



Home Office

BRIBERY

Reform of the Prevention of
Corruption Acts and SFO Powers
in Cases of Bribery of Foreign
Officials

A Consultation Paper

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FOREWORD BY FIONA MACTAGGART, PARLIAMENTARY UNDER-SECRETARY OF STATE AT THE HOME OFFICE

Bribery, meaning the corrupt exchange of cash or favours, is rife in some countries. Constant vigilance is needed to ensure the UK maintains its high standards domestically and that UK Nationals and companies do not contribute to bribery overseas. The existing criminal offences of bribery are comprised of the common law and the Prevention of Corruption Acts 1889-1916, which have served their purpose well. But we believe the present law is fragmented and out of date and needs to be reformed, a view generally shared by stakeholders.

But the essence of the crime is difficult to define and there is no consensus as to what the new offences should look like. The Government's draft Corruption Bill of 2003, based on the Law Commission draft Bill of 1998, was criticised by the Joint Committee of both Houses of Parliament which gave the Bill its pre-legislative scrutiny. So we are now launching this consultation with stakeholders to see if an agreed way forward can be found.

The Government has already ensured the overseas application of the existing offences in the Anti-terrorism, Crime and Security Act 2001, which gave our courts jurisdiction over bribery overseas. That change in the law itself represented a positive step forward – and our aim always was to change attitudes and behaviour, not fill the courts. Nevertheless, we are conscious that a good deal of the criticism of the draft Bill came from those most exercised by the lack, up until now, of prosecutions in the UK using that new jurisdiction. In practice there are many impediments to successful prosecutions of acts which take place overseas, and we do not believe that clarity of the offences is a major factor. Having discussed with law enforcers what can be done, we make a proposal in this paper which would extend the powers of the Serious Fraud Office in such cases, in a way that should enhance the chances of prosecutions.

The Government retains an open mind on this issue as well as on the nature of the reform of the offences. Our aim is to find workable solutions which command wide assent, and we welcome comments from all.

SUMMARY

- 1.** In 1997 the Law Commission published proposals to modernise the Prevention of Corruption Acts 1889-1916 and to replace the common law of bribery.¹ Their scheme for new offences was based on preventing the harm that results from undermining the agency relationship – that is the relationship between anyone (any ‘agent’) who is employed by, or acts for, another person (his ‘principal’) or the public. Their scheme was generally welcomed and so their final report and draft Bill² stayed with it, subject to some modifications. The Government then set up a working group of stakeholders which met over the period 1998-2000, and they also found the basic proposals sound. The work of that group led to the Government White Paper on Corruption in June 2000³, which again elicited positive public responses on publication.
- 2.** However when the Government published a draft Corruption Bill based on the Law Commission proposals in 2003⁴ it was subject to severe criticism in pre-legislative scrutiny (PLS). The only major stakeholder who welcomed it was the Rose Committee (composed of senior judges) – otherwise even those who had previously supported the basic scheme were critical of it. The Joint Committee which gave the Bill its PLS recommended an entirely different approach to the formulation of the offences, which would have set aside the scheme based on the agency relationship⁵. Unfortunately – as the Government Response to the Joint Committee report made clear⁶ – their proposed approach would have raised more problems than it resolved, at least in relation to the private sector.
- 3.** It remains an option to introduce a Bill on the lines of that published in 2003. However there no longer seems to be a broad consensus on this way forward. The Government is therefore now offering alternative ways of modernising the offences and inviting comments from stakeholders, including all those who made comments to the Joint Committee, and members of the public. This paper also suggests a change to the operational powers of the Serious Fraud Office (SFO) to deal with cases of bribery of foreign officials. Views on any aspect of this paper are welcome but the specific questions on which views are sought are set out in Annex A. Any comments should be sent to the address at paragraph 67 by 1 March 2006. Any agreed changes would apply – as did the main provisions of the draft Corruption Bill – to England, Wales and Northern Ireland, but not to Scotland. This area of law is devolved and any review of it in Scotland is for the Scottish Executive to consider.

¹ Legislating the Criminal Code: Corruption [Consultation Paper No 145 (1997)]

² Legislating the Criminal Code: Corruption [Report No 248 (1998)]

³ Raising Standards and Upholding Integrity: the Prevention of Corruption (Cm 4759, 2000)

⁴ Corruption: Draft Legislation (Cm 5777, 2003)

⁵ Draft Corruption Bill: Report and evidence (HL Paper 157: HC 705, 2003)

⁶ Draft Corruption Bill; the Government Reply to the Joint Committee (Cm 6068, 2003)

BACKGROUND

The need for new legislation

4. In practice, cases of corruption are dealt with under a variety of charges, and in recent years there have been only about 25 prosecutions annually under the offences which the Bill would replace. If the law were clarified this figure might rise – CPS suggest it might be multiplied by 3 – but even so it will remain a relatively low figure in comparison with, for example, fraud.

5. Nevertheless, in terms of criminal law policy, the present fragmented state of the law is unsatisfactory, as is the lack of a clear definition of ‘corruptly’. Some law enforcers inform us that this is one of the main reasons why in practice other charges may be selected in preference to corruption. Moreover, the broad concept of ‘corruption’ has a high profile and there is particular concern about the bribery of foreign public officials in the course of business transactions. While the existing offences very clearly cover such behaviour, and the OECD Bribery Working Group has concluded that our law addresses the requirements of their Convention, they have also recommended that we enact new comprehensive legislation to tidy up the existing law⁷.

The current offences

6. The offences which the Bill seeks to replace are:

- the common law offence of bribery,
- the two offences in section 1 of the Public Bodies Corrupt Practices Act 1889,
- the first two offences in section 1 (1) of the Prevention of Corruption Act 1906.

7. All these offences address the gift or receipt of bribes (or corrupt advantages), but they differ in their application depending upon who is the recipient. The common law applies where the person who receives the bribe holds any public office; the 1889 Act applies where he is a ‘member, officer or servant’ of any local or public

authority and the 1906 Act applies where he is an ‘agent’ – which includes persons working in the private sector as well as persons serving under the Crown and other public authorities.

8. These offences were amended by the Prevention of Corruption Act 1916, which introduced the presumption of corruption. Section 2 of the 1916 Act provides that where money or any ‘consideration’ is received by a public official from a person seeking to obtain a public contract, it shall be presumed to have been corruptly received unless the contrary can be proved.

9. Important changes on the overseas application of the offences were made in Part 12 of the Anti-terrorism, Crime and Security Act 2001, which came into force on 14 February 2002:

- Section 108 put beyond doubt that the offences mentioned in paragraph 6 above apply to the bribery of foreign public office holders, including foreign MPs, judges, ministers and ‘agents’ (as defined by the Prevention of Corruption Act 1906). This change mainly clarified existing law. There is caselaw to show that the 1906 Act applied to the bribery of foreign officials prior to the 2001 Act⁸, and no reason to doubt that the common law also applied (though this had not been tested).
- Section 109 was the significant change of substance: it gave our courts jurisdiction over the offences in paragraph 6 when they are committed overseas by UK nationals or by bodies incorporated under UK law.

10. The law as it now stands is set out in Annex B. Its patchwork nature is clearly unsatisfactory and has led to problems (notably in the Natchi case⁹, where a prosecution brought against a Crown servant under the 1889 Act instead of the 1906 Act was overturned on appeal).

⁷ Paragraph 65 of OECD Phase 1 Bis report on UK (2003)

⁸ Raud (1989) Crim LR 809

⁹ (2002) 2 Cr App R 20

The existing proposals for reforming the offences

11. In summary, the draft Corruption Bill published in 2003 seeks to simplify the law by replacing these existing offences with 3 new ones:

- corruptly conferring an advantage,
- corruptly obtaining an advantage,
- performing functions corruptly.

12. The third offence would be, in effect, a new offence and would cover the situation where a person performs his duties in a way designed to secure a future corrupt reward, rather than as a result of any specific corrupt agreement.

13. All 3 offences would apply across both the public and the private sectors. They would apply (as does the Prevention of Corruption Act 1906) to the bribery of any ‘agent.’ This term would be widely defined to cover any person (an ‘agent’) who performs functions for another (his ‘principal’), and any person performing functions for the public. The Government agreed with the Law Commission that the essence of corruption (in the sense of bribery) is conduct which threatens the relationship of trust which exists between an agent and his principal¹⁰. While a holder of public office has no principal under the Bill, he is regarded as an agent performing functions for the public.

14. The Bill also seeks to define ‘corruptly’. For an advantage to be corruptly given, the giver would have to intend an agent to do an act or make an omission in performing his functions that was ‘primarily’ motivated by the advantage (clause 5). The agent would have to know or believe that the giver thought in this way (clause 9). There would be no corruption where the advantage was given by a person acting on behalf of the agent’s principal or of the public (clause 6). That provision ensures that ordinary salaries, bonuses and honours do not fall foul of the law. There would also be no corruption, as regards functions carried out in the private sector (only), if the advantage was received by an agent with the consent of his principal (clause 7). This is the crucial difference between the application of the law in the private as distinct from the public sector. In the public sector there is no defence of principal’s consent. Moreover, even in the private

sector, the consent of the principal of the advantage-giver makes no difference. The consent must be given by, or on behalf of, the principal for whom the functions which it is sought to influence are performed. Moreover, the principal’s consent does not count if it is given corruptly by an agent acting on the principal’s behalf [clause 7 (3)]. That means that it would be no defence for an employee to say the payment he received was authorised by, for example, a company director, if the director was involved in the corruption. However there would be no crime of corruption where a payment to a private sector agent (only) was properly authorised by his company. That is not a crime of corruption under the Bill, though it might, depending on the circumstances, constitute an offence under competition law.

15. The Bill repeals the presumption of corruption in the 1916 Act. The Law Commission recommended this repeal as the provision was no longer necessary in view of the introduction of sections 34 and 35 of the Criminal Justice and Public Order Act 1994. Section 34 allows the court to draw inferences if a defendant relies on a fact at trial which he did not put forward when he was questioned or charged. Section 35 allows the court to draw inferences from the failure of the defendant to testify or to answer any particular question. The Law Commission thought that the presumption might also, combined with the 1994 provisions, infringe article 6 of the ECHR¹¹. Since then the CPS have concluded that the risk of ECHR challenge is so great that they do not in practice rely on the presumption. It is therefore a dead letter in any case.

16. The Bill also seeks to implement a recommendation made in 1999 by the Joint Committee on Parliamentary Privilege¹², by setting aside parliamentary privilege in order to enable evidence of words or actions in Parliament to be led in evidence in proceedings for corruption offences (clause 12). It also provides for an authorisation process for the intelligence agencies if they wish to carry out operations in the course of which they may make payments which might otherwise be corrupt (clauses 15 and 16).

17. The Bill does not make any significant changes to the application of the law overseas, as the main measures which the Government

¹⁰ Paragraph 5.15 of the Law Commission report

¹¹ Paragraph 4.20 ff of the Law Commission report

¹² Paragraph 167 of HL Paper 43 and HC 214, 1999

thought necessary were taken in the 2001 Act (see paragraph 9). However it does contain two small changes in this respect:

- Clause 13 goes beyond the 2001 Act in conveying nationality jurisdiction not only for the substantive offences, but for the inchoate offences (attempts etc) associated with them.
- Clause 14 makes the new offences Group A offences for the purposes of the jurisdiction provisions in Part 1 of the Criminal Justice Act 1993. That means creating a clear statutory jurisdiction in any case where a ‘relevant event’ (such as the offer of a bribe) takes place in our territory. This change would not however add much in practice to the combined effect of the common law and the 2001 Act.

18. The Government has agreed some modifications to the published draft Bill, which flow from the recommendations of the Joint Committee which gave the Bill its pre-legislative scrutiny:

- Narrowing the scope of clause 12 on Parliamentary Privilege, so that it would apply only to the words or actions of an MP or peer in a case where he is the defendant.
- Replacing the requirement for the Attorney General’s consent (in clause 17) with a requirement for consent to be given by the DPP or a nominated deputy. We have since decided to add to that a power for consent to be given by the Director of the SFO, in view of the SFO’s lead role in foreign bribery cases.
- Limiting clause 15 (on authorisations for the intelligence agencies) to acts or omissions done or made in the interests of national security or preventing or detecting serious crime.

The Joint Committee’s alternative scheme

19. Apart from the changes mentioned above, the Joint Committee recommended a fundamentally different approach to the offences in its report. They proposed that a person should be guilty of acting corruptly if:

- he gives an improper advantage with the intention of influencing the recipient in the performance of his duties; or

- he receives an improper advantage with the intention that it will influence him in the performance of his duties.

They said ‘improper advantage’ could be defined as ‘advantage to which a person is not legally entitled’.

20. They proposed to abandon the ‘agency’ basis on which the Bill is constructed (and which underpins the existing law in the 1906 Act) because they thought that was too narrow. They said that the head of a company who bribes the head of another company not to bid for a contract should be guilty of an offence even though no agent was involved. They did not believe that this type of case was sufficiently covered by the Enterprise Act 2002.

21. The Government disagreed with this approach in its Response to the Committee. It argued that the Joint Committee’s scheme was superficially simpler, but at the expense of omitting any provision on several vital complex situations – notably on advantages given to third parties, and on performing functions corruptly in the hope of a reward. It would also pose greater operational problems – at least in the private sector – because it would cover advantages given independently of any agent-principal relationship. That would potentially criminalise a variety of situations which are at present not criminal, or are covered by other legislation – such as the Enterprise Act 2002. (If there are deficiencies in the 2002 Act, we think these should be addressed by re-examining that Act, rather than that corruption law should intrude into that area). The scope of the Joint Committee’s offences would have been subject to the caveat ‘improper’, but this crucial term was not defined in any convincing way. To define an ‘improper’ advantage as ‘an advantage to which a person is not legally entitled’ does not provide much assistance, as the concept of legal entitlement could be construed in many ways. Arguably a legal basis for an advantage could be provided by a simple agreement between the parties, which would represent a wide escape route from the offence. The need to prove intention on the part of the recipient also raises difficulties: the recipient of a bribe might argue that he did not intend to carry out his side of the bargain, and was therefore not guilty of any offence.

The crime of bribery/corruption in international law

22. There is a raft of international law which requires the criminalisation of corruption, in the sense of bribery, where the recipient works in the public sector. Conventions made by the OECD, Council of Europe and UN require the criminalisation of the giving or receiving of ‘undue’ advantages to or by holders of public offices of all kinds. (The giving of bribes is generally referred to as ‘active’ bribery, and their receipt as ‘passive’ bribery). The OECD and UN Conventions offer no guidance on the meaning of ‘undue’, while the explanatory report to the Council of Europe’s Convention states: “‘undue’ for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive.... The adjective ‘undue’ aims at excluding advantages permitted by the law or by administrative rules, as well as minimum gifts, gifts of very low value or socially acceptable gifts”. There is also an EU Convention and Protocol, both of which require the criminalisation of the giving or receiving of advantages to or by EU and Member State officials. They differ from the other Conventions in not referring to ‘undue’ advantages, but to ‘advantages of any kind whatsoever’ but add the requirement that the action should be ‘in breach of his official duties’.

23. International law on bribery within the private sector – often referred to as ‘private-to-private’ bribery – is less developed. In essence two Conventions (Council of Europe and UN), and a Framework Decision of the EU¹³ contain requirements for the criminalisation of the giving or receiving of undue advantages in the course of business activities for actions which represent a breach of duty. The provisions in the Conventions are in effect optional: reservations may be made on articles 7 and 8 in the Council of Europe Convention, and article 21 in the UN Convention only requires parties to ‘consider’ such an offence. The result is that many countries still do not have any offence of private sector corruption.

Action to meet international requirements

24. There is, in our view, no need for any new

provision to be drafted for this Bill to meet our international obligations. The Bill uses the concept ‘corruptly’ instead of ‘undue’, but the former cannot be said to be inconsistent with the latter, when the meaning of ‘undue’ is itself unclear. As regards the application of the offences in the private sector, we believe that the agent/principal concept, which is familiar from existing UK law, was recommended by the Law Commission and is used in other countries’ laws¹⁴, provides the basis for an offence which is clearer and tighter than, the breach of duty concept, which was specifically rejected by the Law Commission (in paragraphs 5.5- 5.10 of their 1998 Report). We thus comply with the EU Framework Decision through the 1906 Act, and would continue to comply with it through the draft Bill.

25. The Anti-terrorism, Crime and Security Act 2001 removed any doubts about the compliance of UK bribery law with the OECD Convention. The OECD Bribery Working Group, in their review of the law published in 2003, concluded that ‘UK law now addresses the requirements set forth in the Convention’. There is no requirement in the OECD, or any other, Convention to have a specific offence of the bribery of a foreign public official; indeed we think it undesirable to require proof of the ‘foreign’ status of the official as an ingredient of the offence, as that carries the risk of complications in marginal cases. The OECD Group are concerned that there have been no prosecutions using the powers in the 2001 Act. This however is not due to any doubts from law enforcers about the scope of the law, but may be related to operational difficulties in securing evidence in cases overseas, particularly in developing countries. While the success of any law is to be measured by changes in behaviour rather than in numbers of prosecutions, a proposal for enhancing the operational powers of the SFO to assist foreign bribery investigations is made below in Section B (paragraphs 52-58).

26. In their phase 2 report on the UK published in 2005, the OECD Bribery Working Group recommended that the UK should ‘broaden the level of person engaging the criminal liability of legal persons for foreign bribery offences’. That recommendation does not imply non-compliance

¹³ Council Framework Decision of 22.7.2003 on combating corruption in the private sector (Official Journal L 192/54-56, 31.7.2003)

¹⁴ In – at least – Ireland (Prevention of Corruption (Amendment) Act 2001); Cyprus (Prevention of Corruption Law, Cap 161); Belize (Prevention of Corruption Act, chapter 105); Canada (s 426 of the Criminal Code); Hong Kong (Prevention of Bribery Ordinance, chapter 201); Jamaica (Corruption (Prevention) Act 2001); Malaysia (Anti-Corruption Act 1997); Mauritius (Prevention of Corruption Act 2002); and Singapore (Prevention of Corruption Act, chapter 241).

with the OECD Convention, as it goes beyond its scope. Article 2 of that Convention requires only that each party should establish the liability of legal persons for the bribery of a foreign public official ‘in accordance with its legal principles’. This is already achieved. It is true that in practice legal persons have not been charged with criminal offences of corruption in the UK. But this is also the practical situation in most other countries. It seems that prosecutors generally prefer, in the case of crimes such as corruption, which involve mens rea (‘guilty mind’), to identify the responsible individuals and to bring charges against them. In any case we do not think it would be justifiable to alter the basic principles of corporate liability in our law solely in relation to bribery. The same principles apply, and should apply, consistently to all mens rea offences. If there is a case for a change of that kind the Corruption Bill is not the place for it.

27. It is worth noting here two other issues often associated with the OECD’s Bribery Working Group, though neither is a requirement of the OECD Convention:

(i) *Foreign subsidiaries*: Under our law a company can be held liable for the actions of a subsidiary overseas if, but only if, it could be proved there was authorisation, direction or active conniving by the parent company. There was pressure from some commentators that the UK should have jurisdiction over the actions of foreign companies overseas if they have UK owners. This proposal was not agreed by the Joint Committee because such behaviour would be subject to national law in the jurisdiction where it took place¹⁵. We agree, and do not think the question of ownership provides sufficient justification for taking jurisdiction over the acts overseas of a company registered abroad. We know of no country in the world which has such jurisdiction. If there is a problem, it requires an international solution. The OECD set up an expert group to consider this issue and they concluded there was no need for change to the OECD Convention.

(ii) *Facilitation payments*: This term refers to small payments given to officials in order to induce them to perform their functions, such as issuing licences or permits. According to the OECD’s Commentaries on the Convention, making such payments is not an offence under

the Convention. There is no exemption for facilitation payments under our law: the making of any payment would be an offence under our law, if corruptly made. However, given the need to be realistic about the situations that may be faced in some overseas countries, the following statement has been made, with the agreement of the Director of Public Prosecutions:

“We do not think it is desirable for UK law to apply differently overseas to the way it applies in the UK. We do not tolerate “facilitation payments” to UK officials. However it is difficult to envisage circumstances in which the making of a small “facilitation payment”, extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK. The making of such payments may well, however, be illegal under the law of the country concerned.”

28. There is no need for amendment to the law of bribery to enable the UK to ratify the UN Convention Against Corruption (though amendment to statute was needed as regards ‘instrumentalities’ of crime: the necessary provision has been made in section 95 of the Serious Organised Crime and Police Act 2005).

29. There are 2 changes in the draft Bill which will assist compliance with international law:

- It will plug an apparent gap in the 1906 Act regarding bribes paid to a 3rd party (eg a spouse) rather than the office holder himself. This is a minor issue for the OECD Bribery Group, but is not of practical importance as such cases can be dealt with on general principles on participation in crime.
- It contains changes to the civil law to enable the UK to ratify the Council of Europe Civil Law Convention on Corruption.

30. Also, the change to the law on Parliamentary Privilege (see paragraph 16) will meet a recommendation made by GRECO, the Council of Europe’s anti-corruption body, in their Round 1 Report on the UK. This is not an issue of compliance with international law, as GRECO’s recommendation relates to ‘soft law’ (the 20 Guiding Principles of the Council of Europe) and, in addition, GRECO has recognised that this recommendation goes beyond the requirements of the Guiding Principles¹⁶.

¹⁵ Paragraph 78 of Joint Committee’s report on Draft Corruption Bill (HL Paper 157: HC 705, 2003)

¹⁶ Fifth General Activity Report of GRECO (2004). GRECO (2005) 1E Final

ISSUES FOR CONSIDERATION

A: DEFINING THE OFFENCES

Terminology: Corruption or Bribery?

31. The Bill deals with the crime of corruption as known to our criminal law, which is in essence the crime of giving and receiving undue advantages. The concept of ‘corruption’ in common speech is much wider, extending to all forms of abuse of position for personal gain. It might help clarify the Bill’s place in our legislation and how it fits with other areas, such as misconduct in public office and offences under competition legislation, if the term ‘bribery’ was used for the offences of giving and receiving illicit advantages (that is, in terms of the Bill, the first 2 offences in paragraph 11 above). ‘Bribery’ is the term used in the common law, which covers the giving of ‘any undue reward’. The ‘reward’ need not be financial¹⁷. ‘Bribery’ is also the term used in international law – in the OECD Bribery Convention and in the relevant articles (2 -11) of the Council of Europe Criminal Law Convention on Corruption and of the UN Convention Against Corruption (articles 15, 16 and 21). The latter two Conventions use the term ‘bribery’ for the specific offences of giving and receiving undue advantages, but cover a wider range of ‘corruption’ offences overall – such as money laundering and accounting offences. Thus both UK and international law already use the term ‘bribery’ to describe offences which cover non-pecuniary advantages and apply to both giver and recipient. Moreover, international law differentiates between relatively narrow ‘bribery’ offences and a wider concept of ‘corruption’.

32. The counter arguments are that ordinary people normally think of ‘bribery’ in quite narrow terms – in particular, in terms of offers of money, whilst the offences will also cover non-pecuniary advantages. Also, that ‘bribery’ can be taken as implying the giver is the guilty party while the receiver plays a passive role, whilst the offences will apply to both parties. The Bill defines the offences in terms of acting ‘corruptly’. To redraft

them as bribery offences would require significant changes to be made to a number of clauses in the Bill. Whether the gain in clarity would justify this is a matter on which we would welcome views.

Q1: Do you think there are any real advantages in describing the crimes of giving and receiving illicit advantages as ‘bribery’ instead of ‘corruption’?

Leaving ‘corruptly’ undefined

33. The main arguments against the draft Bill, from the Joint Committee, concern its complexity and lack of accessibility to the ordinary citizen (and foreign law enforcers, who might need to consider the Bill’s provisions in translation). The main complexity of the Bill derives from defining the term ‘corruptly’, which has not been defined consistently or convincingly by the courts (see annex C). It can be argued that while the quest for certainty in the criminal law is desirable, it can become counter-productive if definitions become too complex. The Court of Appeal has said that ‘corruptly’ is an ordinary word, the meaning of which should cause a jury little difficulty’. (Though the Law Commission felt that the Court of Appeal were being ‘unduly optimistic’ in saying this¹⁸). Most foreign jurisdictions use the term ‘corruptly’ or ‘undue’ without defining them in statute and do not seem to have any particular problems. Instead they rely on caselaw, or administrative guidance, to interpret the terms. The Bill certainly would be radically simplified if it abandoned the attempt to define ‘corruptly’ – but that is arguably its main purpose, so this would be regrettable. In the absence of any such definition, the purposes of reforming the offences would be:

- to bring together, codify and simplify the existing provisions, precluding the possibility of future *Natchi* cases;
- to deal with the points mentioned in paragraphs 15-18 and 29.

¹⁷ This was established in the Bodmin case (1869) 10’M & H 121

¹⁸ Paragraph 4.17 of the Law Commission Consultation Paper of 1997

34. If this course were adopted, it seems preferable to retain the term ‘corruptly’ rather than ‘undue’ or ‘improper’. In our view there is little to choose between the three in terms of clarity, but caselaw gives some guidance on ‘corruptly’, at least in terms of what it does not cover, whilst the adoption of any new term would change the threshold for the offence in unforeseeable ways.

Q2: Do you consider that the Bill should be radically simplified by leaving the central concept (whether ‘corruptly’, ‘undue’, or ‘improper’) undefined?

Finding a simpler definition

35. An alternative course would be to seek a fairly simple way of defining the harm aimed at, without going so far as to leave it undefined. The criminal law has to steer between two opposing dangers: the first, that too much will be left open to interpretation; and the second, that the law will create a straitjacket which will create opportunities for arguing that particular cases fall outside it. In the case of Ghosh¹⁹, the House of Lords gave a relatively simple definition of ‘dishonesty’ which seems now to be widely accepted. The issue is whether a similar kind of test could be devised for corruption.²⁰

36. The Joint Committee considered (but did not recommend) an option under which the harm would be identified as an intention to corrupt or frustrate the proper functioning of (a) government and public services or (b) of a regulated market²¹. We do not think that is workable as it is at once too broad and too narrow. Too broad, in that it would cover crimes such as perverting the course of justice and offences under the Enterprise Act. Too narrow, in that it would not apply to bribes paid in other spheres – for example in education (eg to obtain a qualification) or sport (eg to influence a decision on a venue for an event). It also would not mesh with the requirements of the international conventions on corruption.

37. We share the Law Commission’s view that the essence of the specific crime of corruption (in the sense of bribery) lies in the subversion of the relationship of an agent to his principal, or to the public²². Starting from that point of view, an advantage may be considered:

- To be corruptly given when the intention is to influence an agent (including anyone exercising a public function) in the exercise of his duty. It should not matter if the intention is fulfilled or not, nor who receives the advantage;
- To be corruptly received when the recipient knows or suspects that it is given to him with this intention.

We would add the caveat that in the private sector an advantage is not corruptly given or received if the agent’s principal agrees to it. However while this describes the harm we doubt if it gives us a workable simple definition of it – but rather leads us back to the draft Bill.

Q3: Have you any suggestion for a simple definition of the central harm?

Separate offences for public and private sectors

38. A lot of the complexity, and misunderstandings, of the Bill result from the policy of introducing offences that cover both the public and private sectors. The Law Commission took the view that there would be substantial advantages in abandoning the public-private distinction²³. However, and for convincing reasons, they did not abandon it entirely and so even as the Bill stands there is one major difference between the way the offences apply in the sectors: that is that the defence of ‘principal’s consent’, although necessary in the private sector, does not apply in the public sector. Although the Bill clearly states this, some critics fail to appreciate this fact: which suggests that having offences that cover both sectors, but with differences in the way they apply, can be confusing.

¹⁹ Ghosh (1982) QB 1053

²⁰ We do not intend that a requirement of ‘dishonesty’ should be included in the law of corruption. The courts have made clear it is not a requirement of the existing law (see Annex C), and the idea of introducing it has already been discussed and rejected. The Law Commission recommended against it because the corruption offence might then fail to catch those who engage in corrupt practices but claim they are normal practice (5.134 of Law Commission report). The Joint Committee also did not recommend using the term, accepting the difficulties of relying on it (69 of Joint Committee report).

²¹ Paragraphs 82-84 of the Joint Committee report.

²² Paragraph 5.15 of the Law Commission report

²³ Paragraph 3.34 of the Law Commission report

39. A radical alternative approach would be to make a complete split between public and private sector offences. If so, the private sector offences could follow the scheme in the draft Bill (subject to views on the ‘primarily’ issue discussed below). We believe that the agent-principal relationship provides a strong workable basis for the offences in the private sector. Cheating on your principal (as Lord Falconer described it²⁴) is the underlying concept of the 1906 Act, which has operated successfully for nearly a century while many other countries have struggled to enact any comprehensive law for private sector bribery. The right context for deciding in which circumstances payments between principals should be illegal is in commercial law, including competition law.

40. Offences that apply only to the public sector could broadly resemble the approach of the Council of Europe’s Convention (see paragraph 22 above): that is, any giving or receipt of an advantage would be criminal unless it was specifically authorised by the law (meaning primary or secondary legislation). The term ‘improper’ or ‘undue’, if defined clearly, could also be used instead of ‘corruptly’.

41. However, we do not believe that the definition should stop there, or it would criminalise the acceptance by holders of public office of such advantages as low level corporate hospitality or small gifts on formal occasions. Civil Servants, for example, are able to do so to the limited extent permitted by the staff handbooks drawn up under the Civil Service Management Code. We think therefore that, as well as advantages specifically authorised by the law, holders of public office should be able to accept advantages authorised by their terms and conditions of employment. A reference to such rules in the Bill would place a lot of weight on them and might increase pressure to put them on a statutory basis, so as to ensure that they contain essential safeguards. However, since such documents are subject to the Freedom of Information Act, which covers all public authorities, this should be sufficient to ensure this through public scrutiny and accountability.

42. The Civil Service Management Code says ‘Departments and Agencies must inform staff..... of the circumstances in which they need to report offers of gifts, hospitality, awards, decorations and

other benefits and of the circumstances in which they need to seek permission before accepting them’. The requirement to report such advantages provides some assurance, if not a guarantee, of probity. (Once the receipt of an advantage has been reported, a decision can be made on whether or not it should be accepted/retained.)

43. One way to ensure that this kind of requirement becomes standard in all codes for public staff would be to make provision in the Bill to say that an advantage, even if in accordance with the official’s terms and conditions of employment, will still be considered ‘undue’ unless it is declared. This would be a very big step to take as it would mean rolling out a declaration requirement across the public sector and that does not seem justified simply as an indirect consequence of criminal law reform. In addition, this approach might raise difficult issues of mens rea as regards the giver of the advantage. He may be assumed to know that officials cannot accept gifts of any substance, but he clearly cannot know if a declaration has been made. His offence could be based on his intention to influence the official in the exercise of his functions, though this has the disadvantage of creating a substantial mismatch between the mens rea of the giver and the receiver.

44. Perhaps a better option therefore might be to couple any reference to such codes for the public sector with a de minimis threshold, below which the criminal law would not apply. The main problem with the de minimis approach, which was considered and rejected by the Law Commission, is that even a small advantage can be significant – eg in a poor country, or when it is part of a series of repeated transactions. And it might be invidious to set a specific threshold. But in general, as the Law Commission noted²⁵, the fact that a gift was of small value will suffice to demonstrate that it was not meant as an inducement. And if the ‘small value’ requirement was used in conjunction with a reference to internal codes, it could serve as a useful limitation.

45. There is at least a theoretical problem in that foreign officials may have laxer regimes about gifts. However, US law allows a defence to bribers that the advantage they gave was in accordance with local law, and we understand that has never been successfully invoked. The reality seems to be that officials everywhere are, at least in principle, forbidden to accept advantages of such value that

²⁴ In his oral evidence to the Joint Committee on the Bill, at Ev 79.

²⁵ Paragraph 5.143 of the Law Commission report

they may be considered by law enforcers to merit prosecution.

46. One main advantage of this overall approach would be that we could dispense with the concept of the public official as an agent, which some find disturbing. The main problem is that it would place a lot of weight on the separation between private and public, and this borderline is in practical terms becoming increasingly blurred, with movement of persons and functions between the sectors. But this problem is already inherent in the Bill, to a significant extent, in view of the way ‘principal’s consent’ is (and in our view must be) dealt with. It is also inherent in the Human Rights Act 1998, and the case law is developing dynamically in that context, though it is throwing up some significant anomalies. It can be argued that we should not focus on the inevitable difficulties presented by borderline cases when there is a recognisable difference between the standards we expect, as regards receiving gifts, from those who clearly exercise essential public functions (such as prosecutors), as compared with those clearly in the private sector (such as salesmen). This difference is also reflected in the common law of misconduct in a public office, which also only applies to those exercising public functions.

Q 4: Do you consider that the Bill should be redrafted so as to separate out offences applicable in the public sector from those which apply in the private sector?

If so, should it provide:

(i) that any giving or receipt of an advantage by a person exercising a public function would be criminal unless it was specifically authorised by the law or both of small value and in accordance with the official’s terms and conditions of employment; if so, is any further qualification needed to this (eg an additional requirement of declaration)?

(ii) that any giving or receipt of an advantage by an agent in the private sector should be criminal in the circumstances set out in the draft Bill?

Introducing the Bill as it stands

47. As noted at the outset, it remains an option to introduce the draft Bill as published in 2003, subject to those changes which flow from the

recommendations of the Joint Committee set out in paragraph 18. We believe that the Bill is sound in terms of law, covers all that it needs to, and ensures there is no great discrepancy between the public and private sectors. While its provisions may be complex, it provides a definition of ‘corruptly’ whose ‘apparent intricacy should evaporate as soon as the abstract definition is translated onto the facts of a specific case’²⁶. It thus avoids many of the difficulties to which other options give rise.

48. There is however a new proposal for change to the Bill on which we would be grateful for views, which is discussed below. (Responses to Question 1, on terminology, discussed in paragraphs 31-32, will also be taken into account in this context).

Q5: Do you consider that the best course is to introduce the Bill as it stands, subject to the changes agreed in the light of the Pre-Legislative Scrutiny?

Replacing ‘primarily’ test

49. In the Law Commission’s scheme, a main ingredient in defining ‘corruptly’ is that the advantage must be designed to be the primary factor in motivating the decision which the briber seeks to influence. The Law Commission argued that most commercial enterprises are constantly trying to bring in business and that this involves influencing agents of other firms, and the criminal law would go too wide if it was defined simply in terms of an intention to influence²⁷. They therefore proposed the ‘primarily’ test, which would permit reasonable levels of corporate hospitality, but still catch any truly corrupt behaviour which merited prosecution.

50. This test proved controversial, particularly in relation to bribery in the public sector, which is the main area of public concern. Some commentators suggested that the ‘primarily’ criterion is not in line with international law. That is difficult to demonstrate as international law requires the criminalisation of ‘undue’ payments and in the absence of any definition of ‘undue’ one cannot say that it does not mean, for example, ‘excessive’ payments or that it precludes a ‘primarily’ test. However it clearly can be argued that if an advantage plays any part in an official’s decision – however small – that should be an

²⁶ Criminal Bar Association, evidence to the Joint Committee, Ev 155.

²⁷ Paragraph 5.74 of the Law Commission report.

offence, as it arguably is now. It may also be difficult in practice for the prosecution to prove that the advantage was intended as the primary factor, whether in the public or private sectors. The Law Commission accepted that the test might seem difficult to apply, but said the difficulty would only arise in the case of corporate hospitality and similar advantages, as in practice an advantage must be intended to create an illegitimate influence unless it involved some form of interaction between donor and recipient²⁸.

51. We agree with the Law Commission that there should be some form of qualitative test if law enforcers are to target behaviour which is truly criminal and not catch (relatively) innocent everyday practices. However we invite views on whether to replace ‘primarily’ with a term which sets a lower threshold for the offence (as it applies to both public and private sectors). One possibility is the term ‘substantially’, which case law has established covers any factor which is more than de minimis. The disadvantage of this approach is that it might not overcome criticism from the international angle yet might also prove unwelcome to the private sector, as it would broaden the scope of the proposed offence and might be seen as calling into question some everyday commercial practices.

Q6: Do you think that in defining ‘corruptly’ we should replace ‘primarily’ with ‘substantially’?

B: SERIOUS FRAUD OFFICE POWERS

Enhancing SFO powers in foreign bribery cases

52. We have re-considered the issue of whether any new operational powers are needed to tackle the bribery of foreign officials, in view of the absence of prosecutions since 2002. The Law Commission's 1998 report considered the powers available for the investigation of corruption and concluded that, in the absence of sufficient justification as to why corruption cases should be treated exceptionally, the powers of the police should not be extended (paragraph 6.29 of their report). The Commission did not however specifically consider overseas corruption, which has grown as an issue since 1998.

53. The SFO plays the lead role in vetting allegations of bribery by UK nationals and companies of foreign officials where the behaviour (as it normally does, in any serious case) involves fraud. They report that this type of bribery is more difficult to assess than their other, domestic cases because in the latter SFO are picking up allegations already investigated by the police, DTI or other domestic regulator, where their decision can be made on the basis of the material already gathered. Also in domestic cases SFO can research open sources. Conversely, the foreign jurisdictions involved in bribery cases are frequently unable or unwilling to be of much assistance. Moreover, it is a consideration that the buck stops with the SFO on foreign bribery cases: no other agency is likely to pick up any case the SFO leaves aside. For these reasons foreign bribery allegations are particularly difficult to assess at the early stages, and the role of the SFO is crucial.

54. The SFO has powers under section 2 of the Criminal Justice Act 1987 to compel the production of documents and explanations of them. Section 2 lays down that these powers shall be exercisable 'only for the purposes of an investigation under s 1 above'. That means that the Director of the SFO is required to decide first that there should be an investigation, which he can only do, under section 1 (3) if an offence 'appears to him on reasonable grounds to involve serious or complex fraud'. In practice the Director sets a fairly high hurdle for taking such decisions. Having decided to investigate an offence under s 1, he is then able to exercise the section 2 powers

'in any case in which it appears to him that there is good reason to do so' (section 2(1)).

55. This means that at the vetting stage – when it is not clear whether a section 1 investigation is justified – the powers cannot be used. The SFO say that if the law were changed so that, at the vetting stage, they were able to require suspect companies to provide financial information in relation to specific transactions that would dramatically shorten their inquiries and overcome the problems that both Government agencies and the companies themselves face when allegations are made which are difficult either to substantiate or refute, and which consequently hang fire for a long period. The powers can only be exercised in relation to material in the UK, but the SFO have found that in practice evidence can be found in the UK. The exercise of the section 2 power in these new circumstances would also entail that the destruction of any relevant material becomes an offence under section 2(16) of the 1987 Act.

56. In practice SFO find that individuals who have information on corruption cases wish to have section 2 notices served on them because they believe that unless they can say they were compelled by section 2 to answer questions they risk being sued or losing their jobs. They cite the Data Protection Act, duties of confidence and contractual obligations as reasons given for not wanting to provide information voluntarily. In fact, the Public Interest Disclosure Act 1998 protects whistleblowers ordinarily resident in the UK who have good grounds for believing that a crime has occurred and report it in good faith to the Director of the SFO, who is a person prescribed to receive disclosures in cases involving serious or complex fraud under section 43F of the Employment Rights Act 1996. There is no limit to the compensation available under this Act. Any contractual duties of confidentiality would be void, by virtue of section 43J of the 1996 Act, for the purposes of such reports to the SFO. SFO do inform individuals of these provisions (and free and independent advice on these issues is available from the whistleblowing charity, Public Concern at Work). However there remain problems where the individuals doubt whether what they are alleging involves 'serious or complex fraud'. Moreover some individuals and third party institutions (such as banks) may simply prefer to be compelled to provide information.

What the change would look like

57. The SFO's remit is fixed by section 1 (3) of the 1987 Act, quoted in paragraph 54. The proposal is that the extension will apply only where the offence involves the corruption (bribery) of a foreign public official. The reference would need to be to the relevant new offence which replaces the 'active' bribery provisions of the Prevention of Corruption Acts and the common law of bribery. We do not wish to confine the new power to cases where the bribery takes place overseas. There have been allegations that foreign officials have been bribed in the UK, in respect of contracts with foreign governments, and these are equally difficult to investigate. Equally the new power would not be confined to bribery by UK nationals and companies: if the bribery takes place in the UK, our courts have jurisdiction over any offender, and so should the SFO.

58. It may be argued that the change would give scope for the SFO to investigate allegations on flimsy evidence (perhaps merely media reports possibly deriving from malicious allegations by competitors). However the extended powers envisaged would still require the Director of the SFO to suspect that the case involved corruption (bribery) of a foreign public official, rather than that it appeared to him to actually involve a relevant offence. The extended powers will thus resemble those recently enacted for certain serious and organised crime offences under section 62 of the Serious Organised Crime and Police Act 2005. Also, the exercise of the power would be subject to judicial review, which should ensure that it is not used in an inappropriate way.

Q7: Do you agree that the law should provide that where in the view of the Director of the SFO there are reasonable grounds for suspecting that a case involves the corruption (bribery) of a foreign public official, then the powers under section 2 of the Criminal Justice Act 1987 (to compel the production of documents and explanations of them) will also be available for the purposes of determining whether an investigation should be undertaken?

REGULATORY IMPACT ASSESSMENT

Changes in substantive law

Public sector

59. The main aim of this exercise is to clarify and codify the law, rather than to extend its scope. No increases in penalties are proposed. As noted in paragraph 4, prosecutions for the offences that would be replaced by the Bill are infrequent, but there seems to be some displacement of corruption cases, so that they are dealt with under other charges. In so far as the new offences should be easier to use, they may be used more, but the extra cases would be mainly those currently dealt with under other charges. We would expect the criminal justice system to make some marginal efficiency savings through the new law, but the effect would be minimal as we expect the number of cases will remain relatively small (under 100 per year).

Private sector

60. There may be some initial compliance costs for business, in adapting existing guidance to staff. However the basic messages remain unchanged. Policy statements such as these (from an actual example) remain entirely valid under any of the options above:

- Our company will never offer, pay, solicit, or accept bribes in any form, either directly or indirectly.
- Any demand for or offer of a bribe must be rejected and reported immediately to line management.

61. In our view all of the options for changes in substantive law bring marginal benefits but are effectively cost-neutral.

Changes in SFO powers

Public sector

62. Extra costs will arise for SFO from a slightly increased workload but the SFO can absorb these, as they anticipate serving only about 3 or 4 section 2 notices per year at the vetting stage, and that the result might be perhaps one additional full-scale investigation and prosecution per year. That has some small but we think negligible effects on court and legal aid costs. There will be some overall saving in that the new powers should cut the duration of the uncertainty about whether there should be an investigation or not, which will benefit all concerned (including government departments and any innocent company). In relation to all their cases, the SFO issued 1173 Section 2 notices in 2004-5. They worked on 94 cases in that period. The number of allegations of overseas bribery is relatively small – a total of only 50 such allegations has been made since 2002 and we understand the number of credible allegations is much smaller than that.

63. We do not expect that the change will place any significant burden on commercial interests. SFO estimate the average cost to a company of complying with a section 2 order to be about £200, so the cost to any innocent company should be negligible.

64. In our view the change to SFO powers creates only minor additional costs which can be readily absorbed within existing budgets.

Q8: Will your organisation/authority face any extra costs under any of the proposals mentioned in this paper?

Issues of equity and fairness

65. We do not think any of the options mentioned above impact differentially on individuals within the population according to their ethnicity, religion, nationality or gender. Clarification of the offences so that they can be more easily understood can only benefit all who wish to act within the law.

66. It could be argued that the change in SFO powers will disproportionately affect companies doing business overseas. However, in view of what is said in paragraph 53, our view is that the change aims at correcting a current imbalance in enforcement possibilities: as things stand, enforcers are unable to investigate foreign bribery cases as thoroughly as they can investigate domestic cases.

HOW TO SUBMIT COMMENTS

67. Comments should be sent by 1 March 2006 to:

**Bribery Consultation
Criminal Law Policy Unit
Home Office
2nd Floor Fry
2 Marsham Street
London
SW1P 4DF**

**Email: bribery@homeoffice.gsi.gov.uk
Fax: 0870 336 9141
Tel: 020 7035 6984**

68. The information you send us may be passed to colleagues within the Home Office, the Government or related agencies. Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

69. If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

70. Please ensure that your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be

included in any statistical summary of numbers of comments received and views expressed.

71. The Department will process your personal data in accordance with the DPA – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation Coordinator

72. If you have any complaints or comments about the consultation process, you should contact the Home Office consultation coordinator by email at:

bruce.bebbington@homeoffice.gsi.gov.uk

Alternatively, you may wish to write him:

**Bruce Bebbington
Consultation Coordinator
Performance and Delivery Unit
Home Office
3rd Floor Seacole
2 Marsham Street
London
SW1P 4DF**

ANNEX A

List of specific questions on which views are sought

Q1: Do you think there are any real advantages in describing the crimes of giving and receiving illicit advantages as ‘bribery’ instead of ‘corruption’? (paragraphs 31-32).

Q2: Do you consider that the Bill should be radically simplified by leaving the central concept (whether ‘corruptly’, ‘undue’, or ‘improper’) undefined? (paragraphs 33-34).

Q3: Have you any suggestion for a simple definition of the central harm? (paragraphs 35-37).

Q4: Do you consider that the Bill should be redrafted so as to separate out offences applicable in the public sector from those which apply in the private sector?

If so, should it provide:

(i) that any giving or receipt of an advantage by a person exercising a public function would be criminal unless it was specifically authorised by the law or **both** of small value and in accordance with the official’s terms and conditions of employment; if so, is any further qualification needed to this (eg an additional requirement of declaration)?

(ii) that any giving or receipt of an advantage by an agent in the private sector should be criminal in the circumstances set out in the draft Bill? (paragraphs 38-46).

Q5: Do you consider that the best course is to introduce the Bill as it stands subject to the changes agreed in the light of the Pre-Legislative Scrutiny? (paragraphs 47-48).

Q6: Do you think that in defining ‘corruptly’ we should replace ‘primarily’ with ‘substantially’? (paragraphs 49-51).

Q7: Do you agree that the law should provide that where in the view of the Director of the SFO there are reasonable grounds for suspecting that a case involves the corruption (bribery) of a foreign public official, then the powers under section 2 of the Criminal Justice Act 1987 (to compel the production of documents and explanations of them) will also be available for the purposes of determining whether an investigation should be undertaken? (paragraphs 52-58).

Q8: Will your organisation/authority face any extra costs under any of the proposals mentioned in this paper? (paragraphs 59-64).

ANNEX B

THE EXISTING OFFENCES OF BRIBERY (CORRUPTION)

(As they apply in England, Wales and Northern Ireland following amendment by the Anti-terrorism, Crime and Security Act 2001 with effect from 14 February 2002).

The Common Law

Russell on Crime provides a general definition of the common law:

“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.”

Note: As regards its international extension, see Section 108 of the 2001 Act below.

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 misdemeanor.

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 of 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 to 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) (repealed)

(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 General for England, and as respects Scotland means the Lord Advocate.

5. *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, **and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above.**

The expression "public office" means any office or employment of a person as 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.

(4) For the purposes of this Act it is immaterial if –

(a) the principal’s affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom;

(b) the agent’s functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.

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.

(2) (repealed)

(3) Every information for an offence under this Act shall be on oath.

(4) and (5) (repealed)

(6) Any person aggrieved by a summary conviction under this Act may appeal to the Crown Court.

Prevention of Corruption Act 1916

1. *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 (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 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. *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 (including authorities existing in a country or territory outside the United Kingdom).

(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.

Anti-Terrorism, Crime and Security 2001

108 Bribery and corruption: foreign officers etc

(1) For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with

the United Kingdom and are carried out in a country or territory outside the United Kingdom.

Note: sections 108 (2) to (4) of the 2001 Act amend the Prevention of Corruption Acts 1889-1916 as shown above in bold.

109 Bribery and corruption committed outside the UK

- (1) This section applies if –
 - (a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and
 - (b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).
- (2) In such a case –
 - (a) the act constitutes the offence concerned, and
 - (b) proceedings for the offence may be taken in the United Kingdom.
- (3) These are corruption offences -
 - (a) any common law offence of bribery;
 - (b) the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (c. 69) (corruption in office);
 - (c) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c. 34) (bribes obtained by or given to agents).
- (4) A national of the United Kingdom is an individual who is –
 - (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen,
 - (b) a person who under the British Nationality Act 1981 (c. 61) is a British subject, or
 - (c) a British protected person within the meaning of that Act

110 Presumption of corruption not to apply

Section 2 of the Prevention of Corruption Act 1916 (c. 64) (presumption of corruption in certain cases) is not to apply in relation to anything which would not be an offence apart from section 108 or section 109.

(Note: This is not to be relied upon as a definitive legal text).

ANNEX C

THE MEANING OF ‘CORRUPTLY’ IN EXISTING LAW

English caselaw

1. The Law Commission discussed the problems with the existing case law on the meaning of ‘corruptly’ in section 2 of their 1998 Report. They said there are two competing strands of judicial interpretation: ‘on the one hand, it describes an act which the law forbids as tending to corrupt, and on the other a dishonest intention to weaken the loyalty of an agent to his principal’. (This paper adopts the Law Commission analysis, though it may be noted that the number of strands seems open to debate: in his evidence to the Joint Committee, Mr Justice Silber stated that there are ‘probably six different conflicting judicial interpretations’²⁹).
2. The caselaw in the first strand derives from *Cooper v Slade* (1857) (6 HL Cas 746; 10 ER 1488). This was a case concerning bribery at elections under the Corrupt Practices Act 1854, and the House of Lords held that ‘corruptly’ did not mean dishonestly, but ‘purposely doing an act which the law forbids as intending to corrupt [voters]’. The Court of Appeal followed this broad approach in *Smith* ([1960] 2 QB 423), a case on the 1889 Act, in which the defendant claimed to have offered a bribe with a view to exposing corruption. Lord Parker held that “‘corruptly’ here used denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.” The defendant’s motive was irrelevant. Lord Parker recognised that this construction arguably rendered the term redundant, but suggested that even if this were so in the cases involving inducements, the word might have an independent function in the case of rewards.
3. The second strand of caselaw derives from the case of *Lindley* [(1957, Crim LR 321)], in which the defendant was charged under the 1906 Act with bribing the agents of a company in connection with the award of a contract for the supply of peas. In that case ‘corruptly’ was interpreted as a dishonest intention ‘to weaken the

loyalty of the servants to their master and to transfer that loyalty from the master to the giver.’ This was followed in the case of *Calland* [(1967 Crim LR 236)], in which the defendant, an inspector of a life assurance company, was charged under the 1906 Act with rewarding an agent of the Department of Social Security for keeping him informed about the names and addresses of parents of new-born children. The court held that ‘corruptly’ meant ‘dishonestly trying to wheedle an agent away from his loyalty to his employer’.

4. This second strand of caselaw has been specifically disapproved in 2 cases, both of which concerned the 1906 Act. First in *Wellburn* [(1979) 69 Cr App R 254], the Court of Appeal followed *Cooper v Slade* and approved the trial judge’s direction, which was:

“Corruptly” is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word, and it means purposefully doing an act which the law forbids as tending to corrupt.’

5. Secondly – and since the Law Commission report – there was the case of *Harvey* [(1999) Crim L R 70 CA]. In *Harvey* the defendant was a ‘relationship officer’ with a bank, responsible for a number of commercial accounts, who received financial inducements to show favour in the management of the bank’s affairs towards one of these customers. On appeal the defence argued that ‘corruptly’ involves an element of dishonesty. The Court of Appeal however confirmed that dishonesty is not an element of the term ‘corruptly’. They also approved the direction of the trial judge that:

“corruptly” means purposely, deliberately doing an act, here the giving and acceptance of money, which the law forbids as tending to corrupt.’

6. *Harvey* was applied in another recent case [*Godden-Wood* (2001) Crim LR 810 CA] where the Court of Appeal also made clear that the same test applied whether within the public or private sectors.

²⁹ Paragraph 7 of Ev 98 of the Joint Committee report.

Other jurisdictions

7. The term is used in the USA's Foreign Corrupt Practices Act 1977 and the US courts have said that: 'An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end and result by some unlawful method or means' [US v Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991)].

8. We understand (subject to any recent changes of which we are unaware) that the term is also used in (at least):

- Australia (in section 87 of Queensland's criminal code; also in Tasmania and Northern Territory);
- Belize (Prevention of Corruption Act – Chapter 105);
- Canada (Sections 119 – 120 and 426 of the Canadian Criminal Code);
- Cyprus (Prevention of Corruption Law – Cap 161);
- Ireland (Sections 2 and 4 of the Prevention of Corruption (Amendment) Act 2001). The Irish courts have followed the English case law from Smith;
- Jamaica (Corruption (Prevention) Act 2001);
- Malaysia (Anti-Corruption Act 1997);
- New Zealand (Crimes Amendment Act 2001. The New Zealand courts have adopted the English case law [see R v MacDonald (1993) 3 NZLR 354]) and
- Singapore (Prevention of Corruption Act, chapter 241).

ANNEX D

List of Consultees

Comments are welcome from anyone but copies of this paper have been sent to the following bodies and individuals in view of their previous or anticipated interest.

Members of the Joint Committee on the Draft Corruption Bill

All those who commented to the Joint Committee or to Home Office at that time, namely:

Public Concern at Work

Transparency International

Corner House

Criminal Bar Association

Serious Fraud Office

Crown Prosecution Service

Association of Chief Police Officers

Confederation of British Industry

Newspaper Society

Audit Commission

Financial Services and Markets Legislation City Liaison Group

Association of British Insurers

Investment Management Association

Lord Rose's Committee

Bob McKittrick
(Institution of Structural Engineers)

Prof Sir William McKay
(former Clerk of Commons)

Mr Justice Stephen Silber

Harry Evans (clerk of the Senate, Australia)

Clerk of the House of Commons

Clerk of the Parliaments

Khawar Qureshi

Export Credits Guarantee Department

Drago Kos (chairman of GRECO)

Pricewaterhousecoopers

George Staple

Denis Gedge
(Institute of Civil Engineering Surveyors)

Committee on Standards in Public Life

Chairman of House of Lords Committee on the Constitution

OECD Bribery Working Group Secretariat

Mark Pieth (chair of OECD BWG)

Intelligence and Security Committee

Committee on Standards and Privileges

Peter Alldridge

Plus other interested bodies:

Council of Circuit Judges

Whitehall Prosecutors Group

Legal Services Commission

Law Commission

Magistrates' Association

Justices' Clerks' Society

Law Society

Criminal Law Solicitors' Association
of England and Wales

London Criminal Courts Solicitors' Association

Police Federation

National Crime Squad

Serious Organised Crime Agency

HM Revenue and Customs

NHS Counter Fraud and Security
Management Service

OLAF (European Anti-Fraud Office)

Federation of Small Businesses

British Chambers of Commerce

Institute of Directors

Local Government Association

Financial Services Authority

Assets Recovery Agency

Joint Money Laundering Steering Group

British Bankers Association

Finance and Leasing Association

Institute of Chartered Accountants

Institute of Legal Executives

The Risk Advisory Group

Liberty

Commission for Racial Equality

African Caribbean Finance Forum

Black MBA Association (UK) Ltd

Race Relations Committee of the Bar Association

Kendall Freeman, solicitors

Lovells, solicitors

Unicorn

*In addition, the Northern Ireland Office will
circulate this consultation paper to key stakeholders
in Northern Ireland.*

