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THE LAW COMMISSION

LEGISLATING THE CRIMINAL CODE: CORRUPTION

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ABBREVIATIONS

In this paper we use the following abbreviations:

the 1889 Act: the Public Bodies Corrupt Practices Act 1889

the 1906 Act: the Prevention of Corruption Act 1906

the 1916 Act: the Prevention of Corruption Act 1916

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

the CJPOA 1994: the Criminal Justice and Public Order Act 1994

the CPS: the Crown Prosecution Service

the Convention: the European Convention on Human Rights

the DPP: the Director of Public Prosecutions

the DTI: the Department of Trade and Industry

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

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

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

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

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

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

the SFO: the Serious Fraud Office

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

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

the Strasbourg Commission: the European Commission of Human Rights

the Strasbourg Court: the European Court of Human Rights

PART I
INTRODUCTION

1.1 In this consultation paper we examine the law of corruption. As we shall show, there have been calls from two prestigious bodies[1] for a review of this area of law, and this has been supported by other submissions made to us about the unsatisfactory state of the present law.

1.2 The consequences of corruption are serious. It strikes at the very root of society, as people are encouraged to disregard their duties for some personal benefit. A former Lord Chancellor[2] took the view that "short of high treason it is almost impossible to imagine an offence more grave than to corrupt one of these public servants and cause the neglect of his duty".[3] It is hardly surprising that, in the words of one judge, the "common law … abhors corruption".[4]

1.3 Unfortunately, the present law of corruption suffers from numerous defects. First, it is drawn from a multiplicity of sources. Corruption offences are to be found in at least 11 statutes,[5] the principal of which are the Prevention of Corruption Acts 1889 to 1916.[6] Much of that legislation was impulsive, prompted by contemporary problems or fears and, as a consequence, it is neither comprehensive nor consistent. In addition, there are many overlapping common law offences. These include: misconduct in public office[7] and specific bribery offences[8] such as embracery (bribing of jurors),[9] attempts to bribe a privy councillor,[10] attempts to bribe a police constable,[11] and the taking of a bribe by a coroner not to hold an inquest.[12]

1.4 It is not surprising that the Salmon Commission recommended the rationalisation of the statute law on bribery,[13] while the Nolan Committee pointed out that, as the

1 The Salmon Commission and the Nolan Committee.

2 Lord Buckmaster, speaking in wartime.

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

4 *Whitaker* [1914] 3 KB 1283, 1297, *per* Lawrence J.

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

6 The collective name given to the 1889, 1906 and 1916 Acts by s 4(1) of the 1916 Act.

7 *Llewellyn-Jones* [1968] 1 QB 429.

8 See para 2.2, n 1, below.

9 *Pomfriet v Brownsal* (1600) Cro Eliz 736; 78 ER 968.

10 *Vaughan* (1769) 4 Burr 2495; 98 ER 308.

11 *Richardson* 111 Cent Crim Ct Sess Pap 612.

12 *Harrison* (1800) 1 East PC 383.

13 Salmon Report, para 87.

Government had accepted – but not implemented – that recommendation, it might be a task which this Commission could take forward.[14] We are pleased to do so.

1.5 A second problem with the present law is its dependence on a critical distinction between *public* and *non-public* bodies.[15] The Public Bodies Corrupt Practices Act 1889, as its short title suggests, is concerned only with corruption in public bodies, unlike the more narrowly drafted[16] 1906 Act which extends the law of corruption to all agents. The presumption of corruption under section 2 of the 1916 Act is similarly limited, applying only to persons "in the employment of [Her] Majesty or any Government Department or a public body".[17] And, less significantly, the 1906 Act distinguishes between a person serving under a public body[18] and a person serving under a non-public body: whereas the former is a "agent" for the purposes of the 1906 Act,[19] the latter is not.[20]

1.6 The problem of the public/private distinction is then compounded because of the uncertainty as to what *is* a "public body". Many former public bodies have been privatised, and it is by no means clear whether they are still to be regarded as "public bodies". And we will consider in some detail whether, in any event, the distinction for the purposes of the criminal law of corruption remains justified.[21]

1.7 Another difficulty with the present legislation is ascertaining to whom it applies. For example, although the 1906 Act extended the law of corruption to all agents, expressly defined as including "any person employed by or acting for another"[22] or "a person serving under"[23] any local or public authority,[24] there is uncertainty as to whether certain specific categories of individuals (such as judges) fall within the definition of an agent. Furthermore, unlike the 1889 Act, it appears that the 1906 Act does not extend to those who accept bribes before or after the currency of their agency, or to third-party recipients.[25]

1.8 A fourth problem meriting investigation is the presumption[26] under section 2 of the 1916 Act. There is a rebuttable presumption of corruption where payment is made

[14] Nolan Report, para 2.104.

[15] See Part VI below.

[16] See paras 6.4 – 6.6 below.

[17] 1916 Act, s 2. See paras 4.4 – 4.6 below.

[18] As defined by the 1889 Act, s 7, amended by the 1916 Act, s 4(2).

[19] 1916 Act, s 4(3).

[20] Unless he or she falls into the definition of "agent" for some other reason, namely, that he or she is "employed by" or "acting for" the non-public body: 1906 Act, s 1(2). See para 6.9 below.

[21] See Part VI below.

[22] 1906 Act, s 1(2).

[23] 1906 Act, s 1(3).

[24] 1916 Act, s 4(2) and (3).

[25] See paras 6.4 – 6.6 below.

[26] See para 11.2 below.

to a public servant by a person holding, or seeking to obtain, a contract with a public body. We will consider whether this presumption is still justified in the light of sections 34 and 35 of the Criminal Justice and Public Order Act ("CJPOA") 1994[27] (allowing adverse inferences to be drawn from a defendant's silence in the course of an investigation and at trial) or whether, on the other hand, it should be extended (as suggested in the Salmon Report).[28] We will also consider whether, in the light of the CJPOA, the presumption is compatible with the European Convention on Human Rights.[29]

1.9 Another matter of concern is whether the powers of investigation for corruption are adequate. The Serious Fraud Office ("SFO") has extensive powers[30] and we will consider whether they should be extended to cover *all* cases of corruption, not merely those serious enough to fall within the remit of the SFO. A reformed law of corruption will be of little value if the powers of investigation are inadequate, and we believe that this issue merits consideration.[31]

1.10 Before deciding to embark on this project we carried out the normal process of asking people and organisations that might be particularly interested if they thought that such a review was justified. We were aware of the wishes of the Salmon Commission[32] and the Nolan Committee[33] but additionally received great encouragement from other sources. We are conscious that this Commission is given the statutory task of keeping the law under review and making recommendations for its reform.[34] In undertaking this project on the reform of the law of corruption, we kept in mind our long-held aim to make the criminal law more accessible, comprehensible, consistent and certain,[35] an aim which we have argued would be achieved by the implementation of our draft Criminal Code Bill.[36]

THE MEANING OF CORRUPTION

1.11 According to the *Oxford English Dictionary*, the verb "to corrupt" has a number of meanings, of which the most relevant for our purposes is "To destroy or pervert the integrity or fidelity of (a person) in his discharge of duty; to induce to act dishonestly or unfaithfully; to make venal; to bribe". Similarly the adjective "corrupt" means, among other things, "Perverted from uprightness and fidelity in

[27] See paras 11.25 – 11.34 below.

[28] See para 11.13 below.

[29] See para 11.33 below.

[30] See paras 12.3 – 12.5 below.

[31] See Part XII below.

[32] See n 13 above.

[33] See n 14 above.

[34] See Law Commissions Act 1965, s 3(1).

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

[36] A Criminal Code for England and Wales (1989) Law Com No 177, p v. See para 3.5 and Appendix C where we set out the scheme of a comprehensive Criminal Code which includes offences under the 1889 and 1906 Acts.

the discharge of duty; influenced by bribery or the like; venal". And an act is "corruptive" if it "has the quality of corrupting" or "tends to corrupt".

CORRUPTION AND BREACH OF DUTY

1.12 As we shall see,[37] the offences under the 1889 and 1906 Acts are mostly offences of paying, receiving, offering and soliciting *bribes*. In its simplest form, therefore, a corrupt transaction involves three parties: A, the donor of a bribe (the briber); B, the agent of C and recipient of the bribe (the bribee), and C, the principal of B. The relationship between A, B and C can be described in terms of the interplay of their interests:

(1) A and C both act in self-interest, and their interests potentially conflict with each other.

(2) B, as agent of C, is not entitled to act in self-interest, but is under a duty to act in the interests of C.

(3) By bribing B, A (acting in self-interest) tempts B to breach the duty owed by B to C, by appealing to B's self-interest.

In essence, the purpose of a bribe by A is to cause B to act contrary to the interests of C and in the interests of A. A does this, not by requiring B to act in the interests of A rather than C, but by *tempting* B[38] to act in self-interest, the result of which will coincide with a result desired by A, also acting in self-interest.

1.13 The paradigm set out above casts A as the wrongdoer: *but for* A, B would have discharged his or her duty on behalf of C. A variant of the corrupt transaction, however, is one in which it is *B* who is the initiator: B *offers* to breach his or her duty to C, to the advantage of A, in exchange for a bribe from A.[39]

1.14 Given the consensual nature of bribery, the moral reprehensibility of A and B in both the paradigm and the variant circumstance is fairly evenly balanced. The two situations are distinguished only by which of the parties has instigated the corrupt activity.

1.15 In our view, therefore, the mischief with which the present law of corruption is concerned can be described in terms of both

(1) the *fundamental mischief* (B's breach of duty), and

(2) the *mischief of temptation* (A's temptation of B, by bribery, to breach his or her duty).

[37] See paras 2.16 and 2.21 below.

[38] The purpose of the Prevention of Corruption Acts 1889 to 1916 is, according to Lawton LJ, "to prevent agents and public servants being put in positions of temptation": *Wellburn* (1979) 69 Cr App R 254, 265.

[39] Under the 1889 Act, s 1, it is an offence corruptly to "solicit" a bribe; under the 1906 Act, s 1(1), it is an offence for any agent corruptly to "attempt to obtain" a bribe.

1.16 In focusing on the mischief of temptation, the Prevention of Corruption Acts do not criminalise corruption in the *fundamental* sense of criminalising breaches of duty: rather, they seek to prevent it by criminalising a particular kind of conduct – bribery – which is *likely to encourage* breaches of duty.

CORRUPTION, THEFT, FRAUD AND DISHONESTY

1.17 In 1994 we announced our intention to carry out a comprehensive review of the law of dishonesty,[40] and we originally saw the present project as part of that exercise. As we looked further into the subject of corruption, however, we began to see it as a distinct and independent kind of crime. This view has had certain implications for both the issues that we address in this paper and the solutions we propose.

Corruption and theft

1.18 It is arguable that the acceptance of a bribe by a fiduciary amounts to theft,[41] on the ground that the fiduciary holds the bribe on trust for the principal and that any dishonest dealing with it is therefore an appropriation of property belonging to another. The law on this point is uncertain. It was formerly thought that the fiduciary is not a trustee of the bribe, and owes only a personal obligation to account to the principal for the sum received. This view derives from the decision of the Court of Appeal in *Lister & Co v Stubbs.*[42] The principal in that case wanted to trace secret commissions received by his agent into their product, namely certain investments in land. The court refused to grant this remedy, on the ground that the land did not belong in equity to the principal. The remedy was a personal action for an account only.

1.19 However, the position was recently reviewed in *Attorney-General for Hong Kong v Reid.*[43] Reid, a public prosecutor in Hong Kong, took bribes intended to induce him to obstruct the prosecution of certain criminals. He invested the monies in property in New Zealand. The Attorney-General attempted to freeze dealings with these assets, and to claim them in specie. The New Zealand court of first instance and the Court of Appeal held, following *Lister*, that the Crown could claim no proprietary interest in the property. The Privy Council, however, took the opportunity to overrule *Lister*, and declared that Reid held the bribe monies on constructive trust for the Crown from the moment he received them. Therefore the Crown had an equitable interest in them and could trace into their proceeds, subject to the usual tracing rules.

[40] Criminal Law: Conspiracy to Defraud (1994) Law Com No 228, paras 1.16 – 1.19. At Item 11 of our Sixth Programme of Law Reform (1995) Law Com No 234 we recommended

> that a comprehensive examination be made of the criminal law, … including:
> (a) all offences of dishonesty, including those arising under the Theft Acts 1968 and 1978 and the Forgery and Counterfeiting Act 1981 …

[41] Theft Act 1968, s 1(1).

[42] (1890) 45 Ch D 1.

[43] [1994] 1 AC 324.

1.20 Strictly speaking, the Court of Appeal's decision in *Lister* is binding on the courts below, while that of the Privy Council in *Reid* is of persuasive authority only. In practice, however, decisions of the Privy Council often have a stronger influence than theory would suggest. There are instances where a Privy Council decision has been consistently preferred to a decision of the Court of Appeal which has never been overruled.[44]

1.21 Even if *Reid* now represents English law, its implications for the law of theft are not yet clear. In *Attorney-General's Reference (No 1 of 1985)*[45] the Court of Appeal held that the receipt by an agent of a secret profit was not theft. This was partly because it was then thought that the principal would have no proprietary interest in a bribe accepted by the agent (a view now undermined by *Reid*), but partly also on the ground that, even if the principal did have a proprietary interest, it was not the sort of proprietary interest with which the Theft Act was concerned. The court appears to have thought that, even if the taking of a secret profit (or a bribe) could be squeezed within the Act's wording, it was not within its spirit.

1.22 We have as yet formed no view on whether we agree with this approach. For reasons which we shall now explain, we believe that this issue falls outside the scope of the present project.

Corruption and fraud

1.23 The concept of criminal fraud is wider than that of theft: it includes any dishonest conduct intended to result in loss (or the risk of loss) to another.[46] Thus an agreement between two or more persons to engage in such conduct is a conspiracy to defraud at common law, even if the course of conduct agreed upon does not involve the appropriation of property belonging to another.[47] In many cases of corruption, probably the great majority, the corrupt agent will be defrauding his or her principal: for example, the principal may be obliged to pay more for a service because the agent has corruptly accepted a tender which is unduly expensive.[48]

1.24 Fraud does, however, presuppose the existence of an intended *victim*. One cannot act fraudulently in the abstract: one can only defraud people (or corporations). To exploit a position of trust for one's own benefit is not fraud unless someone else's interests are thereby damaged or endangered. The acceptance of a bribe by an agent is therefore not *necessarily* a fraud on the agent's principal. The civil law recognises this, but treats it as immaterial: the agent must still account to the

[44] If the Privy Council declines to follow a Court of Appeal decision, an English court is thereafter at liberty to follow the Privy Council decision: *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210 at 217, 219.

[45] [1986] QB 491.

[46] *Scott v Metropolitan Police Commissioner* [1975] AC 819.

[47] See Criminal Law: Conspiracy to Defraud (1994) Law Com No 228.

[48] For this reason, corruption can often be charged as a conspiracy to defraud. Indeed, conspiracy to defraud is often easier to prove, in a corruption case, than the offences under the Prevention of Corruption Acts: for example, it does not require proof that a bribe has been offered, solicited or provided. See Law Com No 228, para 4.56.

principal for the bribe even if the principal has suffered no loss, because the agent has been unjustly enriched.[49]

1.25 In the criminal law of fraud, however, the element of loss to another person is crucial: if there is no loss (or risk of loss) there is no fraud. Corruption, we believe, is a kind of conduct which may or may not involve loss to others; and even where loss *is* caused, that factor is not in our view central to the criminality of what is done. The agent's conduct is criminal in two distinct respects, and for two distinct reasons. On the one hand it is a fraud on the principal, because the principal's private interests are improperly put at risk. On the other hand it is contrary to the public interest, because of the damaging consequences if such conduct becomes widespread. It is in the public interest that people should refrain from conduct which might encourage agents to act in breach of their duty – *whether or not anyone would be defrauded by such conduct*. In many cases, these justifications overlap. But, just as there can be fraud without corruption, so there can be corruption without fraud. It follows that fraud, though a common feature of corruption, is not an essential element of it.

Corruption and dishonesty

1.26 It may be suggested, however, that, even if corruption is not an offence of *fraud* (because it need not involve the infliction of loss), it is necessarily an offence of *dishonesty*, because offering or accepting a bribe is necessarily a dishonest thing to do. The concept of dishonesty has been defined, for the purposes of those offences of which it is an element,[50] as including whatever the jury or magistrates believe "ordinary and honest people" would find dishonest – provided that the defendant is shown to have realised that ordinary and honest people would take that view.[51] Arguably, therefore, the concept of dishonesty in the criminal law is by definition identical to the ordinary person's idea of what dishonesty is. If the ordinary person would say, for example, that it is dishonest for a police officer to accept a bribe in return for not reporting a crime, then (provided that the officer is shown to have realised that ordinary people would say so) the element of dishonesty would be established, for the purposes of any criminal offence with which the officer might be charged. In other words, dishonesty is an even wider concept than fraud.

1.27 But, even if this is true,[52] it does not follow that it is helpful to use the concept of dishonesty in such a broad sense for the purpose of classifying and defining

[49] *Parker v McKenna* (1875) 10 Ch App 96, 124-5, *per* Sir William James LJ; Goff and Jones, *The Law of Restitution* (4th ed 1993) p 666 et seq.

[50] Eg theft, the various deception offences under the Theft Acts 1968–96, and conspiracy to defraud.

[51] *Ghosh* [1982] QB 1053.

[52] It is clear that the issue of dishonesty is not *entirely* one for the jury or magistrates. It is never permissible for a jury to be directed that the defendant's conduct *was* dishonest (*Feely* [1973] QB 530), but in certain cases they can, and should, be directed that it was not. Sometimes this is expressly required by the legislation (Theft Act 1968, s 2(1)), but in any event the judge presumably has the right – indeed, the duty – to stop the case if no reasonable jury could take the view that the defendant's conduct *was* dishonest; and it is arguable that no reasonable jury could take this view if no-one was intended to suffer loss as a result of what the defendant did. See D W Elliott, "Directors' Thefts and Dishonesty" [1991] Crim LR 732, 734–735.

criminal offences, or law reform projects. In our view, the expression "offences of dishonesty" is best regarded as being confined to offences involving a *victim* – that is, a person whose private law rights are infringed by the conduct constituting the offence, and whose financial interests are thereby damaged or put at risk. In other words, we see this category of offences as dealing not with anything and everything that a lay person might call dishonest, but only with *fraud*. The same applies to our project on the law of dishonesty. As we have said, corruption may or may not involve fraud; and, by the same token, it may or may not be "dishonest" in the sense in which we use that term. It depends on the circumstances.

Conclusion

1.28 **We provisionally conclude that corruption is not in essence, and should not be treated as, an offence of dishonesty or fraud.** Dishonesty and fraud involve the unlawful infliction of loss, or the risk of loss; corruption is conduct conducive to breach of duty, and may or may not involve dishonesty or fraud. On this conclusion, like all the other provisional views expressed in this paper, we ask for views.

1.29 The implications of this conclusion for the present paper are twofold. In the first place, it follows that this paper is not the appropriate place to discuss the adequacy or otherwise of the law of fraud and dishonesty in the control of corruption. For example, we are not here concerned with the question whether, merely because a bribe or other secret profit is subject to a constructive trust (if it is), the obtaining and retaining of it should be *theft*.[53] Although offences of fraud and dishonesty may well be available in corruption cases, they do not properly represent the real criminality of what is done. We intend to examine these issues in the course of our review of the law of dishonesty.

1.30 Secondly, our view of corruption as a crime in its own right, independent of the law of fraud, has led us to the conclusion that it would be misguided to try to make it conform to the structure or conventions of that law. We have, for example, provisionally rejected the possibility of including a requirement that the defendant act "dishonestly", either instead of or as well as a requirement that his or her conduct be "corrupt". We have instead tried to devise proposals which can be justified in terms of what we regard as the *essence* of corruption, rather than a feature which, though often present in corruption cases, is essentially incidental.

METHOD OF WORKING

1.31 We have spoken to many people who have knowledge of the investigation and prosecution of corruption offences, as well as the conduct of trials for such offences. They have drawn our attention to problems with the present law, and we have included much of their material in this consultation paper. The Australian Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General has previously reviewed this area of law, and we have taken

[53] See paras 1.18 – 1.22 above.

advantage of its recent report. We have also drawn on this Commission's previous work on fiduciary duties and regulatory rules.[54]

1.32 We have considered how corruption is treated abroad, and include details in Appendix B of some relevant provisions of foreign law, which we found of particular value. We have not included an account of the law applicable in Scotland[55] because, with very minor differences, the Prevention of Corruption Acts apply there as in England and Wales.

1.33 We have had the benefit of the assistance of our consultant Professor A T H Smith, Professor of Criminal and Public Laws at the University of Cambridge. The Chairman and Secretary of the Nolan Committee assisted us in many ways. We are grateful to all of them for their help.

PROVISIONAL CONCLUSIONS AND PROPOSALS

1.34 Our main provisional conclusions and proposals are as follows.

1.35 We provisionally conclude that the law of corruption is in an unsatisfactory condition, and should be re-stated in a modern statute creating a new offence of bribery.

1.36 We provisionally propose that the new offence should be committed where

(1) an agent corruptly accepts, solicits or agrees to accept an advantage in connection with the performance of his or her duty;

(2) any person corruptly accepts, solicits or agrees to accept an advantage in connection with the performance by an agent of his or her duty;

(3) any person corruptly confers, or offers or promises to confer, an advantage on an agent in connection with the performance of his or her duty; or

(4) any person corruptly confers, or offers or promises to confer, an advantage on any person in connection with the performance by an agent of his or her duty.

1.37 We provisionally propose that, for the purpose of the new offence, an "agent" should be defined as

(1) any person who, by virtue of his or her status, falls within one or more of certain specified categories;

(2) subject to any express exclusion, any person who has undertaken (expressly or impliedly) to act on behalf of another, where that undertaking involves one or some of the following features:

(a) that person exercising a discretion on the other's behalf;

[54] Fiduciary Duties and Regulatory Rules (1992) Consultation Paper No 124; Fiduciary Duties and Regulatory Rules (1995) Law Com No 236.

[55] As for the common law, see para 2.14 below.

(b) that person having access to the other's assets (irrespective of whether he or she has been given a discretion to act in regard to those assets);

(c) that person having influence over the other's decisions (as regards the other's assets or any other interest); or

(3) subject to any express exclusion, any person who has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function).

1.38 We provisionally propose that, where a person other than an agent corruptly accepts a bribe in connection with the performance by an agent of his or her duty, the offence should also be committed by that agent if he or she receives some or all of

(1) the bribe itself,

(2) the proceeds of the bribe, or

(3) a benefit resulting from the bribe.

1.39 We provisionally propose that, where a person corruptly accepts, solicits or agrees to accept, or confers or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, that person should be guilty of the offence even if the agent in question is no longer an agent, or is not yet an agent, at the material time.

1.40 We provisionally propose that, for the purpose of the new offence, a person (A) should be regarded as conferring an advantage on another (B) if

(1) A does something that B wants A to do, or that is otherwise of benefit to B; or

(2) A has a right to act to B's disadvantage, and forbears to exercise that right.

1.41 In our provisional view, an advantage is accepted and conferred "corruptly" if

(1) it is an inducement to an agent to act or refrain from acting *in breach of duty*, or a reward for an agent's so acting or refraining from so acting, or

(2) it is an inducement to an agent to act or refrain from acting *in any way*, or a reward for an agent's so acting or refraining, *provided* that the transaction has a substantial tendency to encourage that agent, or others in comparable positions, to act in breach of duty;

but we ask for views on

(a) whether our analysis of the meaning of the word "corruptly" is correct (and if not, what it does mean); and

(b) whether its meaning should be set out in a statutory definition.

1.42 We provisionally propose that, where a person accepts, solicits or agrees to accept an advantage, ostensibly in connection with the performance by a person (whether the same person or another) of his or her duty as an agent, but the latter person is not in fact an agent (or was not, or will not be, an agent at the time when the performance of his or her duty is in question), neither person should be regarded as acting corruptly.

1.43 We provisionally propose that the new offence should be included among the offences in respect of which Part I of the Criminal Justice Act 1993, when it is brought into force, will extend the territorial jurisdiction of the English courts.

1.44 We provisionally propose that the distinction currently drawn between public bodies and others should be abandoned. In particular, we provisionally propose the abolition of the presumption of corruption created by section 2 of the 1916 Act, which applies only where the alleged bribe has been paid to a person in the employment of the Crown, a government department or a public body.

PART II
THE PRESENT LAW

2.1 In this Part we review the present law of corruption. We first examine the common law offences of bribery and misconduct in a public office, and the former common law offence of extortion. We also describe, briefly, the common law in Scotland. We then look at a number of statutory offences, primarily those contained in the Prevention of Corruption Acts 1889 to 1916. As we shall see, whereas the 1889 Act is concerned with corruption in public bodies, the 1906 Act, although substantially overlapping the 1889 Act, extends the criminal law of corruption to the private sector. The 1916 Act supplements the provisions of the 1889 and 1906 Acts by dealing with various ancillary matters, the most important of which is the statutory presumption of corruption in certain cases involving public sector corruption.

THE COMMON LAW

Bribery

2.2 Bribery at common law is difficult to define: it has evolved over time, and opinions differ as to whether it is to be regarded as a general offence (applying to a range of different offices or functions) or whether the common law is comprised of a number of offences of bribery (distinguished by the office or function to which a particular offence applies).[1] *Russell on Crime*, however, provides the following general statement of the offence:

> Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.[2]

2.3 In *Stephen's Digest of the Criminal Law*,[3] on the other hand, a distinction is drawn between judicial corruption and corruption of other public officers. As regards the former, it is commented that "[t]he crime is so rare that the definition is very imperfect and more or less conjectural".[4]

The meaning of "public officer"

2.4 The most widely cited definition of who is to be regarded as a public officer for the purposes of common law bribery is taken from the early twentieth century case of

[1] "[T]he offence underwent a development over the centuries and is often described in terms of a number of individual offences rather than a single offence": D Lanham, "Bribery and Corruption" in *Criminal Law: Essays in Honour of J C Smith* (1987) 92, 92–93. Examples of specific offences, or specific instances of the offence, are bribery of a privy councillor (*Vaughan* (1796) 4 Burr 2494; 98 ER 308) and bribery of a coroner (*Harrison* (1800) 1 East PC 382). See *Archbold*, para 31–129.

[2] *Russell on Crime* (12th ed 1964) p 381.

[3] (9th ed 1950, ed L F Sturge) p 122.

[4] *Ibid*, n 1. See also A T H Smith, *Property Offences* (1994) para 25–03.

Whitaker.[5] The defendant, a colonel, had accepted money from a firm of caterers in return for giving the firm the tenancy of the regiment's canteen. It was argued that the law of bribery applied to "judicial and ministerial officers" and that the colonel belonged to neither category. The Court of Appeal disagreed, holding that every public officer who was not a judicial officer was a ministerial officer.[6] A public officer was defined as

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

2.5 One commentator[8] has argued that the common law is not confined to public officers holding some sort of *permanent* public office but extends also to those who discharge an *ad hoc* public duty. In *Pitt and Mead*,[9] for example, bribing electors at a parliamentary election was held to be a common law offence. In *Lancaster and Worrall*[10] the same decision was reached in respect of the bribery of local government electors. Embracery – the bribery of jurors – is a common law offence, though now considered obsolete.[11]

The bribe

2.6 Russell defines a bribe as "any undue reward".[12] However, the benefit conferred in a particular case may be so small that it cannot be considered a reward at all. For example, in the *Bodmin Case*[13] Willes J mentioned that he had been required to swear that he would not take any gift from a man who had a plea pending, unless it was "meat or drink, and that of small value". David Lanham[14] also draws a distinction between bribes, which are prohibited, and treats, which are acceptable. He cites the South African case of *S v Deal Enterprises (Pty) Ltd*,[15] in which Nicholas J distinguished "entertainment" from bribery:

> The difference between legitimate entertainment and bribery lies in the intention with which the entertainment is provided, and that is something to be inferred from all the circumstances, including the relationship between giver and recipient, their respective financial and social positions and the nature and value of the entertainment.[16]

[5] [1914] 3 KB 1283.

[6] *Ibid*, at pp 1296–7.

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

[8] D Lanham, *op cit*, pp 93–94.

[9] (1762) 3 Burr 1335; 97 ER 861.

[10] (1890) 16 Cox CC 737.

[11] *Owen* [1976] 1 WLR 840. See para 7.39 below.

[12] See para 2.2 above.

[13] (1869) 1 O'M & H 121.

[14] D Lanham, *Criminal Fraud* (1987) p 204.

[15] 1978 (3) SA 302.

[16] *Ibid*, at p 311.

The mental element

2.7 Russell describes the mental element of bribery in terms of a briber intending to influence the behaviour of a public officer with a view to that officer "act[ing] contrary to the known rules of honesty and integrity".[17] It appears from the case law, however, that it is not a necessary feature of the offence that the briber should intend the bribee to commit a *breach* of duty. For example, in *Gurney*,[18] where the defendant was charged with attempting to bribe a justice of the peace, the jury was told that if the defendant had an intention to produce *any effect at all* on the justice's decision, that was an attempt to corrupt.

Misconduct in a public office

2.8 Like the common law offence of bribery, misconduct in a public offence is not easily defined. P D Finn, writing in 1978, commented that "the precise metes and bounds of this offence remain uncertain" and that "there has been – and still is – a tendency to regard 'official misconduct' as but a descriptive formula for a series of specific but interrelated offences such as oppression, neglect of duty, abuse of official power, fraud in office, etc".[19] He cites *Halsbury's Laws of England*,[20] in which "misconduct in public office" is treated as a general label encompassing "oppression", "breach of trust or fraud", "neglect of duty by [a] public officer", "refusal to serve in public office", "disclosure of spent convictions etc" and "disclosure of information".

2.9 Acknowledging the difficulty in attempting a definition of "misconduct in public office", Finn suggests that its "principal applications" include

(1) frauds and deceits by officers (fraud in office);

(2) wilful neglects of duty (nonfeasance);

(3) "malicious" exercises of official authority (misfeasance);

(4) wilful excesses of official authority (malfeasance); and

(5) the intentional infliction of bodily harm, imprisonment, or other injury upon a person (oppression).[21]

2.10 The Salmon Report refers to "misconduct in a public office" as "breach of official trust",[22] an offence which, it says, "embraces a wide variety of misconduct including acts done with a dishonest, oppressive or corrupt motive".[23]

[17] See para 2.2 above.

[18] (1867) 10 Cox CC 550.

[19] P Finn, "Official Misconduct" (1978) 2 Crim LJ 307.

[20] (4th ed 1990) vol 11(1), paras 290–295.

[21] Finn, *op cit*, p 310.

[22] Ch 10; and see Finn, *op cit*, p 307.

[23] Salmon Report, para 194, citing *Borron* [1830] 3 B and Ald 432; 106 ER 721.

2.11 Misconduct in a public office is, therefore, a wide-ranging and ill-defined offence which will often encompass either the act of bribery itself or the conduct resulting from the bribe.

Extortion

2.12 Extortion, now abolished,[24] is described by Glanville Williams as having occurred in circumstances where "a public officer [took], by colour of his office, any money or thing that is not due to him".[25] The mental element of the offence was "some improper motive, or at all events intention, to do the wrong actually done".[26]

2.13 As the MCCOC Report points out,[27] there is a substantial overlap between extortion on the one hand, and bribery and blackmail on the other. What is described as the "coercion aspect of extortion" is reflected in the offence of blackmail;[28] and "non-coercive extortion" is likely to amount to bribery.

The common law of Scotland

2.14 In Scotland it is an offence at common law for a public official (defined as a person entrusted with an official situation of trust) wilfully to neglect his or her duty.[29] Today, however, prosecution under the common law for breach of duty will usually involve bribery of *judicial officials*,[30] a separate common law offence. Whether bribery of (or the taking of bribes by) *any* public servant to act contrary to duty is a criminal offence at common law is not certain. It is likely, however, that the law would be extended by the courts if necessary.[31] In practice, it is unlikely that the necessity will arise, because of the availability of offences under the Prevention of Corruption Acts.[32]

THE STATUTORY OFFENCES

2.15 We now turn to the statutory offences of corruption. In Part I we noted[33] that the offences of corruption were contained in a variety of legislative sources. We shall confine our present examination to the principal corruption statutes, namely the

[24] By s 32(1)(a) of the Theft Act 1968.

[25] *Textbook of Criminal Law* (2nd ed 1983) p 837, para 37.5.

[26] *Shoppee v Nathan & Co* [1892] 1 QB 245, 251, *per* Collins J.

[27] See pp 263 and 265.

[28] See paras 5.11 – 5.13 below.

[29] Gordon, *The Criminal Law of Scotland* (2nd ed 1978) para 44–01.

[30] *Ibid.* "Judicial officer" includes clerks of the court, procurators fiscal, macers and messengers as well as judges: see *ibid*, para 50–04, and *Hume's Commentaries on Crime* (3rd ed) vol i, p 408.

[31] See Gordon, *op cit*, para 44–03: "There are no reported cases dealing with other than judicial matters but it can hardly be doubted that whether or not bribery of non-judicial officials has been recognised as criminal the High Court would declare it to be criminal should the need ever arise."

[32] *Ibid.* See para 1.32 above.

[33] Para 1.3, n 5.

Prevention of Corruption Acts 1889 to 1916, and the legislation concerning the sale of public offices and trafficking in honours.

The 1889 Act

2.16 The 1889 Act was introduced following revelations of malpractice ("connected with what would now be called property development")[34] made before a Royal Commission appointed to inquire into the affairs of the Metropolitan Board of Works, the body exercising the powers of local government in London at that time.[35] Section 1 of the Act, closely following the Commission's recommendation,[36] provides:

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

Public bodies[37]

2.17 As originally enacted, the 1889 Act was concerned only with *local* public bodies in the United Kingdom: section 7 provides, in part, that the expression "public body" means

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

Section 4(2) of the 1916 Act extended the definition of "public body" to include "local and public authorities of all descriptions". A further extension is provided

[34] Salmon Report, para 44.

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

[36] Salmon Report, para 44.

[37] See paras 6.10 – 6.15 below.

for under the Local Government and Housing Act 1989, so that it would include companies which, in accordance with Part V of that Act, are "under the control of one or more local authorities".[38] This provision is not, however, in force.

The bribe[39]

2.18 The bribe must take the form of "a gift, loan, fee, reward, or advantage". The expression "advantage" includes

> any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.[40]

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

The 1906 Act

2.20 In 1898 a report was published by the Secret Commissions Committee of the London Chamber of Commerce calling for the criminal law of corruption to be extended into the private sector.[41] Following a number of unsuccessful attempts at legislation,[42] the 1906 Act was passed.

2.21 The 1906 Act applies to all "agents", whether in the public or the private sector. Section 1(1) provides in part:

> If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business … he shall be guilty of an offence …

[38] Local Government and Housing Act 1989, Sched 11, para 3.

[39] See paras 8.59 – 8.62 below.

[40] 1889 Act, s 7.

[41] P Fennell and P A Thomas, *op cit*, p 174.

[42] Salmon Report, para 45.

Agents[43]

2.22 "Agent" is defined as including "any person employed by or acting for another"[44] and a person serving under the Crown[45] or any local or public authority.[46] The term "serving under the Crown" does not require *employment* by the Crown. In *Barrett*[47] the Court of Appeal held that, for the purposes of the Act, an additional superintendent registrar of births, deaths and marriages was serving under the Crown, although he was not appointed, paid or liable to dismissal by it.

The bribe

2.23 Whereas the 1889 Act describes a bribe as a "gift, loan, fee, reward, or advantage", the 1906 Act uses the expression "gift or consideration";[48] and "consideration" is defined as including "valuable consideration of any kind".[49] As under the 1889 Act, the putative bribe must be given or received as a *reward* or *inducement*; but, whereas under the 1889 Act it must be connected to a particular "matter or transaction", under the 1906 Act it may be a general "sweetener" designed to secure *generally* more favourable treatment.

The meaning of "corruptly"

2.24 An ingredient common to the offences under both the 1889 and the 1906 Acts is that the putative bribe should be given or received *corruptly*.[50] The term is not defined in the legislation, and its meaning has therefore been the subject of judicial interpretation.

2.25 In the mid-nineteenth century House of Lords case of *Cooper v Slade*,[51] concerning bribery at elections and the Corrupt Practices Act 1854, Willes J took the view[52] that the word "corruptly", as it appeared in the legislation,[53] did not mean

[43] See Part VII below.

[44] 1906 Act, s 1(2).

[45] 1906 Act, s 1(3).

[46] 1906 Act, s 1(3), as amended by 1916 Act, s 4 (2), (3).

[47] [1976] 1 WLR 946.

[48] 1906 Act, s 1(1).

[49] 1906 Act, s 1(2).

[50] A third offence created by the 1906 Act, s 1(1), is the offence of using a false document with the intent to mislead a principal. *This* offence does not require the agent to have acted corruptly: *Sage v Eicholz* [1919] 2 KB 171. We take the view that, given that it is not a corruption offence, it falls outside the scope of this consultation paper. See paras 10.20 – 10.22 below.

[51] (1858) 6 HL Cas 746; 10 ER 1488.

[52] The majority view.

[53] Section 2 provided that a person was guilty of bribery if he "shall, directly or indirectly, by himself, or by any other person, give or agree to give, or promise money, etc. to any voter, in order to induce any voter to vote, or refrain from voting, etc., or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting".

"dishonestly" but rather meant "purposely doing an act which the law forbids as tending to corrupt voters".[54]

2.26 In the more modern case of *Lindley*,[55] on the other hand, in which the defendant was charged under the 1906 Act with bribing the servants of a company as an inducement or reward for setting up a contract for a supply of peas, Pearce J interpreted "corruptly" as meaning a dishonest intention "to weaken the loyalty of the servants to their master and to transfer that loyalty from the master to the giver". *Lindley* was followed in *Calland*.[56] The defendant, an inspector of a life assurance company, was charged under the 1906 Act with rewarding an agent of the Ministry of Social Security for keeping him informed about the names and addresses of the parents of new-born children. Veale J held that "corruptly" meant "dishonestly trying to wheedle an agent away from his loyalty to his employer"; and, therefore, if the defendant's actions amounted to "sharp practice" and not "dishonesty", he was not guilty of corruption.

2.27 In *Smith*,[57] where the defendant was charged under the 1889 Act with offering a gift to the mayor of the borough of Castleford in order that the mayor should use his influence with the borough council in favour of the defendant, the Court of Appeal approved the dictum of Willes J in *Cooper v Slade.* According to Lord Parker CJ,

> "corruptly" here used … denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.[58]

Lord Parker recognised that this construction arguably rendered the word "corruptly" redundant. He suggested, however, that even if this were so in cases involving inducements, the word might have an independent function in the case of rewards.[59]

2.28 In the later case of *Wellburn*,[60] involving charges under the 1906 Act, the Court of Appeal again approved the words of Willes J, taking the view that "corruptly" was an "ordinary word", the meaning of which would cause a jury little difficulty.[61]

The 1916 Act

2.29 The 1916 Act was prompted by wartime scandals involving contracts with the War Office,[62] and was passed rapidly through Parliament as an emergency measure.

[54] (1858) 6 HL Cas 746, 773; 10 ER 1488, 1499.

[55] [1957] Crim LR 321.

[56] [1967] Crim LR 236.

[57] [1960] 2 QB 423.

[58] *Ibid*, at p 428.

[59] *Ibid*, at pp 428–429.

[60] (1979) 69 Cr App R 254.

[61] *Ibid*, at p 265, *per* Lawton LJ.

[62] P Fennell and P A Thomas, *op cit*, pp 174 and 185–186. Particularly influential were the comments made by Low J, who presided over two of the War Office cases – *Asseling*, *The*

Aside from increasing the maximum sentence for bribery in relation to contracts with the Government or public bodies,[63] and broadening the definition of "public body",[64] it also introduced the presumption of corruption.

The presumption of corruption[65]

2.30 Section 2 of the 1916 Act provides:

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

2.31 The presumption shifts the burden of proof, so that it is for the defence to prove (on the balance of probabilities)[66] that a given payment was not corrupt. It applies only to payments made to employees of public bodies, and only to cases involving contracts.[67]

The Sale of Offices Acts 1551 and 1809

2.32 The 1551 Act forbade the sale of certain public offices concerned with the administration of justice. The 1809 Act extended the range of affected public offices to all offices in the gift of the Crown, and extended the territoriality of the 1551 Act to include Scotland and Ireland;[68] it also created a number of further offences related to the sale of public offices.[69]

2.33 There appear to have been no reported cases brought under either the 1551 or the 1809 Act for 130 years. Furthermore, the offences contained in the Prevention of

Times 10 September 1916, and *Montague*, *The Times* 18 September 1916. See the Salmon Report, para 46.

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

[64] See para 2.17 above.

[65] See Part XI below.

[66] *Carr-Briant* [1943] KB 607.

[67] In *Asseling* (see n 62 above) Low J had considered it impossible to prosecute a civil servant found to be in possession of banknotes that had been traced to a contractor with whom he had had official dealings, because the prosecution was unable to prove why the money was paid. As a result, the burden of proof provisions were applied only to transactions involving contracts, and only to employees.

[68] Now Northern Ireland.

[69] Sections 3–5.

Corruption Acts, and their inchoate counterparts, are likely to cover most circumstances to which the 1551 and 1809 Acts would apply.[70] In view of this, the agreement of all relevant authorities[71] in the United Kingdom has been secured by the Statute Law Revision teams of this and the Scottish Law Commission, and the Northern Ireland draftsman dealing with statute law revision, to the effect that, as part of the Statute Law Revision programme, the 1551 and 1809 Acts should be repealed. For this reason alone, we think it inappropriate for us to make any proposal in respect of these Acts in this consultation paper.

The Honours (Prevention of Abuses) Act 1925

2.34 The Honours (Prevention of Abuses) Act 1925 was passed on the recommendation of the Royal Commission on Honours, which reported in 1922.[72] Section 1 of the Act provides:

> (1) If any person accepts or obtains or agrees to accept or attempt to obtain from any person, for himself or for any other person, or for any purpose, any gift, money or valuable consideration as an inducement or reward for procuring or assisting or endeavouring to procure the grant of a dignity or title of honour to any person, or otherwise in connection with such a grant, he shall be guilty of an offence.
>
> (2) If any person gives, or agrees or proposes to give, or offers to any person any gift, money or valuable consideration as an inducement or reward for procuring or assisting or endeavouring to procure the grant of a dignity or title of honour to any person, or otherwise in connection with such a grant, he shall be guilty of an offence.

2.35 The Royal Commission was appointed "to advise on the procedure to be adopted in future to assist the Prime Minister in making recommendations to [the Sovereign] of names of persons deserving special honour".[73] Although the Sovereign is the "fountain of Honour",[74] most honours are conferred on the advice of the Prime Minister. Of the various categories of honours granted, the Royal Commission's concern was the *political* honours list which, at that time, was initially drawn up by the Patronage Secretary[75] or the Head of the Party Organisation[76] for submission to the Prime Minister for final selection before

[70] The common law offence of misconduct in a public office (or, in Scotland, of a public official acting in breach or wilful neglect of duty) provides a residual offence should the statutory offences be inapplicable.

[71] The Home Office, the CPS, the Scottish Office Home and Health Department, the Crown Office and the authorities in Northern Ireland.

[72] Cmd 1789. The Royal Commission was under the chairmanship of Lord Dunedin. See also A T H Smith, *op cit*, para 25–07, where reference is made to the honours legislation having been prompted by "the activities of Lloyd George who was less than scrupulous about the freedom with which he distributed the patronage available to him".

[73] Cmd 1789, para 1.

[74] *Ibid*, para 5.

[75] If the name was that of a Member of Parliament.

[76] For those other than Members of Parliament.

presentation to the Sovereign.[77] The Royal Commission's particular concern was that

> there have been for some time, and recently in increasing numbers, persons who, for want of a better name, we may stigmatise as touts, who have been going about asserting that they were in a position to secure honours in return for specified payments … It needs no imagination to see that the endeavour to secure an honour might be carried out without authorisation of the person in charge of the list.

As a consequence, the following recommendation was made:

> [A] short Act should be passed which should impose penalties on any person offering to become instrumental in the securing of an honour for another in respect of a money payment or valuable consideration … [S]uch an Act might serve as a deterrent to the class to whom we have given the name touts … We think that the Act should also impose penalties on any person promising payment or consideration in order to receive an honour.[78]

2.36 Although the 1925 Act imports some of the language of the 1889 and 1906 Acts, it differs in that it does not focus directly on the activities of agents or those connected with public bodies: it applies to *any person* who bribes, or is bribed by, *any other person* with a view to the grant of an honour. Furthermore, it does not use the word "corruptly" (although it might be thought that trafficking in honours is, of its nature, corrupt). In our view, the offences contained in the 1925 Act do not fall naturally within the scheme of the offence of bribery provisionally proposed in Part VIII below. The 1925 Act provides specific offences for a highly specific mischief, and we make no proposals in respect of it.

[77] On the recommendation of the Royal Commission on Honours, the Prime Minister is now advised by three Privy Councillors acting as a Political Honours Scrutiny Committee: see E C S Wade and A W Bradley, *Constitutional and Administrative Law* (11th ed 1993, ed A W Bradley and K D Ewing) p 267.

[78] Cmd 1789, paras 31–32.

PART III
PREVIOUS REFORM PROPOSALS

3.1 In Part II we outlined the present criminal law of corruption. In Part IV we will argue that the present law is in need of reform. We are not, however, the first to review the law in this area or to make recommendations for change. The Redcliffe-Maud Committee, the Salmon Commission and, more recently, the Nolan Committee have each produced a report reviewing a specific area of the law on corruption. In this Part, we will set out some of the recommendations contained in these reports.

THE REDCLIFFE-MAUD REPORT

3.2 The Redcliffe-Maud Committee was appointed[1] in 1973 to examine local government law and practice in response to widespread public disquiet about conduct in local government following a number of prosecutions for offences of corruption in that sector. Its terms of reference were as follows:[2]

> To examine existing local government law and practice and how it might affect:
>
> (i) the conduct of both members and officers in situations where there is or could be a conflict between their position in local government and their private interests;
>
> (ii) qualification or disqualification for service as a member of a local authority or any of its committees.
>
> To consider the adequacy of the operation of such law and practice and the principles which should apply, and make recommendations regarding compliance with such principles.

3.3 The Committee reported in 1974. It identified five main areas for consideration: personal honesty and public confidence; conflicts of interest; the local government employee as councillor; responsibility for maintaining standards and a national code of local government conduct. The implementation of its recommendations included reform of the law, action by central and local government, action by political parties and action by individuals. We set out only those provisions relating to reform of the law.

Recommendations on reform of the law

Disclosure of pecuniary interests by councillors and officers

3.4 The Committee recommended

(1) that councillors should be required to make full oral disclosure of pecuniary interests, and that a councillor who has disclosed such an

[1] By the then Prime Minister, the Rt Hon Edward Heath MP.

[2] Redcliffe-Maud Report, para 2.

interest should be required to withdraw from the council meeting, except where the Secretary of State has removed his or her disability for speaking or voting;

(2) that there should be a compulsory register of certain pecuniary interests of councillors (including paid employment, interests in companies and interests in local authority land), to be additional to oral disclosure and to be open to inspection by any elector for the authority; and

(3) that penalties for the offence of failure to disclose a pecuniary interest at a meeting should be strengthened, failure to make an entry in the register should be an offence, and the time limit for prosecution of these offences should be extended.[3]

3.5 Similar recommendations were also made in respect of disclosure of financial interests by officers.

Misuse of official information

3.6 The Committee recommended that it should be a criminal offence to use for private gain information received through membership of, or employment in, a local authority.

Prevention of corruption

3.7 The Committee took the view that "the need to deal firmly with corruption … justifie[d] strengthening the provisions of the Prevention of Corruption Acts".[4] The Committee recommended

(1) that section 2 of the 1916 Act should be amended so as to apply

(a) to exercises of *discretionary powers* by local authorities as well as to the award of contracts, and

(b) to councillors as well as to employees; and

(2) that section 2 of the 1889 Act should be amended so as to give the court discretion to disqualify a person convicted of corruption for membership of a local authority for life on a first offence.

3.8 It also recommended that there should be a power, available only on application of the DPP to a High Court judge, on proof of reasonable grounds for suspecting a corrupt act (whether concerning local government or otherwise),[5] for the police to inspect private financial records before proceedings are started. The Committee acknowledged that such a recommendation should not be "contemplated lightly" and that it would represent a "new measure of intrusion upon the liberty of the

[3] *Ibid*, ch 3.

[4] *Ibid*, para 161.

[5] "A power to inspect financial records … before starting proceedings … could not be confined to cases involving suspected corruption in local government; it must be of general application in corruption cases": *ibid*, para 160.

individual".[6] It was hoped, however, that making the power available only on application by the DPP to a High Court judge on proof of reasonable grounds for suspecting the corrupt act would provide adequate protection against abuses.

The Government response

3.9 While the government appeared to welcome the recommendations made in the report,[7] little action was taken to implement its proposals.[8] The Government sought to encourage local authorities to act on proposals that could be implemented without legislation, and announced the intention of consulting with them with a view to producing such legislation.[9] However, few concrete measures appear to have transpired. One reason for this inactivity may have been that by the time the Redcliffe-Maud Report was being discussed, the Government was already anticipating the publication of the Salmon Report.[10]

THE SALMON REPORT

3.10 Following the Redcliffe-Maud Report, the Salmon Commission was established in 1974 and it reported two years later.[11] Its terms of reference were:

> To enquire into standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body; and to make recommendations as to the further safeguards which may be required to ensure the highest standard of probity in public life.[12]

3.11 The appointment of the Commission was prompted by concern about standards of probity in public life following the Poulson affair,[13] which had resulted in numerous prosecutions for various offences of corruption.[14] Having heard evidence on corruption in the public sector, the Commission concluded:

> Our evidence convinces us that the safeguards against malpractice in the public sector are in need of review. In particular, it is essential to

6 *Ibid.*

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

8 The Salmon Report, para 28, welcomed the promulgation in October 1975 of a national code of local government conduct on the lines recommended by the Redcliffe-Maud Report.

9 See *Hansard* (HL) 10 July 1974, vol 353, cols 550–553.

10 See *Hansard* (HC) 27 June 1974, vol 875, cols 1719–1720.

11 "Our own work has reinforced many of the major conclusions reached by the Redcliffe-Maud Committee within the field of local government, though we have departed from their recommendations on certain issues": Salmon Report, para 29.

12 Salmon Report, para 6. The Commission decided, however, to concentrate on studying the specific problems of conflicts of personal interests with official duties and the risk of corruption: *ibid*, para 7.

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

14 Salmon Report, ch 2.

find more effective ways of bringing corruption to light, since we consider that there are grave weaknesses in investigatory powers and the machinery available for receiving complaints and acting upon them.[15]

Recommendations on reform of the law of corruption

3.12 The Commission examined the law of corruption and recommended that the Prevention of Corruption Acts, insofar as they applied to the public sector, should be amended and consolidated.[16] More detailed recommendations for new legislation included the following:

(1) that the essence of the offence of bribery should remain the corrupt offering, giving, soliciting or accepting of considerations as an inducement or reward in respect of the affairs of the organisation in question;[17]

(2) that public bodies should be defined as broadly as is compatible with certainty;[18]

(3) that the presumption of corruption should remain, and should apply whether or not contracts are involved in the alleged offence;[19]

(4) that there should be a power, available only on application by the DPP to a High Court judge, on proof of reasonable grounds for suspecting a corrupt act, for the police to inspect private financial records before criminal proceedings are started;[20]

(5) that it should be an offence

(a) for a Crown servant or member or employee of any public body corruptly to use for his or her own advantage any information obtained by reason of his or her official position, and

(b) for any other person to use such information passed to him or her by a Crown servant or member or employee of a public body for his or her own advantage;[21] and

(6) that the corrupt disclosure of official information with the intention of conferring an advantage on the recipient or a third party should also be an

15 *Ibid*, para 41.

16 *Ibid*, para 87. Appended to this recommendation was the expressed expectation that "the opportunity will be taken of considering what, if any, changes are needed in the application of the present legislation to the private sector".

17 *Ibid*, para 88(i).

18 *Ibid*, para 88(iii).

19 *Ibid*, para 88(v).

20 *Ibid*, para 88(xii). The Redcliffe-Maud Committee had made a similar proposal: see para 3.8 above.

21 *Ibid*, para 193(i).

offence, whether committed by a Crown servant or member or employee of a public body or by any other person.[22]

Conflicts of interest and registers of interests

3.13 The Commission made recommendations relating to the disclosure of pecuniary interests by local councillors and the establishment of a register of interests.[23] It proposed that disciplinary measures be put in place to prohibit local government officers from taking outside paid employment that has any connection with their official duties.[24]

Other recommendations

3.14 Other recommendations included the following:

(1) that staff rules on acceptance of gifts and hospitality, which should be kept to a bare minimum, should be promulgated in all public bodies;[25]

(2) that legislation should be introduced to enable the "ombudsmen"[26] to transmit information to the police;[27]

(3) that police procedures with regard to corruption should be revised so that, for example, all allegations of corruption should be reported to the deputy chief constable;[28] and

(4) that Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his Parliamentary capacity within the ambit of the criminal law.[29]

The Government response

3.15 This report was not discussed in the House of Commons. There were several requests for information as to what steps were being taken by the Government to implement the Report, but apart from replying that consultation was proceeding on several issues, the Government took no action.[30] The report was fully debated in the House of Lords, where the response to it was somewhat mixed.[31] Lord

[22] *Ibid*, para 193(ii).

[23] *Ibid*, paras 156 and 179.

[24] *Ibid*, para 159.

[25] *Ibid*, para 216.

[26] The Parliamentary Commissioner for Administration and the Commissioners appointed to investigate complaints of maladministration in local authorities and National Health Service bodies: *ibid*, para 258(v).

[27] *Ibid*, para 264(i).

[28] *Ibid*, paras 279–281.

[29] *Ibid*, para 311.

[30] Written Answer, *Hansard* (HC) 25 May 1978, vol 950, col 664.

[31] *Hansard* (HL) 8 December 1976, vol 378, cols 585–604 and 611–674.

Pannell, for example, stated that it dealt with "the small change" of local government, and went on:

> The amount of paper work and the number of civil servants needed to put the thing on to the statute book simply would not be worthwhile.[32]

THE NOLAN REPORT

3.16 The 1990s have seen a spate of allegations to the effect that standards of conduct in public life are slipping. Particular accusations ranged from Members of Parliament accepting cash for asking questions in the House of Commons, to ministers accepting personal favours liable to lead to conflicts of interest with their public duties. This has been conducive to a general public perception of "sleaze" which has had the corresponding effect of lowering the standing of public officials in the eyes of the public.

3.17 On 25 October 1994, the Prime Minister announced the setting up of the Nolan Committee, which was constituted as a standing body with members appointed for a three-year term. Its function is to investigate current concerns about the standards of conduct of all holders of public office, and to propose changes to present arrangements so as to ensure the maintenance of high standards of probity.

3.18 The Committee's terms of reference were:

> To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.
>
> For these purposes, public life should include Ministers, civil servants and advisers, Members of Parliament and UK Members of the European Parliament, members and senior officers of all non-departmental public bodies and of national health service bodies, non-ministerial office holders, members and other senior officers of other bodies discharging publicly-funded functions, and elected members and senior officers of local authorities.[33]

3.19 The first report of the Nolan Committee concentrates on three main areas: issues relating to Members of Parliament, ministers and civil servants, and quangos. The Committee noted that in general its recommendations were designed to buttress, and where necessary restore, standards of conduct in public life. As will be seen, its recommendations laid more emphasis on formulating good standards of practice than reform of the criminal law.

General recommendations

3.20 The Committee thought it important that the general principles of public life be restated. These principles are selflessness, integrity, objectivity, accountability,

[32] *Ibid*, col 645.

[33] The Prime Minister (the Rt Hon John Major MP) *Hansard* (HC) 25 October 1994, vol 248, col 759.

openness, honesty and leadership.[34] The Committee further recommended that all public bodies should draw up codes of conduct to incorporate these principles, with internal systems for maintaining standards being supported by independent scrutiny.[35]

Members of Parliament

3.21 A number of recommendations centred on Members of Parliament. The Committee noted that

> It is vital for the quality of Government, for the effective scrutiny of Government, and for the democratic process, that Members of Parliament should maintain the highest standards of propriety in discharging their obligations to the public which elects them.[36]

It made the following recommendations, among others:

(1) The sale of MPs' services to firms engaged in lobbying for clients should be banned. Full disclosure of consultancy and trade union agreements and payments should be introduced immediately. Parliament should review the merits of allowing MPs to hold consultancies.[37]

(2) The law of Parliament relating to which Members' interests are acceptable and which are not should be reaffirmed. The Register of Interests should be more informative.[38] A Code of Conduct for Members of Parliament should be drawn up.[39]

(3) The House of Commons should remain responsible for enforcing its own rules governing Members' financial interests, but better arrangements are needed.[40] There should be a Parliamentary Commissioner for Standards.[41]

(4) The Government should take steps to clarify the law relating to the bribery of or the receipt of a bribe by an MP, as was recommended in the Salmon Report. This could be combined with the consolidation of the statute law on bribery.[42]

(5) The House of Commons should restate the 1947 resolution which places an absolute bar on Members entering into contracts or agreements which

[34] Nolan Report, p 14.

[35] *Ibid*, para 1.14.

[36] *Ibid*, para 2.2.

[37] *Ibid*, para 2.59.

[38] *Ibid*, para 2.70.

[39] *Ibid*, para 2.89. A draft Code is set out at p 39.

[40] *Ibid*, paras 2.90 – 2.102. There had been calls for the rules governing MPs' financial interests to be put into statutory form.

[41] *Ibid*, para 2.104.

[42] *Ibid*.

> restrict their freedom to act and speak as they wish, or which require them to act in Parliament as representatives of outside bodies.[43]

Ministers and civil servants

3.22 The Committee pointed out the need for clarity about the standards of conduct expected from ministers, and invited the Prime Minister to provide guidance on the matter.[44] Among the more specific proposals was that ministers and special advisers should be subject to rules similar to senior civil servants, whereby for two years after leaving office they must seek clearance before joining private companies.[45] For both ministers and civil servants the system should be made more open to public scrutiny. Better arrangements within departments for confidential investigation of staff concerns about propriety were also recommended.[46] However, the rules on acceptance of gifts and hospitality were sufficiently strict and no change was thought desirable.[47]

Executive quangos

3.23 The Committee pointed to a range of concerns about "quangos",[48] in particular questions relating to appointments, openness and whether enough is done to maintain standards of propriety.[49] It was recommended that an independent Public Appointments Commissioner should regulate the public appointments process.[50] All appointments should be made after advice from a panel or committee which includes an independent element.[51]

The Government response

3.24 The Government's response to the Nolan Report[52] was published in July 1995. As regards the question of the consolidation of the law of corruption, it said:

> The Government reaffirms its commitment to consolidate the laws on corruption, and welcomes the opportunity to clarify the law relating to the bribery of, or receipt of a bribe by, a Member of Parliament alongside that consolidation. The Select Committee on Standards in Public Life has recently recommended that the Government should

[43] *Ibid*, para 2.59.

[44] *Ibid*, para 3.15.

[45] *Ibid*, para 3.31.

[46] *Ibid*, para 3.53.

[47] *Ibid*, paras 3.40 – 3.41. But the Committee did recommend that records of hospitality accepted by Ministers in their official capacity should be kept, and made available if requested: para 3.41.

[48] Quasi-autonomous non-governmental organisations.

[49] *Ibid*, para 4.1.

[50] *Ibid*, para 4.53.

[51] *Ibid*, para 4.48.

[52] The Government's Response to the First Report from the Committee on Standards in Public Life (1995) Cm 2931, debated in Parliament on 18 July 1995. See *Hansard* (HC) 18 July 1995, vol 263, cols 1473–1484 and *Hansard* (HL) 18 July 1995, vol 566, cols 157–168.

> ask the Law Commission to undertake a review of the law relating to bribery, with specific reference to Members of Parliament. The Government will consider that recommendation in the light of the House of Commons debate on the Select Committee's report.[53]

The Select Committee on Standards in Public Life was set up by the House of Commons in June 1995, charged with considering the Nolan Report. It had recommended,[54] among other things, a review of the law of corruption (with specific reference to Members of Parliament) by the Law Commission.[55]

3.25 As we shall see,[56] the Home Office has recently[57] published a document entitled *Clarification of the law relating to the Bribery of Members of Parliament*, which invites the Select Committee on Standards and Privileges to consider a number of options with a view to clarifying the law of corruption as it relates to Members of Parliament.

CONCLUSIONS

3.26 We have seen that previous reviews of the law of corruption have been largely prompted by external events highlighting shortcomings in the law. In the next Part, we will argue why we, as law reformers, consider the existing law to be in need of change.

[53] Cm 2931, p 2.

[54] In its report Standards in Public Life (HC 637), published on 7 July 1995.

[55] For the reasons given in paras 7.48 – 7.49 below, we are not dealing with Members of Parliament in this consultation paper.

[56] Para 7.48 below.

[57] December 1996.

PART IV
THE NEED FOR CHANGE

4.1 We have already noted in Part I[1] that corruption offences are to be found in a range of statutes. Many of them were introduced as ad hoc responses to particular problems or scandals,[2] and, not surprisingly, this has given rise to a number of problems and anomalies. As a consequence, the Salmon Commission recommended the rationalisation of the statute law on bribery,[3] while the Nolan Committee pointed out that, as the government had accepted those proposals and this work still had not been done, it might be a task which this Commission could take forward.[4]

4.2 In this Part we highlight some of the difficulties with the present law. First, the corruption Acts distinguish between "public bodies" and non-public bodies: for example, the rebuttable presumption that a gift or other consideration is given corruptly applies only to those employed by a public body.[5] We consider whether this distinction remains justified. Second, the 1906 Act is concerned with the corruption of *agents* and we consider whether the definition of an agent is adequate.[6] Third, the principal corruption Acts – the 1899, the 1906 and the 1916 Acts – all use the word "corruptly", but there is great uncertainty as to precisely what it means.[7] All these points are considered in more detail later in this paper, and we will therefore only summarise them in this Part.

THE PROBLEM WITH "PUBLIC BODIES"

4.3 We have seen in Part II that the current law distinguishes between "public bodies" and others:[8] at first the law was applied *only* to public bodies (under the 1889 Act), it was then extended to the private sector (under the 1906 Act), but that extension was not then mirrored by the application of the presumption of corruption (under the 1916 Act) which was again confined to public bodies. The main justification for the distinction appears to be the view that higher standards of conduct are required in the public sector than in the private sector. This justification, however, would be more convincing if the distinction were the basis of rules *requiring* higher standards in the public sector. It is not: it has no direct bearing on the question of what conduct *is* corrupt but only, primarily, on the evidential ease (or otherwise) with which corruption can be proved.

[1] See para 1.3, n 5 above.

[2] See paras 2.16, 2.20 and 2.29 above.

[3] See para 1.4, n 13 above.

[4] See para 1.4, n 14 above.

[5] See para 6.7 below for its exact scope.

[6] See paras 4.7 – 4.14 below.

[7] See paras 4.15 – 4.17 below.

[8] See generally Part VI below, and see also para 1.5 above.

The presumption

4.4 In Part II[9] we set out the scope of the presumption of corruption under section 2 of the 1916 Act.

4.5 Since its application is limited to *public bodies* and, further, only to *employees* involved in the issuing of contracts, the general difficulty in defining "public body" *and* the problem of inconsistencies created by the relatively recent trend in privatisation of public bodies and the contracting out of work by public bodies to the private sector will bedevil, in particular, the application of the presumption.

4.6 In Part XI, we review the reasons for retaining the presumption. Given that only in exceptional circumstances should the normal burden of proof be reversed, we consider whether proving corruption offences is so exceptionally difficult that a presumption along the lines of section 2 can be justified. We also consider whether the presumption is compatible with the European Convention on Human Rights, both in itself and in the light of sections 34 and 35 of the CJPOA 1994 (which allow adverse inferences to be drawn from a defendant's silence).

AGENTS

4.7 As we have seen in Part II,[10] the 1906 Act is concerned with the corruption of *agents*, defined in the Acts as including any person "employed by or acting for another"[11] or a person serving under the Crown or any public body.[12] In addition to the criticism levelled at the 1906 Act that the definition of agent is "somewhat vague",[13] we have identified the following as examples of issues giving cause for concern:

(1) the inapplicability of the presumption to agents (of public bodies) not classifiable as employees (of public bodies);

(2) the inconsistency of the law as regards

(a) persons connected with agents,

(b) persons who have been, or are to become, agents, and

(c) purported agents;

(3) the uncertainty of the law as regards

(a) police officers,

9 See paras 2.30 – 2.31 above, and see generally Part XI below.

10 See paras 2.21 – 2.22 above, and see generally Part VII below.

11 1906 Act, s 1(2).

12 1906 Act, s 4(3), and 1916 Act, ss 4(2) and 4(3).

13 "It might be argued that it includes any person who provides another with his services, even if he is neither an employee nor an agent in the normal sense but merely an independent contractor acting as a principal in his own right; but it is equally arguable that a person does not act *for* another unless he acts on his behalf, *i.e.* as his agent in the strict sense": *Arlidge & Parry on Fraud* (2nd ed 1996) para 7–018.

(b) judges, and

(c) local councillors.

Inapplicability of the presumption

4.8 The presumption of corruption under section 2 of the 1916 Act affects only *employees* of the Crown, government department or public body. Any agent, therefore, who cannot be classified as an employee will not be amenable to the presumption.[14] Whatever view is taken of the presumption, it is clear to us that, if it *is* retained, it should be applied consistently.

Persons connected with agents

4.9 Under the 1889 Act, unlike the 1906 Act, it is an offence for a *third party* to receive corrupt gifts. Therefore, the spouse of an employee of a private company who receives a corrupt gift may not be caught by the 1906 Act, but he or she would be guilty under the 1889 Act if his or her spouse were instead an agent of, or employed by, a public body.

Persons who have been, or are to become, agents

4.10 Another example of the inconsistency between the 1889 and 1906 Acts is that, whereas the 1906 Act appears to require that a bribe be received by the agent during the *currency* of the agency, the 1889 Act extends to circumstances in which the public officer is no longer in office at the time of receipt of the bribe or has yet to assume office.

Purported agents

4.11 It is doubtful whether a person who is not in fact an agent can be guilty if he or she obtains a corrupt payment by *purporting* to be one. Professor A T H Smith comments on the balance of the argument as to whether the law *ought* to extend to *purported* agents:

> It is outside the mischief at which the offence, even at its broadest, seems to be aimed, since the recipient of the bribe is in no sense in any position to exploit an office that he does not actually hold. On the other hand, the person handing over the bribe believes that the recipient will be influenced by it and is in a position to affect his affairs favourably, and the recipient knows that this is his belief, and it might be said that this should suffice.[15]

Police officers

4.12 The case law on the applicability of the corruption laws to police officers is unclear. As to whether a police officer is an *agent* for the purposes of the 1906 Act, whereas in *Fisher v Oldham Corporation*,[16] a civil case, it was held that a police

[14] This category might include employees of firms engaged in contracted-out work and private sector secondees to government departments.

[15] A T H Smith, *Property Offences* (1994) para 25–04.

[16] [1930] 2 KB 364.

officer was not an agent of the Borough Watch Committee that appointed him but rather a servant of the State, in the Scottish case of *Graham v Hart*[17] a police officer was held to be the agent of the Chief Constable.[18]

Judges

4.13 It is an offence at common law to offer or to give a judge, magistrate or other judicial officer any gift or reward intended to influence his or her behaviour, or as a reward for anything done, and it is a corresponding offence for the judicial officer to accept such a gift.[19] Furthermore, judges have been held to be "officers" for the purposes of the offence of misconduct in public office.[20] In contrast to the common law, however, it appears that the statutory offence of corruption might not apply to judicial officers – although any attempt to bribe a judicial officer may, of course, be dealt with either as a contempt of court or as an attempt to pervert the course of justice.

Local councillors

4.14 Although local councillors are likely to fall within the common law of corruption and the 1889 Act, they are unlikely to be covered by the 1906 Act.

THE MEANING OF "CORRUPTLY"

4.15 The term "corruptly" is used in each of the principal corruption Acts, but, as we have seen in Part II,[21] its meaning is by no means clear. As one leading commentator has explained:

> The most difficult question under the 1889 and 1906 Acts is the meaning of "corruption". The main questions are whether the word adds anything to the remainder of the formulation of the offence, and if so, what it is that it adds. The cases on these questions are in impressive disarray.[22]

4.16 That the cases are in "impressive disarray" is largely due to the precedent established by the House of Lords in *Cooper v Slade*,[23] the leading case on the meaning of "corruptly", in which the majority took the view that "corruptly" meant "purposely doing an act which the law forbids as tending to corrupt".[24] Professor A T H Smith suggests that such an interpretation would leave the word "devoid of any functional significance".[25] As we have seen,[26] however, there is a

[17] [1908] SC (J) 26.

[18] The Court of Justiciary refused to be influenced by the civil law that a police officer was not a servant for the purposes of vicarious liability.

[19] *Gurney* (1867) 10 Cox CC 550.

[20] *Marshall* (1855) 4 El & Bl 475; 119 ER 174.

[21] See paras 2.24 – 2.28 above.

[22] D Lanham, "Bribery and Corruption", *Essays in Honour of J C Smith* (1987) 92, 104.

[23] [1857] HL Cas 746; 10 ER 1488.

[24] [1857] HL Cas 746, 773; 10 ER 1488, 1499, *per* Willes J.

[25] A T H Smith, *op cit*, para 25-26.

divergence of case law. In the *Bradford Election Case (No 2)*[27] Martin B held that "corruptly" was not otiose and had to be given some meaning, which he stated was akin to an evil mind.[28] Similarly, in *Lindley*[29] Pearce J directed the jury that the defendant must have *dishonestly* intended to weaken the loyalty of the servants to their master and transfer that loyalty from the master to himself. This approach was also followed in *Calland*.[30]

4.17 We agree with Lanham that "The position in English law is hardly satisfactory",[31] and that the view taken in *Wellburn*,[32] that juries would have no difficulty in deciding whether a gift had been received corruptly, was, "[g]iven the divergence of opinion on whether ["corruptly"] means anything at all … unduly optimistic."[33]

CONCLUSION

4.18 For the reasons set out in this Part, **we provisionally conclude**

(1) **that the law of corruption is in an unsatisfactory condition, and**

(2) **that the common law and statutory offences of corruption should be re-stated in a modern statute.**

4.19 We make no proposals as to the common law offence of misconduct in a public office; it covers a range of conduct other than bribery and is therefore, in our view, outside the scope of this consultation paper.

[26] Paras 2.24 – 2.28 above.

[27] (1869) 19 LT 723, 728.

[28] In other words, both motive and intention were held to be relevant in deciding whether the alleged conduct was "corrupt".

[29] [1957] Crim LR 321.

[30] [1967] Crim LR 236.

[31] D Lanham, *op cit*, p 106.

[32] (1979) 69 Cr App R 254, 265.

[33] D Lanham, *op cit*, p 106.

PART V
CORRUPTION AND BREACH OF DUTY

TWO BASIC LAW REFORM QUESTIONS

5.1 In Part I we analysed the source of the present law of corruption in terms of the *fundamental mischief* and the *mischief of temptation*.[1] This analysis raises two basic law reform questions:

(1) the first question: should the law directly prohibit the *fundamental mischief* of an agent breaching the duty of loyalty owed to his or her principal, rather than simply prohibiting kinds of conduct which are likely to *result* in such a breach (the *mischief of temptation*)?

(2) the second question: should the law prohibit ways other than the *mischief of temptation* (and, if so, which) of bringing about the *fundamental mischief* of inducing people to act contrary to their duty?

THE FIRST QUESTION

Acting contrary to duty: the radical approach

5.2 Criminalising conduct likely to result in corruption – the mischief of temptation – is one approach to preventing the fundamental mischief: a more radical and a more direct approach would be to have one or more offences of an agent *acting contrary to his or her duty as agent*, irrespective of the cause. The appeal of the radical approach is that it strikes directly at the fundamental mischief; and it would extend criminal liability to include those who breach duty of their own volition (whether for morally good or bad reasons)[2] and without the intervention of an outside party.

5.3 On the other hand, criminalising *all* such breaches of duty would be, in our view, unduly draconian, and criminalising *some* would mean devising a definition of what would amount to a criminal breach; such a definition would inevitably be elusive and controversial. Further, although we have described breach of duty as the fundamental mischief of the corruption offences, to criminalise breach of duty rather than the conduct which is likely to *result* in a breach of duty would, arguably, fail to reflect what is widely understood to be the meaning of what it is to corrupt: viz "To destroy or pervert the integrity or fidelity of (a person) in his discharge of duty; to induce to act dishonestly or unfaithfully; to make venal; to bribe".[3]

[1] See paras 1.12 – 1.16 above.

[2] We consider in para 5.8 below the case where B threatens to breach his or her duty unless he or she is given some sort of consideration.

[3] See para 1.11 above.

Conclusion

5.4 **We provisionally take the view that, in formulating a modern law of corruption, the radical approach should not be adopted.**

THE SECOND QUESTION

Corruption by means other than bribery and extortion

Causing another to act in breach of duty

5.5 Bribery is one means of causing the fundamental mischief. There are others. Leaving aside more subtle forms of persuasion, we take the view that there are three crude ways in which a person, A, can cause another, B, to act in breach of duty:

(1) offer B an inducement to do it (ie bribery);

(2) threaten B with a sanction if he or she does not do it;[4] or

(3) mislead B into thinking that it *is* his or her duty to do it.[5]

5.6 The various ways of causing a breach of duty can be distinguished by reference to the voluntariness and, therefore, the culpability of the person acting in breach of duty. If A *deceives* B into acting in breach of duty, B's breach is involuntary and he or she is not blameworthy:[6] on the other hand, if A *bribes* B into acting in breach of duty, then B has acted voluntarily. Threats occupy the middle ground: if A *threatens* B into breaching his or her duty, then B's blameworthiness will depend on the nature of the threat (for example, an immediate and effective threat of violence will substantially diminish B's voluntariness, unlike, say, a remote threat to carry out some sort of non-violent act).

5.7 Whereas, of course, the degree of B's voluntariness and, therefore, culpability varies according to circumstance, the culpability of A, using the simple correlation between voluntariness and culpability,[7] does not: it is assumed that A, as instigator, acts of his or her own volition.

Breaches of duty and "extortion"

5.8 We have suggested at paragraph 5.5(2) that one of the ways A can cause B to breach a duty of loyalty to his or her principal, C, is to threaten B. A converse circumstance is one in which B, as malfeasant agent, threatens A that he or she will not perform his or her duty to the principal, C, *unless* A pays some form of

[4] See paras 5.11 – 5.14 below.

[5] See paras 5.15 – 5.16 below.

[6] Unless, in the circumstances, B's being deceived was in itself a culpable breach of duty by B.

[7] Moral reprehensibility is, of course, not merely a matter of whether an act is performed voluntarily. The nature of the act is also determinative. Procuring a breach of duty by threat is, therefore, arguably worse than procuring it by deception. We are not here concerned, however, with the moral gradations of A's conduct but rather with the issue of whether it is appropriate for the criminal law to be used to restrict the conduct of A and B. *This*, to put it simply, will depend on whether A and B act voluntarily.

consideration. Unlike the simple form of bribery set out in Part I,[8] this form of corrupt activity works on the premise that A's and C's interests coincide. A will be anxious that B should perform his or her duty and B will, therefore, be in a position to exploit A's concern.

5.9 This type of conduct by B is akin to the former common law offence of extortion[9] and might well amount to blackmail.[10]

The present law and corruption by means other than bribery

5.10 Before we address the question whether a modern law of corruption should cover a *range* of conduct tending to cause the fundamental mischief rather than bribery only, we consider whether the present law criminalises such conduct in any event.

Corruption by way of threats

BLACKMAIL

5.11 Section 21 of the Theft Act 1968 provides:

> (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief –
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand.
>
> (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.

5.12 Therefore, if A threatens B into doing something that it is B's duty not to do, this might amount to blackmail – *but* only if it is done with a view to gain or with intent to cause loss. This qualification is restrictive since "'gain' and 'loss' are to be construed as extending only to gain or loss in money or other property",[11] although case law has given the terms a fairly wide construction.[12]

5.13 Similarly, if B threatens not to perform his or her duty unless A agrees to satisfy a demand, then that too will be blackmail if the threat is made with a view to gain or with intent to cause loss. B will also be guilty of bribery under the present corruption laws if he or she receives payment as a result of the threat since, for example, under the 1906 Act, it is an offence for an agent to accept any gift or

[8] Para 1.12 above.

[9] See paras 2.12 – 2.13 above.

[10] See para 5.13 below.

[11] Theft Act 1968, s 34(2).

[12] Examples are set out in E Griew, *The Theft Acts* (7th ed 1995) paras 14–34 and 14–35.

consideration as an inducement or reward for doing or forbearing to do *any act* in relation to his principal's affairs or business[13] – it does not appear that the act must be an act contrary to duty.

OTHER OFFENCES

5.14 The making of threats may amount to an offence in itself, whether or not the purpose of uttering the threat is to procure a breach of duty. For example, threats to cause personal violence to another might amount to an assault[14] and making threats to kill is a specific offence.[15] Similarly it is a specific offence to threaten to destroy or damage property.[16]

Corruption by way of deception

5.15 If it does not amount to one of the deception offences under the Theft Acts,[17] deceiving a person into failing to do his duty may not be an offence at all. An *agreement*, however, to practise such a deception may be a conspiracy to defraud.[18] The House of Lords in *Scott*[19] suggested that such a deception could amount to conspiracy to defraud even if no pecuniary or economic loss had been caused, at least where the victim of the deception was a public office holder or a public authority; and in *Wai Yu-Tsang*[20] the Privy Council took a wider view, holding that the same may be true where the victim is a private individual.

5.16 Under the Forgery and Counterfeiting Act 1981, it is an offence to make a false instrument intending that somebody shall be induced to accept it as genuine and, as a result, to do (or not do) some act to that person's (or another's) prejudice;[21] and prejudice will have occurred if the act or omission induced "will be the result

[13] 1906 Act, s 1(1).

[14] See Legislating the Criminal Code: Offences Against the Person and General Principles (1992) Consultation Paper No 122, para 9.1, quoting the Criminal Law Revision Committee's Fourteenth Report, para 158: "an assault is an act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence".

[15] Offences Against the Person Act 1861, s 16, as substituted by the Criminal Law Act 1977, s 65(4), Sch 12. This section provides: "A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence".

[16] Criminal Damage Act 1971, s 2, which provides: "A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out,– (a) to destroy or damage any property belonging to that other or a third person; or (b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person; shall be guilty of an offence".

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

[18] *Welham v DPP* [1961] AC 103; *DPP v Withers* [1975] AC 842; *Scott* [1975] AC 819.

[19] [1975] AC 819, 839D–E.

[20] [1992] 1 AC 269.

[21] Forgery and Counterfeiting Act 1981, s 1.

of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty."[22]

Conclusion and provisional view

5.17 Having taken the provisional view that the radical approach should not be adopted, we necessarily favour the indirect approach of criminalising conduct which is likely to result in causing a breach of duty. It will not, of course, be controversial for us to propose that central to a reformed law of corruption will be a modern law of bribery. We now raise the more contentious questions, however, of whether the criminal law should be extended to include other ways of causing a breach of duty.

Procuring a breach of duty by deception or threats and liability of the parties

5.18 The present law in some measure criminalises the conduct of a person, A, who threatens or deceives another, B, into breaching his or her duty. The focus of the various offences is on the activity of A rather than B, but, bearing in mind our previous consideration of the correlation between B's voluntariness in breaching his or her duty and his or her resulting culpability,[23] we provisionally take the view that this is right – *certainly* as regards any offence involving breach by *deception* and *arguably* right as regards any offence involving breach by *threats*.

5.19 The benefit of creating new offences of procuring a breach of duty by deception and procuring a breach of duty by threats, in addition to a new offence of bribery, is that this would properly put the *fundamental mischief* at the centre of the criminal law of corruption. It would also provide an opportunity to regularise anomalies in the present law (such as the requirement of blackmail that there should be a view to gain or an intent to cause loss, and the uncertainty as to the scope of conspiracy to defraud in this context). On the other hand, the view might be taken that the present law adequately accommodates the forms of conduct that we have identified as the alternative ways of causing someone to act in breach of duty.

5.20 **We ask, therefore, for views on the question whether, in addition to a modern offence of bribery, there should be new offences of procuring a breach of duty by deception and procuring a breach of duty by threats.**

5.21 As regards any criminal liability on the part of *B* in succumbing to the threats, although there will be circumstances in which the coercive effect of the threat is so insubstantial that B's submitting to the threat should attract moral censure, we are loath to suggest that B should be under a general duty to be resolute. **We provisionally take the view, therefore, that, even if consultees are in favour of including new offences of procuring breaches by threats or deception, a modern law of corruption should not be extended generally to impose a duty to be resolute in the face of threats in all circumstances**. This

[22] *Ibid*, s 10(1)(c).

[23] See para 5.7 above.

conclusion is consistent with our conclusion in respect of the first question above.[24] Criminalising B's conduct would be akin to criminalising breaches of duty directly,[25] and, for the reasons set out in paragraph 5.3 above, we take the view that this is not the appropriate approach to adopt in formulating a modern law of corruption. **We ask for views, however, on whether there are any circumstances, and, if so, which, in which a person should be held criminally liable for failing to carry out his or her duty in the face of threats.**[26]

Threatening to breach duty

5.22 In circumstances where B can be said to have extorted some form of consideration from A in return for performing his or her duty, we are inclined to think that this sort of activity should attract criminal liability. In Part VIII we suggest how this result might be achieved through the law of bribery. In case this suggestion is thought unacceptable, however, **we invite views on the question whether there should be a new specific offence of threatening to breach duty, or whether such conduct should be dealt with under the more general offence of blackmail.**

[24] See para 5.4 above.

[25] Because it cannot be an offence to breach duty in the face of threats without the view being taken that, a fortiori, it should be an offence to breach duty in the absence of threats.

[26] An example of the law requiring a person to carry out his or her duty in the face of threats is the liability of witnesses for contempt of court if they refuse to give evidence: see *Archbold*, para 28-111.

PART VI
THE DISTINCTION BETWEEN PUBLIC BODIES AND OTHERS

6.1 We have seen that the current law distinguishes between corruption involving public and non-public bodies.[1] This distinction is central to the structure of the present law, and the shape of a reformed law of bribery will depend largely on whether the distinction is to be retained. We therefore consider that question here.

THE SIGNIFICANCE IN THE PRESENT LAW OF THE DISTINCTION BETWEEN PUBLIC BODIES AND OTHERS

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

The scope of the 1889 Act

6.3 The 1889 Act is concerned only with corruption in public bodies: although there is no restriction on who can be bribed, the bribe must relate to the conduct of a member, officer, or servant of a public body. The distinction between public bodies and others thus determines whether the charge can be brought under the 1889 Act, the 1906 Act or both.[2] This may be important, since, despite the substantial overlap between the 1889 and 1906 Acts, the former has certain advantages (for the prosecution) in relation to both the scope of the offences and the penalties available on conviction.

The scope of the offences

THIRD PARTIES[3]

6.4 The 1889 Act sets no limit on the category of person who can be charged with soliciting or receiving a bribe: it catches *any person* – whether a member, officer or servant of a public body *or* a third party – who solicits or receives a bribe in respect of the conduct of a member, officer or servant of a public body. In contrast, the 1906 Act affects only agents and does not extend to third parties. For example, the Act would not apply to the spouse of an employee of a public body who accepts a bribe in return for persuading the employee to commit a breach of duty.

[1] See Part II above.

[2] Eg a person who serves under a public body is also an agent (1916 Act, s 4(3)), and can therefore be charged under the 1889 *or* the 1906 Act.

[3] See paras 8.70 – 8.73 below.

PERSONS WHO HAVE BEEN, OR ARE TO BECOME, AGENTS[4]

6.5 Under the 1889 Act, it is possible to prosecute although the reward is not received until after the relevant agency has terminated.[5] There is no requirement that the person in respect of whose conduct the reward is paid should still be a member, officer or servant of the public body at the time when it is paid.[6] The 1906 Act, on the other hand, applies only to acts done by agents or persons having dealings with agents. If the person rewarded is no longer an agent, there is no offence.

Penalties

6.6 The powers of the court following a conviction under the 1889 Act are far more extensive than the penalties available under the 1906 Act. In addition to imprisonment and a fine, the court can order a convicted person

(1) to pay back to the public body the amount, or value of the gift, loan, fee or reward received by that person;[7]

(2) to be disqualified from being elected or appointed to any public office for five years[8] from the date of conviction, and to forfeit any such office held at the date of conviction;[9]

(3) in the event of a second conviction, to be permanently disqualified from holding any public office and be incapable for five years[10] of being registered as an elector, or voting in elections intended to return individuals to Parliament or members of any public bodies;[11] or

(4) forfeit any right or claim to compensation or pension if that individual was an officer or servant in the employ of any public body at the time of the conviction.[12]

The presumption

6.7 Whether or not a body is classified as a "public body" often determines whether the presumption under section 2 of the 1916 Act applies.[13] Section 2 applies where any money, gift or consideration

[4] See paras 8.80 – 8.81 below.

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

[6] See D Lanham, "Bribery and Corruption" in *Criminal Law: Essays in Honour of J C Smith* (1987) 92, 103. The equivalent legislation in Australia has been construed as including such a requirement: *Brewer* (1942) 66 CLR 535.

[7] 1889 Act, s 2(b).

[8] Representation of the People Act 1948, s 52(7).

[9] 1889 Act, 2(c).

[10] Representation of the People Act 1948, s 52(7).

[11] 1889 Act, s 2(d).

[12] *Ibid*, s 2(e).

[13] Section 2 is set out at Appendix A below.

(1) is paid or given to, or received by, a person in the employment of the Crown, a government department or a public body, and

(2) is paid or given by, or received from, a person (or agent of a person) holding or seeking to obtain a contract from the Crown, a government department or a public body.

Its effect is that any such money, gift, or consideration is deemed to have been paid or given, and received, corruptly as an inducement or reward, unless the contrary is proved.

6.8 The presumption applies not only to the 1889 Act, which is itself confined to public bodies, but also to the 1906 Act, which is not. But it applies only where the employer of the putative bribee (and, if different, the body with which the putative briber holds or seeks to hold a contract) is a public body (or the Crown or a government department). The issue of whether or not a particular body is a public body can thus determine the incidence of the burden of proof on what will often be the only live issue in the trial.

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

6.9 A further, somewhat theoretical, point is that a person *serving under* a public body counts as an "agent" for the purposes of the 1906 Act,[14] whereas a person serving under any other body is an agent only if *employed by or acting for* the body in question. We find it hard to think of any examples of a person who would be "serving under" a public body although neither "employed by" it nor "acting for" it (in which case that person would be an agent within the definition of the 1906 Act, even *without* the extension in the 1916 Act); but if such a case exists, the person in question is an "agent" within the meaning of the Acts *solely* because the body under which he or she serves happens to be a "public body". In other words, whether or not a body is a public body is to this extent relevant to the distinction between persons who are and are not "agents" within the meaning of the Acts.

THE DEFINITION OF A PUBLIC BODY

6.10 The phrase "public body" is defined in the 1889 Act:

> The expression "public body" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as above defined existing elsewhere than in the United Kingdom.[15]

[14] 1916 Act, s 4(3).

[15] 1889 Act, s 7.

6.11 This definition has been said to be "clearly ... confined to local authorities".[16] It consists of a list of various types of local authorities which existed when the 1889 Act was passed. This list, however, proved too restrictive, since some public bodies were not included.[17] Section 4(2) of the 1916 Act therefore extended the term "public body" to include "local and public authorities of all descriptions".

The *Holly* test

6.12 In *Newbould*[18] Winn J cast doubt on the effectiveness of the 1916 amendment by holding that the National Coal Board was not a public body within the meaning of section 4(2). However, this view was expressly overruled by the House of Lords in *DPP v Holly and Manners*,[19] where it was held that the North Thames Gas Board *was* a public body: that expression included

> bodies which have public or statutory duties to perform and which perform those duties and carry out their transactions for the benefit of the public and not for private profit.[20]

Lord Edmund-Davies said it was difficult to imagine wording that could have been wider than that of section 4(2).[21]

6.13 This decision appeared for a time to clarify matters. It became clear that a public body need not be one established by statute. Thus the Criminal Injuries Compensation Board, established by royal prerogative, was a public body within the meaning of the Act[22] because it had public duties to perform.[23] The *Holly* test was simple: did the body carry out its business for the benefit of the public, or for private profit?

The Local Government and Housing Act 1989 amendment

6.14 The concept of a public body will be further widened if paragraph 3 of Schedule 11 to the Local Government and Housing Act 1989 comes into force.[24] That provision adds the following words to section 4(2) of the 1916 Act:

[16] *Joy and Emmony* (1974) 60 Cr App R 132, 133, *per* HH Judge Rigg.

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

[18] [1962] 2 QB 102.

[19] [1978] AC 43.

[20] *Ibid*, at p 53, *per* Lord Diplock.

[21] *Ibid*, at p 54, citing with approval the words of Judge Rigg in *Joy and Emmony* (1974) 60 Cr App R 132, 133: see n 16 above.

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

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

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

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

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

Public bodies outside the United Kingdom

6.16 It is not entirely clear whether a public body existing outside the United Kingdom is a "public body" within the meaning of the Acts. Section 7 of the 1889 Act expressly excludes such bodies from the definition. Section 4(2) of the 1916 Act extends the definition so as to include "local and public authorities of all descriptions"; but this appears to have been intended only to include certain British bodies which fell outside the original definition. Had Parliament intended to remove the exception for bodies existing outside the United Kingdom, it would surely have done so expressly. We therefore provisionally believe that the bribery of an employee of a foreign public body would not be an offence under the 1889 Act, and that the presumption under section 2 of the 1916 Act would not apply.

6.17 It has been suggested[25] that, if our interpretation is correct,[26] it creates a "singular anomaly" as regards those who qualify as agents: "neither private agents nor Crown servants enjoy any similar exemption". However, the anomaly arises only where the official in question, though *serving under* a public body existing outside the United Kingdom, is neither *employed by* nor *acting for* that body. If the official were employed by it or acting for it, he or she would be an agent within the original definition in section 1(2) of the 1906 Act, and the question of whether the body qualified as a public body would for this purpose be immaterial.

SHOULD THE DISTINCTION BE RETAINED?

6.18 We now turn to the question of whether the distinction between public bodies and others is one which should continue to play a crucial part in the law of corruption.

Is public sector corruption more serious than private sector corruption?

6.19 One possible argument runs as follows: although it is undeniably in the public interest that the agents of private bodies should not be discouraged from discharging their private duties, it is *more* in the public interest that the agents of public bodies should not be discouraged from discharging their public duties. Public duty is of a different order of importance, and this should be recognised by a greater degree of protection.

[25] D Lanham, "Bribery and Corruption" in *Criminal Law: Essays in Honour of J C Smith* (1987) 92, 101.

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

6.20 We agree that, other things being equal, corruption on the part of a public servant is likely to be more damaging to the public interest, and therefore a more serious offence, than corruption in the private sector. However, we do not accept that this is an adequate justification for a rigid distinction between the two. Some private sector corruption is very serious indeed; some public sector corruption is comparatively trivial. To apply different rules to the two environments is, in our view, to try to achieve through the rules of criminal law[27] what should properly be left to the sentencing stage.

6.21 The MCCOC made the same point:

> Confining bribery to the public sector assumes that public sector corruption does more harm to the community than private sector corruption. That assumption is questionable. The secret commissions paid to Johns in the Tricontinental Bank case amounted to $2 million. The corrupting effect of a secret commission of that amount on confidence in the *general* commerce and finances of the community were very serious and more harmful than many instances of bribery in the public sector. … The public needs to be able to have confidence in the integrity of both the public and the private sector. It should not be statutorily presumed that corrupt payments in the public sector do more harm than corrupt payments in the private sector. The amount of damage in a particular case should be a question for sentencing rather than the subject of a separate offence.[28]

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

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

> There is an essential difference between a private body and a public one. A private body has a direct interest in looking after its servants, but in the case of a public body what is everybody's business is nobody's business.[29]

6.23 But this was said at a time when private sector corruption was not a statutory offence at all. Parliament decided in 1906 that the availability of civil remedies was not sufficient reason for allowing such corruption to remain outside the criminal law. The question today is not whether private sector corruption should be criminal, but whether it should continue to be governed by *different rules*; and to this issue the point made by Lord Randolph Churchill does not appear to be relevant.

[27] And, given the implications of the distinction for the presumption under the 1916 Act, criminal evidence.

[28] MCCOC Report, pp 271–273.

[29] *Hansard* (HL) 25 March 1889, vol 334, col 810.

The need for higher standards of conduct in the public sector

6.24 It is often said that different standards of conduct are expected, and required, of those who work in the public sector. The Redcliffe-Maud Committee emphasised this.

> It is common practice in the commercial world for the transaction of business to be accompanied by the giving of personal gifts or benefits, ranging from the Christmas bottle of whisky to much more elaborate and lavish provision. Public life requires a standard of its own; and those entering public office for the first time must be made aware of this from the outset.[30]

6.25 But this point too is, in our view, irrelevant to the question at issue. Most people would probably agree that public life does require higher standards of conduct; that would certainly have been the view of those who framed the legislation. But the distinction between public bodies and others is not an attempt to reflect that view. As we have seen, the existence of the distinction has two main effects and one minor one;[31] but none of those effects relates to the *standards of conduct* required of agents in the public and private sectors respectively. The way in which the legislation confines the offences to conduct falling short of the required standard is by requiring that what is done should be done "corruptly"; and that requirement applies to public and private bodies alike. In practice, the criminal law may well require higher standards of conduct in the public sector, in the sense that a jury may regard a given transaction as "corrupt" *because* it is entered into by a public servant. But, whether or not this is a desirable approach, what makes it possible is the flexibility of the word "corruptly" – not the rigid distinction between public bodies and private ones.

Private bodies with public functions

6.26 As we have seen,[32] the House of Lords confirmed in *Holly* that a body is a public body only if it performs public or statutory duties for the benefit of the public and not for private profit. Developments since *Holly* was decided have made this rule seem increasingly arbitrary in its effects. More and more functions previously performed by organs of national or local government are being sub-contracted to private companies. There are also more and more joint ventures between local and central government and private companies. Private Finance Initiatives are used to finance projects which would previously have been undertaken at public expense.

6.27 On privatisation of the formerly nationalised utilities (the electricity generators, the water boards, British Gas and the like), these bodies continued to provide the same service, which had previously been "for the benefit of the public". But their legal status changed, and they now aim to make a profit for their shareholders. In many cases, the state retains a controlling influence in these companies through a

[30] Redcliffe-Maud Report, para 76.

[31] See para 6.2 above.

[32] See para 6.12 above.

"golden share". In other cases, they have statutory duties to perform, and are regulated by "quangos" answerable to Parliament.[33]

6.28 The effect of the distinction drawn in *Holly* is that an agent of a nationalised industry who accepts a bribe is committing an offence under the 1889 Act, and, if prosecuted, must prove that the transaction was not corrupt; but an agent who did the same thing after the industry was privatised would be committing an offence under the 1906 Act only, and could require the prosecution to prove that the transaction *was* corrupt. Since the body in question is providing the same service irrespective of who owns it, it is hard to justify allowing that factor to determine the rules that will apply.

6.29 The MCCOC argued thus:

> Given that the distinction between the functions to be privatised are based primarily on economic criteria, linking the offence of bribery to functions which *happen* to be performed in the public sector for the time being is arbitrary. For example, whether a corrupt payment to a prison official constitutes bribery will depend on whether the official works in a prison that is privatised. In a state like Queensland where some prisons are private and some public, the arbitrariness of the public/private distinction is stark.[34]

6.30 In defence of the present position it may be argued that the *Holly* test was not in fact formulated against the background of the industrial scene in 1978, which was perhaps the high-water mark of state ownership. Not only were nearly all "public" enterprises then owned by the state, but so were some of a wholly *private* character.[35] The conditions that prevailed between 1889 and 1916 are, in this respect, more like those of 1997 than those of 1978. It would have been quite wrong to construe the legislation with 1978 spectacles, and the House of Lords did not do so: it merely confirmed the correctness of a test laid down in 1907,[36] which Parliament must be taken to have had in mind in 1916. Arguably it follows that that test may have become inappropriate by 1978, but has become *less* inappropriate since then.

6.31 There is force in this argument. But the real question, we believe, is not whether developments since 1978 have undermined the reasoning in *Holly*. It is whether, in the light of the experience of the last fifty years, it still seems sensible to apply different rules of criminal law to an enterprise which is currently in state hands and to one which currently is not. With the benefit of that experience, the difference between the two forms of enterprise now seems far less significant than it must have seemed to the legislators of 1889 and 1916. In our view the distinction between public and private can no longer be regarded as a simple dichotomy: rather, it is a spectrum. At one extreme there are quintessentially public bodies, the privatisation of which is scarcely conceivable; at the other, firms

[33] Eg OFWAT, OFGAS, OFTEL, the Office of the Rail Regulator etc.

[34] MCCOC Report, p 271.

[35] Eg Rover and Rolls Royce.

[36] In *The Johannesburg* [1907] P 65.

which exist to make profits for their owners and for no other purpose. In between, there is a grey area. The bodies in this area may or may not earn profits for shareholders, but their functions are such that it is a matter of public concern that they should be properly run. The current status of such a body does not seem to us to have much bearing on the question of what rules would be appropriate to a criminal case involving the alleged corruption of its servants.

6.32 **Our provisional view is**

(1) that the existence of the distinction between public bodies and others, and the various different effects of that distinction, render the law complex and confusing;

(2) that there would therefore be substantial advantages in abandoning it;

(3) that the arguments for retaining the distinction *in principle* are outweighed by the advantages of abandoning it;

(4) that it should therefore be retained *only* if it is necessary to do so for any of the three purposes we have identified;[37] and

(5) that it is not necessary to retain it for the purpose of determining the scope of

(a) certain of the individual offences (in the sense that they can be committed only where a public body is involved) or

(b) the concept of an "agent".

6.33 Whether the distinction needs to be retained for the purposes of the presumption under section 2 of the 1916 Act is an issue to which we shall return in Part XI. Our conclusion at this stage is that, *if* the distinction is not needed for that purpose, it should be abolished.

6.34 If, however, it is decided that the distinction *is* needed, for the purpose of the presumption at least, it will have to be decided whether it should continue to apply for other purposes as well – in particular, whether there should continue to be *offences* which apply only to public bodies. **We ask those consultees who favour the retention of the distinction between public and other bodies for any purpose to indicate whether they believe that it should be retained for the purpose of the presumption, the definition of certain offences, or both.**

IF THE DISTINCTION WERE RETAINED, SHOULD THE DEFINITION OF A PUBLIC BODY BE EXTENDED?

6.35 We recognise that some consultees may regard the complete abolition of the distinction between public bodies and others as undesirable, impracticable or both. We must therefore consider whether, if the distinction were to be retained (for any of the purposes it currently serves), the definition of a public body could be

[37] See paras 6.2 – 6.9 above.

improved. In view of the preceding discussion, it appears that the best way to do this would be to extend the definition so as to include bodies which, though private under the *Holly* test, have functions of a public character.

6.36 Indeed, there is a precedent for such a step: as we have seen, the Local Government and Housing Act 1989 includes provisions which would extend the definition of a public body so as to include a company under the control of a local authority.[38] These provisions have not been brought in force, but they suggest that Parliament has noted the changing face of local government and responded accordingly. The provisions are also important in that they set down a marker for central government. If there is no objection in principle to a limited company being regarded as a public body where it is controlled by a local authority, the same must apply to a company controlled (by "golden share" or otherwise) by central government.

6.37 For the purpose of effecting a more wide-ranging extension to the concept of a public body, it may be possible to borrow from the reasoning in two recent cases. In *Foster and others v British Gas plc*[39] the European Court of Justice laid down a three part test for determining whether a body was an "emanation" of the state and therefore subject to the doctrine of direct effect:

> [A] body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.[40]

After obtaining this ruling from the European Court of Justice, the House of Lords held that the recently privatised British Gas was a body under the "control" of the state.

6.38 This decision was followed in *Griffin v South West Water Services Ltd*.[41] At the trial, it was conceded that South West Water was providing a "public service"[42] and also had "special powers" (such as the ability to impose temporary hosepipe bans, or compulsorily to purchase land).[43] Two of the conditions stipulated by the European Court of Justice were therefore fulfilled.[44] What was disputed was whether South West Water was "controlled" by the state. On this issue, Blackburne J emphasised five points:

[38] See para 6.14 above.

[39] [1991] IRLR 268.

[40] [1991] IRLR 268, para 20.

[41] [1995] IRLR 15.

[42] *Ibid*, para 91.

[43] *Ibid*, para 93.

[44] See para 6.37 above.

> 1. The question is not whether the *body* in question is under the control of the State but whether the *public service* in question is under the control of the State.
>
> 2. The legal form of the body is irrelevant.
>
> 3. The fact that the body is a commercial concern is also irrelevant.
>
> 4. It is also irrelevant that the body does not carry out any of the traditional functions of the State and is not an agent of the State.
>
> 5. It is irrelevant too that the State does not possess day-to-day control over the activities of the body.[45]

6.39 It may be that, if the distinction between public bodies and others were to be retained for the purposes of the law of corruption, the criteria set out in these cases could form the basis of a more satisfactory definition than the *Holly* test. However, our provisional view is that any such extended definition would be difficult to draw up and to apply, and would not have the degree of certainty that rules of criminal law ought to have. It follows that we do not regard this possibility as a complete solution to the arguments we have put forward for the abolition of the distinction. However, **we invite comments on the possibility of extending the definition of a public body, if the distinction between public bodies and others were to be retained.**

[45] [1995] IRLR 15, para 94.

PART VII
THE AGENCY RELATIONSHIP

7.1 P Fennell and P A Thomas, in their article "Corruption in England and Wales: An Historical Analysis",[1] refer to the agency relationship as "[t]he legal form at the crux of the whole question of corruption".[2] They quote Lord Ellenborough CJ in the early nineteenth century case of *Thompson v Havelock:*

> Is it contended that a servant, who has been engaged to devote the whole of his time and attention to my concerns, may hire out his services, or part of them to another? … No man should be allowed to have an interest against his duty … there would be no security in any department of life or business, if servants could let themselves out in whole or in part.[3]

7.2 In Parts I and V we analysed bribery in terms of conduct which threatens the integrity of that agency relationship: that is, conduct which tempts an agent to act *disloyally* by putting his or her own interests before those of his or her principal,[4] despite an obligation to put the interests of the principal first. Thus the paradigm situation[5] with which we are concerned is one in which A acts in relation to B in such a way as to, and in order to, tempt B to act in breach of an obligation of loyalty which B owes to C. And the purpose of criminalising conduct which gives rise to such a temptation rests in the importance to society of maintaining and protecting the core relationship of loyalty or trust which subsists between B and C.[6]

7.3 In this Part, we consider how the relationship between the parties B and C should be defined in a modern bribery offence. We begin by attempting to identify the essential characteristics of the relationship, drawing on the law of fiduciaries (the "fiduciary model approach"). We consider whether the presence of these characteristics should be an ingredient of the new offence, but provisionally conclude that it would be unnecessarily burdensome for the prosecution to have to prove this in every case. As we shall see, there are a number of relationships, such as that between employee and employer, which obviously have the essential characteristics; it should therefore be sufficient for the prosecution to prove that a defendant is (for example) an employee, without more. As a result, we go on to

1 (1983) 11 Int Jo Soc Law 167.

2 *Ibid*, at p 172.

3 (1808) 1 Camp 527, 528; 170 ER 1045, 1046.

4 Leaving aside the exceptional case where the recipient of the bribe "extorts" payment and the donor makes payment in order to secure performance of duty.

5 We consider in Part VIII below situations other than the paradigm which should arguably be covered by a criminal law of corruption.

6 It is to this end that the civil law of fiduciary duties has developed: the importance of "ensur[ing] that a person who has trust or confidence reposed in him by another, does not abuse that trust or confidence either for his own benefit or to the detriment of that other relying upon him" has, of course, been a preoccupation of the Chancery court "over the centuries": P D Finn, *Fiduciary Obligations* (1977) para 7.

consider an alternative approach in which the requisite relationship is defined by way of a list of categories of individuals (such as employees) with a residual category based on the fiduciary model (the "list approach").

PRELIMINARY POINTS

Terminology

7.4 An "agency relationship", given its strict technical meaning, is "the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties".[7] Although the terms "agent" and "principal" are used in the present criminal law of corruption,[8] their use is not confined to that strict meaning. Similarly, although in this consultation paper we refer to the relationship between B and C as an agency relationship, it is not intended that our proposed offence of bribery should be confined to cases of agency in the strict sense.

7.5 With this in mind, we have considered whether we should retain the terminology of the present law in describing the parties in that relationship as *agent and principal.*

7.6 The MCCOC took the view that the term "agent" was the "obvious choice" for "a common term [to both the public and private sectors] … to define the class of people affected"[9] by bribery offences – although, of course, the term was not to be construed according to the strict law of agency.[10] We agree, and **we provisionally propose that the terms "agent" and "principal" should be used to describe the parties to the core relationship required by a modern offence of bribery.** This is on the understanding that these terms are used not in their strict sense but rather in the broader sense of one party (the agent) acting *for or on behalf of* another (that other being either an individual principal or the public interest).[11]

Scope of the agency relationship

Public and private duties

7.7 An individual may owe a duty of loyalty to another individual, or he or she may hold a *public* office and be charged with *public* duties so that the duty of loyalty is owed not to another individual but to an abstraction – namely, the public or the public interest. In considering how we should define the agency relationship, we bear in mind that any proposed definition must take account of both those who are under a private duty of loyalty and those who are charged with public duties.

[7] *Halsbury's Laws of England* (4th ed 1990) vol 1(2), p 4, para 1 (footnote omitted).

[8] 1906 and 1916 Acts.

[9] MCCOC Report, p 297.

[10] MCCOC Report, p 299.

[11] As regards the distinction between public and private duties, see para 7.7 below.

Duties not within the agency relationship

7.8 The following are examples of breaches of duty which, in our view, are *not* within the meaning of corruption:

(1) C offers his or her agent, B, a bonus in return for assisting in a fraud by C against A.[12] B owes a duty of loyalty to C but not to A. Although A may be owed a range of other sorts of duties by C and B, and some of these duties may be breached by the fraudulent activities of C and B, those activities do not fall within our analysis of the meaning of corruption.

(2) An agent, B, breaches a duty owed to his or her principal, C, but the duty breached is not one which can be characterised as falling within the scope of B's duty of loyalty to C.[13]

In both examples there has been no breach of B's duty of loyalty to C – either because the duty relationship between the parties cannot be characterised as involving loyalty at all, or because, although there is a loyalty relationship between the parties, the duty breached does not encroach upon it.

DEFINING THE AGENCY RELATIONSHIP

7.9 Since the relationship required for the purposes of our proposed bribery offence is not to be construed as an agency relationship in the strict sense, it is not sufficient to define it as an "agency relationship" without further explanation. We now turn, therefore, to the issue of how the relationship should be defined. We first consider a definition in terms of the essential characteristics of the relationship: *the fiduciary model approach.*

The fiduciary model approach

7.10 The relationship between B and C, as a relationship of loyalty or trust,[14] may be regarded as essentially *fiduciary* in character. In the recent Court of Appeal (Civil Division) case of *Bristol & West Building Society v Mothew (t/a Stapley & Co)*,[15] Millett LJ, echoing Lord Ellenborough CJ's observations in *Thompson v Havelock*,[16] emphasised "the obligation of loyalty" as the defining characteristic of a fiduciary:

[12] In our view, this would not normally fall within the mischief of the offence. This exclusion would appear to be one effect (there may be others) of the word "corruptly" in the existing legislation: our understanding of the ordinary meaning of that word is that it implies the procuring of a breach of the *trust* reposed in one person by another.

[13] For example, a duty of skill and care. See *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, 710d, *per* Millett LJ: "it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty".

[14] The MCCOC concluded that a modern offence of bribery should be concerned with "a pool of relationships where there may be said to be a relationship of trust": MCCOC Report, p 299.

[15] [1996] 4 All ER 698. The case concerned the duties of a solicitor acting for the purchasers of property and for the building society to which the purchasers had made an application for a mortgage advance. Millett LJ gave the leading judgment. The other members of the court, Otton and Staughton LJJ, agreed with Millett LJ's analysis of fiduciary duty.

[16] See para 7.1 above.

> … someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary …[17]

And the "distinguishing characteristic of a fiduciary relationship" has been described in the following terms:

> Its essence, or purpose, is to serve exclusively the interests of a person or group of persons; or, to put it negatively, it is a relationship in which the parties are not each free to pursue their separate interests.[18]

The status-based fiduciary

7.11 In our Consultation Paper No 124, Fiduciary Duties and Regulatory Rules,[19] we refer to those people "who by virtue of their involvement in certain relationships are considered, without further inquiry, to be fiduciaries"[20] as *status-based* fiduciaries – a term used by Robert Flannigan in his 1989 article "The Fiduciary Obligation".[21] They include: trustee and beneficiary; agent and principal (in the strict sense); partner and co-partner; director and company; employee and employer; and legal practitioner and client. These are classic examples of the agency relationship in bribery.

The fact-based fiduciary

7.12 *Fact-based* fiduciaries are those who do not fall within any of the categories of status-based fiduciaries but who are nonetheless regarded as fiduciaries because of "the factual situation of the particular relationship".[22]

7.13 Having considered, in particular, the cases of *Hospital Products Ltd v United States Surgical Corporation*[23] (concerning the relationship between a manufacturer and a distributor which, on the facts, was held not to be fiduciary) and *Lac Minerals Ltd*

[17] [1996] 4 All ER 698, 711j–712a.

[18] R P Meagher, W M C Gummow, J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992) pp 130–131 (footnote omitted). The authors rely on the authority of *Hospital Products Ltd v United States Surgical Corporation* (1984–5) 156 CLR 41 (High Court of Australia).

[19] (1992). This paper resulted from a reference to the Law Commission by the Minister of Corporate Affairs made on the following terms:

> Certain professional and business activities are subject to public law regulation by statutory and self-regulatory control. The Law Commission is to consider the effect of such controls on the fiduciary and analogous duties of those carrying on such activities, and to make recommendations. The inquiry will consider examples from differing areas of activity but be with particular reference to financial services.

[20] Consultation Paper No 124, para 2.4.3.

[21] (1989) 9 OJLS 285. See also Meagher, Gummow and Lehane, *op cit*, p 130, which refers to "the accepted or traditional categories of fiduciary relationship".

[22] Consultation Paper No 124, para 2.4.4.

[23] (1984-5) 156 CLR 41 (High Court of Australia).

v International Corona Resources Ltd[24] (concerning the relationship of the parties to a joint venture which, on the facts, was held to be fiduciary), in Consultation Paper No 124 we suggested that, although it is not possible to lay down a general test as to when a fiduciary relationship arises, the following factors provide the basis of a test:[25]

(1) "an undertaking by the fiduciary to act on behalf of or for the benefit of another person";

(2) "a discretion or power which affects the interests of that other person", and

(3) "the peculiar vulnerability of that other person to the fiduciary", that vulnerability resulting from, for example, dependence on information and advice, the existence of a relationship of confidence or the significance of a particular transaction for the parties.[26]

7.14 In the report following Consultation Paper No 124,[27] we encapsulated this test in the following definition:

> Broadly speaking, a fiduciary relationship is one in which a person undertakes to act on behalf of or for the benefit of another, often as an intermediary with a discretion or power which affects the interests of the other who depends on the fiduciary for information and advice.[28]

7.15 This "discretion or power" (identified in the test put forward in Consultation Paper No 124) may involve agents having *behind the scenes* influence over their principals' decision-making – those principals, therefore, presenting to the world as if they had acted alone[29] – or, on the other hand, may involve them *overtly* exercising a discretion or power on behalf of their principals. In the latter case, the relationship between agent and principal is likely to involve the agent having access to, and a discretion over, the deployment of the principal's assets.[30]

7.16 Flannigan, in his analysis of the fiduciary obligation, suggests that "discretion" is "not a sufficiently broad description … outside the undue influence context",[31] in that an agent may have access to his or her principal's assets but no discretion over their deployment. Misuse of those assets may nevertheless amount to breach of fiduciary duty. We agree, and we reflect this possibility in our proposed definition of the agency relationship.

24 [1989] 2 SCR 574 (Canadian Supreme Court).

25 Consultation Paper No 124, para 2.4.6.

26 *Ibid.*

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

28 *Ibid*, para 1.3.

29 See Flannigan, *op cit*, p 309: "It appears to others that the trusting party alone is acting and so alone has access."

30 *Ibid.* We adopt Flannigan's broad use of the word "asset": "It would include, for example, information and goodwill": p 308, n 118.

31 *Ibid*, p 307.

A preliminary definition of the agency relationship

7.17 A preliminary definition of the agency relationship, based on the fiduciary model, might therefore be as follows:

> *B has undertaken (expressly or impliedly) to act on behalf of C, and that undertaking involves one or more of the following features:*
>
> *(a) B exercising a discretion on C's behalf;*
>
> *(b) B having access to C's assets (irrespective of whether B has been given a discretion by C to act in regard to those assets); or*
>
> *(c) B having influence over C's decisions (as regards C's assets or any other interest of C's).*

Quasi-fiduciaries

7.18 Whereas, historically, the present corruption laws were at first concerned only with public officers[32] and were later extended to private agency relationships,[33] the starting point in our present analysis is the private law concept of fiduciary, extended to incorporate a public law analogue – the *quasi-fiduciary*. P D Finn notes the similarity between the fiduciary and the public office-holder:

> A striking feature of the fiduciary … is the close resemblance he bears to the public ministerial officer who, while entrusted with duties and discretions by statute or statutory instrument, discharges those duties and exercises those powers in the interests of the public. This resemblance is not an inconsequential one. … [T]he actual obligations imposed on a fiduciary in the exercise of his discretions mirror to a large degree the obligations imposed on the public officer in exercising his.[34]

7.19 A quasi-fiduciary will usually also be a fiduciary in its proper sense (for example, an employee performing public duties); and the acceptance by such a person of a bribe would amount to a breach both of "public trust" and of his or her duties qua employee.[35] Finn describes the interrelationship between the two sets of duties as follows:

> The nature of the office assumed by a public officer will ordinarily result in his owing duties to the particular authority under which he holds his office. That authority may, for example, be the Crown. It may be a public instrumentality. It may be a local authority. And for misconduct in his position the officer may be answerable to that authority. But quite apart from this "employment" relationship the public nature of his position subjects him to additional duties and liabilities. The public is, in the eyes of the law, regarded as reposing

[32] Under the common law and the 1889 Act.

[33] 1906 Act.

[34] P D Finn, *Fiduciary Obligations* (1977) para 26.

[35] *Ibid*, para 497, n 26, where Finn notes the concurrence of public and private duties "as where the public officer is an employee of a public instrumentality".

> “trust and confidence” in him, and the common law – on grounds of public policy – and equity – through the rules of fiduciary obligation – have combined to ensure that that trust and confidence is not ignored or abused.[36]

7.20 Quasi-fiduciaries who are not also fiduciaries proper are likely to be those individuals who do not hold a continuing public office but, to use Lanham’s words, are better described as *persons acting in an official capacity* or *performing a public function*[37] – in other words, *ad hoc quasi-fiduciaries*. Lanham suggests that both the common law offence of bribery and the 1906 Act extend to such individuals. In *Barrett*,[38] the Court of Appeal ruled (using the terminology of both subsections (2) and (3) of section 1 of the 1906 Act) that an additional superintendent registrar of births, deaths and marriages, although not *employed* by the Crown, was *acting for* the Crown or *serving under* the Crown. In Lanham’s view, the distinction between being employed by the Crown and serving under the Crown suggests that the 1906 Act corresponds with the common law in applying to recipients who do not hold any continuing position:

> [T]he fact that the recipient is performing an ad hoc single duty for the Crown should be enough to bring him within the definition of “serving under the Crown” and thus of “agent” for the purposes of s 1(3).[39]

7.21 We can see no reason why, *in principle*, a distinction should be drawn between continuing and ad hoc quasi-fiduciaries for the purpose of defining the agency relationship.

INCORPORATING QUASI-FIDUCIARIES INTO THE DEFINITION OF THE AGENCY RELATIONSHIP

7.22 Two options come to mind. The first is to adapt the preliminary definition of the agency relationship by replacing the reference to the individual principal (“C”) with the words “the public”; the second is to add to the preliminary definition a further defining feature, namely those who are charged with a public duty. In our view, the first option is unnecessarily schematic. Finn appears to take a similar view. Referring critically to the civil law bribe cases of *Attorney-General v Goddard*[40] (concerning a police officer) and *Reading v Attorney-General*[41] (concerning a member of the armed forces), he says:

> [T]he courts have attempted to impose private law fiduciary relationships upon the holders of public offices … This is much to be regretted, not only because opportunities to clarify the law relating to public officers were foregone, but also because little service has been done to the fiduciary relationship by forcing into its mould officers

[36] P D Finn, “Public Officers: Some Personal Liabilities” (1977) 51 ALJ 313, 315.

[37] D Lanham, “Bribery and Corruption” in *Essays in Honour of J C Smith* (1987) 92, 94.

[38] [1976] 1 WLR 946. See also para 7.33 below.

[39] D Lanham, *op cit*, p 102.

[40] (1929) 98 LJKB 743.

[41] [1951] AC 507.

whose positions are, it is suggested, regulated by a distinct though similar body of public law.[42]

7.23 We therefore conclude that our preliminary definition[43] should be extended to include quasi-fiduciaries by including the following alternative:

> *B has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function).*

7.24 Although the distinction between public and private functions remains uncertain in the law of judicial review,[44] it provides the basis for identifying those authorities charged with duties involving a public element.[45] And individuals acting on behalf of such authorities, performing functions which contribute to the discharge by the authority of its public duty, are likely to fall within our definition of the quasi-fiduciary relationship.

Specific exclusions

7.25 The definition of the agency relationship based on the fiduciary model provides a test for determining whether a given individual is subject to the criminal law of corruption. We believe, however, that there are likely to be certain classes of individuals which should be excluded from its ambit despite satisfying the test. Our proposed definition of the agency relationship therefore provides for specific exclusions.[46]

[42] P D Finn, *Fiduciary Obligations* (1977) para 498.

[43] See para 7.17 above.

[44] The classic test for whether an authority is judicially reviewable was set out in *R v Electricity Commissioners, ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 205, by Atkin LJ, who said it was a matter of whether the authority had "legal authority to determine questions affecting the rights of subjects". In recent years, however, the courts have extended judicial review to non-statutory bodies. In *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, in which it was decided that the Panel on Take-overs and Mergers, an unincorporated association without statutory, prerogative or common law powers, was amenable to judicial review, it was suggested that the essential element in deciding whether an authority was susceptible to judicial review was the presence or otherwise of "a public element" (at 714H, *per* Sir John Donaldson MR) or "public duty" (at 724D, *per* Lloyd LJ, and p 727F, *per* Nicholls LJ). Subsequent decisions have been to the effect that the public authority is one which is "governmental in nature": see S Fredman and G S Morris, "The Costs of Exclusivity: Public and Private Re-examined" [1994] PL 69, 72. They cite *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036; *R v Football Association, ex p Football League Ltd* [1993] 2 All ER 833; and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909.

[45] See also Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (1994) Law Com No 227, paras 6.41 – 6.45, where we raise the issue of the divide between public and private bodies (for the purposes of the law of restitution in the event of payment made by way of taxes or charges following an ultra vires demand) and refer to the supervisory judicial review jurisdiction as a basis for the distinction.

[46] We give examples of specific exclusions in paras 7.39 – 7.41 below.

The list approach

7.26 In our view, it is important for the proper analysis of the criminal law of corruption that we should attempt to identify the essential characteristics of the agency relationship. It would, however, be unnecessarily burdensome for the prosecution, on every occasion, to be required to prove that a defendant charged with bribery is an agent according to the definition based on the fiduciary model. Given that there are a number of categories of individuals which can be described, without contention, as categories of agent, we take the view that the better approach to defining the agency relationship for the purposes of a new bribery offence is to list those uncontentious categories, reserving the fiduciary model definition for residual cases.

7.27 A broad version of this "list approach" appears in the present law. Under section 1 of the 1889 Act, the person whose conduct is sought to be influenced must be *any member, officer, or servant of a public body.*[47] Section 7 of the Act defines the expression "public office" as "any office or employment of a person as a member, officer, or servant of such public body". The 1906 Act expanded the scope of the corruption offences to all *agents*, whether performing public or private functions. Section 1(2) of the 1906 Act defines an "agent" as "any person employed by or acting for another", but section 1(3) expressly includes "[a] person serving under the Crown or under any corporation or any … borough, county, or district council, or any board of guardians". The definition was extended by the 1916 Act: section 4(2) provides that the expression "public body" includes "local and public authorities of all descriptions", and section 4(3) provides that a person serving under any such body is an agent within the meaning of the 1906 Act.

7.28 The MCCOC Report also adopts this approach, but in greater detail. As in the 1906 Act, the term "agent" is given a general definition involving the concept of one person *acting for* another:

> A person who acts on behalf of another person with that other person's actual or implied authority (in which case the other person is the principal).[48]

[47] The definition of "public body" is set out in s 7 of the 1889 Act (as amended by s 4(2) of the 1916 Act), as to which see paras 6.10 – 6.15 above.

[48] MCCOC Report, p 276.

7.29 But the MCCOC then lists[49] a number of classes of persons who are to be included in the meaning of agent, identifying in each instance who is the agent's principal: a public official (his or her principal being the Government or Government agency for which the official acts), an employee (the employer), a legal practitioner acting on behalf of a client (the client), a partner (the partnership), an officer of a corporation or other organisation whether or not employed by it (the corporation or other organisation), and a consultant to any person (that person). "Public official" is defined as "any official having public official functions or acting in a public official capacity" and expressly includes the following: a member of Parliament or of a local government authority, a Minister of the Crown, a judicial officer, a police officer, a person appointed by the Government or a Government agency to a statutory or other office, and a person employed by the Government or a Government agency (including a local government authority).

Various classes of persons we propose should be included in the list

7.30 We now consider those classes of persons which we provisionally propose should be included in the list.

CLASSIC EXAMPLES

7.31 At paragraph 7.11 above, we identified a number of relationships which we described as classic examples of the agency relationship: trustee and beneficiary; agent and principal (in the strict sense); partner and co-partner; director and company; employee and employer; and legal practitioner and client. We provisionally propose that the list should include these classic examples.

JUDGES

7.32 In the nineteenth century case of *Gurney*[50] it was held that a person who offered a bribe to a justice of the peace was guilty of attempting to corrupt, suggesting that those who performed judicial functions could be public officers for the purposes of the common law.

7.33 Although it is probable that the 1889 Act does not apply to judges,[51] the case law provides no clear answer as to whether they are "agents" for the purposes of the 1906 Act. In the Scottish case of *Copeland v Johnston*,[52] it was held that the members of a licensing court were not: judges were thought to serve under the law, rather than under any identifiable principal. As we have seen,[53] a different view

[49] *Ibid.*

[50] (1867) 10 Cox CC 550.

[51] A T H Smith, however, is cautious about stating this categorically:

> The point cannot be asserted with complete confidence; judges were certainly "officers" for the purposes of the offence of misconduct in office. But it would seem that [a judge] does not belong to any public body within the meaning of the relevant legislation …

Property Offences (1994) para 25–05, n 23.

[52] [1967] SLT (Sh Ct R) 28.

[53] See para 7.20 above.

was reached in *Barrett.*[54] The defendant, an additional superintendent registrar of births, deaths and marriages, argued that he was neither a servant of the Crown nor serving under the Crown, but was an independent office-holder appointed for the purpose of carrying out the prescribed statutory duties attached to his office. He supported his argument by pointing out that superintendent registrars are not appointed by the Crown, they are not paid by the Crown, nor are they dismissible by the Crown. The Court of Appeal held that the main issue under consideration was not whether the defendant was an *employee* of the Crown, but whether he was *serving under* the Crown.

7.34 In the Privy Council case of *Ranaweera v Ramachandran*,[55] to which reference was made in *Barrett*, the Judicial Committee was asked to determine whether the members of the Ceylon Inland Revenue Board of Review, who were appointed by a Government Minister, were servants of the Crown. The majority held that the impartiality of the Board of Review membership in respect of their judicial functions, and their character as independent arbitrators, meant that they could not properly be described as servants of the Crown.[56] Lord Diplock, dissenting, held that a person who performs judicial functions could still be a servant of the Crown; he pointed out that in his oath of office he had sworn to *serve* the Queen.[57] However, he also recorded his doubt whether the unique constitutional position of judges of the English Supreme Court of Judicature would enable them to be described as Crown servants.

7.35 According to Megarry, writing in 1962: "As for judicial corruption, no breath of it has stirred for longer than any practitioner can remember."[58] We can see no reason, however, why members of the judiciary should not be expressly brought within the terms of a new bribery offence and we shall provisionally propose, therefore, that they should be included in the list.

LOCAL COUNCILLORS

7.36 Local councillors are likely to fall within the common law of corruption and the 1889 Act, but unlikely to be covered by the 1906 Act.[59] Additionally, under section 94 of the Local Government Act 1972, they are required to disclose any pecuniary interest in a proposed contract or other matter, failure to do so being a summary offence punishable by way of fine.[60] We believe that local councillors should be expressly brought within the terms of a new bribery offence.

[54] [1976] 1 WLR 946.

[55] [1970] AC 962.

[56] *Ibid*, at p 971E–F, *per* Lord Donovan.

[57] *Ibid.*

[58] R E Megarry, *Lawyer and Litigant in England* (1962) p 118.

[59] However, "[s]ince the 1889 and the 1906 Acts overlap to a great extent, the likelihood of practical problems arising is small": D M Hare, "The Need for New Anti-Corruption Laws in Local Government" (1974) PL 146, 167.

[60] On conviction, an offender is liable to a fine not exceeding level 4 on the standard scale (currently £2,500).

POLICE OFFICERS

7.37 The present law of corruption with regard to police officers is, as with regard to judges, uncertain.[61] In the civil case of *Fisher v Oldham Corporation*,[62] an action for damages for false imprisonment, McCardie J held that a police constable appointed by the watch committee of a borough corporation did not act as servant or agent of the corporation, but that he was "a servant of the State, a ministerial officer of the central power".[63] In *Graham v Hart*,[64] the Scottish Court of Justiciary held that a police constable, while in the execution of his duty and acting for his employer (the Chief Constable), was an "agent" for the purposes of the 1906 Act, since he could be said to fall within the phrase "any person employed by or acting for another".[65] Lord Stormouth-Darling, in *Graham v Hart*, concluded his opinion by saying that the 1889 Act might equally apply to a police constable.[66]

7.38 Again, we can see no reason why police officers should not be expressly brought within the terms of a new bribery offence.

Proposed specific exclusions

WITNESSES, JURORS AND ELECTORS[67]

7.39 It is both a criminal contempt of court[68] and an offence under the common law of perverting the course of justice[69] to bribe a witness with the intention of influencing his or her evidence or to bribe a juror. An attempt to corrupt or influence or instruct a jury may amount to the common law offence of embracery although that offence is now said by the Court of Appeal (Criminal Division) in the case of *Owen*[70] to be "obsolescent". A witness who wilfully makes a statement in judicial proceedings which he or she knows to be false or does not believe to be true (irrespective of whether he or she made the statement as a result of a bribe) is guilty of perjury.[71]

7.40 Bribery of, treating or exercising undue influence over electors are offences under the Representation of the People Act 1983, as are the obverse offences of

[61] For completeness, it should be added that police officers who corruptly solicit and obtain rewards to hinder prosecutions by not bringing offenders before the courts, or by warning persons of charges which are going to be brought, are guilty of the common law offence of perverting the course of public justice: *Hammersley* (1958) 42 Cr App R 207.

[62] [1930] 2 KB 364.

[63] [1930] 2 KB 364, 371.

[64] 1908 SC (J) 26.

[65] 1906 Act, s 1(2).

[66] 1908 SC (J) 26, 31.

[67] These are examples of ad hoc quasi-fiduciaries.

[68] "At common law, a contempt of court is an act or omission calculated to interfere with the due administration of justice": *Archbold*, para 28–34.

[69] An offence is committed when a person acts or embarks on a course of conduct which has a tendency to, and is intended to, pervert the course of justice: *ibid*, para 28–1.

[70] (1976) 63 Cr App R 199.

[71] Perjury Act 1911, s 1.

acceptance of bribes or treating by electors.[72] It is also a common law offence to bribe voters in a Parliamentary election;[73] and voters in a local government election.[74]

7.41 We are disinclined to include witnesses, jurors and electors under a modern offence of bribery, and we do not propose that they should be included in the list. Our primary reason is that there are more obvious offences to deal with this mischief; in particular, the jurisdiction of the courts to deal with contempts summarily[75] is, in many circumstances, procedurally more appropriate.

Members of Parliament, members of the House of Lords and Government Ministers

7.42 Whether Members of Parliament *are* subject to the criminal law of corruption, and more particularly whether they *should* be, are both contentious issues currently to the fore in public debate. As to the latter, on the one hand it has been said of Members of Parliament that "Few are in a higher position of trust or have a duty to discharge in which the public have a greater interest",[76] and they should arguably therefore be subject to the criminal law. On the other hand, they are sui generis, in that, although they have the benefit of Parliamentary privilege, which protects them against criminal liability for things said in Parliamentary proceedings, they are, in consequence,[77] subject to the jurisdiction of Parliament.

CONFLICT BETWEEN THE JURISDICTION OF THE COURTS AND PARLIAMENT

7.43 Parliament governs its own procedures by means of resolutions, which it defines and enforces. In 1695 the House of Commons resolved that "the offer of money or other advantage to any Member of Parliament for the promoting of any matter whatsoever, depending or to be transacted in Parliament, is a high crime and misdemeanour".[78] There is no doubt, therefore, that bribing or attempting to bribe a Member of Parliament, or acceptance of a bribe by a Member of Parliament, is a contempt of Parliament. Although the Lords has no analogue to the 1695 Resolution passed in the Commons, bribery of a peer is likely to be regarded as a contempt in the same way as bribery of a Member of Parliament is a contempt.[79]

[72] Sections 113–115.

[73] *Pitt and Mead* (1762) 3 Burr 1336; 97 ER 861.

[74] *Lancaster and Worrall* (1890) 16 Cox CC 737.

[75] *Archbold*, para 28–105.

[76] Ruling by Buckley J in the trial of Currie and others, heard at the Central Criminal Court in 1992. Later in that ruling Buckley J quotes the judgment of Isaacs and Rich JJ in the Australian case of *Boston* (1923) 33 CLR 386, 400: "The fundamental obligation [of a Member of Parliament] … is the duty to serve and, in serving, to act with fidelity and with a single mindedness for the welfare of the community."

[77] "One of the consequences of privilege is ... that the House of Commons regulates the activities of its Members itself": Nolan Report, para 2.92.

[78] *Commons' Journal* (1693-97) 331 (2 May 1695).

[79] *Erskine May Parliamentary Practice* (21st ed 1989) p 128.

7.44 Any challenge to the jurisdiction of Parliament by the judiciary is met by Article 9 of the Bill of Rights (1688):

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Buckley J, in the trial of Currie and others,[80] took the view that Article 9 had significance only in so far as it might prevent relevant evidence being adduced at trial (since the court would be unable to make inquiry into Parliamentary debates or other proceedings). In that case it was alleged that a Member of Parliament[81] had accepted bribes; in his defence, it was submitted that bribery of a Member of Parliament was not a crime and that, in any event, only Parliament could try a member for bribery since it was a matter that was already a subject of Parliamentary privilege. Buckley J, against the submission, ruled that Members of Parliament were subject to the criminal law of corruption. The Attorney-General, in a submission to the House of Commons Privileges Committee, suggested that criminal proceedings would be precluded "in any case where it was necessary to point to an act which occurred within Parliament and assert that what occurred was attributable to an improper motive".[82] In his view, a Member of Parliament could be prosecuted under the present law only if the complete offence could be established without reference to any debates or proceedings in Parliament,[83] or if the House of Commons, in a particular case, could expressly waive privilege.[84]

PREVIOUS REFORM PROPOSALS

7.45 Both the Salmon Commission and the Nolan Committee took the view that Parliament should consider whether its members should be brought within the criminal law of corruption. The Salmon Commission, concluding that Members of Parliament definitely did not fall within the criminal law of corruption,[85] recommended

[80] See n 76 above.

[81] Mr Harry Greenway: he was later acquitted.

[82] Attorney-General's submission to the Committee of Privileges; HC 351-II Minutes of Evidence and Appendices, at p 156, relying on the legal principles summarised in the Privy Council case of *Prebble v New Zealand Television* [1995] 1 AC 321.

[83] As to which, the Attorney-General commented at p 156: "The difficulties of such a prosecution should not be underestimated".

[84] As to which, the Attorney-General speculated that Parliament would probably adopt the view taken by the Committee of Privileges of the House of Representatives of New Zealand that it could not waive privileges under Article 9. However, during the passage of the recent Defamation Bill [HL], a clause – later to become section 13 – was added, subsection (1) of which provides:

> Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

This section came into force on 4 September 1996.

[85] Salmon Report, para 307.

that Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his Parliamentary capacity within the ambit of the criminal law. Our recommendation is limited to this single point, and we do not raise any questions about other aspects of Parliamentary privilege and related matters.[86]

7.46 Although the Report of the Nolan Committe focused on internal and administrative enforcement of standards rather than on the criminal law, it too called on the Government to clarify the boundary between the jurisdiction of Parliament and the courts:

> There is one area of conduct where a need already exists to clarify, and perhaps alter, the boundary between the courts and Parliament. Bribery of a Member, or the acceptance of a bribe by a Member, is contempt of Parliament and can be punished by the House. … [I]t is quite likely that Members of Parliament who accepted bribes in connection with their Parliamentary duties would be committing Common Law offences[87] which could be tried by the courts. Doubt exists as to whether the courts or Parliament have jurisdiction in such cases. …
>
> We believe that it would be unsatisfactory to leave this issue outstanding when other aspects of the law of Parliament relating to conduct are being clarified. We recommend that the Government should now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament.[88]

7.47 On 24 July 1996, the House of Commons approved the *Code of Conduct together with the Guide to the Rules relating to the Conduct of Members*.[89] The purpose of the guide was to assist members in discharging the duties placed upon them by the Code of Conduct agreed by the House of Commons. It is a comprehensive guide which is divided into sections dealing with Registration of Interests,[90] Declaration

[86] *Ibid*, para 311.

[87] See G Zellick, "Bribery of Members of Parliament and the Criminal Law" [1979] PL 31, in which it is argued that not only are Members of Parliament within the common law but they are also subject to the provisions of the 1889 Act.

[88] Nolan Report, paras 2.103 – 2.104.

[89] Session 1996–1997 (HC 688).

[90] Paras 8–36.

of Interests,[91] the Advocacy Rule,[92] and procedure for complaints.[93] Ministers of the Crown who are Members of the House of Commons are subject to the rules of registration, declaration and advocacy in the same way as all other members.[94]

7.48 In the light of the recommendations of the Nolan Committee, the Government is now taking steps to clarify the law relating to the bribery of, or the receipt of a bribe by, a Member of Parliament. The Home Office has recently[95] published a document to achieve this aim. The document, entitled *Clarification of the law relating to the Bribery of Members of Parliament*, invites the Select Committee on Standards and Privileges to consider four broad options:[96]

(1) to rely solely on Parliamentary privilege to deal with accusations of the bribery by Members of Parliament;[97]

(2) subject Members of Parliament to the present corruption statutes in full;

(3) distinguish between conduct which should be dealt with by the criminal law and that which should be left to Parliament itself;

(4) make criminal proceedings subject to the approval of the relevant House of Parliament.

7.49 In those circumstances, we believe that it would be inappropriate and, in any event, a waste of our resources for us to look into these matters at this stage.[98] We believe that similar considerations apply to Ministers of the Crown who are also members of either the Commons or the Lords. The position of Ministers might well be affected by the Home Office review. We assume that the position of members of either House, and of Ministers, will be clarified by the Home Office review, and appropriate steps taken, before we make our final recommendations.

[91] Paras 37–52.

[92] Paras 53–65.

[93] Paras 66–73.

[94] Para 7.

[95] December 1996.

[96] Para 9.

[97] "Member of Parliament" is used to mean members of both Houses: para 8.

[98] "The Government agreed that the law should be clarified. However, in the first instance it was felt that this was a matter of policy for the Government and for Parliament rather than a question of law for the Law Commission, though the Government has not ruled out involving the Commission at a later stage if it seemed that their assistance would be helpful, particularly in the light of their current review of dishonesty offences, which will be considering proposals to reform the law on bribery and corruption": *Clarification of the Law relating to the Bribery of Members of Parliament: a Discussion Paper*, para 3.

Provisional proposals

Fiduciaries

7.50 **We provisionally propose that, for the purposes of a modern offence of bribery, and subject to any express exclusion, a person (B) should be regarded as an "agent", and another person (C) as B's "principal", if**

(1) B and C are, respectively,

(a) trustee and beneficiary,

(b) agent and principal (in the strict sense),[99]

(c) partner and co-partner,

(d) director and company,

(e) employee and employer, or

(f) legal practitioner and client; or

(2) B has undertaken (expressly or impliedly) to act on behalf of C and that undertaking involves one or more of the following features:

(a) B exercising a discretion on C's behalf,

(b) B having access to C's assets (irrespective of whether B has been given a discretion by C to act in regard to those assets), or

(c) B having influence over C's decisions (as regards C's assets or any other interest of C's).

Quasi-fiduciaries

7.51 **We provisionally propose that, for the purposes of a modern offence of bribery, and subject to any express exclusion, a person (B) should be regarded as an "agent" (acting on behalf of the public) if**

(1) B is

(a) a judge,

(b) a local councillor, or

(c) a police officer; or

(2) B has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function).

7.52 **We ask**

[99] See para 7.4 above.

(1) whether the listing of specific categories of fiduciary and quasi-fiduciary relationships, plus (in each case) a residual category defined in general terms, is the right approach;

(2) whether the specific categories set out at paragraphs 7.50(1) and 7.51(1) above should be extended or amended, and if so how; and

(3) whether the definitions of the residual categories set out at paragraphs 7.50(2) and 7.51(2) above should be amended, and if so how.

TRANSNATIONAL AGENCY RELATIONSHIPS

7.53 A transnational agency relationship is one in which the agent acts in this country on behalf of a principal operating outside this jurisdiction. Whereas the 1906 Act catches an agent who engages in a corrupt transaction in this country on behalf of a principal who is outside the jurisdiction, it appears that the 1889 Act does not extend to the officials of foreign public bodies.[100]

7.54 In deciding how a modern offence of bribery should deal with this issue, we need to consider the two types of principal corresponding to the two types of fiduciary that we have identified – the fiduciary proper and the quasi-fiduciary. In a transnational agency relationship in which B is an agent acting on behalf of an extra-jurisdictional principal, C, C is either

(1) an individual – in a relationship with B which can be described as fiduciary proper, or

(2) the public (or public interest) of the country for which B acts – in other words, B is a quasi-fiduciary.

Individual extra-jurisdictional principals

7.55 The arguments in favour of continuing to include agents of individual foreign principals are strong. First, given that we are concerned to prevent the fundamental mischief (breach of duty) by outlawing the mischief of temptation (bribery),[101] it follows that if the latter mischief occurs within the juridiction then it should be caught by the criminal law of this jurisdiction, wherever the harm occurs. Second, to exclude agents of foreign principals could arguably encourage a culture of corruptive activity in transnational transactions, to the detriment of the integrity of business and other financial relationships generally. Finally, to distinguish agents of foreign principals from those of domestic principals would give rise to extensive legal argument as to who should be regarded as the principal.

7.56 **We provisionally propose that, for the purposes of a modern law of bribery, an agent of an individual extra-jurisdictional principal should be regarded as an "agent".**

[100] See paras 6.16 – 6.17 above.

[101] See para 1.15 above.

The public interest of other countries

7.57 A more controversial decision is whether or not our criminal law of corruption should apply to the corrupt activities of foreign quasi-fiduciaries (other than those who are also fiduciaries proper). The argument against such application is that it is not necessarily appropriate for one country's criminal law to uphold the public interest of another. We are inclined to the view that a modern offence of bribery should not extend to corrupt transactions involving foreign quasi-fiduciaries who are not fiduciaries proper.

7.58 **We provisionally propose that, for the purposes of a modern law of bribery, a quasi-fiduciary acting on behalf of the public (or public interest) of another country, and in no other fiduciary capacity, should not be regarded as an "agent".**

PART VIII
FORMULATING A MODERN BRIBERY OFFENCE

8.1 In Part IV we provisionally concluded that the existing corruption offences should be replaced by a new offence of bribery. In this Part we consider what form such an offence might take.

THE DISTINCTION BETWEEN CORRUPT AND NON-CORRUPT CONDUCT

Is it necessary to draw the distinction?

8.2 One possible means of eradicating corruption is to place a blanket ban on individuals receiving anything whatsoever from individuals or organisations involved with work carried out by their principal. Such a view was advocated by Lord James of Hereford in 1903 during the debates on the Prevention of Corruption Bill. He proposed an amendment which would have had the effect of deleting the word "corruptly" from the Bill's provisions. This was on the ground that "the mere act of an agent or servant receiving … gifts should constitute an offence".[1]

8.3 Our provisional view is that such a rule would be too draconian: there are many circumstances in which the acceptance by an agent of gifts from a third party is perfectly proper. The acceptance of a tip for good service is an obvious example. In our view, the absence of a fault element in such an approach makes it unsatisfactory as the basis of a modern bribery offence. **We provisionally believe that the definition of the offence should be formulated in such a way as to exclude conduct which is not potentially corruptive.**

Some possible criteria

8.4 It follows that we must consider how the law might distinguish conduct which is potentially corruptive from conduct which is not. In Part I we attempted to identify the mischief that the law of corruption seeks to prevent, and provisionally concluded that it is the likelihood of persons owing a fiduciary or quasi-fiduciary duty being tempted to act in breach of that duty. We now attempt to identify the characteristics of the kind of conduct that ought prima facie to be criminal because it tends to encourage breaches of fiduciary or quasi-fiduciary duty, and we consider some ways in which those characteristics might be reflected in the definition of the offence.

Inducements and rewards

8.5 As the present legislation recognises, the mischief that we seek to prevent can arise in three main ways:

(1) A confers an advantage on B on the understanding (express or implied) that B will in return act in a particular way.

[1] *Hansard* (HL) 20 March 1903, vol 119, col 1372.

(2) A promises to confer an advantage on B later, on condition that B *first* acts in a particular way. (The "promise" may of course be implied: that is, A may act in such a way as to lead B to believe that a reward may be forthcoming, without actually saying so.)

(3) A confers an advantage on B as a reward for B's having *already* acted in a particular way.

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

8.6 It would be possible to treat inducements more strictly than rewards, on the ground that it is not as self-evidently corruptive to reward people for acting in a particular way in the past as it is to induce them to do so in the future. This approach can be seen in the proposals put forward in Australia by the MCCOC. The Committee recommended[2] that there should be two offences: one of bribery, which would apply where a payment is dishonestly made *in advance of*, and in order to induce, the desired act or omission, and a less serious one of "other corrupt benefits", which could be committed where a benefit is provided as a reward for something already done.

8.7 There is also some precedent for this approach in English law. In *Cooper v Slade*,[3] the House of Lords was concerned with section 2 of the Corrupt Practices Prevention Act 1854. This section imposed liability for bribery on

> Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of any such voter having voted or refrained from voting at any election …

8.8 The section thus distinguished between the payment of money as an *inducement* to vote (or refrain from voting) and as a *reward* for so doing: the word "corruptly" applied only to the latter. This would tend to suggest that the payment of a *reward* for voting was not intended to be an offence in itself, but only if it were "corrupt" in some further and more restrictive sense.[4] Coleridge J thought that there might be good reasons for such a distinction, and suggested one such reason:

> [A] promise to pay money or to procure a place to induce a voter to vote for a particular candidate, can only be made with a view to influence the voter's mind, and interfere with the independence of the vote. However laudable the motive in the mind of him who promises,

[2] MCCOC Report, p 273.

[3] (1858) 6 HLC 746; 10 ER 1488. See para 2.25 above.

[4] Cf *Smith* [1960] 2 QB 423, 428, where Lord Parker CJ accepted that the word "corruptly" in s 1(2) of the 1889 Act should be given some independent role, but thought that that role might lie in its application to "rewards or fees given for services or favours already rendered".

or whatever his knowledge of the law, the act is against the policy of the statute, and within the mischief to be prevented; the statute is, therefore, framed to prevent the act under all circumstances. But to give money or procure place on account of the vote having been given or withheld after the election may or may not be within the mischief which the Act was intended to prevent, or it may be done under circumstances which so remotely tend that way, that the Legislature may well have declined to make it penal under all circumstances.[5]

In Coleridge J's opinion, therefore, the offence had not been made out where the defendant candidate, in good faith and under a misapprehension as to the legal position, had reimbursed voters' travelling expenses.

8.9 The majority disagreed. In what has come to be regarded as the leading judgment, Willes J said:

> I think the word "corruptly" in this statute means not "dishonestly," but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act "corruptly." The word "corruptly" seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence.[6]

8.10 These two approaches have more in common than may at first sight appear: they both recognise that, in context, the word "corruptly" denotes a tendency to subject the casting of votes to influences which ought to have no weight, such as the hope of reward. The difference is that Coleridge J thought this tendency is not necessarily present in the payment of money to a voter for having already voted, whereas Willes J thought it must inevitably be present. In the particular case of rewards for voting, there may be something to be said for Willes J's view; in the broader context of rewarding another person's agent for acting in a particular way, however, we think that Coleridge J's more flexible approach is more appropriate. Some rewards clearly do have a tendency to corrupt; others clearly do not. Generous tipping of a waiter, for example, is hardly likely to tempt the waiter in question, or other waiters, to do the job badly in future: rather the reverse.

8.11 However, it is not just rewards that may or may not have a tendency to corrupt, depending on the circumstances: the same may apply to inducements. It would be artificial to permit the gift to an agent of a bottle of whisky at Christmas, in recognition of the agent's past assistance, but to prohibit such a gift if made in the hope of a mutually profitable relationship in the following year. This reasoning suggests that the crucial distinction is not that between rewards and inducements, but that between conduct which does and does not tend to encourage breaches of duty.[7] The former may sometimes be relevant to the latter: in some circumstances

[5] (1858) 6 HLC 746, 784; 10 ER 1488, 1503.

[6] (1858) 6 HLC 746, 773; 10 ER 1488, 1499.

[7] Cf *Richards* 6 October 1994, CA No 94/0534/W5, where it was held that the acceptance of inducements and the acceptance of rewards are not separate offences, merely different ways of acting corruptly.

it may be proper for A to reward B for having acted in a particular way, whereas it would have been improper for A to give B an *incentive* so to act. But we do not believe that this possibility should be the basis of a rigid distinction between inducements and rewards. Ultimately the question should be whether, in either case, any harm is done – in other words, whether the mischief that we seek to prevent is rendered substantially more likely. **We provisionally propose that the new offence should apply equally to inducements and rewards.**

Whether the act procured or rewarded is itself a breach of duty

8.12 The mischief to be prevented, we have suggested, is that of agents being tempted to act in breach of duty. An obvious way of identifying those transactions that tend to encourage that mischief, therefore, would be to ask whether what is done is done as an inducement to act *in breach of duty*, or as a reward for having already done so. An inducement to do what the agent is obliged to do anyway, or a reward for so doing, would on this view be innocent.

8.13 This approach would be comparatively simple; unfortunately, our provisional view is that it is *too* simple. It would be naive to suppose that there is no harm in A paying B to comply with B's duty to C: if B is free to accept such payments, there is an obvious incentive to insist on them as a precondition for the performance of the duty – in other words, an incentive to act in breach of the duty if payment is not forthcoming. Indeed, it may be that the only reason why A is prepared to pay for the performance of B's duty is that that is the only way to secure it. It is true that in the most blatant such cases B will be guilty of blackmail, in that B obtains the payment by demanding it with menaces (namely the threat not to do his or her duty unless payment is made).[8] But A may pay B because of an unspoken understanding that only then will B do his or her duty. In such a case a charge of blackmail would be hard to establish. We think that such a case is properly regarded as one of corruption, whether or not it amounts to blackmail. **We provisionally propose that it should not be an element of the new offence that the act procured or rewarded should itself be a breach of duty.**

REFRAINING FROM ACTING IN BREACH OF DUTY

8.14 This consideration suggests a further possible approach. As we have seen, corruption may take the form either of inducements to act in a particular way in future or of rewards for things already done. This distinction might be elaborated as follows:

(1) A confers an advantage on B, or promises to do so, on the understanding (express or implied) that B will in return act, *or refrain from acting*, in breach of duty.

(2) A confers an advantage on B as a reward for B's having already acted, *or refrained from acting*, in breach of duty.

[8] At common law B would have been guilty of extortion, but that offence was abolished by the Theft Act 1968: see para 2.12 above.

8.15 This approach would go some way towards meeting the point made at paragraph 8.13 above, by including the case where B is dissuaded from acting (or rewarded for not acting) in breach of duty. However, the point is a more general one. Even if there is no understanding between A and B that the advantage conferred or promised is by way of consideration for B's showing favour to A, either by acting in breach of duty or by not carrying out a threat (express or implied) so to act, what is done may still be potentially corruptive if it contributes to a climate in which such inducements or rewards are expected or hoped for.

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

8.17 Moreover, the corruptive quality of such a payment would lie not only in its possible influence on B's future conduct, but also in the possibility that *other* agents might be influenced in their dealings with A or with others from whom they might hope to receive similar rewards. Obviously this possibility arises only if other agents hear of what has passed between A and B; but it would scarcely be acceptable for the law to permit such conduct provided that it remains a secret. We believe that conduct should be regarded as corruptive if it *would* be corruptive were others to learn of it.

8.18 We therefore provisionally conclude that the offence should be capable of catching a transaction where neither A nor B regards the advantage conferred or promised by A as the consideration either for a breach of duty by B or for B's refraining from such a breach. That is not to say that such cases need to be treated in the same way as the case where B has a direct incentive to act in breach of duty, or derives advantage by threatening to do so: the former type of case is not as obviously corruptive as the latter. Where B is offered an incentive to act in breach of duty, the tendency to corrupt will by definition be present. Similarly, the payment of an incentive *not* to act in breach of duty, or of a reward for having *already* acted in breach of duty or refrained from doing so, will almost inevitably have a tendency to encourage *future* breaches of duty; and we do not think it should be necessary to prove such a tendency as an independent element of the offence. But where the inducement or the reward is not directly related to a breach of duty on B's part (whether actually occurring, desired by A or threatened by B), we think it should in principle be necessary for the prosecution to show that what is done has a

substantial[9] tendency to encourage conduct (on the part of B or anyone else) which *would* be a breach of duty.

8.19 In other words, we suggest that the following kinds of conduct should be covered:

(1) A confers an advantage on B, or promises to do so, on the understanding (express or implied) that B will in return

(a) act in breach of duty, or

(b) refrain from acting in breach of duty.

(2) A confers (or promises to confer) an advantage on B, on the understanding that B will in return act or refrain from acting in a particular way, *whether or not it would be a breach of duty for B so to act*, or as a reward for B's having already so acted or refrained from so acting, in such circumstances that

(a) B may thereby be tempted to act in breach of duty on some future occasion (in the hope of further advantage), and/or

(b) others in a position comparable to B's, if they learned what has passed between A and B, might similarly be tempted to act in breach of duty.

8.20 **We provisionally conclude that an advantage is accepted and conferred "corruptly" if**

(1) it is an inducement to an agent to act or refrain from acting *in breach of duty*, or a reward for an agent's so acting or refraining from so acting, *or*

(2) it is an inducement to an agent to act or refrain from acting *in any way*, or a reward for an agent's so acting or refraining, *provided* that the transaction has a substantial tendency to encourage that agent, or others in comparable positions, to act in breach of duty.

8.21 It does not follow that the definition of the offence should expressly include these criteria: it would be possible simply to retain the word "corruptly", on the ground that, properly understood, it *incorporates* them. The courts have rarely held conduct to fall outside the legislation on the sole ground that it was not "corrupt", but have construed that word to mean (in the words of Willes J in *Cooper v Slade*)[10] "purposely doing an act which the law forbids as tending to corrupt".[11] If we have correctly analysed the nature of corruptive conduct, it would follow that our analysis does no more than spell out what is already implied.

[9] A qualification such as "substantial" would allow the exclusion of the sort of conduct which, in the words of Coleridge J in *Cooper v Slade* (see para 8.8 above), "so remotely" tends to corrupt that it is unnecessary to treat it as a criminal offence.

[10] See para 8.9 above.

[11] *Smith* [1960] 2 QB 423; *Wellburn* (1979) 69 Cr App R 254. See paras 2.27 – 2.28 above.

8.22 Whether it is worthwhile for the *legislation* to spell this out is a matter on which we seek views. Other things being equal, it is obviously better to achieve the desired result with one word than with a hundred. As the MCCOC put it,

> [whilst] the quest for certainty in the criminal law is very much to be desired, the quest itself can be counterproductive if the definitions of concepts like "corruptly" become too complex, or in striving for precision catch cases that should not be caught, or fail to catch cases that should be caught.[12]

8.23 The real question is whether the single word "corruptly" can safely be relied upon to achieve the desired result. We ourselves have not found it easy to unravel the various factors that may have a bearing on whether conduct is or is not corrupt, and not everyone will agree with all of our conclusions. On the other hand, a definition based on those conclusions would be complicated and might be more confusing than the absence of a definition. **We ask for views on**

(1) whether our analysis of the meaning of the word "corruptly" is correct (and if not, what it does mean); and

(2) whether its meaning should be set out in a statutory definition.

A moral standard

8.24 Corruption, unlike most criminal offences, is highly "culture specific".[13] Whether any given conduct is categorised as corrupt will depend, in part, on both the perspective from which it is viewed[14] and the environment in which it occurs. The giving and receipt of valuable benefits of various kinds is common in many areas of business. If these practices are widely considered to be legitimate, it is arguable that the standard set by the criminal law should reflect that fact. The question therefore arises: are there cases which, even if they satisfy the other requirements of the offence, ought nevertheless to be excluded from it because the element of corruption involved is not so grave as to call for a criminal sanction? Should there be some additional requirement, reflecting the fact (if it be a fact) that corruption has a *moral* dimension?

IS A MORAL ELEMENT NECESSARY?

8.25 The answer may of course depend on how the other requirements of the offence are defined. We have suggested that the offence might be expressed as extending to inducements to act, or to refrain from acting, in breach of duty, to rewards for so acting or refraining, and to conduct which otherwise has a substantial tendency to encourage future breaches of duty: this, we believe, is the essence of corruption. If this suggestion were accepted, it would only be truly *corruptive* conduct that could be caught, and it would therefore be arguable that anyone knowingly[15]

[12] MCCOC Report, p 291.

[13] See D J Lowenstein, "For God, For Country or for Me?" (1986) 74 Calif LR 1479.

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

[15] If a defendant does not know the facts that render his or her conduct corruptive, ordinary principles of mens rea require that that conduct should not be criminal. See para 8.82 below.

participating in such conduct ought to be criminally liable. On this view, any factors tending to excuse such conduct would go to mitigation only.

8.26 The point may be illustrated by reference to section 73(2) of the Crimes Act of the Commonwealth of Australia, which provides:

> A Commonwealth officer who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain, any property or benefit of any kind for himself or any other person, on an understanding that the exercise by him of his duty or authority as a Commonwealth officer will, in any manner, be influenced or affected, is guilty of an offence.

This provision was inserted in 1926, in place of an earlier provision which had required that the relevant act be done "corruptly". The reason for the omission of that word in the new provision does not appear from the debates;[16] but, in view of the other requirements of the offence, it would appear to have been redundant. The conduct described is, by definition, corrupt.[17]

8.27 If, on the other hand, the basic ingredients of the new offence were framed in broad terms – for example, to the effect that *any* inducement to an agent to act (or any reward for acting) might suffice, whether or not there is any likelihood of its tending to encourage breaches of duty – it might well be necessary to include some further provision in order to ensure that the offence catches only conduct which is genuinely improper. The wider the basic definition of corrupt conduct, the greater the need for a moral element.

A MORAL ELEMENT FOR THE PRIVATE SECTOR ONLY?

8.28 The Redcliffe-Maud Committee, as we have seen,[18] was anxious to emphasise the different standards of conduct applicable in the public and private sectors; but in the existing law the difference is not made explicit. The word "corruptly" appears in each of the Prevention of Corruption Acts, and presumably bears the same meaning in each context. Corrupt conduct may be aggravated by the nature of the offender's position, and this may be reflected at the sentencing stage; but, so far as liability is concerned, the law applies equally to the public and private sectors. At the same time, however, the vagueness of the word "corruptly" allows the jury to take all the circumstances into account in deciding whether particular conduct was "corrupt". In practice, this may well result in juries requiring higher standards of those in the public sector.

8.29 The public probably does expect higher standards of behaviour from those in public life, or occupying offices of public responsibility or those paid by the State, than from those who work for private companies; and it is arguably right that the

[16] MCCOC Report, p 281.

[17] The MCCOC argues that some additional fault element is necessary even if, as under s 73(2), the benefit must have been given in order to influence the official's duty, because otherwise the payment of the official's salary would constitute bribery: MCCOC Report, p 277. With respect, we doubt whether it can fairly be said that the payment of an official's salary influences or affects the exercise of his or her duty, as distinct from inducing him or her to do the job at all.

[18] See para 6.24 above.

law should recognise this. One way of doing so would be by requiring the prosecution to prove an additional element of impropriety in the case of private sector corruption alone. However, this is obviously impossible if, as we suggested in Part VI, the law ceases to distinguish between the public and private sectors at all. **Our provisional view is that, if the offence is to include an additional requirement designed to reflect the moral aspect of corruption, that requirement should apply to the public and private sectors alike.** If consultees believe that the distinction between the public and the private sectors should be preserved for at least some purposes, we invite their views on whether (and if so how) the law should seek to impose a higher standard in the public sector.

DISHONESTY

8.30 If it were thought that a moral element should be included in the definition of the offence, an obvious form that such an element might take is that of a requirement of dishonesty. The concept of dishonesty, in the sense in which it is now interpreted in English criminal law, was introduced by the Theft Act 1968 in place of the old requirement that an act of larceny be committed "fraudulently". The Criminal Law Revision Committee's reason for the change was that

> "Dishonestly" seems to us a better word than "fraudulently". The question "Was this dishonest?" is easier for a jury to answer than the question "Was this fraudulent?". "Dishonesty" is something which laymen can easily recognize when they see it, whereas "fraud" may seem to involve technicalities which have to be explained by a lawyer.[19]

8.31 It does not appear to have been the Committee's intention that any conduct which would have resulted in a conviction under the old law should result in an acquittal under the new, merely because "dishonesty" had not been proved. However, in *Feely*[20] the Court of Appeal held that a taking "to which no moral obloquy can reasonably attach" was not larceny at common law and is not theft under the 1968 Act, and that it is for the fact-finders to determine whether dishonesty has been proved. And in *Ghosh*[21] the court explained that, in order to determine this issue in favour of the prosecution, the fact-finders must be satisfied

(1) that what the defendant did was dishonest according to the ordinary standards of reasonable and honest people, and

(2) that the defendant must have realised that what he or she was doing was by those standards dishonest.

Does the word "corruptly" imply an element of dishonesty?

8.32 It is arguable that the introduction of a requirement of dishonesty would do no more than make explicit what is already implied in the word "corruptly". According to the Chief Justice of South Australia,

[19] Eighth Report: Theft and Related Offences (1966) Cmnd 2977, para 39.

[20] [1973] QB 530.

[21] [1982] QB 1053.

> a man who acts corruptly within the meaning of that section necessarily acts dishonestly. Of course, I use the word "dishonestly" to mean dishonestly according to the normally received standards of honest conduct.[22]

On this view, dishonesty is an element of the existing statutory offences.

8.33 The Parliamentary debates on the legislation offer some support for this view. In the debate on the 1906 Act, for example, the Attorney-General expressed the view that the word "corruptly" did imply an element of dishonesty, the presence of which would be best evidenced by secrecy.[23] However, *Cooper v Slade*[24] had already established that the word "corruptly" requires only the deliberate doing of an act which the law forbids as tending to corrupt, and that a defendant who has done such an act is not entitled to an acquittal on the ground that his or her conduct was not morally objectionable. Although this decision was concerned with electoral corruption, the reasoning has been applied for the purposes of the Prevention of Corruption Acts.[25] Admittedly juries have sometimes been directed that the word "corruptly" implies an element of dishonesty;[26] but these cases pre-date the concept of dishonesty in its modern form, as analysed in *Ghosh*,[27] and we are not aware of a corruption case in which that concept has been expressly applied. Our provisional view is that the existing offences do not include a requirement of dishonesty in the *Ghosh* sense.

Should the word "corruptly" be replaced by a requirement of dishonesty?

8.34 The MCCOC favoured the use of "dishonesty" as the fault element for bribery.[28] However, this view did not receive unanimous support. The New South Wales Cabinet Office, for example, criticised the dishonesty approach on the ground (among others) that "dishonestly" is a broader term than "corruptly": indeed, the obtaining of property from an agent by deception might fall within the proposed definition of bribery.[29] The MCCOC agreed with this interpretation, but rejected the objection.

> The essence of bribery is the dishonesty of the payment in connection with the performance of a duty owed by an agent. The dishonesty

[22] *Johnson* [1967] SASR 279.

[23] *Hansard* (HL) 17 July 1906, vol 161, col 152.

[24] (1858) 6 HLC 746; 10 ER 1488. See para 8.7 above.

[25] *Smith* [1960] 2 QB 423; *Wellburn* (1979) 69 Cr App R 254.

[26] Eg *Lindley* [1957] Crim LR 321 (Pearce J); *Calland* [1967] Crim LR 236 (Veale J).

[27] [1982] QB 1053; see para 8.31 above.

[28] MCCOC Report, p 287. The South Australian definition of bribery employs the term "improperly", which is defined to apply to a defendant who "knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers" (s 238(1)). This would seem to be essentially an application of the concept of dishonesty as defined in *Ghosh* [1982] QB 1053; see para 8.31 above.

[29] This would presumably be so if the deception involved the provision of a benefit, or the offer or promise of a benefit, to the agent.

> flows not merely from the fact of payment but from the circumstances and nature of what is sought.[30]

8.35 We provisionally agree with the New South Wales Cabinet Office that the concept of dishonesty is too broad to serve as the *sole* criterion for identifying corrupt conduct on the part of an agent or a person having dealings with an agent. It is not, in our view, an adequate *substitute* for the word "corruptly". The MCCOC expressed the view that

> Although there may be shades of different meaning between the concepts of "corruptly" and "dishonestly", dishonesty is a more accessible concept for juries than corruptly and accurately identifies the prohibited evil. It also has the necessary flexibility to deal with the wide variety of circumstances in which offences can occur.[31]

8.36 We agree that dishonesty is probably a more accessible concept (though this is mainly because it has whatever content the jury chooses to give it); but this is surely irrelevant if it is not the most *appropriate* concept. We do not agree that it accurately identifies the "prohibited evil", as we have sought to do in this Part. Our analysis may or may not be implicit in the word "corruptly"; it is clearly not implicit in "dishonestly". Nor is it clear to us what is meant by the assertion that dishonesty is a more *flexible* concept. **We provisionally reject the option of replacing the word "corruptly" with the word "dishonestly".**

Should there be an additional *requirement of dishonesty?*

8.37 This conclusion still leaves the possibility of including an *additional* requirement of dishonesty, over and above requirements designed to identify corrupt conduct along the lines suggested earlier in this Part. The legislation might say, in effect, that conduct which in other respects falls within the definition of corrupt conduct is nevertheless not to be regarded as corrupt unless it is also dishonest.

8.38 Our provisional view is that such a rule, though more defensible than the simple substitution of "dishonestly" for "corruptly", would still be inappropriate, for the reasons set out in Part I.[32] The essence of dishonesty, we believe, is the infringement of another's rights: it requires the existence of a victim.[33] In a case of bribery there may be an identifiable victim, as where B is induced to act in breach of a duty owed to C; or there may not, as where there is no breach of duty on B's part but what is done has a tendency to encourage breaches of duty by others. The latter kind of conduct may be *corrupt*,[34] but it would not be *dishonest* in the sense in which we understand that term. Dishonesty is a very common feature of corrupt conduct, but in our view it would be wrong to regard it as an essential characteristic of such conduct. **We provisionally reject the option of including an additional requirement of dishonesty in the offence.**

[30] MCCOC Report, p 287.

[31] MCCOC Report, p 291.

[32] See paras 1.26 – 1.28 above.

[33] See para 1.27 above.

[34] See paras 8.15 – 8.19 above.

8.39 Even if this argument were rejected, and it were accepted that corruption is no less an offence of dishonesty than deception or theft, it would not follow that dishonesty in the *Ghosh* sense ought to be an element of the offence. This is because it is arguable that dishonesty in that sense ought not to be an element of *any* offence, even deception or theft. We have not attempted in this paper to set out the arguments in support of this view.[35] This is partly because, unless we are wrong in our belief that corruption is not a dishonesty offence, the issue is irrelevant; and partly because it is an issue that, whatever views may emerge in the course of consultation on this paper, we shall in any event need to examine as part of our forthcoming review of the law of deception and fraud. In these circumstances we believe it would be unhelpful to attempt to deal with the issue in this paper, or to invite views on it. The issue on which we seek views at this stage is whether we are right to treat corruption as an offence of a different character from theft, deception and fraud. If we are wrong about this, we shall need to consider the implications for the law of corruption of our developing views on the law of dishonesty, including the desirability or otherwise of the *Ghosh* test. But we have not sought to undertake this somewhat hypothetical exercise for the purpose of the present paper.

Specific defences

8.40 Even if it is agreed that conduct should not fall outside the offence merely because the jury takes the view that it was not "dishonest", there may be a case for including certain more specific criteria for conduct which is to be exempt from liability. None of these criteria is in our view adequate as a complete definition of the conduct to be regarded as corrupt, but some of them might perhaps form the basis of a defence.

OPENNESS

8.41 Corrupt transactions between an agent and a third party are likely to be kept secret from the agent's principal, but we think it would be going too far to say that any transaction between an agent and a third party should be deemed corrupt if it is not disclosed.[36] Conversely, the fact that a transaction *is* disclosed does not prove that it is *not* corrupt. If this were so, the result might be simply that bribes would be paid openly instead of in secret. We provisionally believe that the openness of the transaction may be relevant, but cannot be conclusive.

THE PRINCIPAL'S CONSENT

8.42 It is similarly arguable that a transaction cannot be corrupt if it is done with the consent of the agent's principal. If C agrees that C's agent B may accept payment from A in return for giving A a contract, the position is essentially the same as if C were to accept the payment personally. If C is not in a fiduciary position vis-à-vis anyone else, and is under no obligation to apply any particular criteria in determining where to award the contract, C's acceptance of A's payment might not be entirely ethical but, arguably, it would not be *corrupt.* It makes no

[35] See, eg, Edward Griew, "Dishonesty – The Objections to *Feely* and *Ghosh*" [1985] Crim LR 341; D W Elliott, "Dishonesty in Theft – a Dispensable Concept?" [1982] Crim LR 395.

[36] This is the approach adopted in the MCCOC Report, p 287.

difference, in our view, that the payment is made to B rather than C. It is arguable, therefore, that, if C knows all the relevant facts, and consents to what is done by A, B or both, that conduct ought not in principle to be caught by the offence.

8.43 However, we would question whether this is inevitably so. We have argued that although there is a large overlap between corruption and fraud, they are essentially distinct forms of criminality. Fraud is the dishonest infliction of loss; corruption is conduct conducive to breach of duty.[37] Something done with the consent of the agent's principal cannot be fraud on the principal; but does it follow that it cannot be conducive to breach of duty? Suppose, for example, that in a particular industry it is common for agents to award contracts to those contractors that have bribed them. It is widely known in the industry that some agents do this, but a contractor dealing with a particular agent has no way of knowing whether *this* agent does it. The existence of the practice thus encourages contractors to offer bribes, just in case. Each time an agent accepts a bribe from a contractor, the corrupt practice is reinforced. This effect may be mitigated if the agent's principal consents to what is done, but we doubt that it is entirely negatived.

8.44 Moreover, even if it were accepted that something done with the consent of the agent's principal can never be corrupt, it would be difficult to formulate a *rule* to this effect. In the first place, there are certain classes of person who should probably be treated as comparable to fiduciaries for this purpose although they do not owe fiduciary duties to any particular person.[38] In the case of such a person, it would be meaningless to enquire whether the principal had consented to what was done.

8.45 It would be possible for the law to say that it is a defence if *any person to whom the agent may owe a duty* consents to what is done: this defence would by its nature be unavailable to those agents whose duties are not owed to persons at all, but to the public or the state. But such a rule might give rise to protracted arguments about precisely who or what the agent's duty is owed to, for the purpose of determining whether or not the defence of consent is available. This would distract attention from the central issue of whether what was done was *corrupt*.

8.46 An alternative device would be to provide that the principal's consent is a defence unless the agent falls within the definition of an agent *only* by virtue of falling within the category of a public agent. But if different rules applied to different categories of agents, it would be crucial to determine not only whether a person falls within *any* of the categories but also *which*. The latter question would often be much more difficult than the former. For example, it might be clear that B acts on behalf of C (and is therefore an agent) but debatable whether he or she also acts on behalf of the public. The factors relevant to this latter issue might well have a bearing on whether B's conduct is corrupt; but we do not think it would be desirable to turn this consideration into a formal distinction between different kinds of agents.

[37] See paras 1.23 – 1.25 and 8.19 above.

[38] See para 7.7 above.

8.47 There is a further difficulty in treating the principal's consent as a defence, even where no element of public duty is involved. It may be clear that B owes fiduciary duties to a corporate body, but it may not be clear which of the individuals within that body has the authority to consent on its behalf. Where B is employed by a large company, for example, who is the person empowered to give the company's consent to the transaction proposed? The answer might range from the board of directors at one extreme to B's immediate manager at the other. We believe that these complex issues of corporate responsibility are best kept out of criminal trials if possible.[39]

NO OBLIGATION TO ACCOUNT

8.48 Professor A T H Smith argues that one essential element of a corrupt transaction is the existence on the agent's part of an obligation to account for the benefit received.

> [T]here is an overlap and potential conflict between the civil and the criminal law that must not be overlooked. Where a person receives a consideration that may possibly be classified as a bribe, both branches of the law must speak with one voice on the subject, to the extent that if the civil law says that the consideration received belongs to the recipient, and he is under no obligation in any way to account for its receipt, then (however dishonest the receipt) the reward cannot be considered a bribe … Suppose, for example, that a person is given a rather large tip by a customer using his services. As a matter of civil law, the tip belongs to him rather than to the employer.[40] It would be wrong in those circumstances to treat the tip as a bribe.[41]

8.49 This suggestion, like the preceding one, treats bribery as essentially a crime against the agent's principal, rather than one of conduct which has a tendency to encourage breaches of duty. We suggested above[42] that it would be inappropriate for the offence to include a requirement of dishonesty, on the ground that the concept of dishonesty implies an identifiable victim, and in the case of corruption no such person need exist. Corruption is an offence against the public interest, not against the agent's principal.[43] If this is right then it may be more acceptable for the law to say that an agent can commit an offence by accepting a benefit even if the agent has no obligation to account for it. The existence or non-existence of a duty to account can hinge on factors which have no bearing on the question of whether what is done is likely to encourage breaches of duty. For example, the principal might be unable to make the agent disgorge a bribe if the principal's

[39] Cf our recommendations for a new offence of corporate killing, designed to avoid the difficulties in establishing corporate liability for manslaughter: Legislating the Criminal Code: Involuntary Manslaughter (1996) Law Com No 237, Pt VIII.

[40] See *Hovendon and Sons v Millhoff* (1900-1) 83 LT 41, 43; *Industries and General Mortgage Co v Lewis* [1949] 2 All ER 573, 577. [Footnote in original. But it has recently been held by the Court of Appeal that if the tip is paid by cheque or credit card it belongs to the employer: *Nerva and others v R L and G Ltd, The Times* 28 May 1996.]

[41] A T H Smith, *Property Offences* (1994) para 25–02.

[42] See paras 8.36 and 8.38.

[43] See paras 1.23 – 1.28 above.

enterprise were itself unlawful.[44] This might (and, in our provisional view, should) mean that the agent's conduct cannot be treated as fraud on the principal; but it does not necessarily make that conduct any less corrupt.

8.50 Moreover, there is again the difficulty that a defence along these lines could apply only to agents of a purely private character: where the agent's duty is to the public at large, it would make no sense to ask whether the agent is under a duty to account to the public. Therefore the defence would require a formal distinction to be drawn between agents of a public and private character. As we have said,[45] we believe that such a distinction would prove troublesome to apply. Our provisional view is that the absence of an obligation to account for the benefit may be relevant, but should not in itself be a complete defence.

NORMAL PRACTICE

8.51 It is sometimes suggested that what is normal practice cannot reasonably be considered deviant or "corrupt".[46] A common example is that of corporate hospitality. It is accepted business practice for companies to allocate budgets for the entertainment of prospective or established customers at sporting or cultural events. The expenditure may be intended not to induce the recipients to enter into any particular transaction, but simply to make them more favourably disposed towards the company in future. Such expenditure, if properly authorised, is not normally regarded as corrupt.

8.52 Arguably this is because it is normal practice. But if the normality of the conduct were a complete defence it would follow that, once corrupt practices have taken root in a given environment, they could no longer be regarded as corrupt. We believe that if a transaction is essentially corrupt then it should be criminal, however common such transactions may be. What prevents ordinary business hospitality from being corrupt, we suggest, is not that it is ordinary but that in general it creates no substantial conflict between the recipients' interests and their duty. Whether such a conflict exists in a particular case is a matter of degree. As it was put in the South African case of *S v Deal Enterprises (Pty) Ltd*,[47]

> The difference between legitimate entertainment and bribery lies in the intention with which the entertainment is provided, and that is something to be inferred from all the circumstances, including the

[44] See *Montefiore v Menday Motor Components Co Ltd* [1918] 2 KB 241.

[45] See para 8.46 above.

[46] This view is supported by P Fennell and P A Thomas, "Corruption in England and Wales: An Historical Analysis" (1983) 11 Int Jo Soc Law 167, 171. Analysing three cases of corruption in South Wales, they note that defendants often relied on the fact that their conduct was "common business practice". See also S Chibnall and P Saunders, "Worlds Apart : notes on the social reality of corruption" (1977) 28(2) British Journal of Sociology 138, 143.

[47] [1978] 3 WLD 302. This case involved the giving of gifts purchased from a fund set aside for entertainments. It was held that the giving of gifts in kind was not the same as providing entertainment. Giving monetary gifts was said to be more akin to bribery.

> relationship between the giver and recipient, their respective financial and social positions and the nature and value of the entertainment.[48]

SMALL VALUE

8.53 In their analysis of three corruption cases in South Wales, Fennell and Thomas note a number of defences that emerged during those trials.[49] One line of argument was that the sums of money in question were, from the point of view of the companies giving the bribes, trivial. A bribe, it was argued, was something that ought to be substantial in value.

8.54 Similarly, John Poulson claimed to have been guilty not of corruption but only of being "generous on a ridiculous scale".[50] However, his generosity extended to the provision of free holidays, a house, and suits of clothing. The size and quantity of these items made it easy for the jury to characterise his conduct as corrupt. As the prosecution put it in relation to his gifts to another defendant, Pottinger:

> What friend gives a house to a friend? The nature of the gifts was to take every financial responsibility for the man's whole living. [Pottinger] was living in a Poulson house, driving a Poulson car, wearing Poulson suits, and travelling at Poulson's expense ... The gifts point not to friendship, but to buying a man, making him dependent.[51]

8.55 But what would have been the position if the alleged bribery had been on a more modest scale? At one point during his first trial, Poulson was questioned about a "Christmas gift" of six bottles of whisky to the Peterlee Development Corporation, with whom his company had been doing business for some ten years. Prosecuting counsel asked him:

> Would you agree that to lavish a gift on a person who was in a position to influence a contract in your direction would be a brief description of corruption?

Poulson replied:

> It might be yours, but six bottles of whisky for the amount of work we were doing, and the connections over the past ten years, no sir.[52]

8.56 Poulson was open about the relationship between the amount of business done and the size of a "gift".[53] Indeed, if he had provided no more than six bottles of whisky, he might not even have been prosecuted. Such gifts are common, and

[48] *Ibid*, at p 311, *per* Nicholas J.

[49] P Fennell and P A Thomas, *op cit*, p 171.

[50] Cited in S Chibnall and P Saunders, *op cit*, p 146.

[51] *Ibid*, at p 147.

[52] *Ibid*, at p 148.

[53] In a letter to Sir Bernard Kenyon, former clerk to West Riding County Council, he wrote "an authority giving us 750 houses obviously has to have more spent on it than an authority giving us 25." Cited in S Chibnall and P Saunders, *op cit*, p 153, n 23.

commonly regarded as acceptable. At what level of "generosity" (to use Poulson's term) does a gift become a bribe?

8.57 This question has generated much academic discussion. According to Russell,[54] there exists no qualitative or quantitative limit. He focuses solely on the fact that the gift is "undue". On the other hand, Coke[55] removes from the remit of bribes "meat, drink and that of small value". Such an approach was employed in *Woodward v Maltby*,[56] where a gift of a book of matches containing an exhortation to vote for a candidate was held to be neither treating (because it was not meat, drink, entertainment or provisions) nor bribery because the value was so small that it could not be inferred that it was given in order to influence the recipient voter. From this, Lanham concludes that the triviality of the gift is not a defence in its own right but a factor in determining whether it was given as a reward.[57] We think that this is the right approach.

CONCLUSIONS

8.58 **Our provisional view is that it should not be a specific defence to the new offence**

> **(1) that what was done was done openly;**
>
> **(2) that what was done was done with the consent of the agent's principal;**
>
> **(3) that the agent was under no obligation to account for the benefit in question (or, where it was not in fact received, would have been under no such obligation if it had been);**
>
> **(4) that what was done was normal practice in the environment in question; or**
>
> **(5) that the benefit in question was of small value;**

but that each of these factors should be capable of having a bearing on the issue of whether the defendant's conduct was corrupt.

THE NATURE OF THE BENEFIT

8.59 The 1889 Act applies to the offer or acceptance of "any gift, loan, fee, reward or advantage"; the 1906 Act refers instead to "any gift or consideration".[58]

8.60 In *Braithwaite*[59] it was held that the provision of property or services must be either a "consideration" or a "gift", because it would be a consideration if it were done as

[54] Russell, *A Treatise of Crimes and Misdemeanours (*4th ed 1865) vol 1, p 223.

[55] 3 Inst 145.

[56] [1959] VR 794.

[57] See D Lanham, "Bribery and Corruption" *Essays in Honour of J C Smith* (1987) 92, 95.

[58] "Consideration" includes a valuable consideration of any kind: 1906 Act, s 1(2).

[59] [1983] 1 WLR 385.

part of a bargain, in exchange for some other benefit, and a gift if it were not. The decision was concerned with the words "gift" and "consideration" in section 2 of the 1916 Act (which defines the circumstances in which the defence must prove the absence of corruption), but the reasoning would seem equally applicable to those words in section 1 of the 1906 Act.

8.61 However, that reasoning is perhaps open to criticism, on the ground that the word "gift" is more apt to describe the provision of *property* than that of *services* – particularly where the services are of such a nature that their financial value (if any) is hard to quantify, such as sexual favours. Similarly, it is not clear that every kind of benefit referred to in the 1889 Act will suffice under the 1906 Act. The 1889 Act refers to a "gift, loan, fee, reward or advantage", and section 7 of that Act defines an "advantage" as follows:

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

8.62 With or without the assistance of this definition, the word "advantage" seems wide enough to cover the doing by one person of any act which is either desired by, or in the interests of, another. If there are any such acts which, if gratuitous, would not qualify as a "gift", it follows that the 1889 Act covers a wider range of benefits than the 1906 Act; and, if so, our provisional view is that the wider expression is the more appropriate. Subject to the other requirements of the offence, **we provisionally believe that a person (A) should be regarded as conferring an advantage on another (B) if A does something that B wants A to do, or which is otherwise of benefit to B**.

8.63 A somewhat less clear case is that in which A *refrains* from doing something that B does *not* want A to do, or which it would otherwise be to B's disadvantage for A to do. The 1889 Act includes, within the definition of an advantage, "any forbearance to demand any money or money's worth or valuable thing", which is only one example of providing a benefit by forbearing to act. Forbearance might qualify as "consideration", but only if it formed part of a bargain; if not, it would not be covered by the 1906 Act, since it could scarcely be regarded as a "gift".

8.64 **We provisionally believe that, where A has a *right* to act to B's disadvantage, and forbears to exercise that right, that forbearance should be regarded, for the purposes of our proposed new offence, as the conferring of an advantage on B.** Where, however, A merely refrains from doing that which A has no right to do, it is hard to regard this as an advantage to B. If, by so refraining, A seeks to induce B to act in a particular way, it may be arguable that A should be guilty of an offence; but it would be an offence of using *threats*, not of bribery, and it is questionable whether B should be a party to any such offence if the threat achieves the desired result. We considered these issues in Part V.

THE PROHIBITED ACTS

8.65 Both the 1889 and the 1906 Acts deal separately with the position of the putative briber and bribee. We must also consider the position where a third party or intermediary is involved, and where the "agent" is no longer (or not yet) an agent at the material time.

The bribee

8.66 Under the 1889 Act a person may commit an offence by *soliciting* an advantage, *receiving* it or *agreeing* to receive it. In each case the receipt (or proposed receipt) may be for the defendant or for another. Under the 1906 Act the defendant must *accept* the gift or consideration or *agree* to do so, *obtain* it or *attempt* to do so. The difference between receiving, accepting and obtaining is not obvious: these words appear to be interchangeable.

8.67 It is arguably possible to *solicit* an advantage without *attempting to obtain* it, because the act of soliciting may not be sufficiently proximate to the obtaining to be properly described as an attempt. In the terms of section 1 of the Criminal Attempts Act 1981, it might in certain circumstances be "merely preparatory" to the obtaining of the thing solicited, as distinct from an *attempt* to obtain it – though in that case it is hard to see what purpose is served by the words "attempts to obtain" in the 1906 Act. Our provisional view is that the soliciting of an advantage should suffice, and that there is no need to refer in addition to the possibility of an attempt to obtain. **We provisionally propose that the conduct prohibited on the part of the putative bribee should be that of accepting, soliciting or agreeing to accept the advantage in question.**

The briber

8.68 Under the 1889 Act a person may commit an offence by giving, offering or *promising* the advantage; under the 1906 Act, by giving, offering or *agreeing to give* it. We can see no difference between promising an advantage and agreeing to give it. "Promise" seems the simpler expression, and we provisionally propose to adopt it. **We provisionally propose that the conduct prohibited on the part of the putative briber should be that of conferring, or offering or promising to confer, the advantage in question.**

Tripartite relationships

8.69 As we have suggested in Part I[60] above, in its simplest form, a corrupt transaction involves two active parties, A and B, A conferring an advantage on B with a view to tempting B to breach the duty B owes to C. A more complex form involves a tripartite transaction in which

(1) A confers an advantage on *a third party*, D, with a view to tempting B, or

(2) D acts as *intermediary* between A, the briber, and B, the bribee.

[60] Para 1.12.

Third parties

LIABILITY OF THIRD PARTIES

8.70 The 1889 Act does not require B, the person being tempted to act in breach of duty, to be the recipient of the bribe. So, in a transaction in which a third party, D, is the recipient and distinct from B (the member, officer or servant of a public body whose conduct is sought to be influenced), D may be guilty of an offence if the receipt can be shown to have been an "inducement to" or "reward for" or "otherwise on account of" B's acting (or refraining from acting) in his or her capacity as member, officer or servant of a public body.

8.71 The 1906 Act, unlike the 1889 Act, does not allow for such a separation of roles. In the circumstance where A pays a third party, D, with a view to influencing or rewarding an agent, B, neither B nor D would be guilty of an offence under the first paragraph of section 1(1) of the 1906 Act and A would not be guilty under the second paragraph.[61] In this respect the 1906 Act is more limited than the 1889 Act, and, as a result, although third-party transactions involving those associated with public bodies fall foul of the 1889 Act, the 1906 Act will not bite on similar transactions in the private sector.

8.72 The Salmon Report considered the breadth of the 1889 Act[62] and, following a brief description of the difference between the 1889 and 1906 Acts,[63] stated:

> The Parliamentary debates on the 1906 Act do not explain why the drafting of that Act departed from the precedent set in 1889, and we consider that on the points at issue the wider approach of the 1889 Act is right.[64]

8.73 We agree. We can see no justification in requiring, by law, that the recipient of a bribe and the agent whose conduct is connected with the bribe should be the same person. Indeed, such a requirement would create a lacuna which could be exploited in circumstances where an agent had an interest in a third party receiving a payment (such as a spouse). We believe that a modern law of bribery should recognise a separation of the role of recipient and agent. **We provisionally propose that the offence should be committed by any person who corruptly accepts, solicits or agrees to accept an advantage in connection with the performance by an agent of his or her duty.**

LIABILITY OF THE AGENT

8.74 It would appear that although it is the temptation of the public office holder, B, that constitutes the mischief[65] with which the 1889 Act is directly concerned, so

[61] If, however, D passed A's "bribe" on to B, both B and D would be guilty under the 1906 Act, since D would then be an offeror and B the recipient agent.

[62] In respect of both types of tripartite transaction set out in para 8.69 above.

[63] At para 57.

[64] At para 58.

[65] See para 1.15 above, where the distinction is drawn between the "fundamental mischief" and the "mischief of temptation".

long as B does not solicit, receive or agree to receive any payment, B will not be a principal in the commission of the offence.[66] B may incur liability, however, if

(1) B aids, abets, counsels or procures the receipt of a bribe by the third party, D;[67]

(2) B conspires with D with a view to D's receiving a bribe;[68] or

(3) D passes on some or all of the bribe to B.

8.75 In regard to sub-paragraph (3) above, defining what is meant by *receiving some or all of the bribe* is not without difficulty. It may include not only an agent literally receiving some or all of the property given by the donor to the third party, but also an agent receiving a payment which can be said to be the *proceeds* of the bribe or, more broadly still, an agent who can be said to have received *any* benefit – financial (for example, the remission of a debt) or otherwise – as a result of the receipt of the bribe by a third party. **We provisionally propose that, where a person other than an agent corruptly accepts a bribe in connection with the performance by an agent of his or her duty, the offence should also be committed by that agent if he or she receives**

(1) **some or all of the bribe itself,**

(2) **some or all of the proceeds of the bribe or**

(3) **a benefit resulting from the bribe.**

LIABILITY OF THE BRIBER

8.76 Under the 1889 Act, a briber is liable whether the benefit is conferred on a public officer directly or on a third party. The MCCOC's proposed offence of giving a bribe adopts the same approach.[69] The Committee cites, as an example of a third-party bribe, "the payment of a sum of money to a political party in government with the dishonest intention of obtaining a favour from a third party, for example, a minister in the government".[70] It concludes that although the benefit is not paid

[66] Where D receives a bribe from A without informing B and *then* seeks to persuade B to favour A, B may not be guilty under the Act even if B agrees to favour A, because by that time the offence is already complete.

[67] Accessories and Abettors Act 1861, s 8.

[68] Criminal Law Act 1977, s 1.

[69] Section 20.2(1) of the Code provides: "*Giving a bribe.* A person who dishonestly provides, or offers or promises to provide, a benefit to any agent *or other person* with the intention that the agent will provide a favour is guilty of an offence" (emphasis added). The MCCOC proposes the obverse offence of *receiving a bribe*; this offence, however, appears to be confined to the agent "who dishonestly asks for, receives or agrees to receive a benefit for himself, herself *or another person* with the intention of providing a favour" (s 20.2(2)). The third party appears not to be guilty.

[70] MCCOC Report, p 301.

to the agent, "[t]his is clearly corrupt and should be included within the definition of bribery".[71]

8.77 We agree. **We provisionally propose that, where a person corruptly confers, or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, the offence should be committed by that person whether the advantage is conferred (or to be conferred) on the agent or on a third party.**

Intermediaries

8.78 In the Salmon Report it is suggested that intermediaries – those "who arrange corrupt transactions (or even attempt to arrange them without the knowledge of both the other parties)"[72] – are caught by the broad drafting of the 1889 Act, but by the 1906 Act only "to the extent that [the intermediary] actually gives or offers a corrupt gift or consideration to an agent".[73] Whereas this does, indeed, appear to be the case as regards the substantive offences,[74] an intermediary may be guilty as accessory if he or she aids, abets, counsels or procures the substantive offence.

8.79 Whereas we take the view that a recipient should be liable irrespective of whether he or she is also an agent, we are not inclined to take the same view as regards intermediaries, and to this extent we depart from the conclusion of the Salmon report set out above. Unlike the third-party recipient, an intermediary does not have an equal status to the other parties in the corrupt transaction, and the criminality of the intermediary's role is adequately reflected by liability for aiding and abetting. **We provisionally propose that the offence should not be committed, as a principal offender, by an intermediary.**

Persons who have been, or are to become, agents

8.80 Whereas the 1906 Act appears to require that the bribe be received by the agent *during the currency* of the agency,[75] the 1889 Act extends to circumstances in which the public officer is no longer in office at the time of receipt of the bribe (either by himself or herself or by a third-party) or has yet to assume office. Lanham gives the following example of the former:

[71] *Ibid.*

[72] At para 57.

[73] *Ibid.*

[74] Under the 1889 Act, s 1(1) and (2), an intermediary is guilty if he or she solicits or offers a bribe on behalf of another. The 1906 Act, s 1(1), requires that it is the agent who "accepts or obtains, or agrees to accept or attempts to obtain" the bribe; any person can be guilty if he or she "gives or agrees to give or offers" a bribe, and presumably this is so even if that person is acting only as intermediary. Whereas, however, the 1889 Act is drafted in terms of a person committing an offence either by himself or herself or "in conjunction with any other person", the 1906 Act is not drawn so widely in express terms.

[75] D Lanham, in "Bribery and Corruption" in *Essays in Honour of J C Smith* (1987) 92, at p 101, refers to *Brewer* (1942) 66 CLR 535, in which it was held by a majority of the High Court of Australia that the Secret Commissions Act 1905 (which provides that agent "includes a person serving under the Crown") did not extend to *ex*-servants of the Crown. But Lanham is cautious in placing much reliance on this authority because of the differences between the UK and Australian definitions.

> Suppose D1, an officer of a local authority, influences a decision which creates a large financial gain for D2. If after D1 retires, resigns or is dismissed from his post, D2 pays D1 a substantial sum of money as a reward for his part in the decision, the crime would appear to have been committed. D1 would have received and D2 have given a reward for doing something in which the public body is concerned. There is no requirement that at the time the reward is paid the recipient should be a current officer (or member or servant) of the public body.[76]

8.81 We take the view that limiting criminality on the basis of *when* a bribe is offered or received is unnecessarily restrictive and artificial. The MCCOC reached a similar conclusion: "Obviously, a person should not be able to avoid liability for these offences … simply because he or she sought the benefit just before being appointed to a position, or was paid a reward just after resignation."[77] And "even ex post facto rewards to ex-agents may have a potentially corrupting effect on the agents concerned in their later conduct or on other agents who may get to know of the rewards".[78] **We provisionally propose that, where a person corruptly accepts, solicits or agrees to accept, or confers or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, that person should be guilty of the offence even if the agent in question is no longer an agent, or is not yet an agent, at the material time.**

THE MENTAL ELEMENT

8.82 Basic principles of criminal law dictate that liability for a serious offence should require proof of mens rea. This means that the defendant should at least be proved to have been aware, at the material time, of the circumstances that rendered his or her act criminal (though not necessarily of the relevant criminal law). To a great extent this requirement is implicit in the requirement that what is done should be done "corruptly". To take an extreme example: suppose that A gives B an expensive present. A is a contractor who hopes to secure a contract from X Ltd, but B does not know this. B is in charge of allocating X Ltd's contracts, but A does not know this. Obviously neither the giving of the present by A nor its acceptance by B is an offence; but this is because the present is not, and is not believed to be, an inducement or reward in connection with the performance of B's duties in respect of the allocation of contracts. It is not a case where the transaction is corrupt but the mental element of the offence is lacking: the transaction is not corrupt at all.

8.83 A further problem can arise, however, where what is done is unquestionably corrupt under the principles we have suggested, but the parties to the transaction are not *equally* corrupt.

[76] *Ibid*, at p 103 (footnote omitted).

[77] MCCOC Report, pp 297–299.

[78] D Lanham, *op cit*, p 101.

Advantage offered or solicited but not conferred

8.84 The simplest case is that in which a payment or other benefit is corruptly offered by A but not accepted by B, or solicited by B but not conferred by A. We have already examined these situations.[79] They raise no particular difficulty in relation to mens rea: the question is simply whether A's intention in the former case, and B's in the latter, is corrupt. For example, it has been held in South Africa that a person who solicits a bribe is guilty irrespective of the state of mind of the person from whom the bribe is solicited, and regardless of whether the defendant intends to show favour to that person in return.[80] We agree that this is the correct approach.

Advantage conferred, but giver and recipient not equally corrupt

8.85 Our provisional view is that the issues raised by cases of this kind ought to be determined in accordance with the principles that we have proposed earlier in this Part, together with well-established principles of mens rea. One such principle states that a person charged with an offence of mens rea is entitled to be judged according to the circumstances as he or she believed them to be at the material time, however mistaken or ill-founded that belief may have been: for example, if a person mistakenly believes that he or she is about to be assaulted, and uses force that would have been reasonable had this been the case, the defence of self-defence is available.[81] On the other hand, if a person's conduct would have rendered him or her guilty of an indictable offence had the facts been as he or she wrongly believed them to be, that person is guilty of an *attempt* to commit that offence.[82]

8.86 We may distinguish the case where the recipient of the advantage acts corruptly, but the giver does not, from the reverse situation.

The recipient acts corruptly, but the giver does not

8.87 Here we must draw a further distinction according to whether the recipient believes that the giver is also acting corruptly, or knows that he or she is not.

THE RECIPIENT MISTAKENLY BELIEVES THAT THE GIVER IS ACTING CORRUPTLY

8.88 A pays money to B. A regards the payment as gratuitous, or as relating to some innocent consideration; B wrongly believes it to be intended as a bribe, and accepts it as such. Clearly A is not guilty of an offence, and ought not to be; but in the American case of *Sims v State*,[83] B was held to be guilty. The position is the same in South Africa.[84]

8.89 It has been said that in such cases "the intention of the giver is being pushed into the background, with greater emphasis being placed on the state of mind of the

[79] See paras 8.66 – 8.68 above.

[80] *S v Kok* [1960] 4 SALR 638.

[81] *Williams (Gladstone)* [1987] 3 All ER 130; *Beckford* [1988] AC 130.

[82] Criminal Attempts Act 1981, s 1.

[83] (1917) 198 SW 883.

[84] *S v Du Preez* [1968] 2 SALR 731 (T).

recipient".[85] In our view this is as it should be, given that it is the guilt of the recipient that is in issue. If B believes that A is acting corruptly, B must also believe that B's own act has a tendency to corrupt: by accepting what he or she believes to be a bribe, B is doing an act which, as far as B knows, will encourage A to offer more bribes in the future. The only issue is whether B should be guilty of the full offence or only of an attempt. Our provisional view is that B has in fact acted corruptly, and should be guilty of the full offence. **We provisionally propose that the putative bribee should not be entitled to an acquittal merely because he or she is mistaken in his or her belief that the advantage in question is offered with corrupt intent.**

THE RECIPIENT KNOWS THAT THE GIVER HAS NO CORRUPT INTENT

8.90 A pays money to B. A regards the payment as gratuitous, or as relating to some innocent consideration; B knows this, but privately regards it as an inducement or reward for some action on B's part. Clearly A should not be guilty of an offence. Should B?

8.91 The example may seem somewhat fanciful (and would be hard to prove if it occurred), but has been discussed in several South African cases. Two cases[86] suggest that B may be guilty, on the ground that it is B's intention that is relevant, not A's. A third[87] suggests that if B knows that an innocent payment is intended then B does not intend to take a bribe, and so cannot be guilty.[88] We provisionally prefer the latter approach. **We provisionally propose that, if the putative bribee does not believe the advantage to be offered with corrupt intent, he or she should not be guilty merely because he or she intends to treat it as if it were so offered.**

The giver acts corruptly, but the recipient does not

8.92 This is the mirror image of the situation discussed at paragraph 8.88 above. A gives B a sum of money, intending it as an inducement or a reward for favour shown by B. B accepts it, thinking that A intends it to be gratuitous or an innocent consideration. Clearly B's acceptance of the money is not corrupt. Under the present law, indeed, there is probably no need for B to argue that the money is not accepted "corruptly", because it is not accepted "as an inducement … or reward".

8.93 Under the present law, A is nevertheless guilty.[89] We think this is clearly right, since it is A's *intention* to put temptation in the path of B and encourage a breach of duty, even though A's act does not in fact have this effect. At the very least A should be guilty of an attempt; but in our view A has actually done an act which tends to corrupt, and should be guilty of the full offence. **We provisionally**

[85] A B Leslie, "Bribery and Corruption: The Role of the Giver of a Bribe at the Trial of the Recipient" (1981) 98 SALJ 239, 242.

[86] *S v Gouws* [1975] 1 SALR 1 (A); *S v Hartzenberg* [1964] 2 PH H219 (T).

[87] *Geel* [1953] 2 SA 398 (AD).

[88] *Ibid*, at p 402.

[89] *Millray Window Cleaning Co Ltd* [1962] Crim LR 99; *Andrews Weatherfoil Ltd* [1972] 1 All ER 65.

propose that the putative briber should not be entitled to an acquittal merely because, unknown to him or her, the putative bribee does not realise that the advantage in question is offered with corrupt intent.

8.94 It should be added that B may be guilty even if he or she does not intend to show the favour desired by A,[90] provided that B is aware of A's corrupt intention. In our view this should continue to be so, since, by accepting the gift knowing that it is a bribe, B is knowingly encouraging A to act in the same way in future. **We provisionally propose that the putative bribee should not be entitled to an acquittal merely because he or she does not intend to show the favour desired.**

PURPORTED AGENCY

8.95 Similar principles would seem to apply where the person accepting or soliciting a bribe is not in fact an agent but *purports* to be one. It is debatable whether such a person falls within the present law. Lanham[91] cites the American case of *Ex parte Winters*,[92] a case in which a defendant was convicted for taking a bribe despite the fact that he only purported to be a police officer, in support of the argument that the common law does cover those purporting to be public officers.

8.96 As for the statute law, Lanham argues that, although the 1906 Act applies only to agents, "[t]here is some authority to suggest that if A purports to act as the agent of P, A is estopped from denying the agency".[93] Lanham concedes, however, that the authorities do not establish the point beyond doubt.[94]

8.97 The 1889 Act is also contentious. Under that Act there is no specification as to the capacity of the person accepting the bribe but only that the bribe should be offered or received "as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body ... doing or forbearing to do anything".[95] Arguably, therefore, any transaction in which a person accepts a bribe from a donor who, to the knowledge of the recipient, intends that it be received as an inducement or reward, is guilty of the offence irrespective of whether in fact that person was in a position to induce or reward any member, officer or servant of a public body or whether that person wrongly held him or herself out to be a member, officer or servant of a public body.

[90] *Carr* [1957] 1 WLR 165; *Mills* (1978) 68 Cr App R 154.

[91] *Op cit*, at p 94.

[92] 140 P 164 (1914) (Criminal Court of Appeals of Oklahoma).

[93] D Lanham, *op cit*, p 103. As authority for this Lanham cites 1 *Halsbury's Laws of England* (4th ed) p 434.

[94] *Ibid*; but Lanham cites *State v Pohlmeyer* 52 NE 1027 (1899) to show that the point *is* established in American law. In that case D was charged with embezzlement as agent of a corporation. He claimed that his appointment was invalid. The Supreme Court of Ohio held that one who receives money in the assumed exercise of authority as agent is estopped from denying the agency in both civil and criminal proceedings.

[95] Section 1(1).

8.98 A person corruptly conferring or offering an advantage to a purported agent, under the mistaken impression that the purported agent is a real agent, would seem to be in much the same position as if the agent were a real agent but did not act corruptly. The briber intends to act corruptly. His or her moral culpability does not depend whether the person bribed is in fact in a position to be influenced. **We provisionally propose that the putative briber should not be entitled to an acquittal merely because, unknown to him or her, the putative bribee is not in fact an agent.**

8.99 The offence committed by the purported agent, on the other hand, is not accurately characterised as corruption (because he or she cannot be tempted to breach duties which he or she is not required to discharge in any event) but rather as obtaining property by deception, because the purported agent has obtained property by falsely representing that he or she is an agent. Although it might seem anomalous for the briber to be guilty of the corruption offence but the bribee guilty only of deception, this in fact may be an acceptable reflection of the respective culpability of the parties. **We provisionally propose that, where a person accepts, solicits or agrees to accept an advantage, ostensibly in connection with the performance by a person (whether the same person or another) of his or her duty as an agent, but the latter person is not in fact an agent (or was not, or will not be, an agent at the time when the performance of his or her duty is in question), neither person should be regarded as acting corruptly.**

Entrapment

8.100 A situation raising rather different issues is that of entrapment. For example, A offers B a bribe in order to expose B; or B accepts the bribe in order to expose A. In each situation the person who is trying to entrap is aware of the corrupt intent of the other and so, on the principles outlined above, should be guilty. His or her intention is to create the temptation to act in breach of duty, and it is this temptation that we seek to prevent.

8.101 The question, therefore, is what role *motive* should play in the law of corruption. Although the entrapper is in the short term encouraging corrupt behaviour, his or her long term goal is to prevent it; it might therefore seem unjust to impose liability. On the other hand there is a danger that a spurious claim to have acted with such a motive might be hard to disprove. Moreover, the existence of such a defence might encourage undesirable activities by investigative journalists and others. If one has reason to believe that a person is corrupt, the appropriate course is to bring the matter to the attention of the police or some other suitable authority, not to take the law into one's own hands. **We invite views on whether an intention to expose corruption should be a defence.**

SUMMARY OF MAIN PROPOSALS AND CONSULTATION ISSUES

8.102 **We provisionally propose that the new offence of bribery should be committed where**

(1) an agent corruptly accepts, solicits or agrees to accept an advantage in connection with the performance of his or her duty;

(2) any person corruptly accepts, solicits or agrees to accept an advantage in connection with the performance by an agent of his or her duty;

(3) any person corruptly confers, or offers or promises to confer, an advantage on an agent in connection with the performance of his or her duty; or

(4) any person corruptly confers, or offers or promises to confer, an advantage on any person in connection with the performance by an agent of his or her duty.

8.103 **We provisionally propose that, where a person other than an agent corruptly accepts a bribe in connection with the performance by an agent of his or her duty, the offence should also be committed by that agent if he or she receives**

(1) **some or all of the bribe itself,**

(2) **some or all of the proceeds of the bribe, or**

(3) **a benefit resulting from the bribe.**

8.104 **We provisionally propose that, where a person corruptly accepts, solicits or agrees to accept, or confers or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, that person should be guilty of the offence even if the agent in question is no longer an agent, or is not yet an agent, at the material time.**

8.105 **We provisionally propose that, for the purpose of the new offence, a person (A) should be regarded as conferring an advantage on another (B) if**

(1) A does something that

(a) B wants A to do, or

(b) is otherwise of benefit to B; or

(2) A has a right to act to B's disadvantage, and forbears to exercise that right.

8.106 **In our provisional view, an advantage is accepted and conferred "corruptly" if**

(1) it is an inducement to an agent to act or refrain from acting *in breach of duty*, or a reward for an agent's so acting or refraining from so acting, *or*

(2) it is an inducement to an agent to act or refrain from acting *in any way*, or a reward for an agent's so acting or refraining, *provided* that the transaction has a substantial tendency to encourage that agent, or others in comparable positions, to act in breach of duty;

but we ask for views on

- **(a)** **whether our analysis of the meaning of the word "corruptly" is correct (and if not, what it does mean); and**
- **(b)** **whether its meaning should be set out in a statutory definition.**

8.107 **We provisionally propose that, where a person accepts, solicits or agrees to accept an advantage, ostensibly in connection with the performance by a person (whether the same person or another) of his or her duty as an agent, but the latter person is not in fact an agent (or was not, or will not be, an agent at the time when the performance of his or her duty is in question), neither person should be regarded as acting corruptly.**

PART IX
TERRITORIAL JURISDICTION

9.1 In this Part we examine the extent to which corruption offences committed abroad are indictable in England and Wales. First, we examine the present law, starting with territorial jurisdiction in criminal law generally and then specifically in relation to the corruption offences. We then look at the way in which the jurisdiction of the English courts was extended by the Criminal Justice Act 1948. Next, we consider the effect of the Criminal Justice Act 1993 on this area of law. Finally, we put forward our proposal for reform.

THE PRESENT LAW

General

9.2 The general rule is that the exercise of criminal jurisdiction does not extend to cover acts committed on land abroad.[1] Jurisdiction over a crime belongs to the country in which it was committed.[2] So, in general, English subjects who commit acts abroad are not amenable to the jurisdiction of the courts in England and Wales.

9.3 Under the present law, the English courts do not have jurisdiction to try a criminal offence unless the last act or event necessary for its completion occurs within the jurisdiction.[3] This general principle applies to both common law and statutory offences, but as Parliament is supreme it may extend the territorial limit of a particular offence.[4]

9.4 In applying the common law jurisdiction rules to any criminal offence, it is first necessary to determine the ingredients of the offence, in order to ascertain the acts that must be done before the offence can be said to have been committed. This raises the need to draw a distinction between "*conduct crimes*" and *"result crimes*": only thus can we identify the last act required by an offence, and so discover the jurisdiction in which that last act occurred.

9.5 A *conduct* crime is one whose ingredients consist solely in the acts that must be done for the offence to be made out, and not the results of those acts. A conduct

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

[2] *Macleod v A-G of New South Wales* [1891] AC 455, 458, *per* Lord Halsbury LC.

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

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

crime, in general, will only be indictable where the conduct required by the offence occurs within the jurisdiction.

9.6 This is to be contrasted with *result crimes*, whose ingredients include the *consequences* of what is done. The present position is that no offence occurs in English law unless the offence takes place within the jurisdiction. Therefore, because no offence will have been committed until the result of the act occurs, the offence is committed in the place where the result occurs. This means that it is immaterial that any *conduct* required by the offence happens in this jurisdiction; the required result must occur here as well.[5] Indeed, so long as the result occurs here, it is immaterial that the conduct causing it takes place abroad.[6]

The corruption offences

9.7 The general territorial rule applies to the common law offence of bribery as well as the offences in the Prevention of Corruption Acts 1889–1916. The Acts contain no provision extending the scope of the offences beyond the jurisdiction, and therefore cover only corrupt acts occurring in England and Wales.

9.8 The issue of jurisdiction is particularly relevant to corruption offences, in that they often have an international dimension; but the present law is limited in its application to corrupt practices occurring abroad. In terms of the distinction between conduct crimes and result crimes, the corruption offences are conduct-based. They focus on acts done, rather than the results of those acts. In simple terms, the essence of bribery is to offer, give, solicit or accept a bribe in return for doing (or not doing) a particular act. The conduct required by the offence is the corrupt offer, giving, soliciting or acceptance, and as soon as this occurs the offence is complete. The prosecution is not bound to prove that any particular result flowed from that act. If, therefore, the corrupt conduct occurs here, the matter is justiciable in England and Wales; but if it occurs abroad, the English courts generally have no jurisdiction. Thus the present law seems unable to deal with the situation where a public official takes a bribe while abroad and acts on the bribe after returning to England.

9.9 In certain circumstances, however, it may be arguable that a corrupt act which appears to have been done abroad was in fact done within the jurisdiction. For example, if A sent a letter from France to B in England, offering B a bribe, A might be regarded as having made the offer in England, through the agency of the English postal workers.[7]

Extension of jurisdiction by the Criminal Justice Act 1948

9.10 Section 31(1) of the Criminal Justice Act 1948 provides:

> Any British subject employed under [Her] Majesty's Government in the United Kingdom in the service of the Crown who commits, in a

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

[6] *Bevan* (1987) 84 Cr App R 143.

[7] Cf *Baxter* [1972] 1 QB 1; *DPP v Stonehouse* [1978] AC 55.

> foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence …, and subject to the same punishment, as if the offence had been committed in England.

9.11 This provision may render conduct which would ordinarily be untriable in England and Wales justiciable in this jurisdiction. To grasp the scope of the section it is essential to determine who may be caught by the provision. The Act does not, however, provide a definition of the key phrase "subject employed under [Her] Majesty's Government in the United Kingdom in the service of the Crown". Uncertainty exists as to who exactly serves under the Crown.[8] In deciding that an additional superintendent and registrar of births, deaths and marriages was a person serving under the Crown, the Court of Appeal noted that he was carrying out the functions of central government.[9] It is unclear whether or not this is a determining factor. If it were, this would mean that local government officials would fall outside the Act's scope.

9.12 It must also be doubtful whether a public official who solicits or accepts a bribe while abroad, perhaps on holiday, can be said to be "acting or purporting to act in the course of employment" merely because the bribe is intended to influence the way in which the official does his or her job on returning to this country. It is unlikely that this provision significantly extends the English courts' jurisdiction over corruption offences.

THE CRIMINAL JUSTICE ACT 1993

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

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

Section 2(1) defines a "relevant event" as

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

9.14 The Group A offences do not include bribery or the offences under the Prevention of Corruption Acts. In the report on which Part I of the Act was based,[10] we recommended that these offences should be excluded from the legislation. This was partly because we had not consulted on the possibility of including them, and

[8] For example, doubt surrounds whether those holding judicial office serve under the Crown; see Part VII.

[9] *Barrett* [1976] 1 WLR 946.

[10] Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180.

partly because, since they need not involve any element of fraud, they fell outside the scope of that report.[11] Neither consideration applies to this paper.

The effect of extending the Criminal Justice Act 1993 to bribery

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

> there is a communication in England and Wales of any information, instruction, request, demand or other matter if it is sent by any means
>
> (i) from a place in England and Wales to a place elsewhere; or
>
> (ii) from a place elsewhere to a place in England and Wales.

9.16 The offer of the bribe is a relevant event for the purposes of bribery. Section 4(b) will treat the offer, though it was made from abroad, as having taken place within the jurisdiction. A relevant event has therefore occurred within the jurisdiction, and A could be indicted here.

9.17 The 1993 Act also extends the jurisdiction of the English courts with regard to the inchoate offences of conspiracy,[12] attempt[13] and incitement.[14] If these rules were extended to bribery, it would, for example, be an offence indictable in England and Wales to conspire, outside the jurisdiction, to make a corrupt payment within it. There is authority that this is already the position, irrespective of the 1993 Act;[15] but extending the Act to cases of bribery would put the matter beyond doubt.

9.18 We believe that the extension of the new rules to bribery would bring some cases within the jurisdiction of the English courts which may at present lie outside it. **We provisionally propose that a modern bribery offence should be a Group A offence for the purposes of the Criminal Justice Act 1993.**

[11] *Ibid*, at para 3.19. On the relationship between corruption and fraud, see paras 1.17 – 1.30 above.

[12] Criminal Justice Act 1993, s 3(2).

[13] *Ibid*, s 3(3).

[14] *Ibid*, s 3(1)(b).

[15] *Sansom* [1991] 2 QB 130.

PART X
ANCILLARY MATTERS

10.1 In this Part we consider various ancillary issues which would need to be addressed if a new bribery offence were created as we propose. These issues include the question whether it should continue to be necessary to obtain the consent of the Attorney-General to a prosecution; whether the offence should be indictable only, or triable either way; the appropriate maximum sentence; whether the new law should be retrospective; and the appropriate course to adopt in relation to the offence of using false documents, which, though created by the 1906 Act, is not in truth a corruption offence at all.

THE REQUIREMENT OF THE ATTORNEY-GENERAL'S CONSENT

10.2 Prosecutions for corruption under the 1889 and 1906 Acts require the consent of the Attorney-General (or the Solicitor-General). Section 4 of the 1889 Act provides:

> (1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.
>
> (2) In this section the expression "Attorney General" means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate …

Section 2(1) of the 1906 Act provides in part:

> A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General…

10.3 We examine the justification for this requirement and whether our proposed new offence should contain a similar provision. We shall be inviting views on two broad issues:

(1) whether the consent requirement should be retained at all, and

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

Justification for the requirement of the Attorney-General's consent

10.4 The list of offences for which the consent of the Attorney-General is required in order to bring a prosecution is very diverse. J L J Edwards, author of *The Attorney-General, Politics and the Public Interest*, suggests that "any attempt to derive a set of uniform principles that would provide a rational basis for the various categories of consent provisions is frankly an impossible task".[1]

[1] J L J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) p 25.

10.5 During the passage of the Public Bodies Corrupt Practices Bill, the Lord Chancellor justified the provision requiring the consent of the Attorney-General on the ground that there was a risk that blackmailers would threaten prosecutions.[2] Similar points were raised when the 1906 Act was passed.[3] Thus "the original reasons for introducing the requirement of the Attorney-General's consent were to avoid bribery, collusion, blackmail and other improper practices which frequently surrounded the private prosecution."[4]

Recent discussions of the need for the Law Officers' consent

The Consent to Prosecutions Bill

10.6 In 1977, a working party was set up under the auspices of the Law Officers' Department and the DPP. This led to the introduction of the Consent to Prosecutions Bill in the House of Commons in February 1979. The Bill, which failed to pass through Parliament because a general election was called, was intended to update and clarify the law on consent to prosecution. In particular, it made provision for the transfer of the consent function of the Law Officers in a number of statutes (including the 1906 Act) to the DPP. The reasons given for the transfer were, according to Edwards, "more practical than theoretical": they concerned saving the time of the Law Officers in having to consider run-of-the-mill cases, and that of the DPP in having to prepare a statement of relevant facts for the Attorney-General in each case presented to the Attorney-General for consideration.[5]

10.7 Two main objections were raised to the proposal. The first concerned the protection that the requirement of the Attorney-General's consent gave to police officers who had been wrongly accused of corruption. It was said that such allegations were "easy to make and difficult to deny", and could cause "tremendous damage" to officers' careers. The second objection was expressed as follows:

> [W]e are handing over lock, stock and barrel, however widespread it may be, every politically sensitive corruption prosecution to the Director, with the proviso that the Director always acts under the general supervision of the Attorney-General.[6]

The Home Office submission to the Franks Committee

10.8 Further guidance as to the reasons for including a consent provision in a statutory offence can be found in a Home Office memorandum[7] to the Departmental

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

[3] See, for example, the comments of the Lord Chancellor, the Earl of Halsbury, *Hansard* (HL) 26 April 1904, vol 133, cols 1168–1170.

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

[5] Edwards, *op cit*, pp 22–23.

[6] *Hansard* (HC) 14 March 1979, vol 946, cols 664–665.

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

Committee on section 2 of the Official Secrets Act 1911[8] (the Franks Committee). This follows what Edwards describes as the "classic exposition" by Sir Reginald Manningham-Buller (then Attorney-General) in 1958 "of the relevant factors that should govern any resort to a consent formula in new statutory offences".[9]

10.9 According to the Home Office memorandum, "the basic reason for including in a statute a restriction on the bringing of prosecutions is that otherwise there would be a risk of prosecutions being brought in inappropriate circumstances".[10] Five overlapping reasons were given for considering the inclusion of a consent requirement:

(a) to secure consistency of practice in bringing prosecutions, for example, where it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations;

(b) to prevent abuse, or the bringing of the law into disrepute, for example, with the kind of offence which might otherwise result in vexatious private prosecutions or the institution of proceedings in trivial cases;

(c) to enable account to be taken of mitigating factors, which may vary so widely from case to case that they are not susceptible to statutory definition;

(d) to provide some central control over the use of the criminal law when it has to intrude into areas which are particularly sensitive or controversial, such as race relations or censorship;

(e) to ensure that decisions on prosecutions take account of important considerations of public policy or of a political or international nature, such as may arise, for instance, in relation to official secrets or hijacking.[11]

Of these five reasons, the Home Office submitted that a consent requirement introduced on the grounds of (a), (b) and (c) "would normally be thought appropriate" to the DPP, whereas ground (e) would lie in the province of the Attorney-General. Where consent is required on ground (d), it would depend on the circumstances of the case whether the consent should be that of the Attorney-General or the DPP.

10.10 On this basis, the relevant factor in deciding whether control over prosecutions is to be given to the Attorney-General appears to be the political or international sensitivity of the issues involved. The memorandum states:

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

[9] Edwards, *op cit*, p 26.

[10] Home Office memorandum (see n 7 above) para 7.

[11] *Ibid.*

> [W]here important political or international considerations may be involved, the Attorney-General, who is directly answerable to Parliament for his decisions and is in a position to consult ministerial colleagues if need be, is regarded as the proper person to carry the responsibility. Similarly, on sensitive issues like race relations, Parliament may feel that the Attorney should be directly answerable for a personal decision.

Issues for consultees

10.11 We invite views on two broad issues:

(1) whether the consent requirement should be retained at all, and

(2) if it should, whether the required consent should be that of the Law Officers (the Attorney-General and the Solicitor-General) or the DPP.

Private prosecutions for corruption

10.12 We are very conscious of how much pressure there can be for a prosecution. At present it is initially for the Crown Prosecution Service ("CPS") to decide whether there is sufficient evidence to offer a realistic prospect of conviction ("the evidential test"), and if so, whether the public interest requires a prosecution ("the public interest test").[12] If, in a case of alleged corruption, the CPS decides not to prosecute for either of these reasons, a private individual may either seek judicial review of the decision[13] or bring a private prosecution for a common law offence (for which no consent is required). The CPS is empowered to take over a private prosecution and discontinue it,[14] but the decision to discontinue may itself be open to judicial review.[15]

10.13 Private prosecutions are also controlled, to some extent, by the magistrates' court. In the first place, the court can decline to issue a summons if the proceedings appear to be vexatious; but such a refusal can be challenged by judicial review. Second, the defendant can at present[16] ask for an "old-style" committal hearing, and submit that there is insufficient evidence to justify the case being committed to the Crown Court.

[12] Code for Crown Prosecutors (1994) paras 5.1 and 6.1–6.3. The Code is set out in *Archbold*, para D–2.

[13] An application for judicial review would succeed only in limited circumstances, eg where the DPP was shown to have acted in bad faith or to have failed to apply the Code for Crown Prosecutors: *R v DPP, ex p C* [1995] 1 Cr App R 136.

[14] Prosecution of Offences Act 1985, ss 6(2) and 23.

[15] *Turner v DPP* (1979) 68 Cr App R 70.

[16] The unimplemented transfer of trial provisions under the CJPOA 1994 are now replaced by the Criminal Procedure and Investigations Act 1996, ss 44 and 47 and Sched 1, which, when brought into force, will establish a modified procedure for committal proceedings. The "key feature" of the new system will be the removal of the requirement for witnesses to give oral evidence in the magistrates' court: see *Criminal Procedure and Investigations Act 1996, Introductory Guide* published by the Home Office (July 1996). The Home Office guide suggests that this change will come into force in Spring 1997.

10.14 We do not know whether it is likely that there would be many private prosecutions for the proposed new offence, if they were permissible, though we are not aware of there being many such prosecutions for the common law offences. In our view, however, the right of a private individual to bring criminal proceedings, subject to the usual controls, is an important one which should not be lightly set aside. On the other hand, we acknowledge that if private prosecutions could be brought, there would be a risk of abuse (for example, by blackmailers) and the benefits identified in the Home Office submission would be lost.[17] **We ask for views on whether private prosecutions for the new offence should be permitted**.

Whose consent should be required

10.15 We have already examined the reasons why the consent of the Law Officers might be of value. A further point to bear in mind when considering *whose* consent should be required – if the view is taken that a consent provision should be retained at all – is that if the function were to be transferred to the DPP then, by virtue of section 1(7) of the Prosecution of Offences Act 1985, the consent of any Crown Prosecutor would be sufficient.[18] We question whether it would be desirable for issues of major political significance to be decided in this manner. **We ask for views on whose consent (if any) should be required for the prosecution of the new offence.**

MODE OF TRIAL

10.16 The existing offences under the Prevention of Corruption Acts are triable either summarily or on indictment.[19] The offence that we propose would be capable of catching conduct which, though reprehensible, is not in our view serious enough to justify trial on indictment. **We provisionally propose that the new offence should be triable either way.**

SENTENCE

10.17 The maximum sentences available are the same under the 1889 and 1906 Acts.[20] On summary conviction, an offender is liable to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum,[21] or to

[17] See paras 10.5 and 10.9 above.

[18] Prosecution of Offences Act 1985, s 1(7), provides:

> Where any enactment (whenever passed)–
>
> (a) prevents any step being taken without the consent of the Director or without his consent or the consent of another; or
>
> (b) requires any step to be taken by or in relation to the Director;
>
> any consent given by or, as the case may be, step taken by or in relation to, a Crown Prosecutor shall be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director.

[19] See the 1889 Act, s 2; the 1906 Act, s 1.

[20] But on conviction under the 1889 Act the court can impose a number of penalties other than imprisonment and fine: see para 6.6 above.

both. On conviction on indictment, the maximum is imprisonment for a term not exceeding seven years, or a fine, or both.

10.18 We do not in general regard ourselves as the appropriate body to make recommendations with regard to maximum sentences, and we make no proposal as to the maximum sentence for the new offence.

RETROSPECTIVITY

10.19 It is exceptional for new criminal offences to have retrospective effect, and any such provision might well amount to a breach of Article 7 of the Convention.[22] Nor do we believe that the existing law is so fundamentally unsatisfactory as to render such a provision desirable. **We provisionally propose that the new offence should not have retrospective effect.**

FALSE DOCUMENTS

10.20 We have not so far examined the third paragraph of section 1 of the Prevention of Corruption Act 1906, which provides:

> If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;
>
> he shall be guilty [of an offence].

Conviction on indictment for this offence carries a maximum sentence of seven years' imprisonment or a fine or both.[23] The Attorney-General or Solicitor-General must consent to a prosecution.[24]

[21] The statutory maximum in the case of summary trials is the prescribed sum within the meaning of s 32 of the Magistrates' Courts Act 1980. The prescribed sum is currently £5,000, but this may be altered by an order of the Secretary of State under s 143(1) if it appears to him or her that there has been a change in the value of money.

[22] Article 7 provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

See generally Offences of Dishonesty: Money Transfers (1996) Law Com No 243, paras 5.22 – 5.36.

[23] The 1906 Act, s 1 as amended by the Criminal Justice Act 1988, s 47. The offence may also be tried summarily.

[24] The 1906 Act, s 2(1).

10.21 The cardinal difficulty with the third paragraph is that it fails to sit easily with the other two offences created by section 1. Despite its presence in a statute concerned with corrupt practices, the offence created by this paragraph is not in fact one of corruption at all. This point was established by the Divisional Court in *Sage v Eicholz*[25] where the provision was literally construed. The defendant made a fraudulent representation in a claim handed to the agent of a water board, so that the defendant could obtain a rebate on his water rates. The agent was not aware that the claim was false, so there was no corruption of the agent.[26] However, the defendant's actions fell squarely within the wording of the third paragraph. He knowingly gave the agent a document in which the agent's principal was interested. That document contained a false statement and was intended to mislead the principal. All the necessary ingredients for liability were therefore present. The Divisional Court considered that the word "corruptly" was deliberately absent from the third paragraph and that the word "knowingly", with which it is replaced, imports no element of *corruption*. In short, the approach in *Sage* was that if Parliament had wanted to confine the offence to the corruption of agents or those who corrupt them, the word "corruptly" would have appeared therein as it does in the earlier paragraphs.

10.22 We therefore take the view that this offence, although it appears in the 1906 Act, is not in fact an offence of corruption at all, but one of fraud; and we therefore regard it as lying outside the scope of this consultation paper.[27]

[25] [1919] 2 KB 171.

[26] See paras 5.15 and 5.16 above.

[27] See paras 1.23 – 1.25 above.

PART XI
PROVING CORRUPTION

11.1 In this Part we will analyse how corruption is *proved* under the Prevention of Corruption Acts, focusing in particular on the presumption under section 2 of the 1916 Act. We consider whether the presumption is consistent with the European Convention on Human Rights, and then whether the *combined* effect of the section 2 presumption and the provisions of the CJPOA 1994 on the inferences to be drawn from a defendant's silence might give rise to a breach of the European Convention. We then consider whether, in any event, the presumption is necessary in the light of the CJPOA 1994. Finally, we set out the options for reform of the presumption.

THE PRESUMPTION

11.2 Section 2 of the 1916 Act provides:

> Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration[1] has been paid or given to or received by a person in the employment of [Her] Majesty or any other Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from [Her] Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.[2]

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

(1) that some "money, gift, or other consideration" was paid or given to, or received by, an employee of Her Majesty, a Government department or a public body;[3] and

(2) that the person providing it (or the person whose agent provided it) was holding, or seeking to obtain, a contract from Her Majesty, a Government department or a public body.

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

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

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

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

11.4 Section 2 applies even if the charge is brought under the 1906 Act and therefore does not itself require that the payment should have been made to an employee of a public body. But it applies only to employees, not members (such as local councillors), and only where a contract is involved rather than the exercise of a discretion (such as a grant of planning permission).[4]

11.5 In *Braithwaite* Lord Lane CJ explained the effect of the presumption:

> The effect of [section 2] is that when the matters in that section have been fulfilled, the burden of proof is lifted from the shoulders of the prosecution and descends on the shoulders of the defence. It then becomes necessary for the defendant to show, on the balance of probabilities, that what was going on was not reception corruptly as inducement or reward. In an appropriate case it is the judges duty to direct the jury first of all that they must decide whether they are satisfied so they are sure that the defendant received money or gift or consideration, and then to go on to direct them that if they are so satisfied, then under section 2 of the 1916 Act the burden of proof shifts.[5]

11.6 The presumption can be rebutted only by evidence, established on the balance of probabilities, of an innocent explanation, and not merely by the defendant's unsupported assertion that such an explanation existed.[6]

HISTORICAL REASONS FOR THE CREATION OF THE PRESUMPTION

11.7 Parliament and the courts have always been cautious about placing legal burdens of proof on the defence: they often make the difference between a conviction and an acquittal. It is therefore necessary to consider why Parliament thought such a burden appropriate in the case of corruption, albeit only in the circumstances described in section 2.

11.8 The 1916 Act was passed in the wake of scandals regarding the Clothing Department of the War Office, which involved the taking of bribes by viewers and inspectors of merchandise. It was presented to Parliament as an emergency wartime measure to deal with the burgeoning number of large government contracts and the resulting opportunities for corruption. Corruption in relation to these wartime contracts was viewed as being particularly abominable. The Lord Chancellor, Lord Buckmaster, said in the House of Lords:

> I feel satisfied that you will agree with me in thinking that, short of high treason, it is almost impossible to imagine an offence more grave than to corrupt one of these public servants and cause the neglect of his duty.[7]

[4] *Dickinson* (1948) 33 Cr App R 5.

[5] *Braithwaite* [1983] 1 WLR 385, 389.

[6] *Mills* (1978) 68 Cr App R 154.

[7] *Hansard* (HL) 23 November 1916, vol 23, col 653.

11.9 The Director of Public Prosecutions had suggested that there should be some provision

> to meet a case where there is evidence that money was paid by a contractor to a government official but there is no evidence as to the purpose for which it was paid, by making the transaction a criminal offence unless the parties concerned can satisfy the court that it was an innocent one.[8]

11.10 The immediate catalyst for the enactment of these provisions was criticism made by a judge[9] who had presided over two cases[10] of corruption in quick succession. In the first case, the judge had considered it impossible to prosecute a civil servant found to be in possession of banknotes that had been traced to a contractor with whom he had official dealings. This was because the prosecution was unable to prove *why* the money was paid. It was as a result of the particular circumstances of this case that section 2 addressed only the issue of transactions involving contracts, and extended only to employees. The Salmon Commission explained that "These anomalies doubtless reflect the haste with which the legislation was prepared".[11]

11.11 The only reasons given in Parliament for the introduction of the presumption were that it was necessary "to remedy an obvious defect in the law"[12] and would cause no injustice to an accused:

> It is obvious that if you are going to make this Bill effective you must put the burden on [the accused], and it should be quite easy for him to discharge that burden if he is an innocent man.[13]

11.12 Various attempts were made to widen the ambit of the Bill; but these were thwarted by a Government preoccupied by war and bent on filling a perceived lacuna, rather than reconsidering the law of corruption as a whole. This was admitted by the Government:

> If the times were opportune for a meticulous reconsideration of the whole law relating to corruption, I think the long series of amendments which stand [presented] would deserve the attention of the House. But this is by general agreement a war measure which is rendered necessary by the very large number of Government contracts which

[8] Memorandum from the DPP to the Home Office, 25 September 1916: HO 45/10703/238091, Public Records Office, Kew.

[9] Low J.

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

[11] Salmon Report, para 59.

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

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

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

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

have come into existence and by the scandals which were exposed in a recent criminal trial.[14]

JUSTIFICATIONS OF THE PRESUMPTION

11.13 Both the Redcliffe-Maud Committee and the Salmon Commission thought that the presumption was not only justified but should be extended.[15] The Salmon Commission argued that, without the presumption, corruption would be very difficult to prove:[16] bribes are seldom paid in the presence of witnesses,[17] and there is often little documentary evidence because those involved in a corrupt transaction will inevitably tend to act secretly.[18] The same argument could, of course, be applied to many criminal offences to which no such presumption applies.

11.14 The Salmon Commission also argued that the presumption causes no injustice to the accused.

> If there is an innocent explanation it should be easy for the giver and the recipient of the gift to furnish it; the facts relating to the gift are peculiarly within their own personal knowledge.[19]

11.15 Similar sentiments clearly motivated the framers of the legislation. When the Bill was debated in Parliament the Lord Chancellor said:

> It is obvious that if you are going to make this Bill effective you must put the burden on [the defendant], and it should be quite easy for him to discharge that burden if he is an innocent man.[20]

11.16 The Salmon Commission concluded that the "clandestine" and "grave" nature of corruption justified the reversed burden of proof.[21] It was "satisfied that a burden of proof on the defence is in the public interest and causes no injustice."[22]

DOES THE PRESUMPTION INFRINGE THE CONVENTION?

11.17 The European Convention on Human Rights ("the Convention") has not yet been incorporated into English domestic law. However, the United Kingdom is a State party to the Convention, and British citizens have an individual right of petition to

[14] *Hansard* (HC) 9 November 1916, vol 87, col 467 (the Attorney-General, Sir F Smith).

[15] For the possibility of extending it, see paras 11.48 – 11.50 below.

[16] Salmon Report, para 60.

[17] Any witnesses that are available are likely to be accomplices and unwilling to co-operate.

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

[19] Salmon Report, para 60.

[20] *Hansard* (HL) 23 November 1916, vol 23, col 654 (Lord Buckmaster).

[21] Salmon Report, para 61.

[22] *Ibid.*

the Strasbourg Commission[23] and from there, if their petition is declared admissible, to the Strasbourg Court.[24] As a State party to the Convention the United Kingdom has an obligation in international law to conform its domestic law to the requirements of the Convention.[25] It follows that any law reform proposals which we consider should be assessed in the light of the Convention.

The presumption of innocence

11.18 Article 6 of the Convention guarantees the right to a fair trial. Article 6(2) provides:

> Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[26]

11.19 The presumption of innocence is, like the rights of the defence contained in Article 6(3),[27] a component of the *general* right to a fair trial.[28] It applies only to

[23] Under Article 25 of the Convention.

[24] Under Article 45 of the Convention, the Strasbourg Court has jurisdiction over all cases concerning "the interpretation and application" of the Convention. A case can only be referred to the Court (a) if the Commission has acknowledged the failure of efforts for a friendly settlement; (b) within a period of 3 months after the transmission of the report of the Commission to the Council of Ministers; and (c) if the State party or parties have accepted the jurisdiction of the Court. Article 48 of the Convention provides that the Commission and State parties have the right to refer a case to the Court (individuals may also have the right to refer a case under a procedure established by Protocol 9, although this applies only if the State party has accepted the Protocol). In practice, the Commission makes the majority of references to the Court. In the absence of a reference to the Court within the stipulated time-limit it falls to the Council of Ministers, under Article 32, to decide whether the Convention has been violated. See A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd ed 1993) pp 299–319.

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

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

[27] Article 6(3) provides:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

criminal proceedings. The Strasbourg Court has recently reaffirmed the principle that Article 6(2), like the other elements of the Convention, must be interpreted in such a way as to guarantee rights which are practical and effective, rather than theoretical and illusory.[29]

11.20 In *X v United Kingdom*[30] the Strasbourg Commission considered whether reverse onus clauses of the kind found in section 2 of the 1916 Act violate Article 6(2). The case involved a United Kingdom applicant who had been convicted of the offence of living on the immoral earnings of prostitutes. The legislation creating this offence contains a reverse onus provision to the effect that a person who is proved to be living with a prostitute, or who is, at the material time, proved to be in the company of a prostitute, or who is proved to have exercised control over the movements of a prostitute, so as to assist or encourage the prostitution, is presumed to have committed the offence of living on the earnings of prostitution *unless the contrary is proved.*[31]

11.21 The Commission held[32] that a reverse onus clause of this kind will not violate Article 6(2) if it creates only a *rebuttable* presumption of fact, which the defence may disprove,[33] and is not unreasonable. However, the Commission went on to recognise that

> this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt. It is not, therefore, sufficient to examine only the form in which the presumption is drafted. It is necessary to examine its substance and its effect.[34]

11.22 In *Salabiaku v France*[35] the Strasbourg Court[36] affirmed the approach taken by the Commission in *X v United Kingdom.* It emphasised the importance of confining

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[28] See, inter alia, *Deweer v Belgium* (1979–80) 2 EHRR 439; *Allen de Ribemont v France* (1995) 20 EHRR 557, 574 (para 35).

[29] *Allen de Ribemont v France* (1995) 20 EHRR 557, 575 (para 35).

[30] App 5124/71, (1972) 42 Collection of Decisions 135.

[31] Sexual Offences Act 1956, s 30(2).

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

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

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

[34] App 5124/71, (1972) 42 Collection of Decisions 135.

[35] (1988) 13 EHRR 379.

[36] The Court is a superior tribunal to the Commission, which is responsible for vetting applications and making references. If the Commission, having accepted an application,

reverse onus clauses within "reasonable limits which take into account … what is at stake and maintain the rights of the defence".[37]

11.23 The Commission in *X v United Kingdom* also stated, as an alternative ground for its opinion, that it would be extremely difficult for the prosecution to obtain evidence capable of satisfying the criminal standard of proof on the question of whether the applicant was living on immoral earnings.[38] Thus a reverse onus clause may be justified if it relates to matters which are difficult for the prosecution to prove because they are peculiarly within the defendant's own knowledge, provided that it creates only a rebuttable presumption of fact and is restrictively worded.[39] One commentator has summarised the issue as follows:

> The question seems to be one of whether there is an alternative route of investigation open to the government. If the answer is negative, the presumption would be reasonable. … [C]orruption can be such an elusive crime that it is next to impossible for the Crown to adduce evidence with respect to the corrupt source of the moneys involved. … Thus, it seems that the non-existence of a viable alternative would make that presumption of fact not unreasonable.[40]

11.24 It is likely that by itself section 2 of the 1916 Act would satisfy these criteria in the same way that the statutory provision considered in *X v United Kingdom* did. Support for this view may be taken from the fact that (to the best of our knowledge) no Reference has been made to the Strasbourg Court in relation to section 2. The position may, however, be affected by the provisions of the Criminal Justice and Public Order Act ("CJPOA") 1994, to which we now turn.

Possible implications of the CJPOA 1994

11.25 A person suspected or accused of a criminal offence has traditionally been accorded a "right of silence", which means that there is no obligation to answer questions, either before or during the trial. At common law this right has been supplemented by a further rule that a jury may not be invited to draw any adverse inference from the failure of a defendant to assist the police or to give evidence at trial. Under the CJPOA 1994 the accused remains at liberty to maintain silence under interrogation and at trial; but the supplementary rule against the drawing of

fails to reach a friendly settlement, it prepares a report stating its opinion as to whether there has been a breach of the Convention. This report goes to the Committee of Ministers and the case may then be brought before the Court within three months. See J G Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed 1993) pp 2–5.

[37] (1988) 13 EHRR 379, 388 (para 28).

[38] *X v UK* App 5124/71, (1972) 42 Collection of Decisions 135.

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

[40] L Y Y Ma, "Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bill of Rights" (1991) 21 HKLJ 289, 328–329.

adverse inferences has been abolished, and the Act sets out the circumstances in which "proper" inferences may be drawn.

11.26 Under section 34 of the CJPOA 1994, where the defendant relies on a fact which was not put forward when the defendant was questioned or charged, or informed that he or she might be prosecuted, the fact-finders "may draw such inferences … as appear proper". Section 34 is set out at Appendix A below.

11.27 Potentially more important in relation to the presumption is section 35, which allows the fact-finders to "draw such inferences as appear proper" from a defendant's failure to testify or to answer any particular question. Section 35 provides, in part,[41] as follows:

> (1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless:–
>
> > (a) the accused's guilt is not in issue; or
> >
> > (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;
>
> but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
>
> (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
>
> (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

11.28 However, a person cannot be convicted of an offence *solely* on an inference drawn from a failure to reveal a fact afterwards relied upon, to give evidence, or to answer any question.[42]

11.29 In *Cowan*[43] the Court of Appeal rejected an argument that section 35 should be permitted to operate in exceptional cases only, emphasising that silence cannot be

[41] The section is set out in full at Appendix A below.

[42] CJPOA 1994, s 38(3).

[43] [1996] 1 Cr App R 1.

the only factor on which a conviction is based and that the prosecution remains under an obligation to establish a prima facie case before any question of the defendant testifying is raised. The court took this to mean not only that the case should be fit to be left to the jury, but also that the judge should make clear to the jury that they must be convinced of the existence of a prima facie case before drawing an adverse inference from silence. It would require "some evidential basis … or some exceptional factors in the case" for a judge to advise a jury *against* drawing an inference from silence.

11.30 These developments raise the question whether the effect of sections 34 and 35 is to render unnecessary the presumption created by section 2 of the 1916 Act. If so, the Strasbourg Court might take the view that the burden imposed by the presumption cannot be justified under Article 6 of the Convention.

11.31 It is always difficult to predict the decisions of any court, especially one with as disparate a composition as the Strasbourg Court.[44] It is also important to bear in mind that the Court does not see its role as being to judge the constitutionality of a signatory state's legislation.[45]

11.32 In relation to sections 34 and 35, the view likely to be taken was made apparent in *Murray v United Kingdom*, where the Court stated:

> Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in light of all the circumstances of the case, having particular regard to the situations where inferences might be drawn, the weight attached to them by national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.[46]

11.33 It is therefore difficult to be sure whether, in the light of the CJPOA 1994, the section 2 presumption is likely to be regarded as a breach of Article 6. The most important consideration, it would seem, is how much more difficult it would be to prove corruption if the presumption did not exist. Clearly the increased difficulty that prosecutors would face is now less than it would have been before the enactment of the CJPOA 1994, since there is now greater pressure on the defence to offer an explanation where prima facie evidence of an offence is adduced. The question is whether the presumption is necessary in spite of these new provisions.

[44] In our Consultation Paper No 138, Evidence in Criminal Proceedings: Hearsay and Related Topics, at para 5.3, we noted a difficulty in attempting to judge the compatibility of domestic legislation with the Convention: "because the Strasbourg Court aims to interpret the Convention as a 'living' and developing document, the doctrine of precedent weighs less heavily with the Strasbourg Court than it does in English law".

[45] In *Klass v Germany* (A/28) (1978) 2 EHRR 214, para 33, the Court said:

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

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

[46] *Murray v UK* (1996) Case No 41/1994/488/570, para 47.

The effects of the presumption and the CJPOA 1994 compared

11.34 We must distinguish two issues. First, how much harder would it be to establish a case to answer, on a corruption charge, if the presumption were abolished? And second, once it has been established that there is a case to answer, how much harder would it be to secure a conviction? In the second case we must consider separately the defendant who adduces no evidence at all, the defendant who does not testify in person but adduces other evidence, and the defendant who does testify. In each case we shall assume that the prosecution has proved the facts necessary to trigger the presumption, namely that some "money, gift, or other consideration" was paid or given to, or received by, an employee of Her Majesty, a Government department or a public body,[47] and that the person providing it (or the person whose agent provided it) was holding, or seeking to obtain, a contract from Her Majesty, a Government department or a public body. If these "basic facts" are not proved, the presumption has no application in any event.

Establishing a case to answer

THE EXISTING LAW

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

IF SECTION 2 WERE REPEALED

11.36 Whether a case to answer could be established in the absence of the presumption depends whether the basic facts amount to a prima facie case.[48] Proof of the basic facts is not *in itself* proof that the transaction involved a corrupt inducement or reward. However, it seems likely that a prima facie case would be held to exist where the basic facts are proved. This, coupled with other evidence (such as the absence of the employer's consent) which the prosecution can ordinarily be expected to adduce, will often be sufficient to enable the case to be left to the jury. Moreover, if a defendant exercises the right to silence in the face of police questioning and fails to mention any fact relied upon in his or her defence, the court may draw such inferences as appear proper in determining whether there is a

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

[48] The established authority for this is the direction of Lord Widgery CJ in *Galbraith* (1981) 73 Cr App R 124, 127:

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

case to answer.[49] We believe that the repeal of section 2 would probably not, in practice, make it significantly more difficult for the prosecution to establish a case to answer.

Where the defendant adduces no evidence

THE EXISTING LAW

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

IF SECTION 2 WERE REPEALED

11.38 If the presumption were abolished, it would be for the jury to determine whether the basic facts amounted to proof of corruption beyond reasonable doubt. Under section 35 of the CJPOA 1994, however, the jury could take into account any inference that they thought it proper to draw from the defendant's failure to testify. This might amount to an inference of guilt. In *Murray v DPP*,[50] a decision concerning the equivalent provision in the Criminal Evidence (Northern Ireland) Order 1988, Lord Slynn explained:

> [I]f aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.[51]

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

Where the defendant does not testify but adduces other evidence

THE EXISTING LAW

11.39 If the basic facts are proved, and the defendant does not testify but adduces other evidence, the position at present is that a conviction should result unless the evidence adduced shows, on the balance of probabilities, that the transaction was not corrupt. Moreover, in deciding whether the defence has proved this, the jury would be entitled under section 35 of the CJPOA 1994 to draw appropriate inferences from the defendant's failure to testify.

IF SECTION 2 WERE REPEALED

11.40 If the presumption did not exist, an acquittal should result not only (as at present) if the evidence adduced were such as to show, on the balance of probabilities, that the transaction was not corrupt, but also if it appeared that the transaction probably *was* corrupt but the evidence was sufficient to raise a reasonable doubt. The jury's verdict would depend on the cogency of the evidence adduced, *plus* any inferences that the jury thought it proper to draw from the defendant's failure to testify. Obviously, in some cases the adverse inference drawn would be sufficiently

[49] CJPOA 1994, s 34(2)(c).

[50] [1994] 1 WLR 1.

[51] *Ibid*, at p 11G.

strong (and the evidence adduced by the defendant sufficiently weak) as to lead to a conviction. In other cases, the evidence adduced by the defence might be such as to persuade the jury that the Crown had not made out its case beyond reasonable doubt – notwithstanding the inferences that they chose to draw from the defendant's failure to testify.

Where the defendant testifies

THE EXISTING LAW

11.41 Under the present law, a conviction should result unless the evidence adduced by the defence (including the defendant's own evidence) shows, on the balance of probabilities, that the transaction was not corrupt. Section 35 of the CJPOA 1994 has no application in this case unless the defendant refuses, without good cause, to answer a question; it will normally therefore be somewhat easier to discharge this burden than in the case where the defendant does not testify. However, appropriate inferences might be drawn under section 34 of the CJPOA 1994 if the defendant raises matters in evidence which had not previously been mentioned and which the defendant might reasonably have been expected to mention.

IF SECTION 2 WERE REPEALED

11.42 In the absence of the presumption, it would be the jury's duty to acquit unless the prosecution had proved corruption beyond reasonable doubt. The jury would have to evaluate the cogency and relevance of the evidence adduced by the defendant and consider whether it was sufficient to raise a reasonable doubt. For this purpose, as at present, they could take account of the defendant's refusal, without good cause, to answer any question,[52] or of the raising in evidence of matters that the defendant might reasonably have been expected to mention previously.[53]

Conclusions

11.43 The need for a presumption has been greatly reduced by the provisions of sections 34 and 35 of the CJPOA 1994. They give much assistance to the prosecution where a defendant does not give evidence, refuses without good cause to answer a particular question or fails to mention a relevant fact when questioned or charged. This raises a question which is important both in its own right and in the context of the Convention: is the presumption necessary, and therefore justified?

11.44 As we have pointed out,[54] it is difficult to predict the approach of a court which is principally concerned with scrutinising legislation and procedure which applies to the "detriment"[55] of specific defendants. However, there appear to be grounds for believing, especially in the light of sections 34 and 35 of the CJPOA 1994, that the Strasbourg Court might regard the presumption as going further than is necessary.

[52] CJPOA 1994, s 35(3).

[53] CJPOA 1994, s 34(2).

[54] See para 11.31 above.

[55] See n 45 above.

If the Court came to this view, it might well find that Article 6 of the Convention had been contravened.[56]

11.45 Additional support for this view may be derived from the fact that the presumption applies only to a small range of corruption cases. It does not apply to anyone except employees, nor to any case where no contract is involved. We are not aware of any evidence to support the view that it is essential to the proper prosecution of cases of corruption. Nor can we see what is so unusual about corruption in particular (as distinct from, for example, fraud) that a presumption is required.[57]

11.46 Our provisional view is that the presumption probably infringes the Convention if, but only if, it is not reasonably necessary for the purpose of ensuring that corruption is successfully prosecuted. If it is not reasonably necessary for that purpose, and is therefore unjustifiable, then it should clearly be abolished, quite apart from the need to comply with the Convention. The question is whether, in the light of the CJPOA 1994, the continuing existence of the presumption *is* reasonably necessary – in other words, how much more difficult would it be to prosecute corruption cases if the presumption were abolished, but sections 34 and 35 of the CJPOA 1994 continued to apply?

11.47 It seems to be largely a historical accident that the presumption covers some situations and not others.[58] If so, it may be desirable to examine possible ways of introducing some principled consistency into the application of the presumption.[59] We therefore now consider whether the presumption should be extended or reduced in scope, or whether it should be abolished outright.

OPTIONS FOR REFORM

Option 1: extend the presumption

11.48 At present the presumption is limited to employees of public bodies, government departments or the Crown. We have already suggested that the distinction drawn by the Prevention of Corruption Acts between "public bodies" and others is unsatisfactory.[60] Many public bodies to which section 2 would formerly have applied are now privatised, and therefore no longer amenable to the presumption. Much work is now contracted out to the private sector; such work may be highly sensitive and influential, but, if an agent or employee of a private company performing such work is involved in corruption, the presumption will not bite. If it were thought that there were good reasons for retaining the presumption, it might also be thought that those reasons justified extending it.

11.49 The presumption might be extended in various ways, for example:

[56] See *Funke v France* (No 10828/84) 16 EHRR 297.

[57] This argument also found favour in the MCCOC Report, p 307: see para 11.65 below.

[58] See para 11.8 above.

[59] "If a burden of proof on the defence is to be retained, however, it needs to be extended to ensure that it applies consistently": Salmon Report, para 62.

[60] See Part VI above.

(a) Include *all transactions* in which the putative briber seeks a benefit, not only those involving contracts. Both the Salmon Commission[61] and the Redcliffe-Maud Committee[62] recommended that the presumption should apply to the exercise of discretionary powers by local authorities as well as the award of contracts.

(b) Include any *member or agent* (as well as employees) of the Crown, a government department or a public body who accepts any gift or consideration from a person seeking any benefit from such a body. This extension was recommended by the Redcliffe-Maud Committee[63] and supported by the Salmon Commission.[64]

(c) Include any agent, whether acting for a public body *or on behalf of a private principal.* This option would have the advantage that it would remove the need to distinguish between public bodies and others.[65] It would also recognise that, as a result of the growing number of "private" bodies performing "public" functions, the number of bodies to which the presumption applies is decreasing for reasons which cannot be justified in principle.

(d) Include any gift or consideration received in connection with the employee's public function, whether or not made during the period of his or her employment. At present, the presumption applies only to a person who is an employee of a public body *at the time* that any gift or consideration is actually received. It is possible to envisage a situation in which a reward in respect of action taken during the currency of a person's employment is given after that employment has terminated.[66]

(e) Apply the presumption to *conspiracy* to commit offences of corruption (as well as the substantive offences). It appears that a charge of conspiracy under section 1 of the Criminal Law Act 1977 to commit offences under the Prevention of Corruption Acts will not attract the presumption, since section 2 applies only to proceedings against a person for an offence under the 1889 Act or the 1906 Act.[67]

[61] Salmon Report, para 62.

[62] Redcliffe-Maud Report, para 162.

[63] Redcliffe-Maud Report, vol 1, recommendation 26(ii)(b).

[64] Salmon Report, para 62.

[65] See Part VI above.

[66] As to whether the present law covers former agents, see para 8.80 above.

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

11.50 Our provisional view is that, if it were thought that the presumption should be retained, the question whether it should be extended in any or all of these ways would depend on the reasons why it was thought necessary to retain it at all. At present, as we explain below,[68] we provisionally believe that there are no adequate reasons to retain it; therefore the possibility of extending it does not arise. However, **we ask for views on whether, if the presumption were retained, its scope should be extended, and if so how.**

Option 2: the Hong Kong option

11.51 A series of Ordinances, passed by the Legislative Council, provide a statutory basis for the corruption offences found in Hong Kong law today.[69] These offences are found in the Prevention of Bribery Ordinance[70] and the Corrupt and Illegal Practices Ordinance.[71] The most powerful weapon against the corruption of present and past Crown servants is section 10(1) of the Prevention of Bribery Ordinance 1970, which provides:

> Any person who, being or having been a Crown servant –
>
> (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
>
> (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,
>
> shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

11.52 These provisions have, unsurprisingly, proved controversial.[72] In 1995 section 10(1)(a) was the subject of an appeal by way of case stated after a district judge ruled, at first instance, that it was inconsistent with the Hong Kong Bill of Rights

We would be especially interested to hear the view of practitioners on whether it is workable in practice for a direction to be given on the s 2 presumption on counts involving offences under the 1889 Act or the 1906 Act, and yet for the jury to be told that such a presumption does *not* apply on a count of conspiracy to corrupt which may appear on the same indictment. The Crown in *McGowan* [1990] Crim LR 399 at 400 called such a requirement a “logical absurdity”.

[68] Paras 11.61 – 11.66 below.

[69] The law governing corruption in Hong Kong is set out in Appendix B of this Consultation Paper.

[70] Cap 201.

[71] Cap 288.

[72] Section 31 of the Prevention of Bribery Ordinance requires the prior consent of the Attorney-General for the prosecution of offences contained in ss 3–10. It was suggested by Counsel for the Crown before the Privy Council in *Mok Wei Tak* [1990] 2 AC 333, 339H that, while s 10 is “draconian”, the “protective screening” of the Attorney-General will prevent “absurdity”.

Ordinance.[73] The Hong Kong Court of Appeal, allowing the appeal, held that section 10's worth in the fight against serious corruption was well-established, and that the reversal of the normal burden of proof was necessary and justified on the ground that the primary facts on which the defendant's explanation would be based would be matters peculiarly within his or her own knowledge.

11.53 The Hong Kong law governing the investigation and prosecution of corruption (including the burden on defendants to prove that they are neither living beyond their declared income, nor controlling assets disproportionate to their declared income) represents a substantial invasion of the privacy of the Crown servant who is the subject of the investigation. Any investigations are carried out in conditions of strict secrecy to the suspect. In fact, it is an offence under section 30 of the Prevention of Bribery Ordinance to warn a suspect that he or she is under investigation. This can result in a situation where the suspect may never even know that he or she has been investigated, even though the suspect's entire record of service has been examined and his or her banks called upon to study the suspect's books and determine his or her holdings. Taken together, sections 10(1) and 30 can result in a situation where a Crown servant can be prosecuted without even being given the opportunity to put forward any sort of an explanation which might have proved that there was no need to go ahead with the prosecution in the first place.[74]

11.54 The Hong Kong provisions have been criticised as representing a possible infringement of civil liberties and, although section 10(1) has been held to be consistent with the presumption of innocence provision in the Hong Kong Bill of Rights Ordinance,[75] there is no guarantee that the same decision would necessarily be reached in relation to that provision's European equivalent, Article 6(2) of the Convention. This requires, first, that a presumption must be rebuttable,[76] and second, that it must be confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[77]

11.55 It has been argued that section 10(1) of the Prevention of Bribery Ordinance would *not* infringe the Convention.[78] This argument rests on the fact that the Hong Kong provision does create a presumption which is rebuttable by the defendant on the balance of probabilities; and that, in relation to the second requirement for compliance with Article 6(2), corruption in Hong Kong is a problem of such

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

[74] "The structure of the offence created by section 10, and the very wide powers of investigation, search and seizure conferred by sections 13 and 18, necessarily exposed innocent Crown servants to a real risk that their reputations and future careers could be irreparably damaged by forcing them into the position of having to prove publicly, to the satisfaction of a local judge, that their conduct was above suspicion": B Downey, "Combating Corruption: the Hong Kong Solution" (1976) 6 HKLJ 27, 33.

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

[76] *X v UK*, App 5124/71.

[77] *Salabiaku v France* (1988) 13 EHRR 379.

[78] LYY Ma, "Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bill of Rights" (1991) 21 HKLJ 299.

magnitude, and so hard to detect and prove, that the section is justifiable as being reasonable and necessary.

11.56 Even if this opinion is correct, however, it does not follow that an English equivalent of the Hong Kong provisions would survive a challenge before the Strasbourg Court. In the circumstances prevailing in this country, similar measures might be held to be unreasonable or to bear little "proportionality" to the mischief aimed at being prevented, and thus to contravene Article 6 of the Convention. As we have seen,[79] even the existing English law (in the form of the section 2 presumption) is close to the boundaries of acceptability under the Convention. We provisionally believe that any attempt to copy the Hong Kong model in England and Wales would be doomed to failure before the Strasbourg Court. **We provisionally reject the option of a provision comparable to section 10(1) of the Hong Kong Prevention of Bribery Ordinance.**

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

11.57 If the view is taken that, notwithstanding the silence provisions in the CJPOA 1994, corruption cannot be satisfactorily proved without the imposition on the defence of an obligation to offer an explanation, an intermediate measure might be considered. Such a measure might seek to ensure that, in *all* corruption cases (thus ensuring consistency), the burden on the defence is lighter than a requirement to prove the absence of corruption, but more onerous then that imposed by the prospect of comment on a failure to testify, and of the drawing of appropriate inferences.

11.58 One option could be to retain a presumption but to reduce its weight. For example, instead of having the legal burden of proving (on the balance of probabilities) that any gift or consideration was *not* received corruptly, it might be thought desirable to reduce this to an evidential burden. The effect this has was made clear in *Bratty:*

> [W]here the accused bears the evidential burden alone, he must adduce such evidence as would, if believed and left uncontradicted, induce a reasonable doubt in the mind of the jury as to whether his version might not be true.[80]

11.59 Such a presumption could take a form similar to the presumption that operates in relation to the doctrine of recent possession:[81] on proof or admission of the basic facts,[82] the jury would be directed that such a transaction calls for explanation, and if none is given, or one is given which they are convinced is untrue, they would be entitled to infer, according to the circumstances, that the accused was guilty of corruption and to convict accordingly. However, the burden of proof remains on the prosecution, and if therefore, the explanation given by the accused is one

[79] See paras 12.16 – 12.19 above.

[80] *Bratty v A-G for Northern Ireland* [1963] AC 386, *per* Lord Morris of Borth-y-Gest.

[81] See *Cash* [1985] QB 801.

[82] At present this would require proof that "any money, gift, or other consideration has been paid or given … or received" by or from one who is "holding or seeking to obtain a contract".

which leaves the jury in doubt as to whether the transaction was corrupt, the prosecution would not have proved their case and the jury must acquit.

11.60 Such evidential burdens are usually reserved to ensure that defendants adduce evidence of sufficient cogency to require rebuttal by the prosecution beyond reasonable doubt. The silence provisions of the CJPOA 1994 appear to us to be sufficient to ensure that a defendant does seek to account for the proven receipt of the gift or consideration. Accordingly, we are not clear what advantages such a compromise option would bring. **We provisionally reject the option of reducing the weight of the burden placed by the presumption.**

Option 4: abolish the presumption

11.61 As we have noted,[83] the enactment of section 2 of the 1916 Act was a response to the views of a judge who had presided over two corruption trials, during wartime, involving Crown contracts. Whilst section 2 may indeed have been justified as an emergency measure at that time, in our view, its limited provisions are no longer appropriate and we shall provisionally propose that the present law be reformed.[84]

11.62 Since the silence provisions of the CJPOA 1994 were enacted the necessity for the retention of the presumption has waned.[85] Previously an argument in favour of retaining the presumption could rest on the fact that even after establishing a prima facie case, the silence of an accused would not warrant the jury coming to the conclusion that a suspicious gift or consideration received was part of a corrupt transaction. Now that both the judge and the prosecution are clearly entitled to invite the jury to draw such inferences as are reasonable from the failure of the accused to testify this argument has lost most, if not all, of its weight. This is particularly so when the comments of the Royal Commission are borne in mind: "It is difficult enough to prove the passing of a gift to a public servant from an interested party but, when it occurs, it is normally strong *prima facie* evidence of corruption."[86]

11.63 Those who advocate the retention or extension of the presumption have to persuade us that it *is* actually required. The presumption has only ever applied to employees of the Crown, public bodies and government departments and then only in relation to contracts. Corruption cases for the myriad of scenarios outside this category have been successfully prosecuted without any presumption deemed necessary to assist them. Recent legislation in the form of sections 34–35 of the CJPOA should further significantly aid the prosecution of such offences.

11.64 Whilst we are unsure as to the compatibility of the combined effect of the section 2 presumption and the silence provisions in the CJPOA 1994 with the ECHR,[87] we do provisionally reject the argument that the evidential strains in proving

[83] See para 11.10 above.

[84] Para 11.66 below.

[85] See para 11.43 above.

[86] Salmon Report, para 60.

[87] See para 11.46 above.

corruption are so fundamentally different from, and so much more onerous than, those involved in proving other criminal offences that a presumption is required.

11.65 We have borne in mind in coming to this provisional view that before the retention or extension of the ambit of the presumption could be considered its existence had to be justified. This is because any presumption adverse to the accused is unusual and generally undesirable in a system of criminal justice where a person is presumed innocent until proven guilty, and particularly so when such a presumption requires the accused to prove certain matters on a balance of probabilities. The burden lies upon those who advocate extension of the presumption to make out their case. At the end of the day our provisional view is very similar to the approach of the MCCOC, who have concluded:

> The argument for retention [of the presumption] is the difficulty of proving relevant matters which almost invariably will take place in private. On the other hand, it is difficult to accept that it is any more difficult to prove dishonesty in these cases than in theft or fraud, especially if it is established that the principal did not know about and consent to the payment. … MCCOC concludes that there should not be a reverse onus of proof in the secret commissions offences.[88]

11.66 We agree, and **we provisionally propose the abolition of the presumption.**

[88] MCCOC Report, p 307.

PART XII
THE INVESTIGATION OF CORRUPTION

12.1 By its very nature, the information necessary to a successful prosecution for corruption is shrouded in secrecy. This inevitably presents problems for the investigating officers. In the case of serious fraud, these have been resolved by granting extensive powers to the Serious Fraud Office ("SFO"). In this Part, we consider whether similar powers should be given for the investigation of corruption offences. We first set out the powers of the SFO and compare them with the present powers of the police and the CPS, and those of DTI inspectors. We then consider whether the police powers should match those of the SFO in all corruption cases; in doing so, we bear in mind Article 6 of the Convention, and consider its effect.

THE SERIOUS FRAUD OFFICE

12.2 On the recommendation of the Fraud Trials Committee under the chairmanship of Lord Roskill, the SFO was established by the Criminal Justice Act 1987. The function of the office is to "investigate any suspected offence which appears to [the Director of the SFO] on reasonable grounds to involve serious or complex fraud".[1]

Section 2 of the Criminal Justice Act 1987

Powers

12.3 Section 2 of the 1987 Act confers on the Director of the SFO extensive powers of investigation. Section 2(2) provides:

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

Other provisions under section 2 include the power to require the production of documents,[2] and the power to search for and seize documents.[3]

12.4 Section 2(13) provides that it is an offence[4] to fail, without reasonable excuse, to comply with any requirement imposed under section 2, and section 2(14) further provides that it is an offence[5] to make, either knowingly or recklessly, a statement that is false or misleading in a material particular in purported compliance with any such requirement.

[1] Criminal Justice Act 1987, s 1(3).

[2] *Ibid*, s 2(3).

[3] *Ibid*, s 2(4)–(7).

[4] Punishable by up to six months' imprisonment, a fine not exceeding level 5 on the standard scale, or both: s 2(15).

[5] Punishable on indictment with up to two years' imprisonment or a fine or both; or on summary conviction, with up to six months' imprisonment or a fine or both.

12.5 When a person is required to attend an interview under section 2(2), the Director is not obliged to provide the interviewee with advance information as to the subject-matter of the interview (although the Director may do so if the view is taken that it would be helpful and not likely to prejudice the investigation).[6] The fact that a statement may incriminate its maker is not a reasonable excuse for failing to comply with the Director's order;[7] nor is the fact that the person required to answer questions is the spouse of a person charged with fraud.[8] The powers conferred by section 2 do not cease on a suspect being charged,[9] and section 2 interviews may be conducted even after the delivery of a case statement by the defence.[10]

Safeguards

12.6 The "reasonable excuse" defence in section 2(13)[11] provides one safeguard against the section 2 powers. Another can be found in section 2(8), which provides that a statement given by a person in compliance with a requirement imposed under section 2 may only be used in evidence against him or her

(1) on a prosecution for an offence under section 2(14) (knowingly or recklessly making a statement which is false or misleading), or

(2) on a prosecution for some other offence where, in giving evidence, he or she makes a statement inconsistent with the statement made under section 2.

Furthermore, section 2 cannot bite in circumstances where a person would be entitled to refuse to disclose information or to produce a document on the grounds of legal professional privilege,[12] or where a person is bound by banking confidentiality.[13]

Justification for section 2 powers

12.7 The Roskill Committee described the problems of the investigation of serious fraud in this way:[14]

> Fraud … must be concealed from its victim if it is to succeed, and indeed may not be identified until long after the event. Even when the fraud is detected, it is to be expected that in serious cases the criminals will have taken steps to conceal the way in which the fraud was

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

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

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

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

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

11 See para 12.4 above.

12 Criminal Justice Act 1987, s 2(9).

13 Criminal Justice Act 1987, s 2(10).

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

perpetrated, so as to make the process of investigation and prosecution more difficult. To this end, documents may be falsified or destroyed, and arrangements may be made for some transactions to take place in other jurisdictions, and for the proceeds of the offence to be removed there later perhaps to be followed by the fraudsters themselves. Thus, in large-scale or complex fraud cases, the task facing investigators is formidable.

Comparison with the CPS and the police

12.8 The SFO[15] has some resemblance to the CPS but differs in three ways:

(1) The role of the SFO is to investigate possible serious fraud and then, if the evidence justifies it, to initiate proceedings. In order to achieve this, the Director of the SFO is given very wide investigatory powers. The CPS, on the other hand, does not itself investigate crime but takes over the conduct of proceedings after the evidence has been gathered by the police or other investigatory body.[16]

(2) The SFO, unlike the CPS, has an *investigatory* function. It works in conjunction with other interested parties, directing the investigation and assessing the evidence as it emerges.

(3) It is statutorily required to concern itself only with "serious or complex fraud".[17]

12.9 The powers of the police to interview suspects and gain access to financial records are set out in the Police and Criminal Evidence Act 1984, and are clearly a great deal more restrictive than the powers of the SFO under section 2 of the Criminal Justice Act 1987. In particular, financial records fall into a class of material called "special procedure material" to which special provisions as to access apply.[18] An application must be made to a circuit judge at an inter partes hearing, and for access to be granted, the judge must be satisfied, that, among other things,

(1) a serious arrestable offence has been committed;

(2) the requested material is likely to be relevant evidence, and is also likely to be of substantial value to the investigation;

[15] For details of the work of the SFO see John Wood, "The Serious Fraud Office" [1989] Crim LR 175; George Staple, "Serious and Complex Fraud: A New Perspective" (1993) 56 MLR 127. John Wood was the SFO's first Director and George Staple is the present Director.

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

[17] See n 3 above. The criteria for acceptance of a case are set out in *Arlidge & Parry on Fraud* (2nd ed 1996) paras 13-009 – 13-011.

[18] Police and Criminal Evidence Act 1984, s 9 and Sched 1.

(3) other methods of obtaining the material have been tried without success or have not been tried because they were bound to fail; and

(4) it is in the public interest that the material should be produced.

The intention of these provisions was to give police access to financial and other documents, but subject to certain stringent safeguards.

Comparison with the DTI

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

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

> When inspectors are appointed under section 431 or 432, it is the duty of all officers and agents of the company …
>
> (a) to produce to the inspectors all books and documents of or relating to the company … which are in their custody or power,
>
> (b) to attend before the inspectors when required to do so, and
>
> (c) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give.

Section 434(5) provides:

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

12.12 If a person fails to comply with a request made by inspectors acting under either section 431 or section 432, the inspectors may certify his or her refusal to the court. The court will then hear evidence and, if appropriate, may punish the offender as if he or she had been guilty of contempt of court.[19]

12.13 Under section 447 of the 1985 Act the Secretary of State may, if he or she thinks there is good reason to do so, require a company to produce its books or papers for examination by departmental officers. Failure to comply with a requirement under this section is an offence.[20] Information obtained is confidential, and may only be used for purposes specified in section 449.

12.14 Sachs LJ in *re Pergamon Press Ltd*[21] described the function of the DTI inspectors as follows:

[19] Companies Act 1985, s 436.

[20] Companies Act 1985, s 447(6).

[21] [1971] Ch 388, 401.

> [Their] function is in essence to conduct an investigation designed to discover whether there are facts which may result in others taking action: it is no part of their function to take a decision as to whether action be taken and a fortiori it is not for them finally to determine such issues as may emerge if some action eventuates.[22]

12.15 In his judgment in *Saunders (No 2)*,[23] Lord Taylor of Gosforth CJ set out the Crown's explanation of the differences between the powers of the police, the SFO and DTI inspectors:

> [T]he explanation lies in the very different regime of interviews by DTI Inspectors compared with that of interviews either by the police or the SFO. DTI Inspectors are investigators; unlike the police or SFO they are not prosecutors or potential prosecutors. Here, typically, the two Inspectors were a Queen's Counsel and a senior accountant. They are bound to act fairly, and to give anyone they propose to condemn or criticise a fair opportunity to answer what is alleged against them (*In re Pergamon Press Ltd* [1971] 1 Ch 388).

Section 2 and the Convention

12.16 Article 6(1) of the Convention provides

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

12.17 In *Funke v France*,[24] customs officers, accompanied by a police officer, went to the home of the applicant and his wife to obtain "particulars of their assets abroad". The applicant admitted that he had several bank accounts abroad but said that he did not have any bank statements at his home. Following a search, however, officers discovered bank statements and cheque books relating to accounts abroad. The applicant was then asked to produce three years' statements. He refused and was, as a result, prosecuted and fined (with a daily fine until he produced the documents requested) for his refusal.

12.18 The Strasbourg Court took the view that a provision which compelled a person to produce documents under threat of prosecution if he or she did not do so contravened Article 6(1), which conferred on anyone charged with a criminal offence a right to remain silent and not to self-incriminate.[25] Similar decisions were reached in *Miailhe v France*[26] and *Cremieux v France*.[27]

[22] *Ibid*, at p 401.

[23] *The Times* 28 November 1995; CA Nos 94/7464/S1, 94/7465/S1, 94/7466/S1, 94/7467/S1 (27 November 1995).

[24] (1993) 16 EHRR 297.

[25] The Strasbourg Court also held there to have been a contravention of Article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

12.19 It would appear, therefore, on these authorities, that there is a risk that the SFO's section 2 powers are vulnerable to challenge before the Strasbourg Court. This risk is arguably confirmed by the recent decision of the Court in *Saunders v United Kingdom*,[28] in which is was held that the admission, in criminal proceedings, of transcripts of interviews[29] obtained by DTI inspectors under the Companies Act 1985 was an infringement of the right not to self-incriminate[30] and violated Article 6(1) of the Convention.[31] On the other hand, the court did not suggest that the investigatory powers of the DTI inspectors themselves contravened Article 6(1). Referring to the case of *Fayed v United Kingdom*,[32] it commented that

> a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in Article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex fraud and commercial activities.[33]

EXTENDING THE POWERS TO INVESTIGATE CORRUPTION

12.20 The Roskill Committee recommended that the powers given to the DTI under section 447 of the Companies Act 1985 (or comparable powers) should be conferred on the police.[34]

> The principal advantage of the power available under section 447 is that it enables the DTI to make an investigation into a company both quickly and in a far easier manner than a full-scale investigation under section 432 … There is a paramount need for those charged with the investigation of fraud to be able to move swiftly from the first moment that there is a suspicion of fraud and it is time wasting and

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

26 (1993) 16 EHRR 332.

27 (1993) 16 EHRR 357.

28 Case no 43/1994/490/572, 17 December 1996.

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

30 *Ibid*, at para 76.

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

32 Judgment of 21 September 1994, Series A no 294–B.

33 At para 67.

34 Fraud Trials Committee Report (1986) para 2.62.

administratively unsatisfactory for one body to have to seek the assistance of another to set in hand enquiries which may be urgent.[35]

12.21 As to whether the police should be given the same powers as the SFO in cases of corruption, we bear in mind that the SFO's powers are very extensive. Indeed, one commentator has stated that "there seems little doubt that the privilege against self incrimination is almost dead in white-collar cases".[36]

12.22 There is, however, an apparent anomaly in the present law in that if a case of corruption involves "serious or complex fraud" then it can be investigated by the SFO, whereas, if it does not (or if it does but it is not taken up by the SFO),[37] then the substantial investigative powers of that body are not available. However, were police powers to match SFO powers in respect of those corruption offences *not* investigated by the SFO, there would be the greater anomaly that corruption would attract exceptional powers denied to the police in *other* cases of fraud. **We provisionally conclude that, in the absence of substantial justification as to why corruption offences should be treated exceptionally, the powers of the police should not be extended. However, we ask for views on the following options.**

Option 1: no change

12.23 One of the drawbacks of the present law is the limited power of the investigating authorities to obtain information: it is said that this prevents prosecutions and requires a change in the law. We will be very interested in hearing any views on this, together with details and examples, especially from those who have found the present powers inadequate.

Option 2: give the police similar powers to those of the SFO in *all* corruption cases

12.24 We would be interested in hearing from anybody who believes that the SFO's present powers should be extended to the police in *all* cases of corruption.

Option 3: give the police similar powers to those of the SFO in corruption cases falling within the SFO's terms of reference but, for whatever reason, investigated not by the SFO but by the police

12.25 The Royal Commission on Criminal Justice[38] noted that the SFO was unable to accept all cases falling within its statutory criteria and that, as a result, many cases

[35] *Ibid*, at paras 2.62 and 2.63. This latter point refers to the fact that police and prosecuting authorities have to seek the assistance of the DTI should they desire an order under s 447 to be made.

[36] Michael Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study 14 (1993) p 160, 161. But it should be noted that the SFO cannot use, as evidence against a defendant, admissions made in the course of a section 2 interview unless the defendant is charged with making false statements in the interview or gives evidence inconsistent with what he or she had previously said: Criminal Justice Act 1987, s 2(8).

[37] See para 12.25 below.

[38] (1993) Cm 2263, para 72. The chairman was Viscount Runciman of Doxford CBE FBA.

of serious fraud were dealt with by the Fraud Investigation Group of the CPS. Concern was expressed that this meant that different powers of investigation were being applied to cases of like seriousness.[39] We would welcome views on whether, and if so on what grounds, the police should have extended powers in these limited circumstances.

Option 4: create further investigative powers for corruption offences, not identical to those of the SFO

12.26 In putting forward this option as a possibility, we have in mind increasing the investigative powers of the police in corruption cases and thereby creating a special regime. We would be grateful for any comments on this option, together with details of the regime that should apply.

[39] *Ibid*, paras 73–74.

PART XIII
SUMMARY OF PROVISIONAL CONCLUSIONS, PROPOSALS AND CONSULTATION ISSUES

In this Part we summarise our provisional conclusions and proposals, and other issues on which we seek respondents' views. More generally, we invite comments on *any* of the matters contained in, or the issues raised by, this paper, and any other suggestions that consultees may wish to put forward. **For the purpose of analysing the responses it would be very helpful if, as far as possible, consultees could refer to the numbering of the paragraphs in this summary.**

CORRUPTION, THEFT, DISHONESTY AND FRAUD

1. We provisionally conclude that corruption is not in essence, and should not be treated as, an offence of dishonesty or fraud.

(paragraph 1.28)

THE NEED FOR CHANGE

2. We provisionally conclude

    (1) that the law of corruption is in an unsatisfactory condition, and

    (2) that the common law and statutory offences of corruption should be re-stated in a modern statute.

(paragraph 4.18)

CORRUPTION AND BREACH OF DUTY

Acting contrary to duty: the radical approach

3. We provisionally take the view that, in formulating a modern law of corruption, the radical approach, namely to have one or more offences of an agent acting contrary to his or her duty as agent, irrespective of the cause, should not be adopted.

(paragraph 5.4)

Corruption by means other than bribery and extortion

4. We ask for views on the question whether, in addition to a modern offence of bribery, there should be new offences of procuring a breach of duty by deception and procuring a breach of duty by threats.

(paragraph 5.20)

5. We provisionally take the view that, even if consultees are in favour of including new offences of procuring breaches by threats or deception, a modern law of corruption should not be extended generally to impose a duty to be resolute in the

face of threats in all circumstances. We ask for views, however, on whether there are any circumstances, and, if so, which, in which a person should be held criminally liable for failing to carry out his or her duty in the face of threats.

(paragraph 5.21)

Threatening to breach duty

6. We invite views on the question whether there should be a new specific offence of threatening to breach duty, or whether such conduct should be dealt with under the more general offence of blackmail.

(paragraph 5.22)

THE DISTINCTION BETWEEN PUBLIC BODIES AND OTHERS

Should the distinction be retained?

7. Our provisional view is

    (1) that the existence of the distinction between public bodies and others, and the various different effects of that distinction, render the law complex and confusing;

    (2) that there would therefore be substantial advantages in abandoning it;

    (3) that the arguments for retaining the distinction *in principle* are outweighed by the advantages of abandoning it;

    (4) that it should therefore be retained *only* if it is necessary to do so for any of the three purposes we have identified; and

    (5) that it is not necessary to retain it for the purpose of determining the scope of

        (a) certain of the individual offences (in the sense that they can be committed only where a public body is involved) or

        (b) the concept of an "agent".

(paragraph 6.32)

8. We ask those consultees who favour the retention of the distinction between public and other bodies for any purpose to indicate whether they believe that it should be retained for the purpose of the presumption, the definition of certain offences, or both.

(paragraph 6.34)

If the distinction were retained, should the definition of a public body be extended?

9. We invite comments on the possibility of extending the definition of a public body, if the distinction between public bodies and others were to be retained.

(paragraph 6.39)

THE AGENCY RELATIONSHIP

Terminology

10. We provisionally propose that the terms "agent" and "principal" should be used to describe the parties to the core relationship required by a modern offence of bribery.

(paragraph 7.6)

Fiduciaries

11. We provisionally propose that, for the purposes of a modern offence of bribery, and subject to any express exclusion, a person (B) should be regarded as an "agent", and another person (C) as B's "principal", if

(1) B and C are, respectively,

(a) trustee and beneficiary,

(b) agent and principal (in the strict sense),

(c) partner and co-partner,

(d) director and company,

(e) employee and employer, or

(f) legal practitioner and client; or

(2) B has undertaken (expressly or impliedly) to act on behalf of C and that undertaking involves one or more of the following features:

(a) B exercising a discretion on C's behalf,

(b) B having access to C's assets (irrespective of whether B has been given a discretion by C to act in regard to those assets), or

(c) B having influence over C's decisions (as regards C's assets or any other interest of C's).

(paragraph 7.50)

Quasi-fiduciaries

12. We provisionally propose that, for the purposes of a modern offence of bribery, and subject to any express exclusion, a person (B) should be regarded as an "agent" (acting on behalf of the public) if

(1) B is

(a) a judge,

(b) a local councillor, or

(c) a police officer; or

(2) B has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function).

(paragraph 7.51)

13. We ask

(1) whether the listing of specific categories of fiduciary and quasi-fiduciary relationships, plus (in each case) a residual category defined in general terms, is the right approach;

(2) whether the specific categories set out at paragraphs 11(1) and 12(1) above should be extended or amended, and if so how; and

(3) whether the definitions of the residual categories set out at paragraphs 11(2) and 12(2) above should be amended, and if so how.

(paragraph 7.52)

Individual extra-jurisdictional principals

14. We provisionally propose that, for the purposes of a modern law of bribery, an agent of an individual extra-jurisdictional principal should be regarded as an "agent".

(paragraph 7.56)

The public interest of other countries

15. We provisionally propose that, for the purposes of a modern law of bribery, a quasi-fiduciary acting on behalf of the public (or public interest) of another country, and in no other fiduciary capacity, should not be regarded as an "agent".

(paragraph 7.58)

FORMULATING A MODERN BRIBERY OFFENCE

Is it necessary to distinguish between corrupt and non-corrupt conduct?

16. We provisionally believe that the definition of the offence should be formulated in such a way as to exclude conduct which is not potentially corruptive.

(paragraph 8.3)

Criteria for distinguishing between corrupt and non-corrupt conduct

17. We provisionally propose that the new offence should apply equally to inducements and rewards.

(paragraph 8.11)

18. We provisionally propose that it should not be an element of the new offence that the act procured or rewarded should itself be a breach of duty.

(paragraph 8.13)

19. We provisionally conclude that an advantage is accepted and conferred "corruptly" if

    (1) it is an inducement to an agent to act or refrain from acting *in breach of duty*, or a reward for an agent's so acting or refraining from so acting, *or*

    (2) it is an inducement to an agent to act or refrain from acting *in any way*, or a reward for an agent's so acting or refraining, *provided* that the transaction has a substantial tendency to encourage that agent, or others in comparable positions, to act in breach of duty.

(paragraph 8.20)

20. We ask for views on

    (1) whether our analysis of the meaning of the word "corruptly" is correct (and if not, what it does mean); and

    (2) whether its meaning should be set out in a statutory definition.

(paragraph 8.23)

A moral standard

21. Our provisional view is that, if the offence is to include an additional requirement designed to reflect the moral aspect of corruption, that requirement should apply to the public and private sectors alike.

(paragraph 8.29)

22. We provisionally reject the option of replacing the word "corruptly" with the word "dishonestly".

(paragraph 8.36)

23. We provisionally reject the option of including an additional requirement of dishonesty in the offence.

(paragraph 8.38)

Specific defences

24. Our provisional view is that it should not be a specific defence to the new offence

(1) that what was done was done openly;

(2) that what was done was done with the consent of the agent's principal;

(3) that the agent was under no obligation to account for the benefit in question (or, where it was not in fact received, would have been under no such obligation if it had been);

(4) that what was done was normal practice in the environment in question; or

(5) that the benefit in question was of small value;

but that each of these factors should be capable of having a bearing on the issue of whether the defendant's conduct was corrupt.

(paragraph 8.58)

The nature of the benefit

25. We provisionally believe that a person (A) should be regarded as conferring an advantage on another (B) if A does something that B wants A to do, or which is otherwise of benefit to B.

(paragraph 8.62)

26. We provisionally believe that, where A has a *right* to act to B's disadvantage, and forbears to exercise that right, that forbearance should be regarded, for the purposes of our proposed new offence, as the conferring of an advantage on B.

(paragraph 8.64)

The prohibited acts

The bribee

27. We provisionally propose that the conduct prohibited on the part of the putative bribee should be that of accepting, soliciting or agreeing to accept the advantage in question.

(paragraph 8.67)

The briber

28. We provisionally propose that the conduct prohibited on the part of the putative briber should be that of conferring, or offering or promising to confer, the advantage in question.

(paragraph 8.68)

Tripartite relationships

Liability of third parties

29. We provisionally propose that the offence should be committed by any person who corruptly accepts, solicits or agrees to accept an advantage in connection with the performance by an agent of his or her duty.

(paragraph 8.73)

Liability of the agent

30. We provisionally propose that, where a person other than an agent corruptly accepts a bribe in connection with the performance by an agent of his or her duty, the offence should also be committed by that agent if he or she receives

    (1) some or all of the bribe itself,

    (2) some or all of the proceeds of the bribe or

    (3) a benefit resulting from the bribe.

(paragraph 8.75)

Liability of the briber

31. We provisionally propose that, where a person corruptly confers, or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, the offence should be committed by that person whether the advantage is conferred (or to be conferred) on the agent or on a third party.

(paragraph 8.77)

Intermediaries

32. We provisionally propose that the offence should not be committed, as a principal offender, by an intermediary.

(paragraph 8.79)

Persons who have been, or are about to become, agents

33. We provisionally propose that, where a person corruptly accepts, solicits or agrees to accept, or confers or offers or promises to confer, an advantage in connection with the performance by an agent of his or her duty, that person should be guilty of the offence even if the agent in question is no longer an agent, or is not yet an agent, at the material time.

(paragraph 8.81)

The mental element

34. We provisionally propose that the putative bribee should not be entitled to an acquittal merely because he or she is mistaken in his or her belief that the advantage in question is offered with corrupt intent.

(paragraph 8.89)

35. We provisionally propose that, if the putative bribee does not believe the advantage to be offered with corrupt intent, he or she should not be guilty merely because he or she intends to treat it as if it were so offered.

(paragraph 8.91)

36. We provisionally propose that the putative briber should not be entitled to an acquittal merely because, unknown to him or her, the putative bribee does not realise that the advantage in question is offered with corrupt intent.

(paragraph 8.93)

37. We provisionally propose that the putative bribee should not be entitled to an acquittal merely because he or she does not intend to show the favour desired.

(paragraph 8.94)

Purported agency

38. We provisionally propose that the putative briber should not be entitled to an acquittal merely because, unknown to him or her, the putative bribee is not in fact an agent.

(paragraph 8.98)

39. We provisionally propose that, where a person accepts, solicits or agrees to accept an advantage, ostensibly in connection with the performance by a person (whether the same person or another) of his or her duty as an agent, but the latter person is not in fact an agent (or was not, or will not be, an agent at the time when the performance of his or her duty is in question), neither person should be regarded as acting corruptly.

(paragraph 8.99)

Entrapment

40. We invite views on whether an intention to expose corruption should be a defence.

(paragraph 8.101)

TERRITORIAL JURISDICTION

41. We provisionally propose that a modern bribery offence should be a Group A offence for the purposes of the Criminal Justice Act 1993.

(paragraph 9.18)

ANCILLARY MATTERS

The requirement of the Attorney-General's consent

42. We ask for views on whether private prosecutions for the new offence should be permitted.

(paragraph 10.14)

43. We ask for views on whose consent (if any) should be required for the prosecution of the new offence.

(paragraph 10.15)

Mode of trial

44. We provisionally propose that the new offence should be triable either way.

(paragraph 10.16)

Retrospectivity

45. We provisionally propose that the new offence should not have retrospective effect.

(paragraph 10.19)

PROVING CORRUPTION

46. We ask for views on whether, if the presumption were retained, its scope should be extended, and if so how.

(paragraph 11.50)

47. We provisionally reject the option of a provision comparable to section 10(1) of the Hong Kong Prevention of Bribery Ordinance.

(paragraph 11.56)

48. We provisionally reject the option of reducing the weight of the burden placed by the presumption.

(paragraph 11.60)

49. We provisionally propose the abolition of the presumption.

(paragraph 11.66)

THE INVESTIGATION OF CORRUPTION

50. We provisionally conclude that, in the absence of substantial justification as to why corruption offences should be treated exceptionally, the powers of the police should not be extended. However, we ask for views on the following options:

    (1) no change;

    (2) give the police similar powers to those of the SFO in *all* corruption cases;

(3) give the police similar powers to those of the SFO in corruption cases falling within the SFO's terms of reference but, for whatever reason, investigated not by the SFO but by the police;

(4) create further investigative powers for corruption offences, not identical to those of the SFO.

(paragraphs 12.22 – 12.26)

APPENDIX A
EXTRACTS FROM RELEVANT LEGISLATION

PUBLIC BODIES CORRUPT PRACTICES ACT 1889

1 Corruption in office a misdemeanor

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

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

2 Penalty for offences

(1) Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted, –

(a) be liable

(i) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and

(ii) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both; and

(b) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and

(c) be liable to be adjudged incapable of being elected or appointed to any public office for five years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and

(d) in the event of a second conviction for a like offence he shall, in addition for the foregoing penalties, be liable to be adjudged to be

for ever incapable of holding any public office, and to be incapable for five years of being registered as an elector, or voting at an election either of members to serve in Parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and

(e) if such person is an officer or servant in the employ of any public body upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

3 Savings

(2) A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

4 Restriction on prosecution

(1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General.

(2) In this section the expression "Attorney General" means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate …

7 Interpretation

In this Act –

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

The expression "public office" means any office or employment of a person as a member, officer, or servant of such public body:

The expression "person" includes a body of persons, corporate or unincorporate:

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

PREVENTION OF CORRUPTION ACT 1906

1 Punishment of corrupt transactions with agents

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

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

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

he shall be guilty of a misdemeanour, and shall be liable –

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both; and

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both.

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any … borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

2 Prosecution of offences

(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the Attorney-General or Solicitor-General, and in Ireland of the Attorney-General or Solicitor-General for Ireland.

PREVENTION OF CORRUPTION ACT 1916

2 Presumption of corruption in certain cases

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

4 Short title and interpretation

(1) This Act may be cited as the Prevention of Corruption Act 1916, and the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and this Act may be cited together as the Prevention of Corruption Acts 1889 to 1916.

(2) In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression "public body" includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions.

(3) A person serving under any such public body is an agent within the meaning of the Prevention of Corruption Act 1906, and the expressions "agent" and "consideration" in this Act have the same meaning as in the Prevention of Corruption Act 1906, as amended by this Act.

CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

34 Effect of accused's failure to mention facts when questioned or charged

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused –

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies –

(a) a magistrates' court inquiring into the offence as examining justices;

(b) a judge, in deciding whether to grant an application made by the accused under –

(i) section 6 of the Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not –

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

35 Effect of accused's silence at trial

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless –

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless –

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) Where the age of any person is material for the purpose of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

(7) This section applies –

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

38 Interpretation and savings for sections 34, 35, 36 and 37

(1) In sections 34, 35, 36 and 37 of this Act –

"legal representative" means an authorised advocate or authorised litigator, as defined by section 119(1) or the Courts and Legal Services Act 1990; and

"place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

(2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

(4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).

(5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

APPENDIX B
THE LAW OF OTHER JURISDICTIONS

AUSTRALIA

B.1 In the Australian criminal law of corruption a distinction is drawn between *bribery*, which is confined to public officials, and *secret commissions offences*, described by the MCCOC as "essentially an attempt to create a bribery offence for corruption in the *private* sector".[1] Whereas bribery originated in the common law, secret commissions offences are entirely statutory.

Bribery

B.2 In New South Wales and Victoria, bribery remains a common law offence. The Code States, the Australian Capital Territory and the Commonwealth have broadly similar statutory provisions.[2] An example is section 87 of Queensland's Criminal Code:

> Any person who -
>
> (1) Being employed in the Public Service, or being the holder of any public office, and being charged with the performance of any duty by virtue of such employment or office, not being a duty touching the administration of justice, corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of any thing done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
>
> (2) Corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person employed in the Public Service, or being the holder of any public office, or to, upon, or for, any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed or holding such office;
>
> is guilty of a crime, and is liable to imprisonment for seven years, and to be fined at the discretion of the court.

B.3 The Queensland, Tasmanian and Northern Territory provisions include "corruptly" as a fault element, but it is not present in the Western Australian, Australian Capital Territory or Commonwealth provisions. The new South Australian Act uses the term "improperly".

[1] MCCOC Report, p 267.

[2] "There is some doubt about whether these provisions subsume the common law": *ibid*, p 261, n 161.

Secret commissions

B.4 The offence of receiving a secret commission is committed when an agent corruptly takes a payment from a person as an inducement or reward for doing any act in relation to the principal's business. In 1905 the Commonwealth enacted the Secret Commissions Act, and similar legislation was subsequently enacted in all Australian states. Section 4(1) of the 1905 Act provides:

> Any person who, without the full knowledge and consent of the principal, directly or indirectly:
>
> (a) being an agent of the principal accepts or obtains or agrees or offers to accept or obtain from any person for himself or for any person other than the principal; or
>
> (b) gives or agrees to give or offers to an agent of the principal or to any person at the request of an agent of a principal;
>
> any gift or consideration as an inducement or reward;
>
> (i) for any act done or to be done, or any forbearance observed or to be observed, or any favour or disfavour shown or to be shown, in relation to the principal's affairs or business, or on the principal's behalf; or
>
> (ii) for obtaining or having obtained or aiding or having aided to obtain for any person an agency or contract for or with the principal;
>
> shall be guilty of an indictable offence.

B.5 Section 4(2) provides:

> A gift or consideration shall be deemed to be given as an inducement or reward if the receipt or any expectation thereof would be in any way likely to influence the agent to do or to leave undone something contrary to his duty.

B.6 Section 9 provides:

> In any civil or criminal proceeding under this Act evidence shall not be admissible to show that any such gift or consideration as is mentioned in this Act is customary in any trade or calling.

CANADA

B.7 The law relating to corruption in Canada is contained in Part IV of the Criminal Code, falling within the category of "Offences Against the Administration of Law and Justice". This title deals with crimes against the State and government, rather than the public at large, and is therefore limited to corrupt transactions involving government officials. In addition, section 426 of the Criminal Code creates an offence of secret commissions which is not limited to the public sector.

Corruption and government officials

B.8 The offences relating to bribery and corruption contained in Part IV of the Criminal Code include the bribery of judicial officers,[3] the bribery of other public officers,[4] frauds on the government,[5] breach of trust by a public officer,[6] the influencing of a municipal official,[7] the selling or purchasing of office[8] and the influencing or negotiating of appointments or dealing in offices.[9]

B.9 Each offence[10] includes "corruptly" as a fault element. The meaning of "corruptly" is not statutorily defined but has been considered by the courts in relation to section 426. In *Brown*[11] it was held not to mean wickedly or dishonestly, but to refer to an act done mala fide and designed wholly or partially for the purpose of bringing about the effect forbidden by the section.

Secret commissions

B.10 Section 426 of the Criminal Code, known as the secret commissions offence, is directed at secret transactions with an agent concerning the affairs of his or her principal. It provides, in part:

> (1) Every one commits an offence who
>
> (a) corruptly
>
> (i) gives, offers or agrees to give or offer to an agent, or
>
> (ii) being an agent, demands, accepts or offers or agrees to accept from any person,
>
> any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal …
>
> (2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).

3 Canadian Criminal Code, s 119.

4 *Ibid*, s 120.

5 *Ibid*, s 121. This section creates 12 offences which seek to prohibit conduct such as influence peddling, interference with government tenders and influencing the election of candidates to Parliament or the result of a government election. Each offence involves a donor and recipient but there is no requirement that the offender act corruptly, the mental element being purely the intention to cause the external elements of the offence.

6 *Ibid*, s 122.

7 *Ibid*, s 123.

8 *Ibid*, s 124.

9 *Ibid*, s 125.

10 Except those contained in section 121: see n 5 above.

11 (1956) 116 CCC 287 (Ont CA).

(3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

B.11 The donor or recipient of a secret commission must act "corruptly". In *Kelly*[12] it was held that "corruptly" means secretly or without requisite disclosure; thus there is no requirement of a corrupt bargain between the two parties. The donor may be guilty though the recipient is innocent, or vice versa.

SOUTH AFRICA

B.12 The first criminal offence of bribery in South African law was the corruption of judicial office; this offence was later extended to other officers of state and then to all state employees. The law was later again extended to electoral corruption and, more recently, to bribery in the commercial sector.

B.13 The law of bribery was originally a mixture of common law and statute. It is now, however, governed entirely by the Corruption Act 1992, an Act which followed from a report of the South African Law Commission.[13] Prior to the enactment of the 1992 Act, South African criminal law contained separate offences to deal with the bribery of State officials and commercial bribery. The bribery of State officials was dealt with by the common law offences of bribe-giving and bribe-taking, whereas commercial bribery was subject to the provisions of the Prevention of Corruption Act 1958.

B.14 Section 1 of the 1992 Act provides:

(1) Any person –

(a) who corruptly gives or offers or agrees to give any benefit of whatever nature which is not legally due, to any person upon whom –

(i) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law, or to anyone else, with the intention to influence the person upon whom such power has been conferred or who has been charged with such duty to commit or omit to do any act in relation to such power or duty; or

(ii) any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law and who committed or omitted to do any act constituting any excess of such power or any neglect of such duty, with the intention to reward the person upon whom such power has been conferred or

12 [1992] 4 WWR 640.

13 Bribery (1991) Report No 116. This Report was preceded by Working Paper No 32, which itself contained a draft Bill (an early draft of the 1992 Act).

who has been charged with such duty because he so acted; or

(b) upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempts to obtain any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with the intention –

(i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; or

(ii) to be rewarded for having committed or omitted to do any act constituting any excess of such power or any neglect of such duty, whether the giver or offeror of the benefit has the intention to reward the person upon whom such power has been conferred or who has been charged with such duty, so to act or not,

shall be guilty of an offence.

B.15 The offence may be committed by both a donor and a recipient. Each of these forms of the offence may in turn be committed in respect of a future *or* a past act of corruption.

B.16 The offence has been summarised in these terms:

> The offence of the corruptor essentially consists in corruptly giving any benefit of whatever nature which is not legally due to certain persons with a specified intent. The offence of the corruptee consists in corruptly receiving or obtaining any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with a specified intent.[14]

B.17 The 1992 Act does not itself contain any definitions. The avoidance of definitions was an express policy of the framers of the legislation.[15]

[14] J Milton, "Law Reform: Bribery and the Corruption Act 1992" (1993) 6 SACJ 90, 92.

[15] This is clear from the Law Commission's Report: see, eg, para 5.9.

HONG KONG

B.18 The main corruption offences in Hong Kong law are to be found in the Prevention of Bribery Ordinance.[16] The statutory offences are supplemented by the common law of conspiracy.

The possession of unexplained property

B.19 Section 10(1) of the Prevention of Bribery Ordinance 1970 provides:

> Any person who, being or having been a Crown servant[17] –
>
> (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or
>
> (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,
>
> shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

B.20 Criticism of section 10 has centred on the absence of any definition of "standard of living" and "satisfactory explanation", and the fact that the Ordinance does not make clear where the legal and evidential burdens of proof lie in relation to the various elements of the offence.

Offences based on offering, soliciting or accepting an advantage

B.21 Section 4 of the Prevention of Bribery Ordinance provides:

> (1) Any person who, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's –
>
> (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
>
> (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or

[16] Cap 201. The Corrupt and Illegal Practices Ordinance (Cap 288) deals primarily with electoral fraud.

[17] Defined as a person "holding an office of emolument, whether permanent or temporary, under the Crown in right of the Government": s 2(1).

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

(2) Any public servant who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

Solicitation or acceptance of an advantage by a Crown servant

B.22 Section 3 of the Prevention of Bribery Ordinance contains an offence expressly limited to Crown servants.[18] It provides:

> Any Crown servant, who without the general or special permission of the Governor, solicits or accepts any advantage shall be guilty of an offence.

This provision does not require proof that the defendant solicited or accepted the advantage as an inducement, reward or otherwise in respect of any action or inaction in his or her official capacity.

Other offences in the Prevention of Bribery Ordinance based on the concept of advantage

B.23 A number of other offences in the Prevention of Bribery Ordinance make use of the concept of advantage. Section 5 proscribes the use of bribery for giving assistance in regard to obtaining contracts, section 6 contains an offence of using bribery for procuring the withdrawal of tenders, section 7 prohibits bribery in relation to auctions and section 8 contains an offence which is committed by those who have dealings with public bodies and bribe public servants. Each of these offences is, like section 4, divided into an offence committed by those who offer an advantage in relation to the proscribed activities and those who solicit or accept an advantage in relation to the same activities.

[18] See n 17 above.

SWEDEN[19]

B.24 The criminal law of corruption in Sweden is regulated by the Penal Code of 1962.[20] The provisions of the Code create offences of bribery (corruptive supply) and bribe-taking (corruptive demand). They apply to both the public and the private sectors.

Bribery

B.25 Bribery is a form of corruptive supply and is dealt with by the Code under Chapter 17, article 7. "Bribery" occurs when any person gives, promises or offers any bribe or improper remuneration whatever, to any employee, or any other person belonging to one of a number of specified categories, in respect of his or her service. The specified categories are:

(1) any person engaged in public services, whether in central or local government;

(2) any person whose assignment is governed by any statutory regulation;

(3) any person serving in the armed forces or other national defence units;

(4) any other person vested with public authority; and

(5) any person acting as fiduciary in legal, economic or technical matters.[21]

Bribe-taking

B.26 Bribe-taking is a form of corruptive demand and is dealt with by the Code under Chapter 20, article 2. This offence is committed by any employee, or any person in one of the categories listed above, who receives, accepts a promise of or requests any bribe or improper remuneration in respect of his or her service. It is immaterial whether the bribe-taking occurred before taking up or after leaving service.

Bribes and improper remuneration

B.27 The illicit payments are defined by the Code as "any bribe or improper remuneration": a *bribe* is a payment given in advance, whereas *improper remuneration* is a payment made subsequently. The requirement that such a payment be "improper" implies ethical considerations, depending on custom and public opinion. In practice, the question of impropriety will depend on whether a payment is likely to attract and influence someone in the position of the recipient in such a way as to cause him or her to feel under an obligation to the briber.

[19] The information used in writing this paper is taken from Thorsten Cars, *Mutbrott, Bestickning och Korruptiv Marknadsföring – Summary in English: Corruption in Swedish Law* (1996) p 153.

[20] As amended in 1977, 1986 and 1993.

[21] Ch 20, art 2, para 1.

B.28 Improper payments also include payments made to third parties, made in order to influence another, and in such cases the third party may also be punished for complicity.

Presumption of improper influence

B.29 The actual effect of the bribe or the bribe-taking is irrelevant; it is immaterial that the recipient can prove that he or she was not influenced by the bribe. It is necessary only that the payment be given or offered for the employee's service. Some professional or business relationship has, therefore, to be proved to exist between giver and receiver. If both the gift or offer and such a relationship are proved, the recipient is presumed to have been influenced by the gift or offer.

APPENDIX C
THE AUSTRALIAN REFORM PROPOSALS

C.1 The MCCOC Report proposes two new offences: giving or receiving a bribe (to extend to both the public and private sectors) and giving or receiving other corrupting benefits (replacing the former offences relating to secret commissions).

BRIBERY

C.2 In relation to bribery, the MCCOC Report recommends that a person should be guilty of *giving* a bribe if he or she dishonestly provides, or offers or promises to provide, a benefit to any agent or other person with the intention that the agent will provide a favour;[1] and an agent should be guilty of *receiving* a bribe if he or she dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or any other person with the intention of providing a favour.[2] The maximum penalty for each offence is ten years' imprisonment.

C.3 For these purposes a "favour" is:

(a) the agent being influenced or affected in the exercise of the agent's functions as such an agent; or

(b) the agent doing or not doing something as such an agent or because of his or her position as such an agent; or

(c) the agent causing or influencing his or her principal or other agents to do or not to do something.[3]

The distinction between public and private bodies

C.4 One of the most important reforms proposed by the MCCOC is the recommendation that bribery, presently applicable only to public officials, should be extended to the private sector.[4]

Fault elements

C.5 The fault elements of the proposed offence of bribery are

(1) dishonesty;[5]

(2) an intent to give a benefit to an agent; and

[1] MCCOC report, p 278.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid*, pp 269–275.

[5] Which has the same definition as it has here: see *Ghosh* [1982] QB 1053.

(3) an intent that the benefit will influence or affect the duty of an agent, or that the agent will do or omit to do something, or that the agent will get the principal to do something.

Dishonesty

C.6 The Committee outlined three main options regarding the "dishonest" fault element in bribery. These were:[6]

(1) to omit a fault element like "corruptly" or "dishonestly";

(2) to rely on the common law meaning of "corruptly", which is based on behaviour which is "contrary to the known rules of honesty and integrity"; or

(3) to have a more elaborate and specific definition of "corruptly".

C.7 The MCCOC acknowledged that "dishonestly" is somewhat wider in scope than "corruptly" but took the view that it was preferable on the ground that it was flexible and would allow a jury to assess the behaviour of the defendant against the standards of ordinary people. It was, according to the MCCOC, "the best and most workable way of capturing the essence of bribery and other corrupt payments".[7]

No requirement for agreement

C.8 The proposed new offence does not require any agreement between the giver and the receiver of the bribe.

Definition of agent

C.9 This is statutorily defined by way of a general definition in terms of an agent being "[a] person who acts on behalf of another with that other person's actual or implied authority", followed by a list of specific relationships of trust.

OTHER CORRUPTING BENEFITS

C.10 A person will be guilty of the offence of *giving* other corrupting benefits if he or she dishonestly provides, or offers or promises to provide, a benefit to any agent or other person in any case where the receipt, or expectation of the receipt, of the benefit by the agent would in any way tend to influence the agent to provide a favour.[8] An agent will be guilty of *receiving* other corrupting benefits if he or she dishonestly asks for, or agrees to receive, a benefit for himself or herself or for another person in any case where the receipt, or expectation of the receipt, of the benefit by the agent, would in any way tend to influence the agent to provide a favour.[9] The maximum penalty for either offence is five years' imprisonment.[10]

[6] MCCOC Report, p 281.

[7] *Ibid*, pp 287–289.

[8] *Ibid*, p 302.

[9] *Ibid*.

C.11 The principal difference between the two offences is that in the case of bribery the benefit must have been offered or given in advance to induce the favour, whereas in the case of other corrupting benefits, the benefit must have the tendency to influence the agent to show the person favour or disfavour in relation to the principal's business. For a corrupting benefit, therefore, there is no need to prove a prior arrangement intended to influence the agent's duty. It will be sufficient that a benefit was conferred as a reward for a previous breach of duty.[11]

KICKBACKS[12]

C.12 The MCCOC recognised that there was a need to cover cases of people who held themselves out to the public as making independent selections or assessments of goods and services who in fact receive "kickbacks" for their selection. Although in some circumstances, such people would be covered by the bribery and other corrupting benefits offences, in others they would not because they owe their duty to the public generally rather than to a specific principal. The MCCOC took the view that such conduct should be subject to criminal sanction.[13] The following offence is proposed:

> A person who:
>
> (a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services; and
>
> (b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,
>
> is guilty of an offence.[14]

ABUSE OF PUBLIC OFFICE

C.13 Under the common law there are a number of offences involving public office holders improperly using their position for their own benefit.[15] The MCCOC proposes the following statutory offence of abuse of public office:

10 *Ibid.*

11 *Ibid,* p 305.

12 Referred to in the MCCOC Report as "payola".

13 *Ibid,* p 309.

14 *Ibid,* p 308. The maximum penalty is five years' imprisonment.

15 *Ibid,* p 311.

A public official who dishonestly:

(a) exercises any function or influence that the official has because of his or her public office; or

(b) refuses or fails to exercise any function the official has because of his or her public office; or

(c) uses any information the official has gained because of his or her public office,

with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence.[16]

[16] *Ibid*, p 310. The maximum penalty is five years' imprisonment.