where the host company thinks that the agent's main reason for giving it business (if the agent did so) would be a legitimate reason, we do not believe that the exercise becomes corrupt merely because the host company also hopes for gratitude for the hospitality it provides. If, on the other hand, the host company thinks that a favourable decision on the part of the agent would be motivated primarily by the third, illegitimate reason, the fact that it also expects other, legitimate reasons to play an incidental part should not, in our view, be a defence.
- 5.81 The host company may of course realise that a favourable decision, if it came about, *might* be made primarily in return for the hospitality, without being *sure* that it would be. We do not think that liability should be negated merely because there is a remote possibility of the agent's main reason being a legitimate one. On the other hand, we think it would be going too far to impose liability where there is only a remote possibility of the agent's main reason *not* being legitimate. We have concluded that the crucial question should be whether the provider of the alleged inducement thinks it *probable* (that is, more likely than not) that, if the agent were to act in the manner desired, it would be primarily in return for the advantage conferred.
- 5.82 At first sight this test might seem difficult to apply; but, if so, we believe that any difficulty would arise *only* in the case of corporate hospitality and similar advantages, because in practice an advantage must inevitably be intended to create influence of an "illegitimate" kind unless it involves some sort of interaction between the agent and the donor. Thus, in the case of the football match described above,⁸⁸ it would have to be proved that A Ltd thought that, if B Ltd's managing director gave it the contract, it would *probably* be *primarily* in return for a good lunch and a good seat for the match, rather than as a result of a constructive discussion in congenial surroundings. But if the directors of A Ltd simply sent B Ltd's managing director a ticket for the match with their compliments, it would be hard to resist the inference that this was primarily (if not exclusively) a bribe. The practical effect, we believe, would be that corporate hospitality would be the subject of prosecution only where it was blatantly corrupt on any view.

"Sweeteners"

- 5.83 One of the reasons we gave for including the second limb of our provisional definition was that the first limb was not apt to cover the situation where A confers

(i) it is his purpose to cause it, or (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

⁸⁸ See para 5.77 above.

an advantage on B not in order to cause any *specific* breach of duty by B but as a general “sweetener”.⁸⁹ Buxton LJ queried whether there is any need to intervene before the inducement has any effect. But this approach would be inconsistent with our principle that a bribe need only be *intended* to influence the agent, and need not actually succeed in doing so. We have concluded that it should be sufficient if the briber’s intention is to influence the agent’s conduct at some indeterminate future time, even if neither party can yet foresee the exact circumstances in which the agent’s conduct may be influenced.

- 5.84 For this reason we describe the conduct desired of the agent not as the performance of his or her functions as agent *in a particular way* (which might imply, contrary to our intention, that the briber must have in mind the *details* of the desired conduct) but as *doing an act or making an omission* in performing his or her functions as agent; and the draft Bill makes it clear that the nature of the intended act or omission, and the time it is intended to be done or made, need not be known when the advantage is conferred or the offer or agreement is made.⁹⁰

Bribee unaware of corrupt purpose

- 5.85 In our view the briber is no less culpable merely because, unknown to the briber, the intended bribee is unaware of the briber’s corrupt purpose. We expressed this view in the consultation paper,⁹¹ and nearly all the respondents who commented on it agreed.

Proper remuneration or reimbursement

- 5.86 If a corrupt intention could consist *solely* in an intention to induce an agent to perform his or her functions as agent in return for the promise of an advantage, every agreement to employ an agent would be corrupt: the agent’s salary or other remuneration is an advantage, and the prospect of it induces the agent to perform his or her functions. It is therefore necessary to ensure that proper remuneration of an agent is excluded from our definition of “corruptly” conferring an advantage. The same applies to the reimbursement of expenditure incurred by an agent in the performance of his or her functions as an agent.

⁸⁹ See para 8.16 of the consultation paper:

Suppose, for example, that Ms B’s job involves awarding contracts on behalf of her employer Mr C. In good faith, and in accordance with the appropriate criteria, she awards a contract to Mr A. A shows his gratitude by offering B a substantial sum of money, which she accepts. Our provisional view is that such a payment would be potentially corruptive, since the recollection of it is likely to influence B in any future dealings with A; indeed, that may well be one of A’s purposes in making it. This consideration might perhaps be accommodated by regarding the reward for B’s first act, where the question of a breach of duty did not arise, as an inducement to act (or not act) in breach of duty in the future. *But if A has no particular objective in mind, and intends only to cultivate his relationship with B in the hope that it will eventually bear fruit, such an approach would be artificial at best.* (Italics added).

⁹⁰ Clause 6(3).

⁹¹ Consultation Paper No 145, para 8.93.

- 5.87 The formulation of this exception has to take account of the different kinds of function which an agent may perform – those performed for a principal and those of a public nature. In the case of the former, it is remuneration or reimbursement by or on behalf of the principal that is not corrupt; in the case of the latter, remuneration or reimbursement on behalf of the public. In the case of functions performed for a principal *and* the public, remuneration or reimbursement is not corrupt if it is made on behalf of either.

Things done with the consent of the principal

- 5.88 A number of respondents⁹² took the view that the principal's consent should be a complete defence. Professor Sir John Smith gave his reasons as follows:

I agree with the Commission's rejection of the specific defences examined except that, where the conferment of the advantage has been properly authorised, there is no breach of duty by the agent and so there should be no offence. A person who confers an advantage on an agent knowing or believing that the conferment of that advantage has been authorised by a person entitled to authorise it, does not do so corruptly. There might, as the Commission suggests, be difficulties of proof: but that does not seem to me to be an adequate reason for allowing the offence to apply in circumstances where in principle, it should not do so.

- 5.89 In the consultation paper we recognised that it was arguable that, if the agent's principal knows all the relevant facts and consents to what is done by the agent, the briber or both, that conduct ought not in principle to be caught by an offence of corruption; but we provisionally rejected this view. We gave three main reasons for doing so.

- 5.90 First, we argued that the principal's consent should not be a complete defence because corruption is not an offence of fraud or dishonesty (in the sense in which we use that expression).⁹³ We pointed out that, although the acceptance of a bribe with the principal's consent cannot amount to a fraud on the principal, it can contribute to a climate in which bribery is common.⁹⁴ But this argument seems unconvincing now that we have abandoned the second limb of our provisional definition. We now believe that the offence should be confined to conduct intended to induce a *particular* agent to act primarily in return for an advantage, thus creating a potential conflict with *that* agent's duty to further the interests of his or her principal. It is the function of the law of corruption to avoid such conflicts. But we cannot see how any conflict can exist if the agent's principal knows all the circumstances and consents to what is done.⁹⁵

⁹² Longmore J, Professor Sir John Smith, the SFO and SIB.

⁹³ See paras 5.123 – 5.130 below.

⁹⁴ Consultation Paper No 145, para 8.43.

⁹⁵ In *Fiduciary Duties and Regulatory Rules* (1995) Law Com No 236, para 2.13, we noted that fiduciary duties could be modified or displaced if the beneficiary's consent was obtained after disclosure of all material facts.

5.91 Secondly, we pointed out that such a defence could have no application in relation to a duty owed to the *public*, rather than any particular person. This is true, but we also suggested a solution:

It would be possible for the law to say that it is a defence if *any person to whom the agent may owe a duty* consents to what is done: this defence would by its nature be unavailable to those agents whose duties are not owed to persons at all, but to the public or the state.⁹⁶

If an agent has a public function, something done in order to influence the agent's performance of that function is not excusable merely because the agent also performs functions for one or more *persons* who consent to what is done. If an advocate, for example, is bribed to act in breach of his or her professional duty to the court,⁹⁷ the *client's* consent should be immaterial.

5.92 Even an agent who has no public duties may have more than one principal, and may be bribed by or with the consent of one of them to act against the interests of another. Clearly it is only the consent of the latter principal that could be a defence. Conversely, it seems immaterial that a third principal does *not* consent, if the only one who is adversely affected does. In principle it should be both necessary and sufficient, for this defence to be successfully invoked, that what is done is done with the consent of the principal (or all those principals) for whom the agent performs *the functions in question* – that is, those functions in whose performance the agent is intended to be influenced by the advantage conferred.

5.93 In the consultation paper we added that such a rule might lead to protracted arguments about precisely who or what the agent's duty is owed to, thus distracting attention from the central issue of whether what was done was corrupt. This is indeed a danger; but it may be inevitable. Given that the offence we recommend is essentially concerned with potential breaches of duty by the particular agent involved, it would be anomalous to impose liability where there is no question of any breach of duty because the principal consents to what is done.

5.94 Finally we pointed out that difficulties may arise where the agent clearly owes a duty to a corporate body, but it is not clear which of the individuals within that

⁹⁶ Consultation Paper No 145, para 8.45.

⁹⁷ See Meredith Blake and Andrew Ashworth, "Some Ethical Issues in Prosecuting and Defending Criminal Cases" [1998] Crim LR 16, 16–17.

[T]he lawyer-client relationship is not simply a private contractual matter, with the lawyer being hired as technical expert. For someone to be allowed to practise as a lawyer, she or he must not merely have passed the required examinations and have served whatever form of apprenticeship is prescribed, but also have made an undertaking or pledge to abide by certain professional standards. In most legal systems, including England and Wales, these standards are not enshrined in legislation. They are drawn up by the professions themselves and enforced by way of self-regulation, even though there is a strong argument that the integrity of the profession is fundamental to the administration of justice, which in turn is a basic constitutional function. The "public" element in the lawyer's duties may be said to reside in the recognition of barristers and solicitors as "officers of the court". That gives rise to certain duties, most prominently the obligation to assist the court in the fair administration of justice, and not knowingly to deceive or mislead the court. (Footnote omitted).

body has the authority to consent on its behalf. This too may be an inevitable consequence of focusing on potential breaches of duty by the particular agent involved. Where an agent alleges that what was done was done with the consent of someone who had authority to give such consent, it must in principle be right to enquire whether that person did consent and, if so, whether he or she did have authority to do so.

5.95 However, in this situation there may be a further difficulty. Where an individual (such as the agent's manager) has authority to consent to what the agent does, it is possible that the giving of that consent may itself be corrupt: the manager may also have been bribed, or may hope to be. Alternatively, the *agent* may have authority to consent on the principal's behalf, and may corruptly purport to consent to his or her own corrupt conduct. It may be arguable that such a "consent" would not be valid, but this is a difficult issue which would hardly be suitable for determination in a criminal trial. Clearly the defence of consent should not be available in such circumstances, and we think that express provision should be made for this purpose. We recommend below⁹⁸ that an offence should be committed by an agent who *performs* his or her functions as agent corruptly – that is, primarily in return for, or in order to obtain, a corrupt advantage. This enables us to recommend, in respect of the principal's consent, that consent may be given on a principal's behalf by another agent of the principal, but that it does not count if in giving it the other agent performs his or her functions as an agent corruptly.

5.96 In accordance with the general principle of criminal law that a defendant who is mistaken about the facts should be treated as if the facts were as he or she believes them to be,⁹⁹ a person's conduct should clearly not be regarded as corrupt if he or she mistakenly believes that the relevant principal knows all the material circumstances and consents to what is done.

5.97 A more difficult case is that of the defendant who, while knowing that the principal does not in fact consent, or does consent but does not know all the material circumstances, believes (rightly or wrongly) that the principal *would* consent *if* he or she knew all the material circumstances. In the law of theft it is expressly provided that

A person's appropriation of property belonging to another is not to be regarded as dishonest ... if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.¹⁰⁰

5.98 We do not regard corruption as an offence of dishonesty,¹⁰¹ and it is arguable that an agent (who is by definition a person in a position of trust) should not be able to escape liability on this basis. If the agent does not have the principal's consent, there will usually be an opportunity to get it; and if the agent chooses to proceed without doing so, it should arguably be at his or her own risk. On the other hand,

⁹⁸ Recommendation 14, para 5.122 below.

⁹⁹ *Williams (Gladstone)* [1987] 3 All ER 411, *Beckford* [1988] AC 130.

¹⁰⁰ Theft Act 1968, s 2(1)(b).

¹⁰¹ See paras 5.123 – 5.130 below.

theft may also be committed by persons in positions of trust; yet such a person has a complete defence if he or she believes that the owner of the property would have consented – even if he or she has an opportunity to find out what the owner’s reaction would be, and fails to take it. We do not condone the acceptance of benefits by agents who assume, without reasonable enquiry, that their principals would consent to their actions. But we believe that to hold such agents guilty of *corruption* would be unduly harsh. We have therefore concluded that the corruption legislation should follow the example of the Theft Act, and should provide that it is not corrupt to do an act or make an omission in the belief that the relevant principal would consent to it if he or she knew all the material circumstances.

Our recommendation

5.99 We recommend

- (1) that a person who confers an advantage, or offers or agrees to confer an advantage, should be regarded as doing so corruptly if he or she**
- (a) intends a person, in performing his or her functions as an agent, to do an act or make an omission, and**
 - (b) believes that, if the person did so, it would probably be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it,¹⁰²**

unless

- (i) the advantage is conferred (or to be conferred) by or on behalf of the agent’s principal (or, in the case of functions performed for the public, on behalf of the public) as remuneration or reimbursement in respect of the performance of the functions,¹⁰³ *or***
 - (ii) the functions concerned are performed only for one or more principals (not the public), and each principal is aware of all the material circumstances and consents to the conferring of the advantage or the making of the offer or agreement;**
- (2) a person should be treated as if he or she were aware of all the material circumstances, and consented to the conferring of the advantage or the making of the offer or agreement, if the defendant believes that that person**
- (a) is aware of those circumstances and so consents, or**
 - (b) would so consent if aware of those circumstances; and**

¹⁰² See cl 6(1) of the draft Bill.

¹⁰³ See cl 10 of the draft Bill.

- (3) consent should count for these purposes if given on a principal's behalf by any agent of the principal, unless in giving it the agent performs his or her functions as an agent corruptly.¹⁰⁴

(Recommendation 10)

Corruptly conferring an advantage as a reward

5.100 In the consultation paper¹⁰⁵ we noted that, as the present legislation recognises, the mischief that we seek to prevent can arise in three main ways:

- (1) A confers an advantage on B on the understanding (express or implied) that B will in return act in a particular way.
- (2) A promises to confer an advantage on B later, on condition that B *first* acts in a particular way. (The “promise” may of course be implied: that is, A may act in such a way as to lead B to believe that a reward may be forthcoming, without actually saying so.)
- (3) A confers an advantage on B as a reward for B's having *already* acted in a particular way.

In the first two cases A's conduct acts as an inducement; in the third it is not an inducement but only a reward.

5.101 Although we appreciated the force of the view that inducements should be treated more strictly than rewards “on the ground that it is not as self-evidently corruptive to reward people for acting in a particular way in the past as it is to induce them to do so in the future”, we provisionally proposed¹⁰⁶ that the re-formulated offence should apply equally to inducements and rewards. We gave the following reasons for our conclusion.

... it is not just rewards that may or may not have a tendency to corrupt, depending on the circumstances: the same may apply to inducements. It would be artificial to permit the gift to an agent of a bottle of whisky at Christmas, in recognition of the agent's past assistance, but to prohibit such a gift if made in the hope of a mutually profitable relationship in the following year. This reasoning suggests that the crucial distinction is not that between rewards and inducements, but that between conduct which does and does not tend to encourage breaches of duty.¹⁰⁷

5.102 About a quarter of respondents expressed a view on this aspect of our provisional definition, and all of them agreed with it. We have no doubt that the new offences should, *in some circumstances*, extend to rewards as well as inducements.

¹⁰⁴ See cl 11 of the draft Bill.

¹⁰⁵ Consultation Paper No 145, para 8.5.

¹⁰⁶ Consultation Paper No 145, para 8.6.

¹⁰⁷ Consultation Paper No 145, para 8.11. Cf *Richards* 6 October 1994, CA No 94/0534/W5, where it was held that the acceptance of inducements and the acceptance of rewards are not separate offences, merely different ways of acting corruptly.

- 5.103 The more difficult question is how to define the circumstances in which a reward is *corrupt*. Our provisional definition of a corrupt transaction applied to rewards as well as inducements, but, for reasons explained above,¹⁰⁸ we have had to abandon that definition. Our new definition of a corrupt *inducement* requires a belief that, if the agent were to act in the manner desired, it would probably be primarily in return for the advantage conferred. This approach obviously needs adaptation before it can be applied to rewards for favours *already* shown. It is not enough simply to require that the reward be given in return for an act or omission on the part of the agent, because that would include legitimate rewards (such as tips, and other tokens of genuine appreciation) as well as corrupt ones. But how does a corrupt reward differ from a legitimate one?
- 5.104 Developing the analysis referred to above,¹⁰⁹ we may distinguish four situations.
- (1) A leads B to believe that, if B acts in a particular way, A will reward B for doing so. B therefore acts in that way, and A does reward B.
 - (2) Without any encouragement from A, B nevertheless believes that, if B acts in a particular way, A will reward B for doing so – for example, because B believes that A has rewarded other agents for acting in that way. B therefore acts in that way, and A does reward B.
 - (3) B acts in a particular way, not as a result of a corrupt inducement and not (or not primarily) with a view to reward. A rewards B for acting in that way, hoping that the reward will influence B to act in a similar way in the future.
 - (4) B acts in a particular way, not as a result of a corrupt inducement and not (or not primarily) with a view to reward. A rewards B for acting in that way, with no thought of influencing B to act in a similar way in the future.
- 5.105 Cases (1) and (3) are really forms of inducement, and therefore fall within the principles set out in Recommendation 10 above.¹¹⁰ In case (1), A is offering to confer an advantage with the intention that B should act in return for that advantage. It is immaterial that that advantage will not yet have been conferred when B acts in return for it, or that it may never be conferred at all. And in case (3) the advantage is an inducement to act corruptly in the future, as well as a reward for doing so in the past. The position is the same if the advantage is conferred (or to be conferred) on a third party connected with B, in the hope of influencing B.
- 5.106 Case (4) is not, in our view, corrupt at all. The act rewarded is not a corrupt act, because it is not illegitimately influenced by inducements or the hope of reward. The reward for it is therefore not a corrupt reward: there is no mischief in rewarding an agent for the way he or she performs his or her functions, provided that the agent does not do so corruptly and that the reward is not also an inducement for the future. It may be that the agent is under an obligation to account to the principal for the reward, and may even hold it on trust for the

¹⁰⁸ Paras 5.69 – 5.74 above.

¹⁰⁹ Para 5.100 above.

¹¹⁰ Para 5.99 above.

principal; and a failure to account for it should arguably be treated as an offence of dishonesty against the principal.¹¹¹ This is an issue to which we intend to return in the course of our review of the law of dishonesty; but it is not, we believe, an aspect of the law of *corruption*.

5.107 It is perhaps arguable that, even if case (4) is not in principle corrupt, it cannot safely be exempted because it is too hard to distinguish from cases (1) and (2). If B has given A a valuable contract, and A has rewarded B handsomely for doing so, the defence may assert that B did not expect to be rewarded and that A was motivated by unalloyed gratitude; and, it may be said, such a defence would be impossible to rebut. We believe that this reasoning overstates the difficulty. If the reward is more substantial than a genuine token of gratitude would normally be, and no explanation is offered for that fact, the fact-finders will draw such inferences as appear proper – for example, that B had been promised a reward if A got the contract.¹¹² And a similar inference is likely to be drawn if an innocent explanation is offered but not believed.

5.108 Case (2), on the other hand, is in our view corrupt. By analogy with our recommendation on the definition of a corrupt inducement, we believe that B's conduct, though not procured by corrupt inducement, is nevertheless corrupt if the hope of reward is B's *primary purpose* in acting in that way. If this is the case, and A rewards B in the knowledge that it is the case, A is implicated in B's corrupt purpose, and the reward is therefore corrupt.

5.109 **We recommend that a person who confers an advantage, or offers or agrees to confer an advantage, should be regarded as doing so corruptly if he or she**

- (1) knows or believes that, in performing his or her functions as an agent, a person has done an act or made an omission,**
- (2) knows or believes that that person has done the act or made the omission primarily in order to secure that a person obtains an advantage (whoever obtains it), and**
- (3) intends the person known or believed to have done the act or made the omission to regard the advantage (or the advantage when conferred) as conferred primarily in return for the act or omission.**¹¹³

(Recommendation 11)

Former and future agents

5.110 The 1906 Act appears to require that the bribe be received by the agent during the currency of the agency, but the 1889 Act extends to circumstances in which the public officer is no longer in office at the time of receipt of the bribe or has yet to

¹¹¹ Cf para 5.138 below.

¹¹² CJPOA, s 35.

¹¹³ See cl 6(2) of the draft Bill.

assume office.¹¹⁴ In the consultation paper we took the view that limiting criminality on the basis of *when* a bribe is offered or received is unnecessarily restrictive and artificial, and noted that the MCCOC had reached a similar conclusion. We therefore provisionally proposed that, where a person corruptly accepts, solicits or agrees to accept, or confers or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, that person should be guilty of the offence even if the agent in question is no longer an agent, or is not yet an agent, at the material time.¹¹⁵ All the respondents who commented on this proposal agreed with it.

5.111 Since our analysis of what is “corrupt” hinges on the intentions and beliefs of the person whose conduct is in issue, we would add that it may be corrupt to confer an advantage

- (1) as an inducement to, or a reward for, an act or omission on the part of a person *mistakenly believed* to be an agent;
- (2) as a reward for an act or omission on the part of a person mistakenly believed to have been an agent *at that time*, or
- (3) as an inducement to a person (who is not now an agent) to do an act or make an omission in performance of his or her functions as agent *if and when he or she becomes* an agent.

Corruptly obtaining or agreeing to obtain an advantage

5.112 In the great majority of corruption cases the advantage will be corruptly conferred *and* obtained: each party knows the other’s motives, and both are corrupt. For most practical purposes, therefore, it would be sufficient if our definition of corruptly *conferring* an advantage were supplemented by a rule that a person who obtains (or agrees to obtain) an advantage does so corruptly if he or she knows that the person conferring it (or agreeing to confer it) does so corruptly.

5.113 However, our definition of “obtaining an advantage” is very wide: a person obtains an advantage if another person does an act or makes an omission which *either* is done or made in consequence of the first person’s request *or* results in a benefit to the first person. In the latter case, the person obtaining the advantage may do so without doing anything at all, or even indicating his or her agreement to the receipt of the benefit. It follows that a person who obtains an advantage cannot be regarded as doing so corruptly *merely* because he or she knows that it is conferred corruptly. Otherwise an offence of corruption would be committed by an agent of unimpeachable honesty who knows that another person is paying funds into the agent’s bank account (thus conferring a benefit on the agent) and that those funds are intended as a bribe, even if the agent has no intention of acting upon the bribe, promising to act upon it or keeping it. Our recommendation therefore ensures that, where a person *obtains* an advantage (as against *agreeing* to obtain it) but does not *request* it, he or she will not thereby commit an offence unless he or she *consents* to obtaining it.

¹¹⁴ Consultation Paper No 145, para 8.80.

¹¹⁵ Consultation Paper No 145, para 8.81.

- 5.114 It is possible, however, that the parties may be at cross-purposes, or that the bribee may intend to renege on the agreement. In the consultation paper we provisionally proposed that the bribee should be guilty of the full offence, and not merely an attempt,¹¹⁶ if he or she mistakenly *believes* that the advantage is conferred corruptly: the bribee's conduct is still corrupt.¹¹⁷ Among those who commented on the point, there was almost unanimous agreement with our view.
- 5.115 We provisionally proposed that a person who accepts an advantage, knowing it to be intended as a corrupt inducement, should not escape liability merely because he or she has no intention of acting in the manner desired.¹¹⁸ This proposal was generally accepted.
- 5.116 On the other hand we also proposed what would in effect be an exception to this rule – namely that a person should not commit an offence of *corruption* (as distinct from deception) by accepting or soliciting an advantage, ostensibly in connection with a person's performance of his or her duty as an agent, if that person is not in fact an agent (or was not, or will not be, an agent at the time when the performance of his or her duty is in question).¹¹⁹ Although the majority of those who commented on this proposal agreed with it, further reflection has persuaded us that this situation is not distinguishable in principle from that discussed in the previous paragraph, where the person in question *is* an agent but has no intention of acting on the inducement. In neither case is there any influence on an agent's performance of his or her functions as agent; but in both cases the advantage is obtained by a person who knows it to be corruptly conferred, and in principle we now believe that that person can properly be treated as being implicated in the other party's corrupt purpose.
- 5.117 For these reasons our recommendation refers only to the bribee's knowledge or belief or intentions *with regard to the intentions of the briber* – not to whether the *bribee* intends anyone to be influenced, nor to whether the person the briber intends to influence is in fact, or ever has been or is ever likely to be, an agent at all.
- 5.118 **We recommend that**
- (1) a person who obtains an advantage should be regarded as obtaining it corruptly if he or she**
 - (a) knows or believes that the person conferring it confers it corruptly, and**
 - (b) gives his or her express or implied consent to obtaining it (in a case where he or she does not request it);¹²⁰ and**

¹¹⁶ See Criminal Attempts Act 1981, s 1.

¹¹⁷ Consultation Paper No 145, para 8.89.

¹¹⁸ Consultation Paper No 145, para 8.94.

¹¹⁹ Consultation Paper No 145, para 8.99.

¹²⁰ See cl 7(1) of the draft Bill.

- (2) a person who agrees to obtain an advantage should be regarded as agreeing to obtain it corruptly if he or she knows or believes that the person agreeing to confer it agrees corruptly.¹²¹

(Recommendation 12)

Corruptly soliciting an advantage

5.119 *Soliciting* an advantage is somewhat analogous to conferring an advantage as a corrupt inducement in the absence of any prior agreement that it will be acted upon.¹²² Just as the person providing a corrupt inducement hopes that it will procure the desired act or omission on the part of the agent in question, so the person soliciting an advantage hopes that it will be conferred (or at any rate that the person addressed will *agree* to confer it).¹²³ But the person providing an inducement probably does not care *why* the agent does the act or makes the omission, as long as he or she does so; and we have therefore recommended that such a person should be regarded as acting corruptly if he or she believes that the act or omission would *probably* be primarily done or made in return for the inducement. Similarly, the person soliciting an advantage probably does not care whether it is conferred corruptly or otherwise, as long as it is conferred; and in our view it should therefore be sufficient if he or she believes that, if the advantage were conferred at all, it would probably be conferred corruptly.

5.120 **We recommend that a person who solicits an advantage should be regarded as soliciting it corruptly if he or she**

- (1) **intends a person to confer it or agree to confer it, and**
(2) **believes that, if the person did so, he or she would probably do so corruptly.**¹²⁴

(Recommendation 13)

Corruptly performing functions as an agent

5.121 As we have explained, we believe that an agent should be guilty of an offence not only if he or she corruptly obtains an advantage, or solicits one or agrees to obtain one, but also if he or she corruptly performs his or her functions as an agent, whether in the hope of reward or in return for a previous inducement.¹²⁵

5.122 **We recommend that a person who performs his or her functions as an agent should be regarded as performing them corruptly if he or she**

¹²¹ See cl 7(2) of the draft Bill.

¹²² See paras 5.100 – 5.109 above.

¹²³ It is possible to solicit an advantage with the intention that a person should *agree* to confer it but should not in fact confer it, eg for the purpose of demonstrating that that person is *willing* to confer it. This situation falls within the scope of the offence because we do not recommend a defence of entrapment: see paras 5.144 – 5.150 below.

¹²⁴ See cl 7(3) of the draft Bill.

¹²⁵ Paras 5.54 – 5.58 above.

- (1) **does an act or makes an omission primarily in order to secure that a person confers an advantage (whoever obtains it), and believes that if the person did so he or she would probably do so corruptly, or**
- (2) **does an act or makes an omission when he or she knows or believes that a person has corruptly conferred an advantage (whoever obtained it), and regards the act or omission as done or made primarily in return for the conferring of the advantage.**¹²⁶

(Recommendation 14)

DISHONESTY

Is corruption an offence of dishonesty?

- 5.123 In the consultation paper we provisionally concluded that corruption was not an offence of fraud or dishonesty, and should not be treated as such.¹²⁷ The implications of this provisional conclusion were, we said, twofold. First, it meant that it would be inappropriate to consider the role of the law of fraud and dishonesty in controlling corruption. Secondly, it defined our task as one of formulating a *free-standing* offence of corruption, independent of the structure and conventions of the law of fraud and dishonesty.¹²⁸
- 5.124 Among the respondents who commented on our provisional conclusion that corruption is not, and should not be treated as, an offence of dishonesty or fraud, roughly half agreed and half disagreed. Of those who agreed, many did so without further comment. The tenor of such comments as were made was that corruption should be an autonomous offence, independent of any other branch of the criminal law.¹²⁹
- 5.125 Among those who disagreed with our provisional conclusion (and gave reasons for doing so) there was a division of opinion. Some argued that dishonesty should be *an element of the offence*, which the prosecution must prove in addition to the other elements. Of these, some¹³⁰ thought that the “dishonesty” required should be of the

¹²⁶ See cl 8 of the draft Bill.

¹²⁷ Consultation Paper No 145, para 1.28.

¹²⁸ Consultation Paper No 145, paras 1.29 and 1.30.

¹²⁹ Professor Sir John Smith took the view that corruption was “distinct from offences of dishonesty and fraud”; the Common Serjeant of London, similarly, referred to corruption being “an offence in its own right”. The Association of Chief Police Officers (“ACPO”) wrote that it was “an individual offence, in many ways quite unlike any other offence, which should be capable of being dealt with in isolation, unrestricted by constraints imposed upon it by other legislation”.

¹³⁰ Eg the Employment Law Bar Association. Liberty suggested that the fault element should be “corruptly” but that the definition of that element should include a reference to “dishonesty”, meaning that the putative briber should not be guilty unless he or she was aware that the transaction was improper – which closely resembles the *Ghosh* definition (see n 137 below).

kind defined in the theft case of *Ghosh*,¹³¹ while some thought it should be defined differently,¹³² or not at all.¹³³

- 5.126 Others agreed with us that dishonesty should not be an *element* of the offence, but disagreed with our conclusion that it should not be treated as an *offence* of dishonesty. However, these respondents seem to have taken issue with the sense in which we used the term “dishonesty”, rather than with our analysis of the nature of corruption. We did not deny that corruption is usually (perhaps always) dishonest in a broad sense: an ordinary person would probably say that it is a dishonest thing to do. But, we suggested, this broad sense is not necessarily helpful for the purpose of classifying and defining criminal offences, or law reform projects. For that purpose, we have found it convenient to bracket together those offences that consist in *damaging or endangering a person’s financial interests*, by infringing that person’s rights in private law. Offences of this kind have important similarities with one another, and important differences from other kinds of offence. Corruption, we argued, is not an offence of this kind. For convenience again, we refer to offences of this kind as “offences of dishonesty”; and it was in this sense that we suggested that corruption is not an offence of dishonesty.
- 5.127 Those respondents who rejected this conclusion appear to accept that corruption is not an offence of dishonesty *in the sense in which we used that phrase*,¹³⁴ but they seem to be using that expression in a wider sense, as including *all* offences, *whether or not against a particular victim*, which an ordinary person would think it dishonest to commit. Liberty and the Employment Law Bar Association both argued that “dishonesty” did not require a victim, but only a state of mind. The CPS thought that “corruption is at least morally if not legally dishonest and is most likely to be regarded as such by the general public”, and the Employment Law Committee of the Law Society argued that most people “instinctively” regard bribery as dishonest.¹³⁵ Similarly the Society’s Criminal Law Committee argued that a

¹³¹ [1982] QB 1053. According to this decision, a person’s conduct is dishonest if ordinary people would think it dishonest *and* he or she knows that they would.

¹³² Professor Mark Freedland suggested defining it as “a component which is presumed from the basic factual elements of corruption, unless the defendant can show on the balance of probabilities that he or she acted in pursuit of a goal or an interest which he or she reasonably regarded as one which it was legitimate in all the circumstances to pursue.”

¹³³ Phillips LJ proposed “qualifying the offence by the adverb ‘dishonestly’, a word which a jury can understand without further direction”. But the use of the word “dishonestly” without express definition would presumably attract the *Ghosh* definition.

¹³⁴ Similarly, there was general agreement that it is not an offence of *fraud* – though, as the CPS pointed out, corrupt conduct will often in practice amount to a conspiracy to defraud.

¹³⁵ The Committee also took the view that it would be confusing for employers if corruption were not regarded as an offence of dishonesty:

In most workplaces, a serious dishonest act will justify summary dismissal. Employers faced with good evidence of someone wrongfully taking money (or some other inducement) to act against the employer’s interests, and told that the act was not dishonest may be confused and uncertain about their position and how to proceed.

But we did not suggest that a corrupt act *cannot* be a dishonest act, only that it is *not necessarily* dishonest (in the sense in which we use that term).

company affected by corruption “would have little doubt that a fraud has been perpetrated upon it”.

- 5.128 We are not convinced by these arguments, because they seek to demonstrate something which we did not deny – namely that corruption is usually, perhaps always, dishonest in the ordinary sense of that word. We still believe that, for the purposes of law reform, it is helpful to distinguish offences which typically involve dishonesty in a *general* sense – and may indeed be *defined* in such a way as to require it – from offences of *unlawfully causing loss to specific victims*. For the latter category we have so far been unable to devise a better term than “offences of dishonesty” (though we recognise that this usage risks confusion with offences of the former kind).¹³⁶
- 5.129 Our provisional view was that corruption is not an offence of dishonesty *in this sense*. We still take that view, for two reasons. First, corruption does not necessarily prejudice the interests of the agent’s principal. The agent (B) may be bribed to do something which he or she is in any event bound to do, but which he or she might not do unless bribed; or, where two or more options are equally beneficial to B’s principal (C), B may be bribed to choose one option rather than another. In these cases C is no worse off than if B had not been bribed. It is true that, if B keeps the bribe, C is worse off than if B had handed it over, as B is legally bound to do; but it is debatable whether this consideration justifies treating B’s conduct as an offence of dishonesty vis-à-vis C. B is not depriving C of what is C’s, but failing to confer on C a benefit which C did not expect in the first place.
- 5.130 A further reason for our view that corruption is not in essence a dishonesty offence is the fact that it is not (and under our recommendations would not be) confined to the agents of identifiable principals. It extends also to what we have called “quasi-fiduciaries” – that is, persons whose duty is to subordinate their own interests to those of the *public* rather than those of any particular person. More importantly, it extends to persons such as police officers and civil servants, who are technically the agents of particular persons (namely their employers) but owe a duty to the public as well. We do not believe that it would be practicable to have one form of criminal liability (based on dishonesty) for agents who owe a duty only to particular persons, and another (not based on dishonesty) for agents whose duty is owed wholly or partly to the public. It follows that the offences we recommend would not be offences of dishonesty (in our sense).

Should the definition of corruption include a requirement of dishonesty?

- 5.131 It does *not* follow that the fault element of the new corruption offences should not include a requirement of dishonesty *in the ordinary sense*, as in the law of theft. It would then be necessary for the prosecution to show that the transaction in question was dishonest according to the standards of ordinary people, and that the

¹³⁶ An alternative is “fraud offences”, because “fraud” technically includes any dishonest conduct causing loss or the risk of loss. Unfortunately this term too would invite confusion, since its non-legal meaning applies only to certain kinds of such conduct – chiefly deception and white-collar crime.

defendant knew it was.¹³⁷ The prosecution might be able to do this even where no identifiable person was at risk of financial loss. In other words, it would not be illogical for an offence to include a requirement of dishonesty (in the ordinary sense) although it is not an offence of dishonesty (in our sense).

- 5.132 In the consultation paper we considered whether or not a moral element should be included in the definition of the new offences, and whether or not this moral element should be defined by way of a requirement of dishonesty.¹³⁸ As we pointed out in the consultation paper, “The answer may of course depend on how the other requirements of the offence are defined”.¹³⁹ Given that we had proposed, as part of the new offences, a definition of the fault element “corruptly” which, we believed, would mean that only truly corruptive conduct would be criminalised, we concluded that a moral element was unnecessary. Even if our proposed definition of “corruptly” were not accepted, however, we still did not favour the inclusion of a dishonesty element since, in our view, it did not accurately identify the “prohibited evil” of corruption offences.
- 5.133 A requirement of dishonesty would mean that, even if a transaction has all the other characteristics of corruption, a party to it could invite the fact-finders to acquit on the ground that, in all the circumstances, an ordinary person would not regard that transaction as dishonest, or that the defendant did not realise that an ordinary person might so regard it. A person charged with theft or deception already has a right to seek an acquittal on this basis, though it is debatable whether this should continue to be so.¹⁴⁰ A person charged with corruption has no such right, since the word “corruptly” does not imply a requirement of dishonesty.¹⁴¹ The question is whether such a right should now be conferred, thus making convictions harder to obtain.
- 5.134 We believe that to include a requirement of *Ghosh* dishonesty¹⁴² would significantly reduce the effectiveness of the law of corruption. As we noted in the consultation paper,

Corruption, unlike most criminal offences, is highly “culture specific”.¹⁴³ Whether any given conduct is categorised as corrupt will

¹³⁷ In *Ghosh* [1982] QB 1053 the court explained that, to establish that a defendant was dishonest, the prosecution had to prove: (1) that what the defendant did was dishonest according to the ordinary standards of reasonable and honest people, and (2) that the defendant must have realised that what he or she was doing was by those standards dishonest.

¹³⁸ Consultation Paper No 145, paras 8.30 – 8.39.

¹³⁹ Consultation Paper No 145, para 8.25.

¹⁴⁰ We intend to discuss this issue in a forthcoming consultation paper on the law of fraud, theft and deception.

¹⁴¹ *Cooper v Slade* (1858) 6 HL Cas 746; *Smith* [1960] 2 QB 423; *Wellburn* (1979) 69 Cr App R 254.

¹⁴² See n 137 above.

¹⁴³ See D J Lowenstein, “For God, For Country or for Me?” (1986) 74 Calif LR 1479.

depend, in part, on both the perspective from which it is viewed¹⁴⁴ and the environment in which it occurs.¹⁴⁵

There would therefore be a real risk that an offence which included a requirement of *Ghosh* dishonesty, or something resembling it, would fail to catch those who engage in corruption but claim that it is (for example) normal practice. We therefore do not recommend that the definitions of the new offences should include any requirement that the defendant must have acted “dishonestly”.

POSSIBLE DEFENCES

- 5.135 In the consultation paper,¹⁴⁶ we considered five possible defences: that the allegedly corrupt transaction was performed openly, that the agent’s principal consented to what was done, that the agent had no obligation to account to the principal for the benefit received, that accepting benefits from third parties was normal practice, and that the benefit received was of small value. We provisionally concluded that none of these facts should be a complete defence, though each of them might well be relevant to the issue of whether what was done was corrupt. A number of respondents disagreed with this conclusion and thought that at least one of these facts should be a defence. As we have already explained, we are now persuaded that something done with the informed consent of the agent’s principal cannot properly be regarded as corrupt.¹⁴⁷ We now consider the other defences discussed in the consultation paper, as well as possible defences of entrapment and public interest.

Disclosure

- 5.136 Morison J, President of the Employment Appeal Tribunal, thought that non-disclosure was a necessary part of corruption.

The mere fact that a secret payment has been made has corrupted the agent so as to put him under the influence of the donor. The element of non-disclosure is, as a first thought, a necessary; and a donee is not corrupted if he makes disclosure, although the gift may have been made with a corrupt intent so that the donor is guilty. It is the “separation” of the agent from his principal that corrupts.

- 5.137 It is true that an advantage which is disclosed to the agent’s principal will rarely be corrupt; but in our view this is not *because* it is disclosed. If, believing that the principal will be reluctant to take legal action, the agent admits taking a bribe, we see no reason why the admission should preclude a prosecution. Nor, we believe, should it make any difference that the agent tells the principal what is happening *before* the bribe is paid or the agreement made. Where disclosure does render the agent’s conduct innocent, this will usually be because it indicates that the principal *consents* to what is done, or at any rate that the agent *thinks* the principal will consent. Where either of these is the case, under our recommendations the agent’s

¹⁴⁴ See A T H Smith, *Property Offences* (1994) para 25–01.

¹⁴⁵ Consultation Paper No 145, para 8.24.

¹⁴⁶ Consultation Paper No 145, paras 8.40 – 8.58.

¹⁴⁷ See paras 5.88 – 5.98 above.

conduct would not be corrupt.¹⁴⁸ Where neither is the case, we do not believe that the mere fact of disclosure should be a defence, and we make no such recommendation.

No obligation to account

- 5.138 Under our recommendations there would be a substantial overlap between the scope of the criminal law of corruption and the circumstances in which an agent is under an obligation to account for the benefit received. However, we remain of the view that the unavailability of a civil remedy should not in itself be a defence to a charge of corruption. As we said in the consultation paper, there are circumstances in which the reason why a civil remedy is unavailable has no bearing on whether the agent has acted corruptly. We therefore do not recommend that the absence of an obligation to account should be a defence.

Normal practice

- 5.139 A number of respondents¹⁴⁹ favoured a defence of “normal practice”. Some expressed concern that, without such a defence, British businesses might suffer a competitive disadvantage, given what the Institute of Directors described as the “different moralities of export markets”. Other respondents expressed concern that “ordinary business hospitality” might be criminalised.

- 5.140 However, we remain of the view we expressed in the consultation paper:

[I]f the normality of the conduct were a complete defence it would follow that, once corrupt practices have taken root in a given environment, they could no longer be regarded as corrupt. We believe that if a transaction is essentially corrupt then it should be criminal, however common such transactions may be.¹⁵⁰

- 5.141 A defence of “normal practice” would also be far too vague to be workable, and would largely nullify our attempts to spell out what conduct is and is not corrupt. We accept, of course, that it is common for certain kinds of advantage to be conferred on agents with a view to influencing their conduct: “ordinary business hospitality” is perhaps the best example. But we have argued that the lawfulness of such hospitality rests not on its normality but on the absence of the characteristic feature of corrupt conduct – namely the intention that the agent should favour the provider of the advantage *in return*, as distinct from doing so for a legitimate reason which the provision of the advantage may encourage the agent to take into account.¹⁵¹ We are confident that ordinary business hospitality would not qualify as corrupt conduct under the definition we recommend; but, if it did, we believe that it should make no difference that it is common practice.

¹⁴⁸ See para 5.99 above.

¹⁴⁹ The Institute of Directors, Kingfisher plc, the Institute of Chartered Accountants, the CBI and The Newspaper Society.

¹⁵⁰ Consultation Paper No 145, para 8.52.

¹⁵¹ See paras 5.75 – 5.82 above.

Small value

5.142 The Institute of Chartered Accountants supported a specific defence of “small value”:

Benefits of small value are a regular feature of commerce in most jurisdictions. We recognise that in most cases these will be precluded from definition as an offence because they will not be considered corruptive. However, we do wonder whether the law will be easier to interpret and implement, and court cases shorter, if a specific defence of small value is retained.

5.143 We are not persuaded that this is either a workable or a necessary defence. The practical difficulty lies in deciding how valuable a gift has to be before it becomes a bribe. Perceptions of generosity will vary according to the recipient’s standard of living. Equally importantly, we are not convinced that a “small value” defence is necessary in any event. If we define “corruptly” in terms of an intention to induce an agent to act in a certain way, the fact that a gift was of small value will be evidence that it could not have been intended to act as an inducement.

Entrapment

5.144 In the consultation paper we asked for views on whether an intention to expose corruption should be a defence.¹⁵² We were broadly concerned with two situations:

- (1) A gives B a bribe in order to expose B as a bribe-taker; and
- (2) B accepts from A a bribe in order to expose A as a bribe-giver.

5.145 We were not troubled by the liability of B in case (1) or of A in case (2): there is clear authority that a defence of entrapment is not known to English law,¹⁵³ and, in any event, we do not believe that an agent should escape liability merely because he or she is wrong about the intention with which the advantage is conferred.¹⁵⁴ The question is whether the *entraper* should be liable.

In each situation the person who is trying to entrap is aware of the corrupt intent of the other and so, on the principles outlined above, should be guilty. His or her intention is to create the temptation to act in breach of duty, and it is this temptation that we seek to prevent.

The question, therefore, is what role *motive* should play in the law of corruption. Although the entraper is in the short term encouraging corrupt behaviour, his or her long term goal is to prevent it; it might therefore seem unjust to impose liability. On the other hand there is a danger that a spurious claim to have acted with such a motive might be hard to disprove. Moreover, the existence of such a defence might encourage undesirable activities by investigative journalists and others.

¹⁵² Consultation Paper No 145, para 8.101.

¹⁵³ See *Mealey and Sheridan* (1974) 60 Cr App R 59, 62:

In fact, if one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here.

¹⁵⁴ See para 5.122 above.

If one has reason to believe that a person is corrupt, the appropriate course is to bring the matter to the attention of the police or some other suitable authority, not to take the law into one's own hands.¹⁵⁵

5.146 As regards the case where B's acceptance is intended to expose A, we have recommended that it should be an offence to obtain an advantage in the knowledge that it is corruptly conferred;¹⁵⁶ it makes no difference that the agent does not intend to do anything in return. The reason we gave in support of this view in the consultation paper was that "by accepting the gift knowing that it is a bribe, B is knowingly encouraging A to act in the same way in the future".¹⁵⁷ Arguably, this reason does not apply in cases where B's intention is not merely to refrain from acting on the bribe but to take positive steps to expose A, since exposure is more likely to *discourage* A from offering bribes in future.

5.147 Where A bribes B in order to expose B, under our recommendations A's liability would depend on A's intention. A would be guilty if A confers an advantage on B with the intention of inducing B, in performing B's functions as an agent, to do an act or make an omission in return for the advantage. Therefore, if A *intends* B actually to do what A is purporting to bribe B to do (albeit with the higher motive of exposing B), A would fall within the offence we recommend, in the absence of a specific defence of entrapment.

5.148 However, A may¹⁵⁸ have no interest in seeing any return for the bribe. A's purpose of exposing B may be satisfied simply by B's *acceptance* of the bribe. If so, and if this means that A does not *intend* B to act in return for the bribe, a specific defence of entrapment would be unnecessary: A's conduct would not be corrupt because the requisite intention would not exist.¹⁵⁹ However, those actively involved in exposing corruption (such as investigative journalists) may be loath to rely on this line of defence, since basic principles of criminal law allow fact-finders to impute an intention even where the result allegedly intended is not what a defendant really wanted to happen. On the other hand, they may take comfort from the fact that it is not enough that that result was a foreseeable by-product of the defendant's

¹⁵⁵ Consultation Paper No 145, paras 8.100 and 8.101.

¹⁵⁶ See paras 5.112 – 5.118.

¹⁵⁷ Consultation Paper No 145, para 8.94.

¹⁵⁸ A might want to show B up not only as someone prepared to take bribes but, worse still, as someone who will act on them.

¹⁵⁹ Professor Sullivan comments:

... it is left open whether an intention to expose corruption should afford a defence. Surely it should. If a defendant sought not to corrupt but to expose the presence of corruption, one cannot say that he or she acted corruptly whatever other criticisms the conduct may, justifiably, attract. Further in this vein, it should be a defence that an inducement or reward was offered to obtain information in order to make that information public should it be in the public interest that it be revealed. It should not be enough that the defendant thought that the information should be publicised. Criteria of what the public interest requires would need to be specified and it should be for the jury to decide in the light of these criteria whether the public interest may be successfully invoked by way of defence on the facts of a particular case.

actions: it must have been a “virtual certainty”, and the defendant must have appreciated that this was the case.¹⁶⁰

- 5.149 Of the respondents who expressed a view on this issue, only a small minority were in favour of an entrapment defence. Their principal argument was that the purpose of exposing corruption is a laudable one.¹⁶¹ The main arguments advanced *against* such a defence were that it would “encourage unauthorised persons to take the law into their own hands”;¹⁶² that there is a danger of such a defence being exploited by “unscrupulous people”;¹⁶³ that corrupt activities are a matter for investigative agencies and not investigative journalists;¹⁶⁴ and that such a defence would positively *encourage* temptation and corruption.¹⁶⁵
- 5.150 Whilst it may sometimes be in the public interest for corrupt activity to be exposed by entrapment, we agree with the majority of respondents on this issue that there should be no specific defence. In coming to this view, we were persuaded both by the views of our respondents and also by the further point that, were we to introduce such a defence with respect to corruption offences, this would give rise to a glaring inconsistency between, for example, corruption and conspiracy to defraud.

Public interest

- 5.151 The Newspaper Society expressed concern not only about entrapment – exposing the *corruption* of another – but also on the more general issue of a public interest defence, for example where an investigative journalist pays an agent to expose wrongdoing of any kind by the agent’s principal:

We take the view ... that a moral element *is* inherent in corruption and that a person’s reasons for acting in a particular way should be taken into account. ... [W]e can envisage situations in which journalists might encourage or facilitate a breach of duty and thereby act “corruptly” as defined by the Consultation Paper. This would not necessarily be “entrapment” as envisaged in para 8.101... It could be more in the nature of whistleblowing: a desire to uncover information about the employer’s questionable activities, an aim to which no moral obloquy can attach. ... Our concern is that the “criminalising” of this kind of newsgathering could inhibit investigative journalism. This

¹⁶⁰ *Nedrick* [1986] 1 WLR 1025, 1027–8, *per* Lord Lane CJ. See *Blackstone’s Criminal Practice* (1997 ed) paras A2.2 and B1.11.

¹⁶¹ The Employment Law Bar Association wrote, for example:

We believe that entrapment should be a defence, but that the burden of proof should lie upon the defence. That ought to discourage spurious claims to have acted with the motive of uncovering corrupt activities. Furthermore, we do not regard this sort of activity, providing it is carried out by responsible journalists, as “undesirable” – indeed, it is a valuable independent check on corruption.

The Justices’ Clerks’ Society took a similar line.

¹⁶² Lord Davidson.

¹⁶³ R C White, Assistant Chief Constable of the RUC.

¹⁶⁴ Office of the Solicitor at the DSS, and the Police Federation of England and Wales.

¹⁶⁵ ACPO.

could be avoided either through the exclusion of such conduct from the definition of “corrupt” behaviour or perhaps (less attractively) via the introduction of a public interest defence.

5.152 In our recent consultation paper on the misuse of trade secrets¹⁶⁶ we provisionally proposed that a new offence should not extend to those who use or disclose trade secrets in the public interest (such as for the purpose of preventing crime).¹⁶⁷ We have considered whether it would be appropriate to have a public interest defence in the law of corruption so that a defendant could argue, for example, that the purpose of the alleged bribe was to cause an agent to expose his or her principal’s criminal activities.¹⁶⁸ We have decided against recommending such a defence. It may indeed be the case that an agent should be protected if he or she discloses information for the benefit of the public and not for personal gain. Where an advantage is conferred by one party on another, however, we fear that a public interest defence would positively encourage a climate of corruption.

¹⁶⁶ Consultation Paper No 150, para 6.54.

¹⁶⁷ We note with interest the Lord Chancellor’s Department’s recent consultation paper on Payments to Witnesses, para 46, in which a public interest defence was considered.

¹⁶⁸ Although Article 10(1) of the ECHR gives everyone the right “to receive and impart information and ideas without interference by public authority”, we doubt that this provision would afford the “bribing” investigative journalist with a defence to a charge of corruption. Not only has the right to receive information been interpreted as “basically prohibit[ing] a Government from restricting a person from receiving information *that others wish or may be willing to impart to him*” (*Leander v Sweden* (1987) 9 EHRR 433, 456 (italics added)), but Article 10(2) provides a broad list of public interest purposes which will justify public interference with freedom of expression: it may be circumscribed “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

PART VI

THE INVESTIGATION OF CORRUPTION

- 6.1 We are very conscious that corruption presents particular difficulties for prosecutors for two main reasons. First, unlike many other offences, such as offences of violence, the victim may often be unaware that the offence has been committed. Secondly, the information necessary for a successful prosecution for corruption is often deliberately shrouded in secrecy. Thus investigating officers are confronted with especial difficulties. In the case of serious fraud, these have been resolved by granting extensive powers to the Serious Fraud Office (“SFO”).
- 6.2 In the consultation paper we provisionally concluded that in the absence of suitable justification as to why corruption offences should be treated exceptionally, the powers of the police should not be extended.¹ Nevertheless, we asked for views on four options,² and we will reconsider these options after we have explained the powers given to the SFO and Department of Trade and Industry (“DTI”) and the justification for them.

THE SFO AND SECTION 2 OF THE CRIMINAL JUSTICE ACT 1987

Powers of the SFO

- 6.3 To understand the SFO’s powers it is necessary to bear in mind the problems of investigating fraud. The Roskill Committee described the problems of the investigation of serious fraud in this way:

Fraud ... must be concealed from its victim if it is to succeed, and indeed may not be identified until long after the event. Even when the fraud is detected, it is to be expected that in serious cases the criminals will have taken steps to conceal the way in which the fraud was perpetrated, so as to make the process of investigation and prosecution more difficult. To this end, documents may be falsified or destroyed, and arrangements may be made for some transactions to take place in other jurisdictions, and for the proceeds of the offence to be removed there later perhaps to be followed by the fraudsters themselves. Thus, in large-scale or complex fraud cases, the task facing investigators is formidable.³

- 6.4 On the recommendations of the Fraud Trials Committee under the chairmanship of Lord Roskill, the SFO was established by the Criminal Justice Act 1987 (“CJA 1987”). One of the functions of the office is to “investigate any suspected offence which appears to [the Director of the SFO] on reasonable grounds to involve serious or complex fraud”.⁴

¹ Para 12.22.

² Paras 12.22 – 12.26 (they are considered in paras 6.23 – 6.27 below).

³ Fraud Trials Committee Report (1986) (Chairman: Lord Roskill) para 2.2.

⁴ CJA 1987, s 1(3).

- 6.5 Section 2 of the CJA 1987 confers on the Director of the SFO (“the Director”) extensive powers of investigation. Section 2(2) provides:

The Director may by notice in writing require the person whose affairs are to be investigated ... or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation

Other provisions under section 2 include the power to require the production of documents,⁵ and the power to apply to a justice of the peace for a warrant authorising a constable to search for and seize documents.⁶

- 6.6 Section 2(13) provides that it is an offence⁷ to fail, without reasonable excuse, to comply with any requirement imposed under section 2, and section 2(14) further provides that it is an offence⁸ to make, either knowingly or recklessly, a statement that is false or misleading in a material particular in purported compliance with any such requirement.
- 6.7 When a person is required to attend an interview under section 2(2), the Director is not obliged to provide the interviewee with advance information as to the subject-matter of the interview (although the Director may do so if the view is taken that it would be helpful and not likely to prejudice the investigation).⁹ The fact that a statement may incriminate its maker is not a reasonable excuse for failing to comply with the Director’s order;¹⁰ nor is the fact that the person required to answer questions is the spouse of a person charged with fraud.¹¹ The powers conferred by section 2 do not cease on a suspect being charged,¹² and section 2 interviews may be conducted even after the delivery of a case statement by the defence.¹³

Safeguards for the person investigated

- 6.8 The “reasonable excuse” defence in section 2(13) provides one safeguard against the section 2 powers. Another can be found in section 2(8), which provides that a

⁵ CJA 1987, s 2(3).

⁶ CJA 1987, s 2(4)–(7).

⁷ Punishable by up to six months’ imprisonment, a fine not exceeding level 5 on the standard scale, or both.

⁸ Punishable on indictment with up to two years’ imprisonment or a fine or both; or on summary conviction, with up to six months’ imprisonment or a fine not exceeding the statutory maximum, or both: s 2(15).

⁹ *R v SFO, ex p Maxwell*, *The Times* 9 October 1992.

¹⁰ *R v Director of SFO, ex p Smith* [1993] AC 1.

¹¹ *R v Director of SFO, ex p Johnson* [1993] COD 58.

¹² *R v Director of SFO, ex p Smith* [1993] AC 1.

¹³ *Nadir* [1993] 1 WLR 1322. It would, of course, be open to the defence to try to exclude a late s 2 interview under s 78 or the common law discretion preserved by s 82(3) of the Police and Criminal Evidence Act 1984.

statement given by a person in compliance with a requirement imposed under section 2 may only be used in evidence against him or her

- (1) on a prosecution for an offence under section 2(14) (knowingly or recklessly making a statement which is false or misleading); or
- (2) on a prosecution for some other offence where, in giving evidence, he or she makes a statement inconsistent with the statement made under section 2.

6.9 Furthermore, section 2 cannot bite in circumstances where a person would be entitled to refuse to disclose information or to produce a document on the grounds of legal professional privilege.¹⁴ Similarly, a person bound by banking confidentiality will not be required to disclose information or produce a document under the section¹⁵ unless either the person to whom the obligation of confidence is owed consents¹⁶ or the Director has authorised the making of the requirement.¹⁷

Comparison of the powers of the SFO and the CPS

6.10 The SFO¹⁸ has some resemblance to the CPS but differs in three ways:

- (1) The role of the SFO is to investigate possible serious fraud and then, if the evidence justifies it, to initiate proceedings. In order to achieve this, the Director of the SFO is given very wide investigatory powers. The CPS, on the other hand, does not itself investigate crime but takes over the conduct of proceedings after the evidence has been gathered by the police or other investigatory body.¹⁹
- (2) The SFO, unlike the CPS, has an *investigatory* function. It works in conjunction with other interested parties, directing the investigation and assessing the evidence as it emerges.
- (3) The SFO is required by statute to concern itself only with “serious or complex fraud”.²⁰

¹⁴ CJA 1987, s 2(9).

¹⁵ CJA 1987, s 2(10).

¹⁶ CJA 1987, s 2(10)(a).

¹⁷ CJA 1987, s 2(10)(b). If it is not practicable for the Director to act personally, a member of the SFO designated by the Director may act instead.

¹⁸ For details of the work of the SFO see John Wood, “The Serious Fraud Office” [1989] Crim LR 175; George Staple, “Serious and Complex Fraud: A New Perspective” (1993) 56 MLR 127. John Wood was the SFO’s first Director and George Staple was the Director from April 1992 to April 1997.

¹⁹ However, the SFO is not involved in the *detection* of offences of fraud. It relies on detection by the police, the Department of Trade and Industry, the regulatory bodies and members of the public – although, in the investigation of suspected offences, it may uncover cases of fraud not foreseen when the case was accepted. See George Staple, *op cit*, at p 129.

²⁰ The “key criterion” for deciding whether the SFO should accept a case is that “the suspected fraud is such that the direction of the investigation should be in the hands of those responsible for the prosecution”. In determining whether the key criterion is met several factors are taken into account. These are set out in the SFO publication, *Procedure*

Comparison of the powers of the SFO and the police

6.11 The powers of the police to interview suspects and gain access to financial records are set out in the Police and Criminal Evidence Act 1984 (“PACE”), and are clearly a great deal more restrictive than the powers of the SFO under section 2 of the CJA 1987. The intention of these provisions was to give police access to financial and other documents, but subject to certain stringent safeguards. In particular, confidential financial records fall into a class of material called “special procedure material” to which special provisions as to access apply.²¹ An application must be made to a circuit judge at an inter partes hearing, and for access to be granted, the judge must be satisfied, that, among other things:

- (1) there are reasonable grounds for believing that a serious arrestable offence has been committed;²²
- (2) there are reasonable grounds for believing that the requested material is likely to be relevant evidence, and is also likely to be of substantial value to the investigation;
- (3) other methods of obtaining the material have been tried without success or have not been tried because it appeared that they were bound to fail; and
- (4) it is in the public interest that the material should be produced.

The powers of the DTI

6.12 Under section 431 of the Companies Act 1985, the Secretary of State may appoint inspectors to investigate the affairs of a company and to report on them. Section 432 *requires* the Secretary of State to appoint inspectors if the court orders an investigation.

6.13 Section 434(1) of the 1985 Act provides:

When inspectors are appointed under section 431 or 432, it is the duty of all officers and agents of the company ...

- (a) to produce to the inspectors all books and documents of or relating to the company ... which are in their custody or power,
- (b) to attend before the inspectors when required to do so, and
- (c) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give.

Section 434(5) provides:

An answer given by a person to a question put to him in exercise of powers conferred by this section ... may be used in evidence against him.

for Reference of Cases to the Serious Fraud Office, para 2. See also *Arlidge & Parry on Fraud* (2nd ed 1996) paras 13-009 – 13-011.

²¹ PACE, s 9 and Sched 1.

²² The Home Office consultation paper, paras 3.14 and 3.15, invited views on whether corruption should be a serious arrestable offence.

- 6.14 If a person fails to comply with a request made by inspectors acting under either section 431 or section 432, the inspectors may certify his or her refusal to the court. The court will then hear evidence and, if appropriate, may punish the offender as if he or she had been guilty of contempt of court.²³
- 6.15 Under section 447 of the 1985 Act the Secretary of State may, if he or she thinks there is good reason to do so, require a company to produce its books or papers for examination by departmental officers. Failure to comply with a requirement under this section is an offence.²⁴ Information obtained is confidential, and may only be used for purposes specified in section 449.
- 6.16 Sachs LJ in *Re Pergamon Press Ltd*²⁵ described the function of the DTI inspectors as follows:

[Their] function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action: it is no part of their function to take a decision as to whether action be taken and a fortiori it is not for them finally to determine such issues as may emerge if some action eventuates.²⁶

- 6.17 In the judgment of the Court of Appeal in *Saunders (No 2)*,²⁷ Lord Taylor of Gosforth CJ set out the Crown's explanation of the differences between the powers of the police, the SFO and DTI inspectors:

[T]he explanation lies in the very different regime of interviews by DTI Inspectors compared with that of interviews either by the police or the SFO. DTI Inspectors are investigators; unlike the police or SFO they are not prosecutors or potential prosecutors. Here, typically, the two Inspectors were a Queen's Counsel and a senior accountant. They are bound to act fairly, and to give anyone they propose to condemn or criticise a fair opportunity to answer what is alleged against them (*Re Pergamon Press Ltd* [1971] Ch 388).

SECTION 2 AND THE ECHR

- 6.18 Article 6(1) of the ECHR provides:

In the determination of his civil rights or obligations or of any criminal charge against him, everyone is entitled to a fair public hearing within a reasonable time by an independent and impartial tribunal established by law.

- 6.19 In *Funke v France*,²⁸ customs officers, accompanied by a police officer, went to the home of the applicant and his wife to obtain "particulars of their assets abroad".

²³ Companies Act 1985, s 436.

²⁴ Companies Act 1985, s 447(6).

²⁵ [1971] Ch 388, 401.

²⁶ [1971] Ch 388, 401.

²⁷ [1996] Cr App R 463.

²⁸ (1993) 16 EHRR 297.

The applicant admitted that he had several bank accounts abroad but said that he did not have any bank statements at his home. Following a search, however, officers discovered bank statements and cheque books relating to accounts abroad. The applicant was then asked to produce three years' statements. He refused and was, as a result, prosecuted and fined (with a daily fine until he produced the documents requested) for his refusal.

6.20 The Strasbourg Court took the view that a provision which compelled a person to produce documents under threat of prosecution if he or she did not do so contravened Article 6(1), which conferred on anyone charged with a criminal offence a right to remain silent and not to self-incriminate.²⁹ Similar decisions were reached in *Miaillhe v France*³⁰ and *Cremieux v France*.³¹

6.21 On these authorities,³² it seems that there is a risk that the SFO's section 2 powers are vulnerable to challenge before the Strasbourg Court. This risk is arguably confirmed by the recent decision of the Court in *Saunders v United Kingdom*,³³ in which it was held that the admission, in criminal proceedings, of transcripts of interviews³⁴ obtained by DTI inspectors under the Companies Act 1985 was an infringement of the right not to self-incriminate³⁵ and violated Article 6(1) of the Convention.³⁶ The Court specifically rejected the Government's arguments that the public interest in investigating complex corporate fraud justified a departure from the Article 6 right. On the other hand, the court did not suggest that the investigatory powers of the DTI inspectors *themselves* contravened Article 6(1).

²⁹ The Strasbourg Court also held there to have been a contravention of Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

³⁰ (1993) 16 EHRR 332.

³¹ (1993) 16 EHRR 332, 357.

³² These cases have been criticised from a *theoretical* perspective (see, eg, Naismith, "Self-Incrimination – Fairness or Freedom" [1997] EHRLR 229) but there has been no indication that the Court will depart from this line of authority in the future.

³³ (1997) 23 EHRR 313.

³⁴ The Court took the view that the right not to incriminate oneself did not "extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as ... documents ... , breath, blood and urine samples and bodily tissue for the purpose of DNA testing": *Ibid*, para 69.

³⁵ *Ibid*, para 76.

³⁶ *Ibid*, para 81. The Court rejected the Government's argument that the complexity of corporate fraud and the public interest in the investigation of such fraud justified "such a marked departure ... from one of the basic principles of a fair procedure"; in the Court's view "the general requirements of fairness contained in Article 6 ... apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex." *Ibid*, para 74.

6.22 It is significant that when referring to the case of *Fayed v United Kingdom*,³⁷ the court commented that

a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex fraud and commercial activities.³⁸

THE OPTIONS

6.23 We now reconsider the four options set out in the consultation paper:³⁹

- (1) no change;
- (2) give the police similar powers to those of the SFO in all corruption cases;
- (3) give the police powers similar to those held by the SFO in those corruption cases which, despite falling within the SFO's terms of reference, are, for whatever reason, investigated by the police; or
- (4) create further investigative powers for corruption offences, not identical to those in the SFO.

Responses on consultation

6.24 The majority of those respondents who considered the issue were in favour of the option of no change.

6.25 There was some support for the second option, namely giving the police similar powers to those of the SFO in *all* corruption cases. The Bar Council and the Criminal Bar Association favoured it on the grounds that the same difficulties encountered in the investigation of serious fraud might well arise in any corruption case. ACPO took the view that some prosecutions had failed because of the inability of investigators to "penetrate the veil".⁴⁰

6.26 Very few of the respondents favoured the third option of giving the police powers similar to those of the SFO in those corruption cases which, despite falling within the terms of reference of the SFO, are, for whatever reason, investigated not by the SFO but by the police. ACPO pointed out that many cases of corruption did not fall within the remit of the SFO;⁴¹ and a consequence of this option would be that some cases of corruption would be investigated with the benefit of additional powers whilst others would not.

³⁷ Judgment of 21 September 1994, Series A no 294-B.

³⁸ Para 67.

³⁹ Paras 12.20 – 12.26.

⁴⁰ Detective Sergeant Moore of the Merseyside Police, author of *Power and Corruption: the Rotten Core of Government and Big Business* (1997), supported this view, explaining that corruption is "a consensual crime, carried out in secret", which makes it very difficult to prove before a jury, and that the award of greater powers would help to combat these difficulties.

⁴¹ This may be either because there is corruption but not fraud (cf paras 5.123 – 5.130 above) or, more likely, because the fraud is neither serious nor complex.

- 6.27 There was very limited support for the fourth option, of creating further investigative powers for corruption offences, but ones which were not identical to those of the SFO. Detective Sergeant Moore of the Merseyside Police, for example, suggested that corruption offences should be serious arrestable offences, that a duty be imposed on the Inland Revenue to provide all necessary assistance to investigations and that there should be a requirement to report corruption within organisations providing a public service. The Inland Revenue made clear, however, in their response the importance of maintaining taxpayer confidentiality.

CONCLUSIONS

- 6.28 We accept that there is an apparent anomaly in the present law: the substantial investigative powers of the SFO will only be available if a case falls within the statutory criteria *and* it is taken up by the SFO. However, were police powers to match SFO powers in respect of those corruption offences *not* investigated by the SFO, there would be the greater anomaly that corruption would attract exceptional powers denied to the police in *other* cases of fraud.
- 6.29 Our provisional approach was that in the absence of sufficient justification as to why corruption offences should be treated exceptionally, the powers of the police should not be extended. None of the very helpful responses that we received have persuaded us that we were wrong in this view. We consider that an extension of police powers would be vulnerable to challenge under Article 6 of the ECHR, particularly in the light of the recent decisions in *Saunders* and *Funke* which in the words of Professor Sullivan have had “a considerable chilling effect on the use the SFO makes of its special powers”.⁴² We agree with the majority of our respondents that existing police powers, together with the new powers introduced by the Police Act 1997,⁴³ are not so demonstrably inadequate that further extension of police investigatory powers can be justified. We therefore do not recommend that the investigative powers of the police should be extended in the case of corruption.

⁴² G R Sullivan, “Reformulating the Corruption Laws – the Law Commission Proposals” [1997] Crim LR 730, 737.

⁴³ Part III of the Police Act 1997 is not yet in force.

PART VII

TERRITORIAL JURISDICTION, THE ATTORNEY-GENERAL'S CONSENT TO PROSECUTION AND OTHER ANCILLARY MATTERS

- 7.1 In this part we consider the extent of the territorial jurisdiction of the new offences of corruption, whether prosecutions for corruption should require consent (whether that of the Law Officers or the DPP), mode of trial and whether the new offences should have retrospective effect. We also comment on sentence.

TERRITORIAL JURISDICTION

- 7.2 In the consultation paper we examined the extent to which corruption offences committed abroad are indictable in England and Wales, and we considered whether any steps should be taken to extend the territorial jurisdiction of the courts in this area.¹

The present law

- 7.3 The general rule is that the exercise of criminal jurisdiction does not extend to cover acts committed on land abroad.² Jurisdiction over a crime belongs to the country in which it was committed.³ So, in general, British subjects who commit acts abroad are not amenable to the jurisdiction of the courts in England and Wales.
- 7.4 Under the present law, the English courts do not have jurisdiction to try a criminal offence unless the last act or event necessary for its completion occurs within the jurisdiction.⁴ This general principle applies to both common law and statutory offences, but as Parliament is supreme it may extend the territorial limit of a particular offence.⁵

¹ Consultation Paper No 145, Part IX.

² See the dissenting speech of Lord Morris of Borth-y-Gest in *Treacy* [1971] AC 537, 552.

³ *Macleod v A-G of New South Wales* [1891] AC 455, 458.

⁴ See Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180, para 2.1.

⁵ See, eg, Offences Against the Person Act 1861, s 9; Customs and Excise Management Act 1979, s 148. The territory of England and Wales is extended so as to include British-controlled aircraft if the act taking place on board would be an offence in this country and is not an authorised act under the law which applies to the territory over which the plane is flying; Civil Aviation Act 1982, s 92. Where any act in relation to property or person done by any master or seaman employed on a UK ship would be an offence if done in the UK, it is treated for the purposes of jurisdiction and trial as if it had been done within the jurisdiction of the Admiralty of England: Merchant Shipping Act 1995, s 282.

- 7.5 In applying the common law jurisdiction rules to any criminal offence, it is first necessary to determine the ingredients of the offence, in order to ascertain the acts that must be done before the offence can be said to have been committed. This raises the need to draw a distinction between “*conduct crimes*” and “*result crimes*”: only thus can we identify the last act required by an offence, and so discover the jurisdiction in which that last act occurred.
- 7.6 A *conduct* crime is one whose ingredients consist solely in the acts that must be done for the offence to be made out, and not the results of those acts. A conduct crime, in general, will only be indictable where the conduct required by the offence occurs within the jurisdiction. This is to be contrasted with *result crimes*, whose ingredients include the *consequences* of what is done. The present position is that no offence occurs in English law unless the offence takes place within the jurisdiction. Therefore, because no offence will have been committed until the result of the act occurs, the offence is committed in the place where the result occurs. This means that it is immaterial that any *conduct* required by the offence happens in this jurisdiction; the required result must occur here as well.⁶ Indeed, so long as the result occurs here, it is immaterial that the conduct causing it takes place abroad.⁷
- 7.7 Corruption is a *conduct* crime in that it consists of the act done without any requirement that particular consequences follow from the act. Parliament may extend the territorial limit for particular offences, and has done so on occasion, but the offences under the Prevention of Corruption Acts have no extended territorial limit. Therefore, provided that the act (of, for example, offering or accepting a bribe or agreeing to accept it) takes place within England and Wales, the court will have jurisdiction over the offence.
- 7.8 We argued in the consultation paper that the issue of jurisdiction may be particularly relevant to corruption as there is an increasing international element to this crime.⁸ We criticised the existing law as unable to deal with some circumstances which arguably should be subject to the criminal law; for example, where a public official takes a bribe while abroad and acts on the bribe after returning to England.

The Criminal Justice Act 1993

- 7.9 Part I of the Criminal Justice Act 1993 (“CJA 1993”), when it is brought into force, will greatly extend the territorial jurisdiction of the English courts over a number of offences of dishonesty (referred to in the Act as “Group A offences”). Under section 2(3) of the Act,

A person may be guilty of a Group A offence if any of the events which are relevant events in relation to the offence occurred in England and Wales.

⁶ *Harden* [1963] 1 QB 8; *R v Governor of Pentonville Prison, ex p Khubchandani* (1980) 71 Cr App R 241.

⁷ *Bevan* (1987) 84 Cr App R 143.

⁸ Consultation Paper No 145, para 9.8.

Section 2(1) defines a “relevant event” as

any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence.

- 7.10 The Group A offences do not include bribery or the offences under the Prevention of Corruption Acts.

The effect of extending the CJA 1993 to corruption

- 7.11 Including our proposed corruption offences in the list of Group A offences would side-step the limitations imposed by the general jurisdictional rules. If A, who is abroad, telephones B in England and offers B a bribe, it is doubtful whether A would at present be committing an offence under English law. It is clear, however, that the matter would be justiciable here if corruption were brought within the list of Group A offences. Section 4(b) of the 1993 Act provides that, in relation to a Group A offence,

there is a communication in England and Wales of any information, instruction, request, demand or other matter if it is sent by any means

- (i) from a place in England and Wales to a place elsewhere; or
- (ii) from a place elsewhere to a place in England and Wales.

- 7.12 The offer of the bribe is a relevant event for the purposes of our recommended offence of corruptly offering to confer an advantage. Section 4(b) would treat the offer, though it was made from abroad, as having taken place within the jurisdiction. A relevant event has therefore occurred within the jurisdiction, and A could be indicted here.

- 7.13 The 1993 Act also extends the jurisdiction of the English courts with regard to the inchoate offences of conspiracy,⁹ attempt¹⁰ and incitement.¹¹ If these rules were extended to corruption, it would, for example, be an offence indictable in England and Wales to conspire, outside the jurisdiction, to make a corrupt payment within it. There is authority that this is already the position, irrespective of the 1993 Act;¹² but extending the Act to cases of corruption would put the matter beyond doubt.

Our provisional proposal and the views of respondents

- 7.14 In the consultation paper,¹³ we took the view that the extension of the new rules to corruption would bring some cases within the jurisdiction of the English courts which may at present lie outside it. We provisionally proposed that a modern bribery offence should be a Group A offence for the purposes of the CJA 1993. Of

⁹ CJA 1993, s 3(2).

¹⁰ *Ibid*, s 3(3).

¹¹ *Ibid*, s 3(1)(b).

¹² *Sansom* [1991] 2 QB 130.

¹³ Paras 9.15 – 9.18.

those respondents who commented on the issue, the substantial majority agreed with us.

Our recommendation

- 7.15 We have been given no reason to suggest that our provisional proposal was wrong. **We, therefore, recommend that the new offences should be Group A offences for the purposes of the Criminal Justice Act 1993.**¹⁴

(Recommendation 15)

ANCILLARY MATTERS

Requirement of the Attorney-General's consent

- 7.16 Prosecutions for corruption under the 1889 Act¹⁵ and the 1906 Act¹⁶ require the consent of the Attorney-General or the Solicitor-General. In the consultation paper we examined the justification for this in order to decide whether our proposed new offences should contain any similar provision.¹⁷ There are two stages in the argument, namely:

- (1) whether the consent requirement should be retained at all, and
- (2) if it should, whether the required consent should be that of the Law Officers (the Attorney-General and the Solicitor-General) or the Director of Public Prosecutions (the "DPP").

The need for consent

- 7.17 During the passage of the 1889 Act, the Lord Chancellor justified the provision requiring the consent of the Attorney-General on the ground that there was a risk that blackmailers would threaten prosecutions.¹⁸ Similar points were raised when what became the 1906 Act was passed.¹⁹ Thus "the original reasons for introducing the requirement of the Attorney-General's consent were to avoid bribery, collusion, blackmail and other improper practices which frequently surrounded the private prosecution".²⁰

¹⁴ Given that Part I of the 1993 Act is not in force, an alternative approach would be to make specific provision within the new legislation so that it had the same effect, as regards corruption offences, as CJA 1993 would have if Part 1 of the CJA were in force and corruption were a Group A offence under that Act.

¹⁵ Section 4.

¹⁶ Section 2(1).

¹⁷ Consultation Paper No 145, paras 10.4 – 10.5.

¹⁸ *Hansard* (HC) 20 April 1889, vol 70, col 25; and see the views of Lord Russell of Killowen at col 22.

¹⁹ See, eg, the comments of the Lord Chancellor, the Earl of Halsbury, *Hansard* (HL) 26 April 1904, vol 133, cols 1168–1170.

²⁰ P Fennell and P A Thomas, "Corruption in England and Wales: An Historical Analysis" (1983) 11 *Int Jo Soc Law* 167, 173.

7.18 In order to decide whether there should be a consents provision, we considered reasons that have been put forward in justification of such provisions – in particular, a Home Office memorandum²¹ to the Departmental Committee on section 2 of the Official Secrets Act 1911²² (the Franks Committee). According to the Home Office memorandum, “the basic reason for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances”. Five overlapping reasons were given for considering the inclusion of a consent requirement:

- (a) to secure consistency of practice in bringing prosecutions, for example, where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;
- (b) to prevent abuse, or the bringing of the law into disrepute, for example, with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases;
- (c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;
- (d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship;
- (e) to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international nature, such as may arise, for instance, in relation to official secrets or hijacking.

7.19 Since we published our consultation paper on corruption, we have subsequently examined as a separate project²³ the issue of the circumstances in which offences should require the consent of the Law Officers or the DPP as a condition precedent to criminal proceedings. We did not consider whether private prosecutions should be abolished. We bore in mind the constitutional importance of consent provisions – not only do they fetter the right of private prosecutions but also, by their nature, they impose an administrative burden on senior officials and cause additional delay within the criminal justice system.

7.20 Our provisional view in the consultation paper on consent provisions was that a requirement of consent should only be used to control prosecutions for those offences

- (1) which directly affect freedom of expression;

²¹ Further memorandum by the Home Office on the control of prosecutions by the Attorney-General and the Director of Public Prosecutions (April 1972).

²² Report of the Departmental Committee on s 2 of the Official Secrets Act 1911 (1972) Cmnd 5104. A prosecution under s 2 of the 1911 Act also requires the consent of the Law Officers.

²³ Consents to Prosecution (1997) Consultation Paper No 149.

- (2) which may involve the national security or have some international element; or
- (3) in respect of which it is particularly likely, given the availability of civil proceedings in respect of the same conduct, that the public interest would not require a prosecution.²⁴

7.21 The new corruption offences would not fall within any of these exceptions. Therefore, on the basis of the provisional views put forward in Consultation Paper No 149, no consent should be needed for the new offences.

Views of respondents

7.22 Of those who responded on this issue, the majority did not want a consent provision.

7.23 The principal argument in favour of requiring consent was the sensitivity of certain prosecutions for corruption. For example, the Magistrates' Association believed that

[i]n view of the potential significance and sensitivity of a corruption case it seems sensible to require the consent of the DPP, to ensure that the matter is considered at a sufficiently high level, and away from the local environment.

7.24 We considered this issue carefully. A matter of substantial importance to us was that for many years it has been possible to prosecute for the common law offence of bribery without any need to obtain the consent of the Law Officers or the DPP. We are not aware of, and nobody has drawn to our attention, any problems that this has caused. In particular, the fear mentioned at the time when the 1889 and 1906 Acts were passed,²⁵ of blackmailers using corruption offences has not been justified. Similarly, there has been no evidence put forward in relation to the use of the common law offence to support the concern that corruption cases are so sensitive as to require the detached view that the consent provisions give. We therefore conclude that there should be no requirement for consent for the new corruption offences.

7.25 To those who are concerned about indiscriminate and unjustified private prosecutions for the new offences, we would point out that there are existing procedural restraints on private prosecutions, namely:

- (1) A magistrate may refuse to issue a summons.
- (2) The Attorney-General may terminate proceedings by entering a *nolle prosequi*.
- (3) The Attorney-General may prevent criminal proceedings by vexatious litigants by applying to the High Court for a criminal proceedings order.

²⁴ See Consultation Paper No 149, para 7.5.

²⁵ See para 7.17 above.

- (4) The DPP may take over private prosecutions and terminate them, whether by discontinuance, withdrawal or offering no evidence.
- (5) Legal aid is not available to a private prosecutor save for the limited purpose of resisting an appeal to the Crown Court.²⁶ A claim for costs may be made either against central funds or against the accused but, even if granted, an award may not meet the full cost of a prosecution, or if it is against the accused, it may not be recoverable.²⁷
- (6) A private prosecutor might be sued in the civil courts for malicious prosecution.

7.26 **We recommend that prosecutions for the new offences should not require the consent of either the Law Officers or the Director of Public Prosecutions.**

(Recommendation 16)

Mode of trial

7.27 We provisionally proposed that the new offence should be triable either way, as are the existing offences under the Prevention of Corruption Acts.²⁸ The majority of respondents who replied to this issue agreed without further comment.

7.28 Two respondents disagreed on the ground that corruption cases are too serious to be tried summarily. However, we feel that, although it is true that corruption is *generally* a serious offence, it would be impossible to say that *all* instances of corrupt behaviour are sufficiently serious to be triable only on indictment. **We recommend that the new offences should be triable either way.**

(Recommendation 17)

Sentence

7.29 This Commission does not regard itself as qualified to specify the maximum sentence for the new offences on conviction on indictment. We note, however, that the courts have passed heavy sentences for the existing corruption offences: for example, the Court of Appeal (Criminal Division) dismissed an appeal against a total of 11 years' imprisonment imposed on a detective constable who had pleaded guilty to four counts of corruption. The appellant had accepted £18,500 from a man who was a subject of criminal proceedings to disclose confidential information about the inquiry and to destroy surveillance logs.²⁹

²⁶ Legal Aid Act 1988, s 21(1).

²⁷ See Consultation Paper No 149, paras 5.13 – 5.15.

²⁸ Consultation Paper No 145, para 10.16.

²⁹ *Donald* [1997] 2 Cr App R(S) 272. In *Hopwood* (1985) 7 Cr App R (S) 402 the Court of Appeal regarded as “exceedingly lucky” an appellant who was sent to prison for a total of three and a half years for acting corruptly in the private sphere. He received sums totalling more than £200,000 and the re-wiring of his house in return for acting against the interests of his employer.

- 7.30 We believe, however, that consideration should be given to allowing the courts the power to impose penalties other than, or in addition to, imprisonment or a fine: for example, an order that a person convicted of bribery pay the amount or value of any gift, loan, fee or reward received by him or her;³⁰ disqualification from public office; or forfeiture of any office held by him or her at the time of conviction. Such powers exist under the 1889 Act.³¹

Retrospectivity

- 7.31 We provisionally proposed that the new law should not have retrospective effect.³² It is obviously exceptional for any new criminal offence to have such an effect. In any event, an offence with retrospective effect would be likely to be held in breach of Article 7 of the ECHR which provides that no-one shall be guilty of a criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed.
- 7.32 Only a small number of respondents commented on this provisional proposal. It was entirely uncontroversial. **We recommend that the new offence should not have retrospective effect.**

(Recommendation 18)

³⁰ We note that the laundering of the proceeds of corruption is an offence by virtue of ss 29 to 33, 35 and 77 of the CJA 1993, which inserted seven new sections, numbered 93A to 93G, into the CJA 1988. Section 93C makes it an offence to conceal or disguise any property which is, or represents, the proceeds of criminal conduct, or to convert or transfer such property or remove it from the jurisdiction. Under s 93A it is an offence to assist another to retain the benefit of criminal conduct, and under s 93B it is an offence to acquire or possess the proceeds of criminal conduct.

³¹ See s 2 of the 1889 Act.

³² Consultation Paper No 145, para 10.19.

PART VIII

CORRUPTION AND BREACH OF DUTY

TWO BASIC LAW REFORM QUESTIONS

- 8.1 In the consultation paper, we analysed the functions of the law of corruption in terms of the *fundamental mischief* (the agent's breach of duty) and the *mischief of temptation* (the conduct which is likely to result in such a breach).¹ This, in turn, raised two basic law reform questions: first, should the law prohibit the fundamental mischief *directly*, or should it instead prohibit conduct which is *likely to result* in the fundamental mischief? And second, if we take the latter view, should the law prohibit *all* such conduct or only certain kinds; and, if only certain kinds, which kinds?²

THE FIRST QUESTION

Acting contrary to duty: the radical approach

- 8.2 In the consultation paper, we provisionally rejected the "radical approach" of introducing one or more offences of an agent acting contrary to his or her duty.³ We argued that if *all* such breaches were penalised, this would be unduly draconian, while if only *some* breaches were penalised this would mean devising criteria for determining which breaches should be criminal. Such criteria, we believed, would inevitably be elusive and controversial. Further, we took the view that criminalising the breach of duty directly would fail to reflect the widely understood meaning of corruption as something which destroys or perverts another's integrity or fidelity.⁴ About a third of respondents commented on this conclusion and, of those, the majority agreed with our rejection of the radical approach.
- 8.3 For the reasons set out above, we remain of the view that it would be wrong to criminalise breaches of duty directly, and we therefore do not recommend the adoption of the radical approach.
- 8.4 However, as we have explained,⁵ our analysis of the nature of corrupt transactions has led us to the conclusion that it should be an offence for an agent to perform his or her functions *corruptly* – that is, either in return for a corrupt inducement or in the hope of a corrupt reward. In most cases the commission of this offence would consist in a breach of the agent's duty to his or her principal; but our recommendation is less radical than the criminalisation of breaches of duty per se, because it requires the element of *corruption* (whether by inducement or by the

¹ Consultation Paper No 145, paras 1.12 – 1.16.

² Consultation Paper No 145, para 5.1.

³ Consultation Paper No 145, paras 5.2 – 5.4.

⁴ Consultation Paper No 145, para 5.3.

⁵ Paras 5.54 – 5.58 above.

hope of reward). On the other hand, for reasons we have explained,⁶ it does not require a *breach of duty* at all, but only the corrupt performance of the agent's functions as an agent. Given the element of corruption, it is immaterial whether the agent is also in breach of his or her duty.

THE SECOND QUESTION

Corruption by means other than bribery

- 8.5 We identified three crude ways in which A can cause B to act in breach of duty – by inducement, by threats or by deception.⁷ In each instance B will have breached his or her duty – but with different degrees of *voluntariness*.
- 8.6 In the consultation paper,⁸ we considered whether breaches of duty procured by threats or deception are at present criminal. We concluded that they are to some extent, but that there are anomalies. We thought it was at least arguable that there would be advantages in creating specific new offences: first, it would put the fundamental mischief of breach of duty (as we then considered it to be) at the centre of the criminal law of corruption; and, second, it would provide an opportunity to rectify the anomalies that we had identified. On the other hand, we acknowledged that the view might be taken that the present law, though not perfect, was adequate. We therefore asked for views on whether, in addition to a modern offence of bribery, there should be new offences of procuring a breach of duty by deception and procuring breach of duty by threats.
- 8.7 About a third of the respondents commented on this issue. The clear majority favoured new offences. Most considered that the law relating to both threats *and* deception was inadequate and therefore wished to see the introduction of two new offences, while the remaining few wished only for a new offence to deal *either* with breach of duty induced by threats *or* with breach of duty procured by deception.⁹ Those respondents who did not favour new offences did so primarily for the reason that their subject would be well beyond the traditional boundaries of the offence of corruption: if B does not act voluntarily, it was argued, it is difficult to see how he or she can have been *corrupted*.
- 8.8 In order to reach a conclusion on this issue, we now consider in more detail the present law, its deficiencies and possible remedies. We begin by asking, first, in what circumstances will the present law fail to cover the procuring of breaches of duty by either threats or deception? And then, should any proposed new offences form part of a modern law of *corruption*?

⁶ Paras 5.5 – 5.10 above.

⁷ Consultation Paper No 145, para 5.5.

⁸ Consultation Paper No 145, paras 5.10 – 5.19.

⁹ Judge Walsh was content with the current law on blackmail but considered that the current law regarding deception was inadequate, whilst Judge Mark Dyer and Liberty were happy with the law relating to deception but wished to see a new offence to deal with breaches of duty induced by threats.

The present law and its deficiencies

Blackmail and breaches of duty procured by threats

- 8.9 Section 21 of the Theft Act 1968 provides that it is an offence to make an unwarranted demand with menaces¹⁰ with a view to gain for oneself or another or with intent to cause another loss. A demand is unwarranted unless the maker believes that he or she has reasonable grounds for making the demand *and* that the use of the menaces is a proper means of reinforcing that demand.¹¹ “Gain” and “loss” are defined¹² as “extending only to gain or loss in money or other property”. This provides an important limit to the extent of liability for blackmail, although the courts have interpreted the provision widely.¹³
- 8.10 Professor Sir John Smith notes that, although blackmail is limited to the protection of economic interests, “[i]n most cases, the blackmailer is trying to obtain money to which he knows he has no right and there will be no doubt about his view to gain”.¹⁴ Similarly, although our present concern is with the threatening of any agent into breaching his or her duty, the threat will usually be made with “a view to gain” or “intent to cause loss to another”, in terms of money or other property, and will therefore amount to blackmail.
- 8.11 On the other hand, it is possible to envisage circumstances in which the threat will not be made with a view to gain or intent to cause loss. For example, if A threatens B, an agent, into disclosing personal information about B’s principal, C, with a view to damaging C’s reputation, then there is no offence of blackmail unless the disclosure of the information is intended to result in *financial* loss to C. Alternatively, the gain or loss might be too remote. Professor Sir John Smith suggests that a person who menaces the headmaster of a public school, with a view to gaining admission for his newly-born son, is literally acting with a view to gain if he is motivated by a belief that his son will one day have greater earning power through having been to that school.

¹⁰ The definition of “menaces” has received much judicial attention. In *Clear* [1968] 1 QB 670 Sellers LJ held that threats which would influence the mind of a person of “normal stability and courage” would suffice to be a menace. *Garwood* [1987] 1 WLR 319 added that where the threat in fact affected the victim, but would not have affected an ordinary person, the threat is still a menace provided that the defendant knew the victim would react in the way he or she did. In *Lawrence and Pomroy* [1971] Crim LR 645, the Court of Appeal stated that “menace” was an ordinary English word which any jury could be expected to understand, and only in exceptional cases shall a direction be given.

¹¹ The test of whether the defendant believes that he or she has reasonable grounds for making the demand is purely subjective. In *Harvey* (1981) 72 Cr App R 139, Bingham J held that the beliefs of the reasonable person were irrelevant, save as may help throw light on the defendant’s actual beliefs. However, he added that an act known by the defendant to be unlawful can never be “proper” within the meaning of s 21(1)(b).

¹² Theft Act 1968, s 34(2)(a).

¹³ In *Bevans* (1988) 87 Cr App R 64 the court held that there was no material difference between a doctor giving a patient some ampoules of morphine and the doctor injecting them himself. The court held that “property” was still gained by the patient albeit through an unusual medium.

¹⁴ J C Smith, *The Law of Theft* (8th ed 1997), para 10–13.

Yet the gain is so distant in time and subject to so many contingencies that its connection with the demand with menaces may be thought too remote.¹⁵

- 8.12 Broadly, respondents favoured a new offence of procuring a breach of duty by threats because most took the view that, in the words of the Employment Law Bar Association, “although some threats are already criminalised, the law is not sufficiently comprehensive to deal with even the majority of threats.”
- 8.13 We also canvassed opinion as to whether there should be an offence of threatening to breach duty. Most of the respondents who gave their views were against the introduction of such offence on the grounds that this circumstance could be adequately dealt with under the law of blackmail. In our view, whilst this may well be the case on most occasions, the law of blackmail may prove inadequate for the reasons given above.¹⁶

Breaches of duty procured by deception

- 8.14 Under the present law it is not an offence for A to deceive B into breaching his or her duty to C unless, incidentally, the circumstances of A’s conduct are covered by one of the various offences of deception which are contained in the Theft Acts.¹⁷ An agreement between A and another to practise such a deception may, on the other hand, amount to a conspiracy to defraud.¹⁸ Although it seems unlikely that the procurement of a breach of duty by deception will not fall within one of the existing offences, nonetheless there is no reason to suppose that the present offences cover *all* such cases. In any event, it is arguably preferable not to have to rely on a multiplicity of offences of deception. The majority of the respondents favoured a new offence of procuring a breach of duty by deception.

Whether offences of procuring a breach of duty by threats or deception are offences of corruption

- 8.15 We think that it is likely that the present law may well not be adequate to deal with circumstances where a breach of duty is procured by threats or deception, and that there is a strong argument for extending it so as to catch such circumstances. However, we question whether it is appropriate to treat such conduct as amounting to offences of *corruption*. We can see arguments on both sides.
- 8.16 The argument in favour is an argument which we put forward in the consultation paper:

The benefit of creating new offences of procuring a breach of duty by deception and procuring a breach of duty by threats, in addition to a

¹⁵ *Ibid*, para 10–22.

¹⁶ Para 8.11 above.

¹⁷ For example, obtaining property by deception (Theft Act 1968, s 15), obtaining a money transfer by deception (Theft Act 1968 s 15A, inserted by Theft (Amendment) Act 1996, s 1), obtaining a pecuniary advantage by deception (Theft Act 1968, s 16), or procuring the execution of a valuable security by deception (Theft Act 1968, s 20(2)).

¹⁸ *Welham v DPP* [1961] AC 103 and *Wai Yu-Tsang* [1992] 1 AC 269. See Consultation Paper No 145, para 5.15.

new offence of bribery, is that this would properly put the *fundamental mischief* at the centre of the criminal law of corruption. It would also provide an opportunity to regularise anomalies in the present law (such as the requirement of blackmail that there should be a view to gain or an intent to cause loss, and the uncertainty as to the scope of conspiracy to defraud in this context).¹⁹

8.17 The argument against is that, although the essential purpose of the criminal law of corruption is to prevent the “fundamental mischief”, it does not follow that all instances of the fundamental mischief, whatever the cause, must be proscribed by the law of corruption. In Part V above, we have defined “corruptly” in terms of an agent being influenced, in the performance of his or functions as an agent, by inducements or by the hope of reward.²⁰ In our view, the essence of corruption involves not only the fundamental mischief but also the mischief of temptation.

8.18 We note the comments of Professor Sir John Smith, who wrote in his response:

There would be logic in extending the law to include the procurement of breaches by threats or deception. The principal is equally damaged, whether the breach is caused by bribes, threats or deception. The deceived agent is, however, in no sense “corrupted”: nor is that word particularly apt for the agent who gives in to threats. Is not an element of rationale of the offence the inexcusable betrayal by the agent which it seeks to bring about? There is no betrayal by the deceived agent and a possibly excusable one where the agent acts only because of threats ... [M]y instinctive reaction is in favour of confining the offence of corruption to its traditional limits.

8.19 Phillips LJ did not wish to include the new offences “in the interests of simplicity”. The SIB thought that the existing law was adequate and that the new offences contemplated were a “long way from the common conception of corruption”.

OUR CONCLUSION

8.20 Although we believe that it is likely that the present law does not deal adequately with circumstances in which the fundamental mischief is brought about by threats or deception, we do not recommend that these cases should be caught by the law of corruption. Our reasons stem from our analysis of the nature of corruption. We take the view that these issues would be better considered in the context of our review of the law of dishonesty.²¹

¹⁹ Consultation Paper No 145, para 5.19.

²⁰ Para 5.73 above.

²¹ See Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, paras 1.16 – 1.19.

PART IX

OUR RECOMMENDATIONS

In this part we set out our recommendations in full.

THE PRESENT LAW AND THE NEED FOR CHANGE

- 9.1 We recommend that the common law offence of bribery and statutory offences of corruption should be replaced by a modern statute.¹

THE PRESUMPTION OF CORRUPTION AND THE DISTINCTION BETWEEN PUBLIC BODIES AND OTHERS

- 9.2 We recommend that the new law of corruption
- (1) should not include a presumption comparable to that created by section 2 of the 1916 Act (under which a transaction is in certain circumstances presumed to be corrupt unless the contrary is proved), and
 - (2) should not draw a distinction between public bodies and others.²

THE AGENCY RELATIONSHIP

- 9.3 We recommend that
- (1) a person should be regarded as an agent, and another as a principal for whom he or she performs functions, if
 - (a) the first is a trustee and the second is a beneficiary under the same trust;
 - (b) the first is a director of a company and the second is the company;
 - (c) each is a partner in the same partnership;
 - (d) the first is a professional person (such as lawyer or accountant) and the second is his or her client;
 - (e) the first is an agent and the second is his or her principal (taking agent and principal in the sense normally understood by lawyers);
or
 - (f) the first is the employee of the second;
 - (2) a person who does not fall within any of the categories above should be regarded as an agent, and another as a principal for whom he or she performs functions, if there is an agreement or understanding between them (express or implied) that the first is to perform the functions for the second; and

¹ Para 2.33 above.

² Para 4.78 above.

- (3) a person should be regarded as an agent performing functions for the public if the functions he or she performs are of a public nature (whether or not in relation to the United Kingdom).³

9.4 We recommend that consideration should be given to extending the scope of the corruption offences to include officials of international intergovernmental organisations.⁴

THE CONCEPT OF ADVANTAGE

9.5 We recommend that

- (1) a person should be regarded as conferring an advantage if
 - (a) he or she does something or omits to do something which he or she has a right to do, and
 - (b) the act or omission is done or made in consequence of another's request (express or implied) or with the result (direct or indirect) that another benefits; and
- (2) a person should be regarded as obtaining an advantage if
 - (a) another does something or omits to do something which he or she has a right to do, and
 - (b) the act or omission is done or made in consequence of the first person's request (express or implied) or with the result (direct or indirect) that the first person benefits.⁵

THE OFFENCES

Corruptly conferring, or offering or agreeing to confer, an advantage

9.6 We recommend that a person should commit an offence if he or she

- (1) corruptly confers an advantage, or
- (2) corruptly offers or agrees to confer an advantage.⁶

Corruptly obtaining, soliciting or agreeing to obtain an advantage

9.7 We recommend that a person should commit an offence if he or she

³ Para 5.36 above.

⁴ Para 5.37 above.

⁵ Para 5.43 above.

⁶ Para 5.50 above.

- (1) corruptly obtains an advantage, or
- (2) corruptly solicits or agrees to obtain an advantage.⁷

Corruptly performing functions as an agent

- 9.8 We recommend that a person should commit an offence if he or she performs his or her functions as an agent corruptly.⁸

Agents receiving benefit from corruption

- 9.9 We recommend that if
- (1) an advantage is obtained corruptly by a person other than the agent concerned,
 - (2) the agent receives a benefit (in any form) which consists of or is derived (directly or indirectly) from all or part of the advantage,
 - (3) the agent knows or believes that the advantage was obtained corruptly and that the benefit consists of or is derived from all or part of the advantage, and
 - (4) the agent give his or her express or implied consent to receiving the benefit,
- the agent should commit an offence.⁹

“CORRUPTLY”

Corruptly conferring an advantage as an inducement

- 9.10 We recommend
- (1) that a person who confers an advantage, or offers or agrees to confer an advantage, should be regarded as doing so corruptly if he or she
 - (a) intends a person, in performing his or her functions as an agent, to do an act or make an omission, and
 - (b) believes that, if the person did so, it would probably be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it,

unless

 - (i) the advantage is conferred (or to be conferred) by or on behalf of the agent’s principal (or, in the case of functions performed for the public, on behalf of the public) as remuneration or reimbursement in respect of the performance of the functions, *or*

⁷ Para 5.53 above.

⁸ Para 5.58 above.

⁹ Para 5.61 above.

- (ii) the functions concerned are performed only for one or more principals (not the public), and each principal is aware of all the material circumstances and consents to the conferring of the advantage or the making of the offer or agreement;
- (2) a person should be treated as if he or she were aware of all the material circumstances, and consented to the conferring of the advantage or the making of the offer or agreement, if the defendant believes that that person
 - (a) is aware of those circumstances and so consents, or
 - (b) would so consent if aware of those circumstances; and
- (3) consent should count for these purposes if given on a principal's behalf by any agent of the principal, unless in giving it the agent performs his or her functions as an agent corruptly.¹⁰

Corruptly conferring an advantage as a reward

9.11 We recommend that a person who confers an advantage, or offers or agrees to confer an advantage, should be regarded as doing so corruptly if he or she

- (1) knows or believes that, in performing his or her functions as an agent, a person has done an act or made an omission,
- (2) knows or believes that that person has done the act or made the omission primarily in order to secure that a person obtains an advantage (whoever obtains it), and
- (3) intends the person known or believed to have done the act or made the omission to regard the advantage (or the advantage when conferred) as conferred primarily in return for the act or omission.¹¹

Corruptly obtaining or agreeing to obtain an advantage

9.12 We recommend that

- (1) a person who obtains an advantage should be regarded as obtaining it corruptly if he or she
 - (a) knows or believes that the person conferring it confers it corruptly, and
 - (b) gives his or her express or implied consent to obtaining it (in a case where he or she does not request it); and

¹⁰ Para 5.99 above.

¹¹ Para 5.109 above.

- (2) a person who agrees to obtain an advantage should be regarded as agreeing to obtain it corruptly if he or she knows or believes that the person agreeing to confer it agrees corruptly.¹²

Corruptly soliciting an advantage

- 9.13 We recommend that a person who solicits an advantage should be regarded as soliciting it corruptly if he or she
- (1) intends a person to confer it or agree to confer it, and
 - (2) believes that, if the person did so, he or she would probably do so corruptly.¹³

Corruptly performing functions as an agent

- 9.14 We recommend that a person who performs his or her functions as an agent should be regarded as performing them corruptly if he or she
- (1) does an act or makes an omission primarily in order to secure that a person confers an advantage (whoever obtains it), and believes that if the person did so he or she would probably do so corruptly, or
 - (2) does an act or makes an omission when he or she knows or believes that a person has corruptly conferred an advantage (whoever obtained it), and regards the act or omission as done or made primarily in return for the conferring of the advantage.¹⁴

TERRITORIAL JURISDICTION

- 9.15 We recommend that the new offences should be Group A offences for the purposes of the Criminal Justice Act 1993.¹⁵

ANCILLARY MATTERS

Requirement of the Attorney-General's consent

- 9.16 We recommend that prosecutions for the new offences should not require the consent of either the Law Officers or the Director of Public Prosecutions.¹⁶

Mode of trial

- 9.17 We recommend that the new offences should be triable either way.¹⁷

Retrospectivity

- 9.18 We recommend that the new offences should not have retrospective effect.¹⁸

¹² Para 5.118 above.

¹³ Para 5.120 above.

¹⁴ Para 5.122 above.

¹⁵ Para 7.15 above.

¹⁶ Para 7.26 above.

¹⁷ Para 7.28 above.

(Signed) MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
15 January 1998

¹⁸ Para 7.32 above.

APPENDIX A

DRAFT CORRUPTION BILL

INDEX

This index shows where in the report each substantive provision of the draft Bill is explained.

Clause of draft Bill	Paragraphs of report
1	5.45 – 5.50
2	5.51 – 5.53
3	5.54 – 5.58
4, 5	5.38 – 5.43
6(1)	5.67 – 5.85, 5.99
6(2)	5.100 – 5.109
6(3)	5.83 – 5.84
7(1), (2)	5.112 – 5.118
7(3)	5.119 – 5.120
8	5.121 – 5.122
9	5.15 – 5.37
10	5.86 – 5.87, 5.99
11	5.88 – 5.99
12	5.59 – 5.61
13	7.29 - 7.30
14	7.2 – 7.15
15	2.17 – 2.33

NOTE: For the reasons set out in paragraphs 1.21 and 1.22 of the report, the draft Bill does not expressly refer to MPs or Ministers.

Corruption Bill

ARRANGEMENT OF CLAUSES

Main offences

Clause

1. Corruptly conferring an advantage.
2. Corruptly obtaining an advantage.
3. Performing functions corruptly.

Conferring and obtaining

4. Meaning of conferring an advantage.
5. Meaning of obtaining an advantage.

Acting corruptly

6. Conferring an advantage: meaning of corruptly.
7. Obtaining an advantage: meaning of corruptly.
8. Performing functions: meaning of corruptly.

Agents and principals

9. Meaning of agent and principal.

Exceptions from offences

10. Remuneration or reimbursement: no corruption.
11. Principal's consent: no corruption.

Miscellaneous

12. Receiving benefit from corruption.
13. Penalties.
14. Jurisdiction.
15. Abolition of existing offences.

General

16. Repeals.
17. Commencement.
18. Extent.
19. Citation.

SCHEDULE:—

Repeals.

DRAFT

OF A

B I L L

INTITLED

An Act to make provision about corruption.

A.D. 1998.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5

Main offences

1. A person commits an offence if—

(a) he corruptly confers an advantage, or

(b) he corruptly offers or agrees to confer an advantage.

Corruptly
conferring an
advantage.

2. A person commits an offence if—

10 (a) he corruptly obtains an advantage, or

(b) he corruptly solicits or agrees to obtain an advantage.

Corruptly
obtaining an
advantage.

3. A person commits an offence if he performs his functions as an agent corruptly.

Performing
functions
corruptly.

Conferring and obtaining

15 4.—(1) A person confers an advantage if—

(a) he does something or he omits to do something which he has a right to do, and

(b) the act or omission is done or made in consequence of another's request (express or implied) or with the result (direct or indirect) that another benefits.

20

Meaning of
conferring an
advantage.

(2) An act or omission may be done or made in consequence of a person's request even if the nature of the act or omission, and the time it is intended to be done or made, are not known at the time of the request.

Meaning of obtaining an advantage.

5.—(1) A person obtains an advantage if—

- (a) another does something or he omits to do something which he has a right to do, and
- (b) the act or omission is done or made in consequence of the first person's request (express or implied) or with the result (direct or indirect) that the first person benefits.

(2) An act or omission may be done or made in consequence of a person's request even if the nature of the act or omission, and the time it is intended to be done or made, are not known at the time of the request.

Acting corruptly

10

Conferring an advantage: meaning of corruptly.

6.—(1) A person who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if—

- (a) he intends a person in performing his functions as an agent to do an act or make an omission, and
- (b) he believes that if the person did so it would probably be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it.

(2) A person who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if—

- (a) he knows or believes that in performing his functions as an agent a person has done an act or made an omission,
- (b) he knows or believes that the person has done the act or made the omission primarily in order to secure that a person confers an advantage (whoever obtains it), and
- (c) he intends the person known or believed to have done the act or made the omission to regard the advantage (or the advantage when conferred) as conferred primarily in return for the act or omission.

(3) For the purposes of subsection (1) the nature of the intended act or omission, and the time it is intended to be done or made, need not be known when the advantage is conferred or the offer or agreement is made.

(4) This section has effect subject to sections 10 and 11.

Obtaining an advantage: meaning of corruptly.

7.—(1) A person who obtains an advantage obtains it corruptly if—

- (a) he knows or believes that the person conferring it confers it corruptly, and
- (b) he gives his express or implied consent to obtaining it (in a case where he does not request it).

(2) A person who agrees to obtain an advantage agrees to obtain it corruptly if he knows or believes that the person agreeing to confer it agrees corruptly.

(3) A person who solicits an advantage solicits it corruptly if—

- (a) he intends a person to confer it or agree to confer it, and
- (b) he believes that if the person did so he would probably do so corruptly.

8.—(1) A person who performs his functions as an agent performs them corruptly if—

- (a) he does an act or makes an omission primarily in order to secure that a person confers an advantage (whoever obtains it), and
- 5 (b) he believes that if the person did so he would probably do so corruptly.

Performing functions: meaning of corruptly.

(2) A person who performs his functions as an agent performs them corruptly if—

- 10 (a) he does an act or makes an omission when he knows or believes that a person has corruptly conferred an advantage (whoever obtained it), and
- (b) he regards the act or omission as done or made primarily in return for the conferring of the advantage.

Agents and principals

15 9.—(1) A person is an agent, and another is his principal for whom he performs functions, if—

Meaning of agent and principal.

- (a) the first is a trustee and the second is a beneficiary under the same trust;
- (b) the first is a director of a company and the second is the company;
- 20 (c) each is a partner in the same partnership;
- (d) the first is a professional person (such as a lawyer or accountant) and the second is his client;
- (e) the first is an agent and the second is his principal (taking agent and principal in the sense normally understood by lawyers);
- 25 (f) the first is the employee of the second.

(2) If subsection (1) does not apply a person is an agent, and another is his principal for whom he performs functions, if there is an agreement or understanding between them (express or implied) that the first is to perform the functions for the second.

30 (3) A person is an agent performing functions for the public if the functions he performs are of a public nature.

(4) Subsection (3) has effect even if the person has no connection with the United Kingdom, and “public” is not confined to the public of the United Kingdom or of any part of it.

35 (5) A person may be an agent performing some functions for a principal and others for the public.

(6) As regards a given function, a person may be an agent performing it for a principal and the public.

Exceptions from offences

40 10.—(1) If—

- (a) an advantage is conferred or an offer or agreement to confer an advantage is made, and
 - (b) any of the following three conditions is satisfied,
- the advantage is not conferred corruptly or (as the case may be) the offer or
- 45 agreement is not made corruptly.

Remuneration or reimbursement: no corruption.

- (2) The first condition is that—
- (a) the functions concerned are performed only for a principal (and not the public), and
 - (b) the advantage is conferred (or to be conferred) by or on behalf of the principal as remuneration or reimbursement in respect of the performance of the functions. 5
- (3) The second condition is that—
- (a) the functions concerned are performed only for the public (and not a principal), and
 - (b) the advantage is conferred (or to be conferred) on behalf of the public as remuneration or reimbursement in respect of the performance of the functions. 10
- (4) The third condition is that—
- (a) some of the functions concerned are performed for a principal and others are performed for the public, or a given function is performed for a principal and the public, and 15
 - (b) each element of the advantage is conferred (or to be conferred) by or on behalf of the principal, or on behalf of the public, as remuneration or reimbursement in respect of the performance of the functions. 20
- (5) The functions concerned are the functions relating to the act or omission which is intended to be done or made, or is known or believed to have been done or made.
- (6) References to the public are not confined to the public of the United Kingdom or of any part of it. 25

Principal's
consent: no
corruption.

11.—(1) If—

- (a) an advantage is conferred or an offer or agreement to confer an advantage is made, and
 - (b) the following condition is satisfied,
- the advantage is not conferred corruptly or (as the case may be) the offer or agreement is not made corruptly. 30
- (2) The condition is that—
- (a) the functions concerned are performed only for a principal (and not the public), and
 - (b) the principal, or each of them if more than one, is aware of all the material circumstances and consents to the conferring of the advantage or the making of the offer or agreement. 35
- (3) A person is to be treated as if he were aware of all the material circumstances, and consented to the conferring of the advantage or the making of the offer or agreement, if the defendant believes that— 40
- (a) he is aware of those circumstances and so consents, or
 - (b) he would so consent if aware of those circumstances.
- (4) For the purposes of subsections (2) and (3) consent may be given on a principal's behalf by any agent of the principal, but it does not count if in giving it the agent performs his functions as an agent corruptly. 45

(5) The functions concerned are the functions relating to the act or omission which is intended to be done or made, or is known or believed to have been done or made.

Miscellaneous

- 5 **12.**—(1) If— Receiving benefit
from corruption.
- (a) an advantage is obtained corruptly by a person other than the agent concerned,
- (b) the agent receives a benefit which consists of or is derived from all or part of the advantage,
- 10 (c) the agent knows or believes that the advantage was obtained corruptly and that the benefit consists of or is derived from all or part of the advantage, and
- (d) the agent gives his express or implied consent to receiving the benefit,
- 15 the agent commits an offence.
- (2) The benefit may take any form and may be directly or indirectly derived.
- 13.** A person guilty of an offence under this Act is liable— Penalties.
- 20 (a) on conviction on indictment, to imprisonment for a term not exceeding [] years;
- (b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.
- 14.** In section 1(2) of the Criminal Justice Act 1993 (group A offences for purposes of provisions about jurisdiction) the following paragraph is inserted Jurisdiction.
1993 c. 36.
- 25 after paragraph (c)—
- “(cc) an offence under the Corruption Act 1998;”.
- 15.**—(1) The common law offence of bribery is abolished. Abolition of
existing offences.
- (2) The Public Bodies Corrupt Practices Act 1889 shall cease to have effect. 1889 c. 69.
- 30 (3) In section 1(1) of the Prevention of Corruption Act 1906 (offences relating to corrupt transactions with agents) the words from “If” to “business; or” (in the second place where the latter words occur) are omitted. 1906 c. 34.
- (4) Section 2 of the Prevention of Corruption Act 1916 (presumption of corruption for certain offences) is omitted. 1916 c. 64.
- 35 *General*
- 16.** The enactments mentioned in the Schedule are repealed to the extent specified. Repeals.
- 17.**—(1) Sections 1 to 16 and the Schedule apply in relation to acts or omissions done or made on or after the appointed day. Commencement.

(2) If an act or omission is alleged to have been done or made over a period of two or more days, or at some time in a period of two or more days, it must be taken for the purposes of this section to have been done or made on the last of those days.

(3) The appointed day is such day as the Secretary of State appoints by order made by statutory instrument. 5

Extent. **18.** This Act extends to England and Wales only.

Citation. **19.** This Act may be cited as the Corruption Act 1998.

SCHEDULE

Section 16.

REPEALS

Chapter	Short title	Extent of repeal
5	1889 c. 69. Public Bodies Corrupt Practices Act 1889.	The whole Act.
10	1906 c. 34. Prevention of Corruption Act 1906.	In section 1(1) the words from "If" to "business; or" (in the second place where the latter words occur). In section 1(2) the words " e x p r e s s i o n "consideration" includes valuable consideration of any kind; the".
15	1916 c. 64. Prevention of Corruption Act 1916.	Section 2. In section 4(3) the words from "and the" to the end.
20	1948 c. 65. Representation of the People Act 1948.	Section 52(7).
	1988 c. 33. Criminal Justice Act 1988.	Section 47(1).
	1995 c. x. London Local Authorities Act 1995.	In Part I of the Schedule, the entry relating to the Public Bodies Corrupt Practices Act 1889.

APPENDIX B

EXTRACTS FROM RELEVANT LEGISLATION

PUBLIC BODIES CORRUPT PRACTICES ACT 1889

1 Corruption in office a misdemeanor

- (1) Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor.
- (2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

2 Penalty for offences

- (1) Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted, –
 - (a) be liable
 - (i) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and
 - (ii) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both; and
 - (b) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and
 - (c) be liable to be adjudged incapable of being elected or appointed to any public office for five years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and

- (d) in the event of a second conviction for a like offence he shall, in addition for the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for five years of being registered as an elector, or voting at an election either of members to serve in Parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and
- (e) if such person is an officer or servant in the employ of any public body upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

3 Savings

- (1) ...
- (2) A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

4 Restriction on prosecution

- (1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.
- (2) In this section the expression “Attorney General” means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate ...

7 Interpretation

In this Act –

The expression “public body” means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom:

The expression “public office” means any office or employment of a person as a member, officer, or servant of such public body:

The expression “person” includes a body of persons, corporate or unincorporate:

The expression “advantage” includes any office or dignity, and any forbearance to demand any money or money’s worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or

agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

PREVENTION OF CORRUPTION ACT 1906

1 Punishment of corrupt transactions with agents

- (1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable –

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and
- (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.
- (2) For the purposes of this Act the expression “consideration” includes valuable consideration of any kind; the expression “agent” includes any person employed by or acting for another; and the expression “principal” includes an employer.
- (3) A person serving under the Crown or under any corporation or any ... borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2 Prosecution of offences

- (1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

PREVENTION OF CORRUPTION ACT 1916

2 Presumption of corruption in certain cases

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from [Her] Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

4 Short title and interpretation

- (1) This Act may be cited as the Prevention of Corruption Act 1916, and the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and this Act may be cited together as the Prevention of Corruption Acts 1889 to 1916.
- (2) In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression “public body” includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions.
- (3) A person serving under any such public body is an agent within the meaning of the Prevention of Corruption Act 1906, and the expressions “agent” and “consideration” in this Act have the same meaning as in the Prevention of Corruption Act 1906, as amended by this Act.

CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

34 Effect of accused’s failure to mention facts when questioned or charged

- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused –
 - (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

- (2) Where this subsection applies –

- (a) a magistrates' court inquiring into the offence as examining justices;
- (b) a judge, in deciding whether to grant an application made by the accused under –
 - (i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
- (c) the court, in determining whether there is a case to answer; and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above “officially informed” means informed by a constable or any such person.

(5) This section does not –

- (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
- (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

35 Effect of accused's silence at trial

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless –

- (a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

- (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
- (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.
- (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
- (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless –
 - (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
 - (b) the court in the exercise of its general discretion excuses him from answering it.
- (6) Where the age of any person is material for the purpose of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.
- (7) This section applies –
 - (a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;
 - (b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

38 Interpretation and savings for sections 34, 35, 36 and 37

- (1) In sections 34, 35, 36 and 37 of this Act –

“legal representative” means an authorised advocate or authorised litigator, as defined by section 119(1) or the Courts and Legal Services Act 1990; and

“place” includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

- (2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.
- (3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).
- (4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).
- (5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

- (6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

APPENDIX C

LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON THE CONSULTATION PAPER

Individuals

Mr Anthony Arlidge QC

Mrs Wendy Armitstead

Mr R V Ashman

Mr Cyril Brenner

Mr Justice Buxton (now Lord Justice Buxton)

Mrs Pat Bygramed

Judge David Clarke QC, Recorder of Liverpool

Judge Bruce Coles QC

Mr John Colthorp

Dr Stephen Cretney

Lord Davidson

Judge Rhys Davies QC, Recorder of Manchester

Judge Neil Denison QC, Common Serjeant of London

Judge Mark Dyer, Recorder of Bristol

Mr A C Farran

Mr J Flynn

Mr A S Foster

Professor Mark Freedland

Mr Justice Garland

Mrs Elizabeth Gaskell Syms

Mr John H Jeffrey

Mr Roger Jones

Mr Brian Leveson QC

Mr Justice Longmore

Mr E A Marsh

Mr Justice McCullough

Sheriff Iain McPhail QC

Mrs D Mitchell

Mr Frank Mitchell

Mr Justice Morison

Mr Colin Peters
Lord Justice Phillips
G R Poulton
Mr P Prankerd
Mrs Joan Mary Prescott
Mr D Rippen
Mr Norman Scarth
Mr Geoffrey Scriven
Mr Justice Sedley
Mr David Sheldon
Professor Sir John Smith CBE QC LLD FBA
Mr R S Smith
R E Spalton
Professor G R Sullivan
Mrs Janet Talbot
Mr James Tonelli
Mr Neville D Vandyk
Judge Walsh QC, Recorder of Leeds
Mrs M A Watts
Mr John Williams
An anonymous respondent

Organisations

Association of Chief Police Officers
Chartered Institute of Public Finance and Accountancy
Confederation of British Industry
Criminal Bar Association
Crown Office
Crown Prosecution Service
Department of Social Security, Solicitor's Office
Department of Trade and Industry, Business Law Unit
Employment Law Bar Association
Employment Appeal Tribunal
Financial Law Panel
General Council of the Bar
Greater Manchester Police
Hampshire Constabulary
HM Customs and Excise, Criminal Policy Unit
Inland Revenue

Institute of Chartered Accountants of England and Wales
Institute of Directors
Institute of Legal Executives
Joint Council of the Metropolitan and Provincial Stipendiary Magistrates
Justices' Clerks' Society
Kingfisher plc
Labour Group of Councillors, Borough of Reigate and Banstead
Law Society, Criminal Law Committee
Law Society, Employment Law Committee
Liberty
Lloyd's
London Criminal Courts Solicitors' Association
Magistrates' Association
Merseyside Police
Metropolitan Police, Company Fraud Department
Ministry of Defence Police
Newspaper Society
Office of the Judge Advocate General
Police Federation of England and Wales
Royal Town Planning Institute
Royal Ulster Constabulary
Securities and Investments Board
Serious Fraud Office
Transparency International (UK)
Trinidad and Tobago Law Commission