



Northern
Ireland
Office



Home Office

Consultation on Bribery:

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

Summary of responses and next steps

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Executive Summary

Introduction

1. In December 2005 the Consultation Paper, “Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials” was issued by the Home Office to stakeholders in England and Wales and overseas, and by the Northern Ireland Office to stakeholders in Northern Ireland. 24 responses were received in total, of which 3 came from Northern Ireland. The consultation sought views on the reform of the law in England, Wales and Northern Ireland.¹ We are extremely grateful to those who took the time and trouble to reply (listed at Annex 1). This paper sets out the main comments they made, and the Government’s response to them. The Government remains committed to reforming the law of bribery but further work is needed to reach an acceptable outcome.

Overview

2. There is broad support for reform of the Prevention of Corruption Acts, but no consensus view as to what that reform should look like. The consultation has shown there is some degree of support for each of several differing models of reform, but insufficient support for any one particular model to justify its being submitted to Parliament at this time. We are not convinced that the overall scope of the bribery offences should be redrawn as suggested by some respondents, but the responses have thrown up some interesting suggestions and perspectives which merit further exploration. It is clear that things have moved on since the Law Commission reported in 1998. We therefore think the right course is to ask the Law Commission to look at this

again and consider what is the best model for reform. We will ask the Law Commission to look at the full range of structural options for the scheme of bribery offences with a view to producing a draft Bill. Meanwhile this paper makes clear our preliminary views on the options which have been proposed.

3. On the separate operational issue, concerning the powers of the Serious Fraud Office (SFO) regarding cases of foreign bribery, there was a balance of opinion in favour of the proposal. This will be pursued independently.

4. A few commentators made clear that they wish the reform of the law to go significantly beyond the Government’s aim of reforming the Prevention of Corruption Acts, which deal with the crime known as ‘bribery’ in the common law, to cover a wide range of other behaviour which might be described as ‘corruption’ in the broad sense of the term, such as the crime of misuse of public office or anti-competitive practices (such as foreign bid-rigging). Such an approach would go beyond the scope of the present law on corruption into areas covered by other legislation, or would criminalise some areas at present not covered by the criminal law. We do not think it would be helpful to expand our law on corruption in such a way. We would need to examine in detail and consult separately on any further areas before bringing forward any reform. We do not believe we should do this. Instead we should focus on what is at the centre of an effective corruption law: the construction of an effective scheme of bribery offences.

¹ The consultation did not look at the reform of the law in Scotland as this area of law is devolved and any review of it in Scotland is for the Scottish Executive to consider.

Section A - Responses to questions

Question 1: Terminology – is the term ‘bribery’ preferable to ‘corruption’?

5. The Consultation Paper noted that both the UN Convention Against Corruption and the Council of Europe Criminal Law Convention on Corruption use the term ‘bribery’ for the specific offences of giving and receiving illicit advantages, and the term ‘corruption’ as a wider concept, covering other crimes. The Paper asked whether there were any real advantages in describing these offences in our own law as ‘bribery’ instead of ‘corruption’.

6. Several respondents, including the SFO, the Council of HM Circuit Judges (hereafter “Circuit Judges”), the Law Society, the London Criminal Courts Solicitors Association (LCCSA), the Police Federation of Northern Ireland (PFNI), the Ministry of Defence Police (MDP) and the International Chamber of Commerce of the UK (ICC-UK) saw no advantage in using the term ‘bribery’ rather than ‘corruption’ for the offences in question.

7. The SFO and solicitors Simmons & Simmons suggested that ‘corruption’ is the preferable term, since in their view ‘bribery’ could be misunderstood to mean only payment of money. The MDP agreed on the basis that the word ‘corruption’, in their view, better describes all the elements concerned with the offence. The LCCSA preferred ‘corruption’, but on the basis that the Bill should address all behaviour which could be regarded as corrupt, not just bribery. OLAF (the European Anti-Fraud Office) preferred the term ‘corruption’ because it appears in EU instruments, the law of Ireland, and also because it connotes immorality. The Public Prosecution Service of Northern Ireland (PPSNI) likewise preferred ‘corruption’ as the term used in EU law, saying the use of another term might lead to unnecessary argument. The ICC-UK also thought ‘corruption’ was preferable.

8. The Association of Certified Chartered Accountants (“ACCA”) suggested the term ‘corruption’ was better suited to the public sector than the private sector, since all commercial activity involves the offer and receipt of financial advantage. Belfast City Council thought that the term ‘corruptly’ was useful as caselaw has provided guidance on its meaning, hence they suggested it be part of either a statutory definition or additional guidance.

9. The CBI thought there were valid arguments on both sides, but that the decision should aim at ensuring the offences were clearly defined in terms of their scope. Clifford Chance thought using the term ‘bribery’ for some offences but not others could be confusing; for instance, would “performing functions corruptly” be termed ‘bribery’ or ‘corruption’?

10. Several respondents supported using the term ‘bribery’. Professor Peter Alldridge favoured it as being less vague and also because the proposed Bill does not cover many forms of corruption. The Police Federation thought juries would more readily understand the term ‘bribery’. The Financial Services and Markets Legislation City Liaison Group (hereafter City Liaison Group) thought ‘bribery’ conveys better the principal purpose of the legislation. Transparency International (TI) and the Anti-Bribery All-Party Panel of Parliamentarians (hereafter the All Party Panel) were content for the relevant offences to be known as bribery but thought there should be a ‘Corruption Bill’ with a wider content.

Government view

11. The terms ‘bribery’ and ‘corruption’ are both used to describe the unlawful exchange of advantages. In our domestic law, ‘bribery’ is the common law term and ‘corruption’ the statutory term. In international law, ‘bribery’ is used by the OECD, the Council of Europe and the UN, with ‘corruption’ being used as a wider

term, covering a broader range of offences. But in EU instruments the term ‘corruption’ is used both in this broad sense and as a synonym for ‘bribery’. Several other countries, such as Ireland, which have based their law on English statutes, use the term ‘corruption’ in this way. In these circumstances there are arguments on both sides, so the division of opinion is understandable.

12. A few commentators accept the Prevention of Corruption Act offences are best described as ‘bribery’ but argue that there is a need for wider changes in the law, covering the whole field of ‘corruption’. As noted above, the current exercise is aimed at the reform of the Prevention of Corruption Acts and we think the offences of giving and receiving illicit advantages may best be described as ‘bribery’. The offence of performing functions corruptly would probably not be so described. The title of whatever Bill is used to reform the law is a different issue and that will depend on its overall content – the provisions might possibly form part of a future ‘Criminal Justice Bill’, for example.

Question 2: Simplify the Bill by leaving the central concept undefined?

13. The Consultation Paper sought views on whether the Bill should be radically simplified by leaving the central concept (whether ‘corruptly’, ‘undue’ or ‘improper’) undefined.

14. Several respondents thought the central concept should remain undefined. The SFO, drawing on its experiences with complex trials, thought that a simple definition was not achievable, so that any definition would just confuse juries. Circuit Judges vehemently opposed having any definition: they believe the benefits of reform would be undermined by needless litigation which would result from the artificial definition of a concept that they see as readily recognisable, asserting that “corruption,

like dishonesty and the elephant, is difficult to describe but easily recognised by all.” The Police Federation and the MDP thought that the term should remain undefined, as did the City of London Law Society (CLLS) who thought the term ‘corruptly’ correctly expresses the proper mens rea of the offence.

15. The response from OLAF seemed to support leaving the central concept undefined, and in particular OLAF asserted that if there was any definition then neither ‘dishonestly’ nor ‘corruptly’ should be part of it. They referred to examples of continental law which they say specify corruption offences without qualifiers such as ‘corruptly’.

16. By contrast many respondents thought the central concept should be defined. For instance the ICC-UK thought such definition would bring the UK in line with international standards such as their own ICC Rules of Conduct to Combat Extortion and Bribery which uses terms from OECD guidelines (therefore they suggest the phrase “improper advantage” be used).

17. The CBI took a similar approach, focused on the ‘improper’ or ‘undue’ advantage gained rather than the state of mind or intention of the accused (i.e. the ‘corruptly’ test). Their reasoning is that there is less scope for (mis)interpretation of the law if the statutory definition involves the transfer of an advantage rather than the state of a person’s mind. Similarly, Clifford Chance wanted the concept to be defined, but cited the UN Convention Against Corruption to argue that the element of ‘undue’, ‘improper’ or ‘dishonest’ was essential to the offence, being worried that the offence as drafted would catch corporate hospitality.

18. Global Witness suggested following the lead of the UN Convention, but interpreted this as adopting a descriptive approach covering existing forms of corruption whilst also recognising it as a fluid and evolving

concept. The All-Party Panel thought a fresh attempt should be made at defining the central concept, on grounds that the previous difficulties were due to the “agency construct” which should be abandoned. Professor Peter Alldridge, Belfast City Council and the ACCA all thought a definition was necessary, as did solicitors Simmons & Simmons who also suggested that Court of Appeal cases and the definitions in international instruments could be helpful. The PFNI suggested the term could be defined from the best of existing caselaw. The LCCSA agreed that the central concept must be defined but said that the existing caselaw was not very helpful as often the definitions were circular (e.g. “Corruptly...means purposefully doing an act that the law forbids as tending to corrupt”²).

19. The City Liaison Group wanted the term to be defined, as long as the offences contained an exemption for commissions and other considerations paid within City financial markets. If such exemptions were not added to the Bill then they would prefer that the offence remained undefined to allow juries discretion to distinguish such remuneration from real corruption. They support use of the term ‘undue’ or ‘improper’ in order to reflect international conventions and being more understandable to the layman than ‘corrupt’. They are concerned about the complexity of the current draft offences and make the point that the European Convention on Human Rights requires offences to be drafted with precision.

Government view

20. We note the support of some stakeholders with wide operational experience for a Bill which would leave the central concept to be defined by the courts. The main term in the existing law (“corruptly”) has been defined by the courts, and while the outcome is not very helpful, the caselaw has at least made clear that dishonesty is not a requirement of the offence. While it was a major aim of the Law

Commission’s work to define ‘corruptly’, their definition is no longer welcomed by most stakeholders.

21. We have examined the laws of other countries. Most have not defined the central concept in statute. Many English-language speaking countries, including the USA, focus on the term ‘corruptly’ to describe the way in which the advantage is given, and some rely on caselaw from the English courts to explain that term (see Annex C of the Consultation Paper). Most other countries use terms equivalent to ‘undue’ or ‘improper’ to describe the nature of the advantages conveyed. For example French law uses ‘sans droit’ as an element of the offence. ‘Undue’ is the corresponding term used in the international conventions, without definition (apart from a very broad definition covering public sector bribery in the Council of Europe Convention). The OECD Convention on Combating Bribery of Foreign Public Officials also employs the term ‘improper’: that Convention bans ‘undue’ advantages whose aim is ‘to obtain or retain business or other improper advantage’ (though that seems, oddly, to imply that retaining business is an ‘improper advantage’).

22. Terms like ‘undue’ or ‘improper’ seem to us to be ‘qualifiers’ which are not inherently any clearer than ‘corruptly’, so the choice of any particular term is not of great significance. We note the support of several stakeholders for the language of the international conventions. In our view however the evil of bribery resides not in the nature of the advantage conveyed (a gift, for example, may clearly be either innocent or improper), but in the way it is conveyed. Conceptually an adverb rather than an adjective seems the right central term.

23. A possible way forward might be to accept that the protracted debate on this issue has demonstrated that the central concept cannot realistically be defined in law in a way that is satisfactory to all stakeholders. At the same time, it is clear that there is not a uniform

² Wellburn (1979) 69 Cr App R 254 (CA).

understanding as to what constitutes an act of corruption and so this matter should not be left entirely to the jury. Instead the central term might be clarified to the extent possible by stating what it does not cover. That would include clarifying that dishonesty is not a requirement. The law would also need to make clear that the law of bribery does not cover conduct which might be deemed bad practice but does not meet the threshold of the law preventing anti-competitive practices or other law applicable in the sector concerned. To extend it to this degree would go beyond the remit of the law of bribery. We return to these issues below.

Question 3: Suggestions for a simple central definition.

24. The suggestions made can be seen to fall broadly under 4 headings, as discussed below.

(i) The issue of corrupt intention

25. Solicitors Simmons & Simmons proposed a working draft definition of the offences as follows:

“An advantage, money, gift or valuable consideration is given corruptly where:

the giver intends that the receiver shall confer an advantage on the giver primarily as a result of the advantage, money, gift or valuable consideration, and

the giver is not the principal or employer of the receiver or acting on behalf of the principal or employer of the receiver

An advantage, money, gift or valuable consideration is received corruptly where:

the receiver understands the intention of the giver to be to influence the receiver to confer an advantage on the giver primarily as a result of the advantage, money, gift or valuable consideration, and

the giver is not the principal or employer of the receiver or acting on behalf of the principal or employer of the receiver.

Professional or official functions are performed corruptly when any of those functions are, in any particular case, performed primarily in order to secure an advantage, money, gift or valuable consideration for the person performing the functions.

26. The ACCA considered it crucial that the new law expressly provide that the intention must be to secure the agreement of the other party to perform actions which would not have been agreed but for the inducement. In their view expenditure which merely facilitates the free agreement of two parties to a course of action should not be considered to be bribery. The inducement conferred on agents would have to be over and above legitimate contractual considerations between principals. The CBI opposed any definition that turned on the suspicion of an intent to bribe since this risks criminalising legitimate activities. The City Liaison Group sought specific exemptions (discussed below) but if that proved not possible then they suggest there should be no offence if the advantage “is not considered improper by the standards of ordinary and reasonable people”.

Government view

27. The definition proposed by Simmons and Simmons is attractive but seems to rely too much on the concepts of the Law Commission scheme to satisfy those who now oppose that scheme. On the other hand it omits important aspects of the Law Commission’s scheme: notably it does not cover the case where the receiver of the bribe is not the person who will carry out the final act (the conveying of the advantage). There also seems to be a problem in the definition concerning the performing of professional functions: surely professionals such as barristers do perform functions primarily in return for cash, for themselves, from their client.

28. We see difficulties in the proposals from the ACCA. It should not be essential to the offence, in our view, that the final action would

not have been performed but for the 'bribe'. We agree with the Law Commission that it should be an offence for an agent to demand a bribe for doing what his duty already requires him to do. Nor should the 'briber' be excused liability in this type of case: for example, he may be paying the agent to prefer his bid to a bid which is equally advantageous to the principal (Law Commission report 5.8 and 5.9). The crime lies in the intention to influence the agent's conduct. It is also difficult to rule out expenditure which facilitates 'free agreement' between parties as bribery may be, in essence, expenditure aimed at that result. The problem lies in defining the point where corporate hospitality, agents' commissions and 'contractual considerations' become improper. We agree with the CBI who said that 'an advantage does not become appropriate merely because there is a contractual obligation to provide it'.

(ii) The Joint Committee definition

29. The Law Society approved clauses 4, 8 and 10 of the Bill as clear but not over-elaborate. But like Belfast City Council and the LCCSA they advocated the definitions provided by the Joint Committee, namely:

"A person acts corruptly if he gives, offers or agrees to give an improper advantage with the intention of influencing the recipient in the performance of his duties."

"A person acts corruptly if he receives, asks for or agrees to receive an improper advantage with the intention that it will influence him in the performance of his duties."

Government view

30. The Government rejected the Joint Committee's scheme in its response document of 2003. It argued that the Joint Committee's scheme was superficially simpler than the Law Commission's, 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.

31. 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.

32. The Government's arguments have not been answered by those who support the Joint Committee scheme and the Government's position remains that this scheme should not be adopted.

(iii) Focus on breach of duty

33. OLAF suggested using elements from the relevant EU instruments in constructing a definition, notably the requirement that the final act should represent a 'breach of duty'. Clifford Chance recommended the provisions of the UN Convention Against Corruption which sets out a two-stage test, at least for the private sector, involving (1) the question whether an undue advantage is being offered and (2) whether the purpose is to make the recipient act in breach of his duties.

34. TI report that they are the only non-governmental organisation in the UK devoted exclusively to anti-corruption and they have worked hard with several approaches. They have concluded that the real mischief is the improper conduct resulting from the bribe. They advocate the key word in any definition should be “improperly”. They would define this as meaning ‘in breach of any duty, express or implied, of a public or private nature and including a duty to act in good faith.’ This they argue would cover a broad range of circumstances including failure to act and over-speedy exercise of a function in response to “grease” or “facilitation” payments. They are satisfied that the resultant offence would clearly and precisely define the bribery offence and would cover the concerns expressed about the existing law both by the Law Commission and the Government. The All-Party Panel agreed that a definition should focus on the improper conduct that is induced or hoped to be induced.

Government view

35. The idea of focussing on breach of duty was proposed by the Law Commission in their 1997 Consultation Paper but rejected in their final report in 1998. That was both because their respondents said it was too unclear (many commercial and public duties being unspecified) and because, in principle, as is argued above, you can be corrupt by taking payment for doing an act which is perfectly in accordance with your duties (see 5.5-5.9 of the Law Commission Report). The Government reconsidered the ‘breach of duty’ model in 2003 and rejected it again as too uncertain, particularly in the private sector. However, the TI scheme clearly recognises the danger that the ordinary concept of breach of duty may not cover all that it needs to, since it proposes to add the concept of a ‘duty to act in good faith’.

36. That is certainly potentially far-reaching, but the issues of who has that duty, in what

circumstances, and what it consists of, raise a number of questions. TI say that their approach can underpin offences in both the public and private sectors, which is an attractive feature in principle. But the idea of criminalising payments for ‘over-speedy’ service may be difficult to apply throughout the private sector – particularly in the absence of the ‘agent-principal’ structure which TI oppose. It may also be difficult to convince partners that a ‘breach of duty’ requirement in the public sector is in accordance with the international instruments of the OECD, the Council of Europe and the UN (this issue is dealt with further in Annex 2). However TI have considerable authority and their new scheme, now put forward with the support of the All Party Panel, merits further consideration.

37. Since the consultation closed, we have had the opportunity of discussing TI’s scheme both with them and with Hugh Bayley, who has tabled a Private Members’ Bill which embodies TI’s ideas. We note that Hugh Bayley’s Corruption Bill, and the identical Private Members’ Bill now introduced in the House of Lords by Lord Chidgey, as drafted focus on the intention of the briber, so that it will make no difference whether in fact the official (or private sector agent) breaches his duty as a result of the bribe. The test will be what was the intention of the person who bribed him. However the Bill defines breach of duty as ‘including any duty to act in good faith or impartially’ and hence relies for its central concept on a definition which raises many questions, as mentioned above in paragraph 36.

(iv) Focus on subversion of markets

38. Professor Alldridge, who was appointed specialist adviser by the Joint Committee, is the leading proponent of this approach. His reasoning is that the harm against which the law should be directed is not disloyalty of an agent towards his principal but rather anti-competitive behaviour. Therefore the latter

should be the starting point for conceptualising the offence. He is opposed to any definition in terms of intention and reiterated his proposal, rejected in the Joint Committee Report, that the offence be based on multilateral relationships within markets rather than the principal-agent concept. He suggested the following two harms should be addressed (the first being the more serious):

Trying to create a “market” where there should be none (e.g. bribing public officials). For this no specific mens rea is needed.

Corruptly impacting the operation of an existing market (e.g. taking bribes to award contracts to particular suppliers). For this, some mens rea threshold, such as “corruptly”, would be needed.

39. TI specifically disagree with this approach, which they say is unsatisfactory.

Government view

40. The Government agrees this approach is unsatisfactory, as it made clear in its Consultation Paper (paragraph 36). It said it did not think it 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, which require the criminalisation of the exchange of undue advantages, rather than of activities which subvert markets. While it might still be possible to comply with the Conventions, it would be very difficult to demonstrate compliance if this approach were to be adopted.

Question 4: Redraft the Bill to separate the public and private sectors?

41. Question 4 sought views on a scheme which would create separate offences for the public and private sectors. It suggested that if this step of separation was taken then the scheme for the public sector might be much stricter than that for the private sector, and might resemble that advocated by the Joint Committee. The private sector scheme might resemble that advocated by the Law Commission.

42. The Circuit Judges supported the separation of the offences as applicable to the private and public sectors, pointing out that practices involving giving and receiving of advantages such as a seat at Wimbledon or Christmas dinner at the Savoy are long established as part of customer/client care in the private sector. The City Liaison Group thought separation would make it easier to produce targeted amendments to address particular concerns. Solicitors Simmons & Simmons took a similar view.

43. OLAF agreed with separating the offences, and sought clarification on whether officials of European Community bodies would come within the scope of the offences. The All-Party Panel also supported such separation because international conventions (including the OECD, the Council of Europe and the UN) take this approach, however they thought there could be common language for the main offences. TI suggested that a common offence should deal with bribery but the Bill should set out various offences of corruption (in a broader sense) that can only be committed in the context of public functions. (These offences go well beyond bribery and are discussed below).

44. Clifford Chance argued for the separation in order to facilitate stricter controls on the public sector. Stricter controls are necessary, they say, because public officials

need not only to act in the public interest but to be actively seen to be so acting. However, they foresaw difficulties with organisations in which the public/private functions are blurred. Therefore they suggested following the approach of the UN Convention where the offences are similarly worded but the private sector offence includes the additional requirement of a breach of duty (they thought the principal-agent concept was useful for the private sector only).

45. Those who were opposed to separating offences between the public and private sectors included the SFO, as this would cause problems ascertaining which of the offences applied³, and the MDP, who emphasised that such a separation was unjustified and might cause difficulties for investigative authorities pursuing offenders interacting in both sectors. The Law Society saw no need or advantage in treating the sectors separately. Belfast City Council also did not support such separation on grounds that privatisation and contracting out of public services make it no longer useful or practicable to distinguish the agents involved. The CBI, the ICC-UK and LCCSA expressed similar views,⁴ as did the Police Federation. The CBI said there were real difficulties for companies in deciding if they were public, private or mixed. The same law should apply, though some exemptions would be applicable only in the private sector.

Government view

46. The majority of those who commented favour having offences which cover both sectors, on the grounds that it can be difficult in the modern world to draw the line between public and private. We recognise the force of this argument, which was indeed also that of the Law Commission. The question is whether this parity, which is desirable in principle, is actually achievable in practice. There appears to be a wide view that the offences applicable to public officials should be tightly drawn, whilst there may be reasons for a broader approach in

the private sector. A solution might be for the same basic terms of the offences to apply in both sectors, but for more exemptions to apply in the private sector than the public. This is an area that requires further consideration.

Q4i: how to define criminality of advantages given to those who perform public functions?

47. The Consultation Paper suggested an advantage given to a person exercising public functions should be criminal unless (a) it was specifically authorised by the law, or (b) it was both of small value and permitted under the official's terms of employment. It also asked whether there should be any further qualification (for example an additional requirement that the advantage be declared).

48. Clifford Chance agreed the approach in (a) and (b). So did OLAF, who thought no additional qualification was required apart from those suggested, assuming that if 'declaration' of the gift was the requirement of a foreign government or organisation, then that would ensure the element of 'authorised by the law' was met.

49. Solicitors Simmons & Simmons thought the "specifically authorised by law" exemption was confusing, for instance as it is not clear if this refers to English law, or the law in the country in which the transaction took place (noting that the latter amounts to a defence in US law). They did however support the de minimis threshold and system of declaration for advantages received. The PPSNI said that codes of conduct were crucial and suggested they should provide that any offering or receiving of an advantage contrary to the code should be evidence of bad faith and lead to a reversal of the burden of proof. The Law Society said a declaration system was a practical way for the honest public servant to ensure his actions are not misinterpreted. More cautious comments were made by the MDP who warned that simple acceptance of a gift should

³ SFO did, however, accept that such a separation would clarify the availability of the defence of "principal's consent".

⁴ Citing the need for the same standards to apply, for example, to publicly run prisons and privately run prisons.

not automatically signify corruption. In their view the influence of the gift, as opposed to its size, was crucial to determining corruption.

Government view

50. The few comments received suggest that there is little controversy as to what constitutes bribery of public officials. The difficulty comes in applying those standards in the private sector, and in the fact that at the margins the two sectors blur into each other. We understand the views expressed by the MDP but other respondents see strict standards as necessary and appropriate for mainstream public officials. As stated in paragraph 46, further consideration is required to determine whether and to what extent to distinguish offences applicable in the public and private sectors.

Q4ii: should advantages given to private sector persons be criminal as set out in the draft Bill?

51. Organisations representing those involved in the financial markets (notably the CLLS and the City Liaison Group) were worried that the Bill as drafted might criminalise the paying and receiving of commissions and other advantages which are commonplace when trading financial products in the City. They also expressed concern that the wide definition of public sector bribery would catch the type of small facilitation payments that are permitted by the laws of other OECD countries, which they thought would thereby harm the UK's international competitiveness. Similarly, the ACCA urged that the law make a "workable distinction" between conduct which is corrupt and conduct which merely facilitates fair business activity.

52. The City Liaison Group, supported by the Investment Management Association (IMA), proposed a new exemption, in addition to cases where the principal consents, to cover commissions given within the financial

markets. They suggested that there should be no corruption where an advantage was provided in accordance with prevailing market practice and where the activities of the agent are subject to regulatory oversight. Clifford Chance suggested an exemption to cover advantages that were not improper according to the standards of reasonable and honest people, having regard to any prevailing market practice.

53. The CBI thought there should be exemptions and defences to clarify the scope of the law, and that the law should not apply to inducements which are a routine and legitimate feature of business conduct in the sphere concerned. They proposed exemptions for corporate entertaining, bona fide promotional expenditure, commissions in the insurance and financial sector, offset contracts, small facilitation payments, and advantages paid under duress. The ACCA accepted it would be hard to define which inducements constituted bribes, but a code of business practice might assist in relation to corporate hospitality. They also said that the recipient of a bribe should be considered corrupt where his acceptance of that bribe was inconsistent with his obligations to his principal, regardless of whether he subsequently committed his principal to the course of action paid for.

54. Solicitors Simmons & Simmons said the key issue in private sector corruption should be the consent of the principal. CBI sought clarification on the circumstances in which a shareholder could be considered a "principal". They were concerned that allegations of a criminal act could be made if directors did not consult shareholders about certain transactions.

55. On the other hand, Professor Alldridge considers it a flaw of the principal-agent concept that the consent of the principal would be a defence to a charge of bribery by the agent, for example where an agent takes a bribe to award a contract with his principal to one supplier rather than to another. Professor

Alldrige contends that even if the principal does not object to his agent taking bribes (for instance because that means the principal can pay the agent less), this type of bribery damages the competitive free market. He asserts that the OECD model is based on bribery as anti-competitive behaviour, and thus it makes sense for the UK to align itself with this approach.

56. This anti-competitive behaviour issue was also raised by LCCSA. Like most commentators they accepted the law should be based on the agency concept, and said it could encompass functions performed on behalf of the public as well as in the private sphere. They also accepted it may be true that the right context for prosecuting payments between principals, or payments to agents with the consent of their principal, is competition law. Nevertheless they argued that it does not follow that such circumstances should not be capable of being examined from a corruption law perspective. They gave an example where a job application is accepted on the basis of a bribe by the candidate to the employee, then even if the employee's principal is content with that (perhaps as a recipient of a share of the bribe) that should still be criminal. Therefore LCCSA believe strongly that the principal's consent should not provide a defence to private sector corruption.

57. TI are opposed to the defence of principal's consent and to the use of the expanded agency concept in the draft Bill. They are however in favour of an offence, amongst a raft of other offences, based on what they call 'normal agency', that is defined on the lines of the 1906 Act. The All Party Panel consider that the complexity of the draft Bill flowed from the application of the agency construct.

Government view

The issue of exemptions in the private sector

58. As noted, those representing industry suggest that certain practices that are accepted in the private sector should be specifically exempted from the operation of the law of bribery. Blanket exemptions are always liable to abuse so they require careful scrutiny but, as we argued above, it is worth considering an approach whereby the central concept of the offences remains largely undefined, but is defined – to the extent possible – negatively, by means of a list of exemptions.

(i) Consent of the Principal

59. The Law Commission saw 'agent' as the 'obvious choice' to describe those who are the targets of bribes, and said 'agent' is a convenient term for a person in a position of trust, whether in the private or public sector⁵. The use of this concept was supported by the vast majority of those who submitted evidence to Law Commission. The same was true of responses to the Home Office White Paper of 2000. The Joint Committee received some evidence which criticised the use of the concept in the public sector⁶, but no evidence critical of its use in the private sector. The majority of our respondents supported the use of the concept, though some wish to confine it to the private sector.

60. It may not automatically follow that there should be a defence of principal's consent, but this was recommended by the Law Commission⁷ and agreed by the Government and the majority of consultees at all stages. As Lord Falconer put it "it is difficult to think of occasions when the essence of corruption is not cheating on the person who you should be looking after". The defence would apply in the private sector only.

⁵ paras 5.15 and 5.16 of the 1998 Report

⁶ para 28 of the Joint Committee's report

⁷ see 5.88 – 5.98 of the 1998 report

61. If an agreement between principals damages competition, then that is rightly a matter for competition law. Parliament has defined the circumstances in which anti-competitive behaviour should be criminal in the Enterprise Act 2002.

62. As regards the example cited by the LCCSA, we note that there are no obligations on principals in the private sector to allocate jobs on the basis of merit. They may for example be allocated on the basis of family relationships. Equally they may be allocated as a result of the offer of advantages, which may be undesirable but this is not an area in which it is appropriate for the criminal law to intrude. If we widened the law of bribery as is proposed by LCCSA, it would appear, for example, that it might become a criminal act to offer to do a job for a lower salary than other candidates.

(ii) Normal practice

63. The Law Commission considered the possible defence of ‘normal practice’⁸. They rejected it on the grounds that if the normality of the conduct were a complete defence it would follow that once corrupt practices had taken root in a given environment, they could no longer be regarded as corrupt. We agree that ‘normal practice’ should not of itself constitute a defence. However suggestions have been made for refining this test by introducing either or both of two additional requirements:

- that the activities of the agent are subject to regulatory oversight. This makes sense: the Prevention of Corruption Acts date back to a period when there was little if any oversight of financial services. Their purpose in the modern world is, arguably, not to cut across other regulatory frameworks but to underpin them and to fill in the gaps so that certain basic standards apply throughout society.

- that the advantage was not improper according to the standards of honest and reasonable people. This makes sense provided that ‘improper’ is not already part of the mens rea of the crime.

(iii) Corporate Hospitality

64. The Law Commission rejected the idea that all corporate hospitality could be exempted from the law of bribery because that would open the door to abuse: bribery would simply be dressed up as hospitality⁹. Their proposal instead was the ‘primarily’ test: that is, do the offerers of the hospitality believe they will get their guest to do something primarily because of their hospitality? They accepted the test might be difficult to apply but said that would only arise in cases of corporate hospitality and other similar advantages. Nevertheless, the ‘primarily’ test was drafted to apply across the board and has proved somewhat controversial. It has the potential of leading to arguments in situations far removed from the Commission’s target area of corporate hospitality. It therefore seems preferable, in terms of clarity, to tackle this issue head on. This might be done for example by exempting corporate hospitality which was reasonable both by the standards of ordinary people and by prevailing practices in the sector concerned.

65. There is an issue as to what ‘similar advantages’ might need to be specifically mentioned if they are to be covered by this exemption: we suggest promotional expenditure might be the main candidate.

(iv) Other exemptions

66. We think that if there were three such exemptions they would between them provide sufficient scope to ensure legitimate advantages were not seen as bribes. There is no need to introduce a defence of duress: under the existing law ‘duress is a defence to all crimes except murder, attempted murder and seizable treason involving the death of the sovereign’ (Archbold, 17-119).

⁸ paras 5.139-141 of the 1998 Report

⁹ para 5.76 of the 1998 Report

Question 5: Introduce the Bill, subject to changes agreed in Pre-Legislative Scrutiny?

67. Question 5 asked whether the best course might not be to introduce the existing draft Bill, subject to the changes agreed at the Pre-Legislative Scrutiny stage.

68. Support for this option, subject to some qualifications, was expressed by the Circuit Judges, OLAF, the Police Federation, the PFNI, and the LCCSA. The ICC-UK supported the Bill, but also recommended redrafting to use the concept of ‘improper advantage’. Belfast City Council also supported introducing the Bill as it stands, subject to redrafting to use the term ‘bribery’ rather than ‘corruption’. The Law Society said the best way forward was to use the Bill, but proposed major changes to it - by deleting clauses 5, 6, 7 and 9 and using the Joint Committee’s central definition.

69. Opposition to introducing the Bill as it stands came from several respondents on grounds of its complexity and lack of clarity: namely, TI, the All-Party Panel, the CLLS, the MDP, the City Liaison Group, Clifford Chance and Simmons & Simmons. The MDP felt that the Bill had not taken sufficient account of the needs of investigation or the interface between public and private sectors. The Africa All Party Group urged the government instead to draft a new Bill reflecting the high importance of tackling the bribery of foreign officials, with four overarching principles of effectiveness, clarity, compliance and policy coherence. Professor Alldridge said that the Bill as drafted should not be introduced, but not only because it is too complex but also because in his view it is based on a mistaken apprehension about the nature of the harm the law should aim to remedy.

Government view

70. The Government presented the draft Corruption Bill of 2003 for Parliamentary scrutiny on the basis that it implemented the basic scheme recommended by the 1998 Law Commission Report, which reflected stakeholder views expressed to the Commission in 1997, and was also welcomed by respondents to the Government’s White Paper of 2000. When the Joint Committee gave the Bill Pre-Legislative Scrutiny in 2003 it was clear that views had changed and support for this scheme had diminished. Following this present consultation, it seems clear that, although some stakeholders still support the scheme in the 2003 Bill, there is such significant and influential opposition to it as to render it unsuitable for presentation to Parliament.

Question 6: Replace 'primarily' with test of 'substantially'?

71. Question 6 sought views on the definition of ‘corruptly’ in terms of the degree to which the bribe motivates the decision of the person being bribed; namely, whether the test should be – as the Law Commission proposed – that the bribe ‘primarily’ motivated the actions of the person being bribed, or whether it should be enough that the bribe only ‘substantially’ motivated him. The effect of replacing ‘primarily’ with ‘substantially’ would be to bring more borderline behaviour within the scope of the offence.

72. The Law Society supported this change and commented that it could be compared with the rule in the law of manslaughter that the actus reus must be a substantial cause of the ensuing death even if it is not the primary cause. The Police Federation supported the change considering that members of the public may well see some “everyday” commercial practices as questionable. Similarly, the LCCSA set out some examples of very high value corporate sponsorship and hospitality packages¹⁰ and suggested a qualitative test

¹⁰ such as €300,000 for a luxury corporate box for 10 people at the World Cup.

could usefully be set as low as ‘substantially’ in order to help businesses to “clean up their act”. However, they also asserted that it would be better for the law to develop transparent systems for corporate responsibility rather than bringing more prosecutions of individuals operating with no proper corporate governance. The PFNI also supported this as a qualitative test to distinguish criminal acts from innocent or naïve behaviour.

73. By contrast, the ICC-UK strongly opposed a lower threshold of ‘substantially’ - they preferred the original term ‘primarily’ as this would allow reasonable business hospitality to continue. Belfast City Council expressed a similar view, as did the IMA and the City Liaison Group who thought it would exacerbate the problems in the draft Bill, especially in distinguishing legitimate gifts/entertainment from corrupt advantages. Solicitors Simmons & Simmons agreed, and also expressed concern that the lower threshold of ‘substantially’ would isolate public servants from the business world where it is commonplace to exchange small advantages such as lunches, know-how and introduction to business contacts. Also they thought juries would be unlikely to convict those whose act was not the primary factor motivating the actions of another. In a similar vein, the SFO cited its experience that juries tend to be clear on what they regard as “criminal” and that if the criminal law extends beyond this area then juries will acquit, whatever definition is used.

74. Although acknowledging the appropriateness of the lower threshold of the “substantially” test, OLAF was concerned that this would not succeed in distinguishing criminal behaviour from innocent lobbying without causing difficulties in practical application. It therefore suggested referring to the intention to influence the official conduct or business conduct of another. The ACCA thought this question was off the point because there should not be any qualitative distinction between actions that are primarily corrupt and

those which are substantially corrupt. More important to them was the issue of whether someone attempts to secure favours by offering an advantage to another, regardless of the weight which is subsequently given to the favour by the person corrupted or bribed.

75. CBI similarly argued that if the central concept were that of an ‘improper’ advantage the question would not arise. TI said this issue would not arise if the Bill focused on what TI see as the “central harm”; and the All-Party Panel took a similar approach, suggesting the problem would not arise if the word ‘corruptly’ was avoided. The MDP felt that the question missed the point. In their view the question concerned unnecessary safeguards which complicated investigations; the key issue was whether influence had been bought. The Circuit Judges thought the question itself reflected the futility of attempting any statutory definition.

Government view

76. We accept there would be arguments in court in demonstrating whether either test was fulfilled. The origins of the Law Commission’s ‘primarily’ test lie in their wish to exempt reasonable corporate hospitality from the operation of the law, and they believed the arguments would only rarely arise in practice. We think there is another possible approach to the corporate hospitality issue, discussed above. In any case, if the scheme in the draft 2003 Bill is not pursued question 6 may become irrelevant, but the points made may be relevant to any other solution.

Question 7: Extend SFO investigatory powers to the vetting stage?

77. The proposal in Question 7 is an operational one which arose from concerns about the SFO’s practical ability to pursue overseas bribery cases. The proposal is that the SFO should be able, in such cases, to exercise its powers under section 2 of the Criminal

Justice Act 1987 (to compel the production of documents and explanations of them) at the vetting stage – that is before deciding whether there is enough evidence for them to embark on a formal investigation.

78. The SFO supported this extension in its powers but thought the power should be applicable not only to companies but to individuals. It sought more clarity on what is a “foreign public official”, for instance there are circumstances where a person could influence the awarding of a contract on behalf of an official. The SFO indicated they hoped that eventually its section 2 power to compel evidence would be extended to all its cases at the vetting stage, not just foreign bribery cases.

79. TI also supported the extension of the SFO powers and urged that the SFO’s remit be extended to all serious or complex corruption cases. The All-Party Panel made a similar suggestion. Support for this extension of SFO powers also came from Professor Alldridge, solicitors Simmons & Simmons, the Africa All Party Group and the LCCSA. The LCCSA thought the new power would be useful in persuading people (essentially whistleblowers) to give evidence under compulsion which they would not otherwise give for fear of being sued or losing their job.

80. The Police Federation thought the SFO were best placed to comment, but they did query how evidence gathered by such means would be converted into evidence admissible at trial. They suggested this might call into question the purpose of the Bill – is it to prevent corruption, or is it to allow successful prosecution of those who disregard the law? OLAF pointed out that it possesses such a power in relation to investigations within European institutions.

81. The ICC-UK supported the proposal in principle, but thought there should be wider consultation in order to protect the human rights of corporations, directors and

employees, and also suggested clarification about handling competing obligations such as data protection laws and contractual duties. They also wondered why the power applies only to foreign public officials but not to foreign companies, contending there should instead be a “level playing field” in this regard.

82. Clifford Chance was understanding of the reasons for the extension of powers, but was not convinced it was necessary. The City Liaison Group thought the increased powers would mean greatly increased compliance costs for companies (see below) but they are still considering the issues involved in the proposal to extend the SFO powers in this way.

83. The Law Society and the CBI were opposed to this extension to the SFO’s powers, saying the case had not been made out. They feared the SFO could be granted broad powers, without appropriate safeguards, to compel people to provide information. The CBI said that the lack of prosecutions to date reflected the general level of corporate behaviour and practice in UK companies. They add that companies are increasingly active in producing guidance, including codes of conduct, for employees. The CBI are not convinced that judicial review was a remedy for the inappropriate exercise of SFO powers, because it thought where a company was wrongly accused then the additional publicity of a judicial review would simply increase the damage to the company. Therefore they support the retention of the requirement for the Attorney-General’s prior consent to corruption investigations (this separate issue is discussed further below).

Government view

84. The Government recognises that the general level of corporate behaviour by UK companies is high. This is reflected in international surveys – notably TI’s Bribe Payers Survey (2006), which suggests that UK companies are perceived as the second least

likely of all G8 countries' companies to pay bribes in emerging market countries.¹¹ But we need to ensure our high standards are maintained, and while the criminal law is only a part of the picture, it may need to play a part where some individual companies fail to operate effective internal controls.

85. While views are divided we think the balance of opinion is marginally in favour of this change, which we do not consider to be innovatory. Part 2 of the Serious Organised Crime and Police Act 2005 confers powers on the Director of Public Prosecutions (DPP) and the Director of Revenue and Customs Prosecutions to give (or to authorise a constable, a designated member of SOCA staff or a Revenue & Customs officer to give) a disclosure notice compelling the provision of information if “it appears ... that there are reasonable grounds for suspecting that [a relevant, listed] offence ... has been committed.”

86. Bribery offences were included in the relevant list by the Serious Organised Crime and Police Act 2005 (Amendment of Section 61(1)) Order 2006, made on 19 June 2006. The basis on which the DPP or Director of Revenue and Customs Prosecutions authorises a constable, member of SOCA or Revenue and Customs officer to give a disclosure notice is very similar to the proposed power for the Director of the SFO to order the use of powers under section 2 of the Criminal Justice Act 1987 where there are reasonable grounds for suspecting that a case involves the bribery of a foreign public official.

87. The Police Federation raise a point which is more relevant to the existing use of SFO powers than to this extension of them. Under section 2 of the Criminal Justice Act 1987 the SFO has powers to compel evidence in its investigations. Section 2(8) provides that an answer given to SFO investigators using section 2 powers may not be used in evidence against the answerer in criminal proceedings.

This protects a defendant from self-incrimination in a strict sense. However, it does not protect them from the use by the SFO of materials provided pursuant to section 2 to pursue their inquiries (for instance with a third party witness) and then using this fresh evidence against the defendant in court.

88. On the details of the proposal, we agree with the SFO that the power should be available in respect of both companies and individuals. We also agree with them that the power should be capable of covering investigations where the payment was made not to the foreign official himself but to a third party.

Question 8: Will your organisation face extra costs from any of these proposals?

89. Question 8 asked for views and information on costs in order to inform the Regulatory Impact Assessment.

90. The ICC-UK thought that companies would face additional costs in compliance and producing guidance for employees. Likewise the CBI thought the Consultation Paper underestimated the compliance costs for businesses; in particular it said the SFO estimate of £200 for a section 2 order was “simply unrealistic”. The City Liaison Group also thought the RIA underestimated the costs of complying with a section 2 notice; they thought that if the SFO powers were extended in the manner suggested the costs would increase to several thousands, or tens of thousands of pounds in management and legal time, because the investigation would be broader where the SFO is uncertain of the matters under investigation.

91. Clifford Chance also “strongly disagreed” with the estimate of £200 to comply with a section 2 order, saying in their experience it was a great deal more than that. The LCCSA said there would be an increase in

¹¹ Canada's are the least likely.

the volume of work for defence solicitors and hence in costs, whether for clients or for the Legal Aid budget. The Africa All Party Group stressed that the SFO will need more resources in order to utilise their new powers.

Government view

92. We accept that in a complex case the costs of complying with a section 2 order may be considerably higher than the SFO estimate of £200. However we anticipate there will be few extra notices and the costs would have to be very much higher indeed to outweigh the perceived benefits of this change, which will be seen not only in terms of more effective law enforcement, but in dispelling the problems caused to companies by the propagation of unfounded allegations. The SFO did not request extra resources for themselves in respect of this new power. Their own view on this is persuasive – and may also serve to reassure those concerned about the level of use of the power.

93. It is worth noting that prosecutions for bribery overseas are rare throughout the world.

The USA, which has conducted such prosecutions since 1977, has only prosecuted 2-3 cases annually on average. Prosecutions by other countries have been very rare. The UK has had only one known prosecution for the offence of bribing a foreign official, which took place in the 1980s¹². The OECD's Bribery Working Group published a Mid-Term report in May 2006 which showed that at the time of their Phase 2 reports there had been only 4 other convictions – one 'petty' case dealt with by Switzerland and 3 cases by Korea. While this is a developing area of law and practice, and the report states there have been 4 other convictions since Phase 2, there is no reason to suppose this new power will be used to such an extent that it will impose significant costs on business.

¹² Raud (1989) Crim LR 809

Section B - Additional comments

94. This section sets out the additional comments which were made, not relating to the specific questions asked in the Consultation Paper.

Requirement for consent to prosecutions

95. The Africa All Party Group said there should not be a requirement of Attorney General's consent for investigations or prosecutions of corruption. The Law Society said the consent (whether of the Attorney General or of the Director of Public Prosecutions) provision was a bulwark against the danger of liability to a broadly defined offence which might catch commercially acceptable practices or de minimis cases. The CBI want to retain the existing requirement for the Attorney's consent, in order to ensure that innocent parties are not subject to unwarranted prosecutions.

Government view

96. The Attorney General's consent is currently required for prosecutions (but not investigations) under the Prevention of Corruption Acts 1889-1916. This does not act as a brake on meritorious prosecutions: it is a constitutional principle that Law Officers do not exercise their prosecution functions as members of the Government but act as impartial guardians of the public interest. The Attorney General said in evidence to the Joint Committee: "I know that successive Attorney Generals have felt – and I do – very, very strongly when it comes to making prosecutorial decisions and public interest decisions that we are not acting as part of the Government." In addition, in deciding to give consent to the commencement of criminal proceedings the Law Officers apply the criteria set out in the Code for Crown Prosecutors and take into account the advice of the Crown Prosecution Service.

97. Nevertheless, in its response to the Joint Committee's report (paragraph 21) the Government accepted the Committee's recommendation that the requirement for the Attorney's consent should be replaced with a requirement for consent to be given by the Director of Public Prosecutions or a nominated deputy. In its Consultation Paper (paragraph 18), the Government said it had 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. These changes will ensure that the most serious consideration continues to be given to cases before they proceed. The test applied will be that of the public interest. In accordance with Article 5 of the OECD Convention on Bribery of Foreign Public Officials, the investigation and prosecution of offences to which the Convention applies shall not be influenced by considerations of the factors excluded by the Convention.

New specific offence of bribery of foreign public officials

98. A specific offence of bribery of a foreign official is sought by the Africa All Party Group and by TI. OLAF sought the specific inclusion of officials of international organisations.

Government view

99. The Anti-terrorism, Crime and Security Act 2001 removed any possible doubt that the existing law covers the bribery of foreign officials, including those who work for international organisations. The Government agrees that the bribery of such officials should remain an offence. However there is no obligation in any Convention to create separate offences as between domestic officials and foreign officials. The benefits and difficulties that such separate offences would bring will need to be considered further. The additional requirement of proof that the official is "foreign" as an ingredient of the offence

carries the risk of complications in marginal cases. In general it is not helpful to prosecutors to have overlapping offences. It can lead to confusion – as the Naatchi¹³ case demonstrated. In this case a Crown Servant was charged with corruption under the 1889 Act when he should have been charged under the 1906 Act.

New specific offence of corruption in sports

100. TI suggested a new offence of ‘fixing’ sports events should be created to ‘send out a strong international message that the UK is determined to tackle this form of corruption’.

Government view

101. No new offence is needed to cover match fixing. Such behaviour can be, and has been, dealt with under the existing law – the Prevention of Corruption Act 1906 if bribery is involved and section 17 of the Gaming Act 1845 if gains are made by cheating in gambling. Section 17 has been modernised and will be replaced from 2007 by the new offence of ‘cheating’ in section 42 of the Gambling Act 2005. The UK is determined to tackle corruption in sport, but that ‘message’ can be more convincingly and appropriately sent by other means than the creation of unnecessary offences. The Gambling Act 2005 establishes a robust new regulatory body, the Gambling Commission, with powers of investigation and prosecution, and the power to void bets where it believes cheating has taken place. Moreover the Minister for Sport has launched a ten-point plan on integrity in sports betting, to which all the major sports and betting operators have agreed to adhere, and to work together to combat corruption in sporting events.

New offence of failure to report a bribe

102. TI suggest there should be a new criminal offence for public officials who fail to report a bribe.

Government view

103. The Government does not believe that failure by an official to report a bribe is an appropriate subject for the criminal law. This view was made clear in the Memorandum Lord Falconer, then Minister of State at the Home Office, submitted to the Joint Committee in May 2003 (Ev 75 in the JC Report). Such behaviour can be the subject of disciplinary proceedings, and that is, we think, the appropriate sanction.

New offence of bid rigging

104. TI suggest there should be an offence of bid rigging to cover abuses of competitive tendering not covered by the Enterprise Act 2002, notably offences which take place overseas.

Government view

105. Bid-rigging is one element of the cartel offence in section 188 of the Enterprise Act 2002. In line with international approaches to competition law this offence is specifically limited to arrangements in response to a request for bids for the supply of a product or service in the UK; and no proceedings may be brought for an offence under section 188 in respect of an agreement outside the UK unless it has been implemented in whole or in part in the UK. The Government is not aware of any country that has a bid-rigging offence that is not premised on a direct or substantial impact on the domestic market.

106. However, the Government is committed to combating hard-core cartel activity wherever it occurs. Co-operation between national enforcement authorities is key to tackling cross-border hard-core cartels and to this end UK competition authorities work closely with their overseas counterparts. Provisions for co-operation can include exchange of crucial information and the extradition of individuals who commit or who conspire or attempt to commit the cartel offence in a country that has

¹³ (2002) 2 Cr App R 20

an equivalent offence. In addition we fully support initiatives such as the OECD Guidelines for Multinational Enterprises¹⁴ and the work of the United Nations Conference on Trade and Development¹⁵. The Government does not therefore believe it would be right at this stage to introduce a foreign bid-rigging offence but will continue to work actively with other countries in tackling the issues in this area.

New offence of trading in influence

107. TI suggest there should be an offence of trading in influence, drafted so as to exclude legitimate lobbying. A similar view is taken by the All-Party Africa Group, who suggest this new offence is needed to bring the UK into line with the Council of Europe Criminal Law Convention on Corruption.

Government view

108. The Government accepted the view of the Joint Committee (paragraph 79 of their report) that the case for a separate offence of trading in influence is not convincing. ‘Trading in influence’ is covered by the existing 1906 Act in so far as an agent-principal relationship exists between the ‘influence seller’ and the person influenced. If a person taking advice does not establish some kind of agency relationship with the one who gives him that advice, he has only himself to blame if he gets biased advice. On the other hand, if an agency relationship has been set up, trading in influence is covered by the corruption offences. We do not think it appropriate to go beyond that, and it is not the intention of the Government to introduce any new offence of ‘trading in influence’. As there is no statutory framework covering lobbying it is not practicable to make law to cover ‘trading in influence’ while excluding lobbyists.

109. There is no mandatory international requirement to create such an offence. The Council of Europe Convention contains an article (12) on trading in influence but allows

reservations to be made on that article, and the UK has entered such a reservation. The Convention provision seems to us too broad, as it appears to cover a number of activities rightly not considered criminal, notably legitimate political lobbying. We are far from being the only country to have made a reservation on Article 12: Belgium, Denmark, Sweden and Switzerland for example have also done so. It is worth noting that those countries which do have a specific offence of trading in influence (France, for example) use it mainly to prosecute cases which would constitute offences here under existing corruption/bribery law. The lack of international consensus as to the desirability of criminalising ‘trading in influence’ is also clear from the fact the UN Convention only requires parties to ‘consider’ such an offence. The UK has considered and rejected the idea.

New statutory offence of Misuse of Office

110. TI suggest that the common law offence should be codified.

Government view

111. The Government is committed to the ultimate codification of the criminal law as a whole but accepted the view of the Joint Committee (paragraph 80 of their report) that the Corruption Bill was not the appropriate vehicle for this particular change. This change is not an urgent matter as the scope of the common law offence of misuse of office has recently been clarified by the Appeal Court in Attorney General’s reference No 3 of 2003 (2004 EWCA Crim 868).

Retention of 1916 presumption

112. TI suggest that the presumption of corruption in the 1916 Act should not simply be abolished but instead replaced by an improved provision which is not vulnerable to ECHR challenge.

¹⁴ The OECD guidelines provide a set of recommendations to multinational enterprises. These include recommendations on competition including bid-ridding and encourage their business partners to adhere to the recommendations.

¹⁵ The UN Conference among other tasks provides analysis and capacity building in competition laws and policies in developing countries.

Government view

113. After lengthy consideration in part 4 of their 1998 Report, the Law Commission recommended the abolition of the 1916 presumption. This was mainly on the grounds that corruption is no more difficult to prove than some other offences, such as fraud, and so no special reasons exist to justify such a reversal of the burden of proof. The Commission also suggested 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 ECHR. Moreover, since their report the Crown Prosecution Service (CPS) have decided that the risk of ECHR challenge is so great that the presumption should not be relied upon, so it is now disused.

114. The purpose of the presumption is to reverse the burden of proof in the circumstances where a public official accepts a gift from a contractor. Reverse burdens of proof that are legal burdens of proof that shift the balance of proof to the defendant are vulnerable to challenge under the ECHR. As a simply evidential burden may not make much difference in practice we see no need to replicate any provision on the lines of the 1916 burden in any new law.

115. The 1916 presumption requires the prosecution to prove that a consideration has been received by a public official from a person who is holding or seeking to obtain a contract from Her Majesty's Government. Once that has been proved, if the official stayed silent in court, inferences could be drawn under section 35 of the 1994 Act.

Mandatory disclosure by HMRC

116. TI suggest that HMRC should be obliged to disclose information to support criminal proceedings since 'audit and tax investigations would be among the more likely sources of information about commissions etc concealing bribes'.

Government view

117. The Government is not in favour of imposing a mandatory requirement of this kind on HMRC. It does not believe that such a requirement would result in more or better information. HMRC already provide as much assistance as they can within the law. The law on the disclosure of information by the tax authorities was changed by section 19 of the Anti-terrorism, Crime and Security Act 2001. This provision gives very wide powers of disclosure to the tax authorities in relation to all criminal investigations and proceedings. It allows HMRC to disclose information, which would otherwise be subject to their statutory duty of confidentiality, if the disclosure is made:

- (a) for the purposes of facilitating the carrying out by any of the intelligence services of any of that service's functions;
- (b) for the purposes of any criminal investigation whatever which is being or may be carried out, whether in the UK or elsewhere;
- (c) for the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the UK or elsewhere;
- (d) for the purposes of the initiation or bringing to an end of any such investigation or proceedings; or
- (e) for the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

118. The Act lifts, in specified circumstances, restrictions on disclosure imposed by law, but disclosure is permitted rather than required. HMRC have an important responsibility in deciding whether disclosure is justified. In taking that decision, HMRC have to consider the terms of the Data Protection Act 1998, and their duties under the Human Rights Act 1998. All disclosures will have to be subjected to the proportionality test, which means that the person making a disclosure must be satisfied that disclosure is proportionate to the end sought to be achieved by the disclosure. We would expect that disclosure would be justified in most if not all cases of bribery.

119. If the law enforcement authorities required the production of information in any case, it is open to them to seek a Production Order from a court.

Specific foreign bribery remit for SFO

120. I suggest that the SFO's remit in the Criminal Justice Act 1987 should be amended to make a specific mention of foreign bribery.

Government view

121. Under the 1987 Act the SFO's remit covers cases 'involving serious or complex fraud'. In practice, major cases of foreign bribery will normally involve fraud, either directly or because the commission or concealment of the crime requires fraudulent activity. The SFO has already demonstrated its ability to prosecute in cases involving bribery and corruption cases. We are not, therefore, convinced of the need for any formal extension of its powers. A formal extension of its powers to cover 'foreign' bribery would also be undesirable in that it would raise questions about its power over 'domestic' bribery cases, and about cases which pre-dated the extension. The SFO already acts as the focal point for receiving any allegations about offences of overseas bribery by UK nationals or UK incorporated bodies and undertakes a vetting

exercise to establish who is best placed to lead the investigation.¹⁶ The SFO is a highly specialised organisation and it is not appropriate for it to deal with 'pedestrian' acts of bribery, as the Attorney General suggested in evidence to the Joint Committee (Ev 93 in their report). CPS are well equipped to prosecute any cases of bribery that are not picked up by the SFO.

Holding UK Companies to account for acts abroad by their Foreign Subsidiaries

122. Global Witness was concerned that the proposed bribery offences do not cover acts abroad by foreign subsidiaries of UK companies. They say exploitation of this 'loophole' is common, where bribery of local officials in developing countries (for example the Democratic Republic of Congo) is carried out by a local subsidiary of a larger foreign company. They do not accept the Joint Committee's argument that this should be a matter for national law in the jurisdiction where it took place. The Africa All Party Group similarly argued for parent company liability for corruption committed by foreign subsidiaries. They suggest creating a new offence for a company to fail to satisfy itself that its subsidiaries are implementing anti-corruption procedures. A similar view is taken by TI.

123. Conversely, solicitors Simmons and Simmons thought the existing law was correct – in that a company should be criminally liable for the acts of a subsidiary only if it procured or assisted in that conduct. They also warned of the dangers of seeking to export the criminal law of Northern European countries into foreign and under-developed countries with different cultural practices around facilitation payments, corporate hospitality and the personal elements of business relationships. They contended that compliance policies are discredited because of the difficult situation they face in relation to facilitation payments – these are illegal even if prosecutions are

¹⁶ This process is set out in the Revised Memorandum of Understanding on Implementing Part 12 of the Anti-Terrorism, Crime and Security Act 2001 (1 December 2005).

unlikely. Instead they urged the adoption of the OECD Convention position, that facilitation payments do not constitute ‘foreign bribery’, so that UK businesses are in the same position as those other OECD countries.

Government view

124. The Government, like the Joint Committee (paragraph 78 of its report) is not persuaded that UK companies should have criminal liability for the acts of foreign subsidiaries, as such acts should be subject to national law in the jurisdiction concerned. There is a limit to the extent to which any country can police behaviour abroad. Under existing law a company may be held liable if it can be shown to have authorised, directed or actively connived in acts of bribery by a foreign subsidiary abroad. To establish any form of wider liability would have significant implications for company law and we are not convinced that any wider liability is either desirable or justified. We need to be realistic about what can be achieved by the UK criminal law and law enforcers in overseas cases. We would also wish to avoid giving third countries a reason to shed responsibility for dealing with criminal acts alleged to have taken place on their own territory by companies registered under their law.

125. As regards facilitation payments, the Government made its view clear in paragraph 27 of its Consultation Paper. The notes to the OECD Convention make clear that it is not a requirement of the Convention that they should be criminalised but the UK believes in principle that they should be, and the UK is far from being the only country which does criminalise them. The practicalities of life in some countries are better recognised in practice than in the law. If such payments were lawful they would be tax-deductible and also could be made in countries where there is no real corruption problem. The statement about prosecution policy that has been made with the approval of the DPP seems a better course.

That statement is:

“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.”

Extension of corporate liability for bribery

126. TI think that the existing law of corporate liability is unsatisfactory and suggested a clause to address liability for corruption in advance of a more general reform.

Government view

127. The Government has made clear its view that it would not be justifiable to alter the basic principles of corporate liability in our law solely in relation to bribery (Paragraph 26 of the Consultation Paper). The general issue of corporate liability forms part of the Law Commission’s work on codification of the criminal law.

New offence on books and records

128. TI suggested a provision on ‘books and records’ along the lines of the US Foreign Corrupt Practices Act 1977. This is alleged to be a useful provision where the evidence to mount a prosecution is in a foreign jurisdiction in which a domestic company operates through a subsidiary or associate.

Government view

129. The US 1977 Act requires companies to keep accounting records in reasonable detail which accurately reflects the transactions and dispositions of assets they have undertaken. In

effect they are exposed to penalties if they misdescribe a bribe as a commission payment. There are already extensive provisions in UK company law on the keeping of accounting records, and requirements in the Combined Code on internal controls. The UK is also required to comply with EC requirements on the preparation of published accounts. Against this background the adoption of provisions drafted in the US in the 1970s seems unnecessary and has the potential to undermine the UK's approach to corporate governance in this area.

Parliamentary Privilege

130. Harry Evans, Clerk to the Senate of Australia, remained concerned about clause 12 of the Bill even if narrowed so that it would apply only to a Member of Parliament in a case where that Member was a defendant. He thought it would not solve the problems in the original wording, including the risk that investigations could be used as a political tool to silence members, and also the general chilling effect on the freedom of speech of MPs in Parliament. Conversely, Clifford Chance did not agree that the Bill should be narrowed in the way proposed, thinking it desirable that all such evidence be admissible in court for instance in relation to a third party civil servant. TI also said that Parliamentarians should not have any special privilege. Professor Alldridge suggested postponing the introduction of this provision until a proper Parliamentary Privilege Bill can be brought forward.

Government view

131. In 1999 the Nichols Committee Report recommended that 'Members of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that evidence relating to an offence..... shall be admissible notwithstanding article 9 [of the Bill of Rights 1688]'. This recommendation was accepted by the

Government in its 2000 White Paper. The issue was reconsidered by the Joint Committee on the Bill and the Government accepted recommendation 12 of the Joint Committee that the proposed clause on privilege should be narrowed so it applies only to the words or actions of an MP or peer in a case where he is the defendant. We think this strikes the right balance between the desirability of lessening evidential bars to prosecution and the need to ensure there is no impediment to freedom of speech in Parliament. While there is a case for including any such change in a future Bill on Parliamentary Privilege, no such Bill is currently in prospect.

Donations to Political Parties

132. One individual respondent suggested there is a need to reform the system whereby donations to political parties can 'buy influence'. He suggested the system either be reformed by banning large donations, limiting political expenditure by political parties, introducing State funding for elections, or setting up 'Chinese walls' to prevent ministers being informed of such donations. Also he thought the definition of corruption in paragraph 21 of the Consultation Paper should be extended to include payments to 'third parties' such as political parties.

Government view

133. The funding of political parties in the United Kingdom is tightly regulated under the Political Parties, Elections and Referendums Act 2000. In particular the Act imposes general accounting requirements on parties and a much more detailed regime for the reporting of donations by parties and members of parties including a range of offences connected with such matters, for example, giving false information about donations and accepting donations from impermissible sources.

134. In order to create further transparency the Government introduced amendments to

the 2000 Act by means of the Electoral Administration Act 2006 to make it compulsory for political parties to disclose loans in the same way as donations are declared. The Prime Minister also asked Sir Hayden Phillips to conduct a review of the funding of political parties. The terms of reference of the review are ‘to conduct a review of the funding of political parties. In particular:

- To examine the case for state funding of political parties including whether it should be enhanced in return for a cap on the size of donations;
- To consider the transparency of political parties’ funding;
- And to report to the Government by the end of December 2006 with recommendations for any changes in the current arrangements.’

135. Sir Hayden Phillips has worked closely with stakeholders including, especially, the political parties and the Electoral Commission with a view to producing recommendations which are as much as possible agreed between the political parties with a view to legislation as soon as Parliamentary time allows. An interim assessment was published in October 2006 which set out the main issues and the possible options. It is anticipated that Sir Hayden will report the findings of his review shortly.

Asset recovery

136. Global Witness called for improved asset recovery assistance and oversight of returned funds

Government view

137. Recent secondary legislation under the Proceeds of Crime Act 2002 has significantly improved the assistance that the UK can provide in freezing, confiscating and repatriating assets. Work is ongoing on further secondary legislation to improve the assistance we can provide in tracing and investigating the

proceeds of crime, including corruption. Mutual legal assistance web guidance has been updated. Asset recovery assistance is thus improving without the need for further primary legislation and the UK is fully complying with its obligations under the UN Convention Against Corruption, including the ability to repatriate stolen state assets.

138. Consideration is ongoing on the issue of oversight of returned funds. Monitoring returned funds implies that conditions have been attached. The UK has never attached conditions or monitored returned funds as yet. This is a controversial area, as if money is originally from another country, then attaching conditions and/or monitoring raises significant issues of sovereignty. The UN Convention Against Corruption provides for the possibility of conditionality on a case-by-case basis (art 57.5) but does not make it a requirement.

Civil law measures

139. The City Liaison Group sought clarification on what is meant in paragraph 29 of the Consultation Paper, when it refers to certain “changes to the civil law” (in the draft Bill of 2003). TI also sought information on this.

Government view

140. The reference is to clauses 22 to 28 of the draft Corruption Bill published in 2003. These clauses amend the civil law on limitation of actions to enable ratification of the Council of Europe Civil Law Convention on Corruption (ETS No 174). The Convention requires parties to the Convention to provide in their internal law for effective remedies for persons who have suffered damage as a result of corruption, in order to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

ANNEX 1

LIST OF RESPONDENTS AND ABBREVIATIONS USED

Africa All-Party Parliamentary Group [group of 170 Parliamentarians chaired by Hugh Bayley MP] (Africa All-Party Group)

Professor Peter Alldrige, University of London

Association of Chartered Certified Accountants (ACCA)

Belfast City Council

Bribery All-Party Panel of Parliamentarians [group of 4 Parliamentarians chaired by Hugh Bayley MP] (All-Party Panel)

City of London Law Society (CLLS)

Clifford Chance, Solicitors

Confederation of British Industry (CBI)

Council of HM Circuit Judges (the Circuit Judges)

European Anti-fraud Office (OLAF)

Harry Evans, Clerk of the Senate of Australia

Financial Services and Markets Legislation City Liaison Group (City Liaison Group)

Global Witness

International Chamber of Commerce United Kingdom (ICC – UK)

Investment Management Association (IMA)

Law Society

London Criminal Courts Solicitors' Association (LCCSA)

S J Melinek

Ministry of Defence Police (MDP)

Police Federation of England and Wales (Police Federation)

Police Federation for Northern Ireland (PFNI)

Public Prosecution Service of Northern Ireland (PPSNI)

Serious Fraud Office (SFO)

Simmons & Simmons, Solicitors

Transparency International (UK) (TI)

ANNEX 2 - BREACH OF DUTY IN INTERNATIONAL BRIBERY LAW

Summary

A requirement for a 'breach of duty' as an element of an offence of bribery in the public sector raises compliance questions in relation to the corruption conventions of the Council of Europe, the OECD, and the UN, but not the EU.

Council of Europe Criminal Law Convention on Corruption

The text of this Convention includes a breach of duty requirement for some bribery offences but not for others. In essence it is included for bribery in the private sector (Articles 7 and 8) but not in the public sector (Articles 2-6 and 9-11). In the public sector bribery means giving or receiving an undue advantage for an official to act or refrain from acting in the exercise of his functions. In the private sector it is only a crime if the undue advantage is for the person 'to act, or refrain from acting, in breach of their duties.' But there is a special provision in Article 36 which allows Parties to declare that they will only criminalise bribery of foreign public officials (Articles 5, 9 and 11) to the extent that the official acts in breach of his duties.

The reasons for distinguishing the public and private sectors are explained in the Explanatory Report on the Convention. It states that confidence in the fairness of public administration would be undermined even if the official would have acted in the same way without a bribe (paragraph 39). A different approach is taken as justified in the private sector and, according to the Council of Europe, the expression 'breach of duty' aims to guarantee there will be no breach of the general duty of loyalty in relation to the principal's affairs or business (paragraph 55).

Some confusion is created by the fact that the laws of some states see breach of duty as an aggravating circumstance, not a necessary part of the basic crime. Hence in these countries

(Slovenia is one example) bribery of an official to do something that is a breach of duty is seen as a more serious crime than a bribe to do something that does not breach his duty.

The Explanatory Report says that breach of duty adds an element of ambiguity but nevertheless does not rule out the possibility that Parties may require it, as it adds 'States that require such an extra element for bribery would therefore have to ensure that they could implement the definition of bribery under Article 2 of this Convention without hindering its objective'.

The term 'breach of duties' is not defined in the Convention but the Explanatory Report at para 142 says it is to be understood in a broad sense, and to imply that a public official has a duty to act impartially.

OECD Convention on Bribery of Foreign Public Officials

The Convention does not refer to 'breach of duty' but the accompanying commentaries say that 'a statute which defined the offence in terms of payments 'to induce a breach of the official's duty' could meet the standard provided that every public official had a duty to exercise judgement or discretion impartially and that this was an autonomous definition not requiring proof of the law of the particular official's country'.

Some countries have relied on this section in the Commentaries and have stated that showing any partiality is a violation of an official's duties, and that an official's duty was breached if his decision was influenced by a bribe even if the result itself was not objectionable. Thus they see the receipt of the bribe as constituting itself the breach of duty.

EU Corruption Convention

There is no EU compliance problem as the offences in this Convention, which apply only

to public sector bribery, refer to breach of duties (in Articles 2 and 3) without defining the term. These articles provide that the offence is giving or receiving an advantage of any kind for an official ‘to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties’ (sic). There is an Explanatory Report on this Convention which mentions that ‘the laws of certain Member States also cover cases where an official, contrary to his duty to act impartially, receives an advantage in return for acting..... (eg by giving preferential treatment by accelerating or suspending the processing of a case). These cases are also covered by the present Article.’

Similar bribery offences with a breach of duty requirement are to be found also in the 1st protocol to the EU’s PIF Convention (the so-called ‘Fraud Convention’).

EU Framework Decision on Private Sector Corruption

The offence provisions (Article 2.1 (a) and (b)) refer to breach of duties and the term is defined in Article 1, which says:

‘breach of duty’ shall be understood in accordance with national law. The concept of breach of duty in national law should cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person, who in any capacity directs or works for a private sector entity.

UN Convention Against Corruption

Articles 15 and 16, which deal with the bribery of public officials, do not refer to breach of duties. The concept is however included in Article 21, which covers the private sector, and is not mandatory (parties are only required to consider adopting such an offence).

ANNEX 3 – LIST OF PUBLICATIONS REFERRED TO

The Law Commission Consultation Paper: Legislating the Criminal Code: Corruption (Consultation Paper No 145 (1997))

The Law Commission Report: Legislating the Criminal Code: Corruption (Report No 248 (1998))

The ‘Nicholls Committee Report’: Report of the Joint Committee on Parliamentary Privilege (HL Paper 43 and HC 214, March 1999)

The White Paper on Corruption: Raising Standards and Upholding Integrity: the Prevention of Corruption (Cm 4759, 2000)

The Draft Bill: Corruption: Draft Legislation (Cm 5777, 2003)

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

The Government Response to the Joint Committee: Draft Corruption Bill (Cm 6068, 2003)

The Consultation Paper: Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials (2005)