The Law Commission

(LAW COM No 313)

REFORMING BRIBERY

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THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 2 October 2008.

The text of this report is available on the Internet at:
http://www.lawcom.gov.uk/bribery.htm

THE LAW COMMISSION

REFORMING BRIBERY

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REFORMING BRIBERY: A SUMMARY OF OUR MAIN RECOMMENDATIONS

1 Bribery has been contrary to the law at least since Magna Carta declared, "We will sell to no man…either justice or right". Most people have an intuitive sense of what "bribery" is. However, it has proved hard to define in law. The current law is both out-dated and in some instances unfit for purpose.

2 We propose repeal of the common law offence of bribery, the whole of the 1889, 1906 and 1916 Acts, and all or part of a number of other statutory provisions.

3 These offences will be replaced by two general offences of bribery, and with one specific offence of bribing a foreign public official. In addition, there will be a new corporate offence of negligently failing to prevent bribery by an employee or agent.

4 In the text below, the precise statutory terms and definitions have not always been used. The draft Bill must be consulted for these. Not all of our recommendations and draft clauses are discussed below.

THE GENERAL OFFENCES

5 The first of the general offences will be concerned with the conduct of the payer (P):

> *P will be guilty if, directly or indirectly, he offers, promises or gives an advantage to another, intending it to induce another person to do something improper (defined below), or to reward someone for behaving improperly (defined below).*
>
> *EXAMPLE: P provides a friend (who works in the same company as X) £10,000 to give to X, to persuade X to send P confidential information about the company that P wants in connection with her own business.*

6 The second of these offences will be concerned with the conduct of the recipient (R):

> *R will be guilty:*
>
> *(a) if he requests or accepts an advantage, intending that he, or another, should in consequence behave improperly, defined below,*
>
> *(b) if he requests or accepts an advantage and the request or acceptance itself constitutes improper behaviour, defined below,*
>
> *(c) if he asks for a reward for improper behaviour, defined below, or*
>
> *(d) if he behaves improperly, defined below, in anticipation or in consequence of requesting or accepting an advantage.*

EXAMPLES:

(a) R asks P for £10,000 if he – R – or a colleague destroy supporting documents submitted by rival bidders for a contract P is seeking to secure with R's employer.

(b) R, a civil servant, asks for £1,000 for himself to process a routine application.

(c) R, a civil servant, asks for £1,000 from P as a reward, having processed P's application for a licence especially quickly.

(d) R, an agent, accepts P's bid for a contract on behalf of a company, because R expects P secretly to reward him personally; or, R accepts an undocumented personal reward from P for accepting P's bid for the contract.

7 These offences will be confined to activity of a business, professional or public nature. Distinctions between such activities will no longer be reflected in different offences, as such. Instead, the distinctions will be reflected in the different ways that P and R come respectively to commit their offences. In that regard, performance of a function or activity will be "improper" if it is carried out in breach of one or more of the following expectations (the "expectations" in question are those that a person of moral integrity would have):

(1) An expectation that someone will perform a function or activity in good faith;

(2) An expectation that someone will perform a function or activity impartially;

(3) An expectation created by the fact that someone is in a position of trust.

EXAMPLES:

(1) R, an employee, invites bids for a contract, but makes it clear to the wealthiest bidder privately that he or she will look favourably upon their bid if he (R) is rewarded personally.

(2) R is a trustee who makes grants to a company's needy former employees. R agrees to consider making grants to a needy former employee – X – who is also a member of his own family, when X says he has made R a beneficiary under X's Will.

(3) In exchange for payment, R, a security guard, agrees to allow P on to company premises at night so that P - a director of a rival company - can go through confidential papers.

8 The general offences will apply to acts done outside the jurisdiction, if they would have amounted to an offence within the jurisdiction and the person accused is, amongst other possibilities, (a) a British citizen, (b) an individual ordinarily resident in the UK, (c) a body incorporated in the UK.

9 In that regard, we suggest that the Government enters into negotiations with Overseas Territories and Crown Dependencies over the extension of the law to bodies incorporated and persons ordinarily resident in those Territories or Dependencies.

10 An individual director, manager, or equivalent person who consents to or connives at the commission of one of these offences him or herself commits the offence.

11 The Director of the relevant prosecution authority must consent to a prosecution for these offences.

12 The penalties upon conviction are the same as for fraud. For example, in the most serious cases involving individuals, there may be a sentence of up to ten years' imprisonment following conviction on indictment.

BRIBERY OF A FOREIGN PUBLIC OFFICIAL

13 There will be a separate offence of bribing a foreign official ("FPO"). A definition of "Foreign Public Official" is provided. Paragraphs 8 to12 above will also apply to this offence.

14 The offence will be committed if P offers or gives any advantage not legitimately due to a FPO, or to another person with the FPO's assent. P must offer or give the advantage, (a) intending to influence the FPO in his or her capacity as a FPO, and (b) intending to obtain or retain business:

> *EXAMPLE: P asks R, a civil servant in Blueland, to process quickly P's application for a licence to engage in construction work in Blueland. R says that will only be possible if P provides X, a relative of R, with help in the conversion of flats on X's land. P agrees to provide the help.*

15 If the law applicable to F permits or requires F to accept an advantage, that advantage is "legitimately due":

> *EXAMPLE: P asks R, a civil servant in Blueland, to process quickly P's application for a licence to engage in construction work in Blueland. R says that will only be possible if P helps to build a new school in Blueland. P agrees to provide the help. The law applicable to R says that favourable treatment may be given to foreign businesses if they agree to fund genuinely charitable work in Blueland.*

16 It is a defence for P to show that he or she reasonably believed that the law permitted or required R to accept the advantage, bearing in mind steps P has taken to find out the true position:

> *EXAMPLE: The facts are as in the example above. The law applicable to R says that favourable treatment may be given to foreign businesses if they agree to fund genuinely charitable work in Blueland. P checks the register of charities in Blueland, and it includes the company in charge of building schools to which P is to pay the money. Unknown to P or R, the company's charitable status expired a month before. The register had not been updated.*

THE NEW CORPORATE OFFENCE

17 A company ("C") registered in England and Wales is guilty of an offence, punishable by a fine, if:

(1) someone ("A") acting on C's behalf commits bribery;

(2) the bribe was in connection with C's business; and

(3) someone connected with C, whose functions included preventing bribery being committed by persons like A, negligently failed to prevent the bribery:

> *EXAMPLE: C decides to do business in Blueland. No one at C concerns themselves with whether bribes to secure business opportunities may be paid on C's behalf. C employs an agent (A) living in Blueland to establish business contacts on C's behalf with Government officials in Blueland. A bribes those officials to place contracts with C. The directors of C had given no guidance to A on their attitude towards bribery, even though it is well-known that officials in Blueland are open to bribery.*

18 It is a defence for C to show that there were adequate procedures in place designed to prevent persons such as A committing bribery:

> *EXAMPLE: C wishes to do business in Blueland. C employs an agent (A) living in Blueland to establish business contacts on C's behalf with Government officials in Blueland. A bribes those officials to place contracts with C. C can show that they gave their regional manager the task of ensuring that all foreign agents complied with the company's anti-bribery policy. The regional manager had failed in her task, as she was busy looking for a job with a rival company.*

19 However, this defence will not apply if the person or persons whose responsibility it was to prevent the bribery was a director, manager, or equivalent person within C.

20 In spite of the inevitable complexity of some of recommended provisions, we believe that it will be perfectly possible to capture the essence of our three main recommended offences of bribery in plain language and in a short form. In this way, adequate guidance can be given to those who do not, unlike lawyers dealing with legal cases, need to know the full legal details.

21 In that regard, it will generally be sufficient guidance to those in a position to make payments to say:

> *Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position.*

22 In that regard, it will generally be sufficient guidance to those in a position in which they may receive payments to say:

> *Do not misuse your position in connection with payments (or other favours) for yourself or others.*

23 It should in general be sufficient guidance to those dealing with foreign public officials to say:

> *Do not deliberately use advantages to try to influence foreign public officials for business reasons, without a legal justification.*

THE LAW COMMISSION

REFORMING BRIBERY

To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice

PART 1
INTRODUCTION

1.1 The damage and inefficiency caused by corruption, in either financial or social terms, should not be underestimated.[1] The effective combating of corrupt practices requires an effective law of bribery. However, the current law is riddled with uncertainty and in need of rationalisation.[2]

1.2 Unfortunately, while few would dispute the need for reform, consensus on the best approach for doing so has been difficult to achieve.[3] More than a decade has passed since the publication of our initial consultation paper and report on corruption.[4] Following Parliamentary criticism of the Government's draft Corruption Bill,[5] the Home Office issued its own consultation paper and, in March 2007, asked the Law Commission to look again at the law of bribery.[6]

1.3 Our consultation paper on reforming the law of bribery ("the CP") was published on 31 October 2007.[7] This report contains our recommendations for reform, as shaped by the ensuing consultative process.

[1] The World Bank has estimated that more that US$ 1 Trillion is paid in bribes annually. See World Bank, "The Costs of Corruption" (8 April 2004). An Ernst & Young survey of executives indicated that almost half of those involved in the mining industry said that bribery was prevalent, with 30% saying that it was prevalent in the banking and energy industries, especially in countries outside Europe. See http://news.bbc.co.uk/1/hi/business/7399678.stm. In our consultation paper (see n 7 below), we referred to the World Bank's discussion of the inefficiencies involved for management in having to negotiate and pay bribes, however small: Appx F to the consultation paper, para F.18. See para 6.52 below. On the broader social side, a culture of corruption may, amongst other things, create an environment in which officials see themselves as beholden to the highest payer, who may be a terrorist or criminal organisation: Trace International, quoted in http://www.ethicalcorp.com/content.asp?ContentID=4471.

[2] See Parts 2 and 4 below.

[3] See Part 2 below for a summary of the background to this project, paras 2.35 to 2.39.

[4] Legislating the Criminal Code: Corruption (1997) Law Commission Consultation Paper No 145; Legislating the Criminal Code: Corruption (1998) Law Com No 248.

[5] Joint Committee on the Draft Corruption Bill, Session 2002-2003, HL Paper 157, HC 705 (2003).

[6] Our terms of reference are set out at para 2.39 below.

[7] Reforming Bribery (2007) Law Commission Consultation Paper No 185.

OUTLINE OF THE SCHEME RECOMMENDED

1.4 We are recommending that the current law, comprising a large number of miscellaneous statutes as well as a common law offence, be replaced by five offences. We also make recommendations in relation to defences, the extra-territorial application of the offences, consent to prosecution and other matters.

1.5 Broadly speaking (without using precise terminology), the recommended offences comprise the following:

(1) Offering or giving a bribe to induce someone to, or to reward someone for, behaving improperly.[8]

(2) Requesting or accepting a bribe either in exchange for acting improperly, or where the request or acceptance is itself improper.[9]

(3) Bribing a foreign public official, where the intention is to influence that official in his or her capacity as a foreign public official, in the obtaining or retaining of business advantages.[10]

(4) A negligent failure by a company or limited liability partnership to prevent bribes being given or offered on behalf of that organisation.[11]

We refer to (1) and (2) as the general offences. In addition, we recommend that:

(5) Directors or equivalent officers of a body corporate who consent or connive at the commission of bribery (i.e. the offences in (1), (2) and (3)) by that body may be charged with the principal offence.[12]

1.6 The consent of the relevant prosecution authority will be required respecting any of the four offences just mentioned. They will all be triable either way.[13]

1.7 Again, without using precise terminology at this stage, there will also be specific defences to the third of these offences along the following lines:

(1) It will be a defence for someone charged with bribing a foreign public official to show that they reasonably believed that the advantage conferred was required or permitted by the law applicable to the official in question[14]

and to the fourth of these offences as follows:

[8] Part 3, and clause 2 of the draft Bill.

[9] Part 3, and clause 1 of the draft Bill.

[10] Part 5, and clause 4 of the draft Bill.

[11] Part 6, and clause 7 of the draft Bill.

[12] Part 6, and clause 8 of the Bill.

[13] Part 9, and clause 9 of the draft Bill.

[14] Part 7, and clause 5 of the draft Bill.

(2) It will be a defence for a company or limited liability partnership charged with negligently failing to prevent bribery being committed on its behalf to show that it had in place adequate procedures to prevent such offences being committed.[15]

1.8 Our recommendations respecting the scope or reach of the offence will have the following effects.

(1) An offence is regarded as committed in England and Wales if any part of the conduct element takes place in England and Wales.[16]

(2) If no part of the conduct element takes place in England and Wales, then there can still be liability, and proceedings can still be taken in England and Wales, if:

(a) the acts done outside England and Wales would constitute an offence if done in England and Wales and

(b) the person doing the acts was, amongst other categories of person:

(i) someone 'ordinarily resident' in England and Wales;

(ii) a British overseas territories citizen; or

(iii) a British citizen or body incorporated under the law of any part of the UK.[17]

STRUCTURE OF THIS REPORT

1.9 In Part 2 we provide an overview of the present law of bribery, the problems with it, and the history of the project.

1.10 In Part 3 we set out the elements of our two recommended general offences of bribery.

1.11 In Part 4 we turn to the current law as regards bribing foreign public officials and summarise the current law on bribery of a foreign public official and its deficiencies.

1.12 In Part 5 we set out the elements of our recommended offence of bribery of a foreign public official.

1.13 In Part 6 we discuss our recommendations on corporate liability.

1.14 In Part 7 we consider possible defences to each recommended offence.

1.15 In Part 8 we explain our recommendations for dealing with extra-territorial bribery.

[15] Part 6, and clause 7(6) of the draft Bill.

[16] Clause 1(7) of the draft Bill.

[17] See Part 8 and clause 6 of the draft Bill.

1.16 In Part 9 we address the issue of consent to prosecution and other ancillary matters.

1.17 Part 10 contains all our recommendations.

1.18 Appendix A consists of our draft Bill and accompanying explanatory notes.

1.19 Appendix B lists those who responded to our CP.

1.20 Appendix C considers how our recommendations would operate alongside other related offences.

1.21 Appendix D explains how our recommendations address facilitation payments, commission payments and corporate hospitality.

PART 2
THE CURRENT LAW, ITS DEFECTS AND PREVIOUS ATTEMPTS AT REFORM

2.1 This Part outlines the current law of bribery, noting its main deficiencies, and summarises the background to this project. Fuller discussion can be found in Parts 1, 2 and 3 of the CP.[1]

THE CURRENT LAW

2.2 The criminal law of bribery comprises the common law and several statutory offences. The most important statutes, addressed below, are the Public Bodies Corrupt Practices Act 1889 ("the 1889 Act"), the Prevention of Corruption Act 1906 ("the 1906 Act") and the Prevention of Corruption Act 1916 ("the 1916 Act"). They are referred to collectively in this report as the Prevention of Corruption Acts.

2.3 Other corruption-related offences, and how our recommendations might operate alongside them, are considered in Appendix C.

Bribery at common law

2.4 Opinions vary as to whether bribery at common law is to be regarded as a general offence or made up of individual offences distinguished by the office or function involved.[2] *Russell on Crime* provides the following general statement:

> 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.[3]

The bribe: "any undue reward"

2.5 A reward that is so small as not to be considered a reward at all will not suffice.[4] David Lanham also draws a distinction between bribes and treats,[5] citing the South African case *S v Deal Enterprises (Pty) Ltd*:

1 Reforming Bribery (2007) Law Commission Consultation Paper No 185.

2 For example, bribery of a privy councillor (*Vaughan* (1769) 4 Burr 2494; 98 ER 308) and bribery of a coroner (*Harrison* (1800) 1 East PC 382). See *Archbold: Criminal Pleading, Evidence and Practice* (2008) para 31–129.

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

4 In the *Bodmin Case* (1869) 1 O'M & H 121 Willes J mentioned how 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".

5 D Lanham, *Criminal Fraud* (1987) p 204.

> 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.[6]

A "public officer"

2.6 The Court of Appeal in *Whitaker*[7] rejected the argument that the common law offence applied only to judicial and ministerial officers and that the defendant army officer belonged to neither category. 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.[8]

2.7 This includes persons discharging *ad hoc* public duties, such as electors at parliamentary[9] or local government elections.[10] Embracery (bribery of jurors) is also an offence at common law, though now considered obsolete.[11]

The mental element

2.8 The payer of the bribe ("P") must intend to influence the behaviour of the recipient ("R") and incline him or her to act "contrary to the known rules of honesty and integrity". Although this includes paying R to act in breach of his or her duties of office, this may not be a necessary feature. In *Gurney*[12] it was held sufficient that the defendant, charged with attempting to bribe a justice of the peace, had intended to produce any effect at all on the justice's decision.

The 1889 Act

2.9 Section 1 of the 1889 Act 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.

6 1978 (3) SA 302, 311, by Nicholas J.

7 [1914] 3 KB 1283.

8 Above, 1296, by Lawrence J.

9 *Pitt and Mead* (1762) 3 Burr 1335, 97 ER 861.

10 *Worrall* (1890) 16 Cox CC 737.

11 *Owen* [1976] 1 WLR 840. See Appendix C, paras C.12 to C.13.

12 (1867) 10 Cox CC 550.

> (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.

The bribe: "gift, loan, fee, reward, or advantage"

2.10 The terms "gift", "loan", "fee" and "reward" are not defined. "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.[13]

2.11 The bribe must act as an inducement to, a reward for, or otherwise on account of R doing or forbearing to do anything in respect of a matter concerning his or her office.

A "public body"

2.12 As amended by the Anti-terrorism, Crime and Security Act 2001, section 7 of the 1889 Act defines "public body" as

> any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, and [this] includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above.

2.13 Section 4(2) of the 1916 Act extends this definition to encompass "local and public authorities of all descriptions".[14] Part 5 of the Local Government and Housing Act 1989 makes provision for including companies "under the control of one or more local authorities", but this is not yet in force.[15]

The 1906 Act

2.14 Extending the law of corruption into the private sector, section 1(1) of the 1906 Act provides:

[13] The 1889 Act, s 7.

[14] Excluding the Crown or Government departments, which are distinguished in s 2. See *Natji* [2002] EWCA Crim 271, [2002] 1 WLR 2337.

[15] Local Government and Housing Act 1989, Sch 11, para 3.

> 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].

The bribe: "any gift or consideration"

2.15 The expression "consideration" is defined as including "valuable consideration of any kind".[16] "Gift" is not defined.

An "agent"

2.16 "Agent" is defined as "any person employed by or acting for another",[17] including a person serving under the Crown or any local or public authority.[18] Serving under the Crown does not require employment by the Crown.[19]

2.17 It is unclear whether police officers, judicial officers and local councillors can be classified as "agents" for the purposes of the 1906 Act,[20] though in such cases there may be recourse to the common law or the 1889 Act. It is also doubtful whether a person merely purporting to be an agent will suffice for the 1906 Act.[21]

[16] Prevention of Crime Act 1906 Act, s 1(2).

[17] Above.

[18] Above, s 1(3), as amended by the 1916 Act, ss 4(2) and 4(3).

[19] In *Barrett* [1976] 1 WLR 946, a superintendent registrar of births, deaths and marriages was serving under the Crown despite not being appointed, paid or liable to dismissal by it.

[20] In the English civil case of *Fisher v Oldham Corporation* [1930] 2 KB 364, a police officer was held to be a servant of the State; but in the Scottish case of *Graham v Hart* [1908] SC (J) 26, a police officer was held to be an agent of the Chief Constable.

[21] ATH Smith, *Property Offences* (1994) pp 792 to 793, para 25–04.

The 1916 Act

2.18 As well as broadening the definition of "public body"[22] and increasing the maximum sentence for bribery in relation to contracts with the Government or public bodies,[23] section 2 of the 1916 Act introduced the presumption of corruption:

> 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.

2.19 The presumption shifts the burden of proof so that it is for the defence to prove (on a balance of probabilities)[24] that a given payment was not corrupt. It applies only to payments made to employees of the Crown, Government departments or public bodies,[25] and only to cases involving contracts.[26]

Extra-territorial jurisdiction

2.20 Part 12 of the Anti-terrorism, Crime and Security Act 2001, which came into force on 14 February 2002, extends the jurisdiction of domestic courts to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law.[27]

2.21 References to public bodies in the 1889 and 1916 Acts now include "any body which exists in a country or territory outside the United Kingdom".[28] It is also immaterial that R's functions have no connection with the UK and are carried out in another country.[29]

[22] See paras 2.12 and 2.13 above.

[23] From 2 years' hard labour 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.

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

[25] It does not apply therefore to agents who are not so classified, such as employees of private companies engaged in contracted-out work or private sector secondees to Government departments.

[26] *Asseling*, *The Times* 10 September 1916. Low J considered it impossible to prosecute a civil servant found in possession of banknotes traced to a contractor with whom he had had official dealings, because the prosecution was unable to prove why the money was paid. This case helps to explain the restricted application of the presumption of corruption.

[27] Anti-terrorism, Crime and Security Act 2001, s 109.

[28] 1889 Act, s 7.

[29] Anti-terrorism, Crime and Security Act 2001, s 108.

2.22 The presumption of corruption does not apply to anything that would not have been an offence prior to Part 12 coming into force.[30]

PROBLEMS WITH THE CURRENT LAW

2.23 The central difficulties with the current law are highlighted below.

Fragmentation

2.24 The motley of common law and statutory offences, each with their own scope, has left the law in need of rationalisation and simplification. The Organisation for Economic Co-operation and Development ("the OECD") put it in this way:

> [there is] a lack of clarity among the different legislative and regulatory instruments in place …
>
> …The current substantive law governing bribery in the UK is characterised by complexity and uncertainty.[31]

Imperfect distinction between public and private sector bribery

2.25 The 1889 Act is confined to bribery of public officials, whereas the 1906 Act applies to bribery of "agents" regardless of the sector in which they are employed. This has led to charging errors[32] and the risk of increased litigation over whether various quasi-public bodies are sufficiently public for the purposes of the 1889 Act.[33]

2.26 Despite this distinction, the substantive law governing bribery in the public sector is not markedly different from that governing the private sector because the often-decisive issue of acting "corruptly" is the same in both cases.[34] The distinction becomes relevant only when proving corruption, since the presumption of corruption applies only in certain cases.[35] The inconsistent application of a presumption of questionable necessity is a further cause for concern.

Inconsistencies and uncertainties in terminology and scope

2.27 The common law and the Prevention of Corruption Acts employ different formulations for bribery, giving rise to considerable uncertainty over the proper application of the offences.

[30] Above, s 110.

[31] OECD, *United Kingdom: Phase 2, report on the application of the convention on combating bribery of foreign public officials in international business transactions* (March 2005), paras 15 and 194.

[32] For example, *Natji* [2002] EWCA Crim 271, [2002] 1 WLR 2337, in which the conviction of the defendant employee of the Immigration and Nationality Department of the Home Office under the 1889 Act was quashed because, although the defendant was working in the public sector, that Act did not encompass bribery of those employed by the Crown.

[33] A risk borne out by the similar difficulties of interpreting "public authority" in section 6 of the Human Rights Act 1998.

[34] See para 2.33 below.

[35] See para 2.19 above.

The bribe

2.28 While the common law requires merely an "undue reward", the 1889 Act specifies a "gift, loan, fee, reward or advantage" and the 1906 Act some "gift or consideration".

Those capable of being bribed

2.29 At common law, R must be a public officer; under the 1889 Act, R must be a "member, officer, or servant of a public body". While these may often amount to the same thing in practice, it is by no means clear that they are synonymous. Moreover, even if such terms were interchangeable, they remain in sharp contrast with the "agent" terminology used by the 1906 Act, which applies across both public and private sectors.

2.30 The breadth of the term "agent" is not itself free of uncertainty. For example, it is unclear whether the particular categories of person referred to in paragraph 2.17 above can be included.

2.31 In addition, the 1889 Act can apply to circumstances where the R is no longer or is yet to be in office at the time of the bribe. Conversely, the 1906 Act appears to require the recipient agent to receive, or agree to receive, the bribe during the currency of his or her agency.

Connections between the bribe and the conduct influenced

2.32 Under the 1889 Act, the bribe must be connected to a particular "matter or transaction".[36] Under the 1906 Act, it can be a "sweetener" designed to secure more favourable treatment generally.

The meaning of "corruptly"

2.33 Both the 1889 and 1906 Acts require the defendant to have acted "corruptly", but neither provides a definition. The majority of the House of Lords in *Cooper v Slade*[37] took the view that "corruptly" did not mean "dishonestly" but rather "doing an act which the law forbids as tending to corrupt". This was thrown into doubt by *Lindley*[38] and *Calland*,[39] which suggested that dishonesty must be proved. Yet *Smith*[40] and most recent appellate authority[41] have favoured the earlier view, requiring proof of intent to corrupt without needing dishonesty. The lack of clarity surrounding this critical adverb weakens the effective application of the law of bribery.

[36] See para 2.9 above.

[37] (1858) 6 HL Cas 746; 10 ER 1488.

[38] [1957] *Criminal Law Review* 321.

[39] [1967] *Criminal Law Review* 236.

[40] [1960] 2 QB 423.

[41] *Wellburn* (1979) 69 Cr App R 254; *Harvey* [1999] *Criminal Law Review* 70; *Godden-Wood* [2001] EWCA Crim 1586, [2001] *Criminal Law Review* 810.

Lacuna where bribery is committed outside England and Wales

2.34 Although the Anti-terrorism, Crime and Security Act 2001 has extended the domestic courts' jurisdiction to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law, this extension does not apply to foreign nationals committing bribery offences abroad, even if those nationals are domiciled or habitually resident in England and Wales. It is unfair that people who reside and conduct their business in England and Wales should not be vulnerable to prosecution when UK nationals would be vulnerable to prosecution for the same behaviour.

THE BACKGROUND TO THE PROJECT

Our previous report on corruption

2.35 The starting point for our original project on corruption was the Nolan Report in 1995.[42] The Commission published a consultation paper[43] in 1997 and a final report with an appended draft Bill in 1998[44] ("the previous report"). In summary, the previous report recommended that:

(1) corruption should be codified within a single Bill;

(2) the single Bill should remove the public/private distinction and abolish the presumption of corruption;

(3) it should be an offence to act corruptly in the "hope" or "expectation" of a bribe, even when no such bribe had been agreed;

(4) bribery should be split into five offences: two for persons corruptly conferring or offering to confer an advantage; two for persons corruptly obtaining or soliciting/agreeing to obtain an advantage; and one for those who performed their functions as agents corruptly;

(5) the Bill should list relevant agent/principal relationships;

(6) acting corruptly should be defined as acting "primarily in return for the conferring of an advantage". This would be subject to a number of defences including acting in return for remuneration from the principal, or with the principal's consent;

(7) there should be no extension of police powers (due regard being given to human rights issues and the need for consistency with other offences);

(8) the offence should be added to the list of Group A offences in Part 1 of the Criminal Justice Act 1993, which would extend the domestic courts' jurisdiction to certain acts of bribery committed outside the UK; and

[42] The Nolan Committee, now the Committee on Standards in Public Life, was set up in response to concerns about the unethical conduct of those in public office. See www.parliament.uk/works/standards.cfm.

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

[44] Legislating the Criminal Code: Corruption (1998) Law Com No 248.

(9) procurement of a breach of duty through threats or deception should not be included in the law of corruption.

The Government's response to the previous report[45]

2.36 The Government agreed with the majority of the recommendations made in the previous report. Subject to a few modifications,[46] the draft Corruption Bill presented to Parliament largely reflected the draft Bill appended to that report.

The Joint Committee on the draft Corruption Bill[47]

2.37 The Joint Committee did not dispute the case for reform, but it did have reservations about several aspects of the draft Corruption Bill, namely:

(1) that some corrupt conduct was not caught (such as when heads of firms bribe each other or when an agent unreasonably believes that his or her principal has consented to the bribe);

(2) that the general law of corruption was not defined with sufficiently clarity;

(3) that the definition of corruption was too vague for business and could be interpreted in a manner that was inconsistent with the UK's international obligations;

(4) that the agent/principal focus was too restrictive; and

(5) that the waiver of Parliamentary privilege in corruption cases should be narrowed.

The Committee concluded that the agent/principal focus, which formed the heart of the draft Bill, should be reassessed.

The Government's response to the Joint Committee[48]

2.38 Although the Government supported some of the amendments suggested by the Committee, it did not accept them all. In particular, it maintained that the agent/principal concept should be retained, since to do otherwise would be to "cast the criminal net unacceptably wide", and that bribes between principals were already covered by other legislation.[49] The Government was also of the view that the "primary motivator" test would avoid incriminating small gratuities.[50]

[45] Raising Standards and Upholding Integrity: the Prevention of Corruption (2000) Cm 4759.

[46] For example, the Government felt that the consent of a Law Officer should be required for every corruption prosecution; that trading in influence should be included; that jurisdiction should be extended to catch corruption committed abroad by UK nationals; and that the reform should extend corruption to cover MPs.

[47] Joint Committee on the Draft Corruption Bill, Session 2002-2003, HL Paper 157, HC 705 (2003).

[48] The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill, Session 2002-2003, HL Paper 157, HC 705 (2003) Cm 6086.

[49] For example, the cartel offence in the Enterprise Act 2002.

[50] The "primary motivator " test is whether the advantage is the primary reason for R doing an improper act.

The most recent Government consultation and our second referral

2.39 Despite the Government's intention to take forward the draft Corruption Bill, its momentum was effectively undermined by the criticisms of the Joint Committee. In an effort to find a way forward, the Home Office published a consultation paper in December 2005. The response to that consultation was published in March 2007. At the same time, the Government announced that it had asked the Law Commission to re-examine the law of bribery – a shift of focus reflected in our terms of reference:

(1) To review the various elements of the law on bribery with a view to modernisation, consolidation and reform; and to produce a draft Bill. The review will consider the full range of structural options including a single general offence covering both public and private sectors, separate offences for the public and private sectors, and an offence dealing separately with bribery of foreign public officials. The review will make recommendations that:

(a) provide coherent and clear offences which protect individuals and society and provide clarity for investigators and prosecutors;

(b) enable those convicted to be appropriately punished;

(c) are fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act 1998; and

(d) continue to ensure consistency with the UK's international obligations.

(2) The process used will be open, inclusive and evidence-based and will involve:

(a) a review structure that will look to include key stakeholders;

(b) consultation with the public, criminal justice practitioners, academics, parliamentarians, and non-governmental organisations;

(c) consideration of the previous attempts at reform (including the recent Home Office consultation) and the experiences of law enforcement and prosecutors in using the current law; and

(d) comparing, in so far as is possible, the experience in England and Wales with that in other countries: this will include making international comparisons, in particular looking at relevant international Conventions and the body of experience around their implementation.

(3) The review will also look at the wider context of corrupt practices to see how the various provisions complement the law of bribery. This will provide the wider context in which the specific reform of bribery law can be considered. This part of the review will comprise a summary of provisions, not recommendations for reform.

PART 3
THE ELEMENTS OF THE GENERAL OFFENCES

3.1 In this Part we examine the elements of the two general offences of bribery that we recommend. We start with an overview. When we turn to examining the elements of the offences in detail, we begin with the limits of bribery as a form of criminal wrongdoing. At paragraphs 3.29 to 3.33 we explain why we think there should be two general offences of bribery. We analyse the elements of the offence committed by the payer at paragraphs 3.34 to 3.77. That is followed by a breakdown of the offence committed by the recipient. In the course of that analysis, we address the issue of the connections between the offences of bribery that we recommend and the offence of fraud. At the end of this Part we consider whether misconduct by "public servants" should be dealt with through a separate offence.

OUR RECOMMENDATIONS IN BRIEF

3.2 Under our recommendations, there will be two general offences of bribery. One will be concerned with the provider of the advantage ("P"),[1] and the other will be concerned with the person receiving the advantage ("R").[2] These two offences will in broad terms consist of the following elements.

The threshold condition

3.3 Both offences must relate to conduct undertaken in connection with activities or functions of a public nature, or in connection with a trade, professional, employment or business activity, or activity on behalf of a body of persons.[3] The conduct in question may relate to past as well as to present activities of these kinds.[4]

P's offence

The basic element

3.4 The basic element of the offence committed by P consists in a promise, or offer or giving of, a financial or other advantage (to be left undefined) to R, or to someone else.[5]

[1] Clause 2.

[2] Clause 1.

[3] Clause 3(1).

[4] Clause 3(8).

[5] Clause 2(2)(a); Clause 2(3)(a).

The wrongfulness element: seeking a favour from R

3.5 The wrongfulness, in the offence committed by P, consists in carrying out the basic element when intending to induce someone (who need not be the recipient of the bribe) to act "improperly," or intending to reward such behaviour.[6] "Improperly" means contrary to an expectation that a person will act in good faith or impartially or in accordance with a position of trust.[7]

The wrongfulness element: compromising R

3.6 Alternatively, the wrongfulness in the offence committed by P may lie in fulfilling the basic element when P knows or believes that the acceptance of the advantage by R would itself constitute the improper performance of a relevant function or activity.[8]

R's offence

The basic element

3.7 The basic element of an offence committed by R is that R must request, agree to receive, or accept a financial or advantage for him or herself,[9] or for another.[10]

The wrongfulness element: when R provides a favour

3.8 The wrongfulness of the offence committed by R is that the advantage (or the prospect thereof) must be either

(a) a reward for improper conduct,[11] or

(b) requested, agreed to or accepted with the intention that improper conduct be engaged in,[12] or

(c) the improper conduct must be engaged in, in anticipation or in consequence of, a request or agreement to receive or an acceptance of that advantage.[13]

As we have already indicated,[14] "improper" conduct means conduct either contrary to an expectation that R would act in good faith or impartially, or conduct involving a betrayal of a position of trust.[15]

6 Clause 2(2)(b).

7 Clause 3(3) to 3(7).

8 Clause 2(3)(b).

9 Clause 1(2); clause 1(3)(a); clause 1(4). Alternatively, R's improper conduct must be done in anticipation of or in consequence of such a request, agreement or acceptance: clause1(5).

10 Clause 1(6).

11 Clause 1(4).

12 Clause 1(2).

13 Clause 1(5). There will be some overlapping between these ways in which the wrongfulness element comes to be committed. We do not regard that as a weakness in the scheme.

The wrongfulness element: when R compromises him or herself

3.9 Alternatively, in relation to R's offence, the request or agreement to receive or acceptance of the advantage must in itself breach an expectation of the relevant kind, or involve a betrayal of a position of trust.[16] In such cases (usually where R occupies a position of trust) there is no need for a breach or betrayal of the relevant kind separate from the request for, agreement to receive, or acceptance of the advantage.

The "expectation" of propriety

3.10 R must fulfil the basic element in breach of an expectation that he or she would have behaved with propriety. The "expectation" in question is that which would be had, in the circumstances, by a person of moral integrity. It will be for the tribunal of fact to decide whether or not there was the relevant expectation, in the circumstances.[17]

3.11 We will now set these elements of the recommended offences in context, and examine them individually.

THE THRESHOLD CONDITION: BRIBERY'S LIMITS AS A FORM OF CRIMINAL WRONGDOING

Avoiding the enforcement of morality in inappropriate contexts

3.12 14/14 consultees who addressed the issue agreed that any new offence should not make conduct criminal simply because the conduct was immoral. One problem with the definition of bribery that we offered in the CP is that it arguably did not exclude the use of bribery solely to enforce morality as such, and did not exclude its extension into private family contexts. Here is an example of the latter:

> **Example 3A**
>
> H and W, who have a young daughter, have separated acrimoniously. W offers to pay H not to seek access to, or contact with, their daughter. H accepts W's offer, and agrees not to seek access or contact.

3.13 In such an example, it is arguable that there is a betrayal of a position of trust by the father with respect to his daughter, in his wilful failure to seek access or to stay in contact. That betrayal is clearly induced by the advantage offered by W. However, we do not see a legitimate role for the criminal law of bribery in punishing people for their conduct in these kinds of circumstances.

[14] Para 3.5 above.

[15] Clause 3(3) to 3(7).

[16] Clause 1(3)(b).

[17] This point will not be set out explicitly in the new law. Its precise formulation will be for judges directing juries, or for magistrates.

3.14 We do not believe that our proposals in the CP would unequivocally have secured this position. The problem is that those proposals encompassed any situation in which there was a breach of a legal duty to act in another's best interests. In theory, that could have included the duty owed by a father to a daughter.

3.15 Considerations of this kind are part of the reason that we have not followed some consultees' proposals, such as that of the Council of HM Circuit Judges,[18] to place at the heart of the general offence a very general concept of "breach of duty", without further definition. Such a proposal is open to the same objection, namely that it would open up a role for the criminal law of bribery as an enforcer of moral standards in private family life.

3.16 In that regard, we would not regard it as a sufficient counter-argument that the prosecution could be relied on not to institute proceedings in such instances. There must, of course, inevitably be a role for prosecutorial discretion in relation to the circumstances in which any offence is prosecuted. However, it is not in general sound policy to cast an offence "net" very wide, particularly when that means wrongdoing in sensitive private moral contexts is covered, and then hope to rely on the proper use of prosecutorial discretion to avoid wrongful interference by the state.

3.17 We now consider that the solution to this problem is to confine the scope of bribery to its traditional contexts: the performance of public functions, and the conduct of trade, professional, employment or business activity. This explains the character of what we are referring to as the "threshold condition".[19] The alleged offence must relate to conduct undertaken in connection with the performance of a function of a public nature, or in connection with trade, professional, employment or business activity, or activity on behalf of a body of persons.[20]

The functions and activities to which the general offences of bribery will apply

The definition of "functions of a public nature"

3.18 It is obvious that bribery should extend to contexts in which advantages have been requested or received by those holding public office or, more broadly, by those performing functions of a public nature. Section 1(1) of the Public Bodies Corrupt Practices Act 1889 confines its scope to advantages sought or received by "any member, officer, or servant of a public body" ("public body" being defined in section 7). The common law offence of bribery is itself confined to conduct relating to a person in a "public office".[21]

[18] Para 3.100 below.

[19] See para 3.3 above.

[20] Clause 3(1).

[21] *Russell on Crime* (12th ed, 1964), at p 381.

3.19 The problem with the older approach is that it is obviously much more difficult now than it was 100 or more years ago to capture what is meant by "public bodies". It may be equally difficult to decide, in relation to a public body, whether someone is a member (or officer, or "servant") of it, or is alternatively a private person contracted to perform the functions the public body is meant to perform.[22]

3.20 We do not believe that it would be desirable to seek to provide a comprehensive definition of "public body", or of "public function", for the purposes of a reformed law of bribery. To some extent, these notions are shifting ones that depend on changes in the way that services are provided to the public at local and national level. Consequently, we believe that it should be left to the courts to decide, in particular cases, whether the advantage given or offered to, or sought or received by, R, related to a "function of a public nature" being performed by R.[23]

The definition of trade, profession, employment or business

3.21 So far as the conduct of "trade, employment or business" is concerned,[24] a number of legal definitions of these concepts may be found in the statute book. Of course, each definition takes its colour from its context (as Lord Diplock has put it, the word "business" is an "etymological chameleon"[25]).

3.22 An example of a definition that provides some guidance as to the kind of activity that should be covered is to be found in Part II of the Landlord and Tenant Act 1954. Section 23(2) of the Act provides that:

> The expression "business" includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate.

3.23 Such a definition is clearly inclusive rather than exclusive, and would overlap to some degree with bodies performing a public function, such as NHS hospitals.[26]

3.24 However, we have concluded that it is not necessary to provide an elaborate definition of what is involved in the conduct of trade, profession or business, or activity on behalf of a body of persons. Most importantly, the wording we are using is the same as that employed in other criminal statutes, with the same purpose in mind.[27]

[22] Some discussion of the issue can be found in *Administrative Redress: Public Bodies and the Citizen* (2008), Law Commission Consultation Paper No 187, at p 79 to 80.

[23] Clause 3(1)(a).

[24] Clauses 3(1)(b) and 3(1)(c).

[25] *Town Investments Ltd v Department of the Environment* [1978] AC 359, at p 383.

[26] *Hill (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90.

[27] Theft Act 1968, s 12.

Companies and unincorporated associations

3.25 The phrase, "activity performed by or on behalf of a body of persons (whether corporate or unincorporate)",[28] has been included to avoid obvious gaps and for the sake of consistency with other closely related legislation.[29] An example of an unincorporated association ("a body of persons") would be a prestigious golf club, and so the conduct of P and R will be covered where P pays R (the membership secretary) to allow P to move to the top of the waiting list of potential members.

Past or present functions, trade, employment or business etc activities

3.26 It is important that whatever definition of public function, trade, employment or business etc is adopted, the definition applies not only when R is currently involved in such activities, but also when he or she has been in the past. A simple example illustrates the point.

Example 3B

R has recently retired from an influential position in the civil service. He or she is approached by P who is seeking a lucrative contract with a Government department. P pays R a large sum of money to provide confidential information to P about the bidding processes.

3.27 In this example, a prosecution should not fail at the outset simply because R is not currently engaged in a profession or performing a public function. The transaction between P and R clearly relates to past conduct of a public or professional kind. That should be sufficient to bring the matter within the scope of the offence.[30]

Recommendation

3.28 **We recommend that the offence should relate to conduct undertaken in connection with the past or present performance of a public function, or in connection with past or present trade, employment or business activity, or activity on behalf of a body of persons (whether corporate or unincorporate).**

TWO GENERAL OFFENCES OF BRIBERY

3.29 In the CP, we did not divide the general offence of bribery along any particular lines. For example, we rejected a distinction between "public" and "private" activity as a basis for separate offences,[31] and we maintain the view that no such distinction should be drawn. Additionally, we did not formally divide the conduct of P from the conduct or R, as a basis for devising separate offences, although we discussed separately the elements of the offence bearing respectively on P and on R.

[28] Clause 3(1)(d).

[29] Theft Act 1968, s 19.

[30] Clause 3(8).

[31] CP, paras 1.8 to 1.17.

3.30 However, in their joint response, the Criminal Bar Association and the Bar Council argued in favour of dividing the general offence of bribery into two. One offence would, broadly speaking, be offer-based, and concerned with P. The other offence would, broadly speaking, be acceptance-based, and concerned with R. We agree with that argument, and have accordingly divided the general offence into two along these lines.

3.31 It was always our intention that the general offence could be committed by P without R being also convicted, and vice versa, and this feature of the general offence is a further ground for accepting the argument of the Criminal Bar Association and the Bar Council.

3.32 There is, of course, an intrinsic link between the (prospective) activities of P and R in bribery cases. A would-be payer requires a potential recipient, just as a would-be recipient requires a potential payer. However, bribery is not the same as (say) conspiracy, even though conspiracy is a single offence involving two or more people, because conspiracy requires a meeting of (at least two) minds. By way of contrast, bribery can be committed either by P or by R without the other's agreement or even awareness. Nor is bribery the same as the doctrine of complicity, where the same offence is committed by two or more people through different routes.[32] Complicity concerns activity made criminal by one person's involvement in another's crime, and not a crime independently committed by two or more people.

Recommendation

3.33 **We recommend that there should be two general offences of bribery: one concerned with the conduct of the payer, and the other with the conduct of the recipient.**

THE OFFENCE COMMITTED BY THE PAYER

The basic element of P's offence

3.34 The basic element of P's offence entails the giving, offering or promising of a financial or other advantage (to be left undefined) to R or to another person, whether directly or through a third party.[33] We can now break up this element into its separate parts for analysis.

The definition of "advantage"

3.35 The existing law of bribery provides definitions of "advantage", although they are not consistent. For example, under section 1(1) of the Public Bodies Corrupt Practice Act 1889, an advantage is defined as, "any gift, loan, fee, reward, or advantage whatever". Section 7 expands on this very considerably by saying that:

[32] Discounting the anomalous case of "procuring" where D acts through P when P is an innocent agent.

[33] Clause 2(2)(a); clause 2(3)(a).

> 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.

3.36 The attempt to provide such comprehensive coverage on a matter of this kind may simply reflect a common tendency in Victorian legislation to seek to provide in advance for every conceivable circumstance and situation. In the CP,[34] we sought to provide a less detailed definition:

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

3.37 18/18 consultees who addressed this issue agreed with the thrust of the definition. However, Colin Nicholls QC and his colleagues, along with Transparency International and the Criminal Bar Association and Bar Council, suggested that the definition was either too complex or unnecessary.

3.38 On consideration, we now agree that the definition is unnecessary. "Advantage" is a term perfectly capable of being understood, in this context, in a common sense way without further elaboration.

3.39 Suppose P is offering something to R, in exchange for a favour. It is hard to imagine circumstances in which what is offered will not be understood by all the parties, and subsequently by the courts, as at least potentially advantageous to R (or to the person on whom R agrees that it should be conferred). The courts are unlikely to be detained by specious pleas that what seemed advantageous at the time of the transaction (say, a grant of shares) should not be regarded as advantageous in fact, because unbeknownst to P, or to both parties, what was offered turned out to be worthless.

[34] CP para 5.60.

3.40 As under the existing law, an advantage can be provided in the form of a reward for improper conduct.[35] It need not have to be provided in advance of the improper conduct in question.

The offer or promise of an advantage

3.41 14/14 consultees who addressed the issue agreed that P can be regarded as satisfying the external element even when R has not as yet acted as requested, and not even agreed with P exactly what will be done as his or her (R's) part of the bargain.

3.42 In the CP, we proposed that P should be regarded as satisfying the conduct element not only when he or she confers an advantage on R, but also when he or she represents a willingness to confer an advantage on R.[36] The present law also defines the offence of bribery in such a way as to impose such an "inchoate" form of liability on P.

3.43 13/14 consultees agreed with the proposal. However UK Anti-Corruption Forum questioned whether our formula was wide enough. They could foresee instances in which P might, for example, interview R with an open briefcase full of money on his or her desk, and later say that this did not involve "representing" a willingness to confer an advantage. It is true that the only evidence against P might be, for example, evidence that a cheque signed by P was banked by R.

3.44 However, we believe that the legal difficulties likely to be posed by such cases are more apparent than real. Moreover, we must take care to ensure that there is as little ambiguity as possible in relation to the external element, given that the offence can be complete before anything has been done by R. Like some of the offences under the Fraud Act 2006, bribery can be "complete" even when it is committed in what would ordinarily be thought of as an inchoate form.

3.45 Accordingly, we have employed the language of "offering" or "promising" (alongside "giving") an advantage. In an ordinary moral or legal context, promising and offering can be activities which create obligations. They embody a degree of certainty as to the scope of the external element, even when – as in this context – it is not our intention that they should be understood in some special legal sense.

3.46 It must also be kept in mind that an offer or promise can be implied as well as express. It can be inferred from conduct as well as being given more concrete expression. In the example of the interview in front of an open briefcase full of money, we believe that a tribunal of fact would have no difficulty finding, in appropriate circumstances, that P was impliedly offering or promising an advantage to R.

[35] Clause 2(2)(b).

[36] CP paras 5.103 to 5.107.

Should the advantage conferred have to be "undue"?

3.47 We proposed in the CP[37] that the advantage (to be) conferred should not have to be "undue". This was for the simple reason that our model for bribery was focused on the impropriety of conduct, and not on the impropriety of the advantage. 13/13 consultees who addressed this issue agreed that this was the right approach. It would be an unnecessary and complex restriction to insist that the advantage had to be undue. As our recommended general offence is not an "improper payment" model,[38] we adhere to that view.

Rewarding improper conduct

3.48 The law has always in some form covered the giving of rewards in exchange for favours. In such cases, the corrupt conduct comes first, and the advantage is conferred afterwards. There may, or may not, have been contact between P and R prior to the giving of the advantage by way of reward. Such conduct will also be covered by our recommended scheme, in cases where the reward is for improper conduct on R's part.[39] Here is an example involving no prior contact between P and R:

> **Example 3C**
>
> P is well known as a provider of large "bonuses" to officials who give P's work priority. Hoping to secure such a bonus, R moves P's planning application to the top of the list for consideration. When he subsequently discovers this, P sends R a £1000 "bonus".

3.49 In this example, both P and R are both guilty of bribery. R has acted improperly in anticipation of receiving an advantage,[40] and P has conferred the advantage as a reward for improper conduct.[41]

3.50 Our recommended scheme does not cover rewards for conduct on R's part that is not improper, in the sense that we will be defining it. This is so even if R breaks a rule (governing his or her employment, say) in accepting the reward. The provision of the reward is not bribery unless it is provided to induce, or to reward, improper conduct. Naturally, if P believed that the conduct he or she was rewarding was improper conduct P would be guilty of an attempt to commit bribery, in accordance with ordinary principles governing the law of criminal attempts.

Recommendation

3.51 **We recommend that P must be shown, directly or through a third party, to have given, offered or promised an advantage (to be left undefined) to R or to someone else.**

[37] CP para 5.64.

[38] For discussion of such a model, see the CP, paras 4.48 to 4.64.

[39] Clause 2(2)(b).

[40] Clause 1(5).

[41] Clause 2(2)(b).

The wrongfulness element in P's offence: seeking a favour from R

3.52 Before turning directly to our recommendations on the element of wrongfulness in P's conduct, we must consider the proposals on this element that were made in the CP, and consultees' responses to them. This will inevitably involve some discussion of the element of wrongfulness in R's conduct.

The proposals in the CP

3.53 In relation to the wrongfulness element in P's conduct, we proposed that the prosecution should have to show one of two things. It would be enough to show that P intended that the advantage should be R's "primary" reason for doing the improper act. Alternatively, it would be enough to show that P realised that there was a serious risk that the advantage would be R's primary reason for doing that act.[42]

3.54 The "primary reason" test shielded from conviction of bribery those whose motives for accepting advantages to breach a duty are in the main defensible, but who are to a small extent influenced by an advantage offered:

> **Example 3D**
>
> Company P, the clear front-runner on all counts to win a contract with company Y, offers R (an employee of company Y) an advantage if R will place the contract their way. R accepts the advantage to place the contract with company P, but is mainly motivated by the fact that company P is clearly the right choice in any event.

3.55 Under our provisional proposals, whether P would be guilty of bribery in this example would depend on whether P intended the advantage to be R's primary reason for placing the contract with P, or realised that there was a serious risk that it would be R's primary reason for so doing. Only if one or other of these conditions was satisfied would P be guilty of bribery. In other words, the payment of a "sweetener" to R to firm up his or her resolve to make P the successful contract bidder would not be captured by the law of bribery under the provisional proposal.[43]

3.56 To understand the justification for this approach it is necessary to go back to something we said in our previous report on bribery. In our previous report[44] we criticised the view that there need only be a "connection" between the advantage to be conferred and R's improper act, on the grounds that:

> The difficulty is that most commercial enterprises are constantly trying to bring in business in a variety of ways all of which involve "influencing" those agents or other firms whose job it is to decide where their firms' business should go.[45]

[42] CP para 12.26.

[43] In this example, R would not have been guilty of bribery under our provisional proposals. This is because the advantage was not R's primary reason for placing the contract with P.

[44] As indicated in the CP, para 6.18.

[45] Legislating the Criminal Code: Corruption (1998) Law Com No 248, para 5.74.

3.57 Our task, in this report as in the last, is to structure the law of bribery such that there is adequate space for commercial enterprises, without fear of legal sanctions, to pursue their goals with determination and imagination, including the use of advantages offered to do business. However, there must also be a line that indicates as clearly as possible when the use of advantages will amount to bribery. The "primary reason" approach did not adequately satisfy the latter obligation.

The element of wrongfulness in P's conduct when P seeks a favour from R: consultees' responses

3.58 So far as our provisional proposals on this issue were concerned, the reception from consultees was very mixed. 8/18 who addressed the issue agreed that P should have to intend the advantage to be the primary reason for R's improper act, or foresee a serious risk that the advantage will be the primary reason for R's improper action.

3.59 However, 10/18 consultees disagreed with this provisional proposal. Most of the disagreement centred on problems with the "primary reason" analysis.

3.60 The "primary reason analysis" was supported by, amongst others, the Police Federation, Clifford Chance, and a number of business organisations such as the British Bankers' Association, the CBI, the International Chamber of Commerce ("the ICC"), and the Financial Services and Markets Legislation City Liaison Group. The ICC said:

> It is clear that the use of the word "primary" is among the most important elements in the Law Commission's innovative proposals, and we consider that this is key to the effectiveness of the legislation that the Law Commission envisages. The use of other criteria, such as "substantial" or "material", which the Law Commission also considers but in our view rightly rejects, would seriously weaken the legislation.

3.61 The main objection to the "primary reason" test was the difficulty in proving that a reason for doing something was a "primary" reason for doing it. The higher court judges said:

> We oppose this proposal. Cases involving "mixed motives" raise particular factual difficulties: in particular, how is the jury to decide which of a number of motives was pre-eminent? If the jury were in doubt as to whether an established and "real" reason was the "primary" one, the defendant would be entitled to an unmeritorious acquittal… Whilst we accept that it is necessary to ensure that the offence net is not cast excessively wide, we nonetheless consider that sensible decisions on charging and an appropriate approach to sentencing will remedy any possible unfairness to the accused.

3.62 Transparency International commented as follows:

> To require that the advantage should be "the primary reason" for an improper act is too restrictive, complicating and burdensome on the prosecution. It requires little imagination on the part of a well advised defendant and his counsel to define a number of reasons why the defendant did whatever constituted the "improper act". The greater the number of reasons, the more difficult it will be to be confident of finding that the advantage was the primary reason. The requirement gives rise to illogical and even discriminatory results. If R is wealthy it will be more difficult to show that a sum of money or other advantage could be the primary reason.

3.63 We agree with the majority who criticised the "primary reason" analysis that it is an inappropriate way to restrict the scope of the general offences of bribery. It seems likely to cause more problems than it will solve. It does not provide the clear line that must not be crossed for which we are looking, like many of our consultees, including those from the world of business.

3.64 The concerns raised about a wide wrongfulness element in our previous report remain significant.[46] However, there is a way to meet those concerns other than through a "primary reason" analysis.

3.65 Moving on from the issue of "primary reason", neither Transparency International nor the Council of HM Circuit Judges agreed with the "foresight of serious risk" part of the wrongfulness element in P's conduct. The Council of HM Circuit Judges said that an offence such as bribery should not be satisfied by a fault element amounting to a kind of recklessness; proof of nothing less than intention should suffice.

3.66 We agree with the Council of HM Circuit Judges that it is inappropriate to try, in effect, to compensate for the narrowness of a bribery offence focused on advantages as "primary" reasons for acting improperly, by widening P's fault element beyond an intention that R should act improperly. In this context, foresight of a serious risk that an advantage will be R's primary reason for acting improperly is too difficult a matter to prove beyond doubt. It involves proof that P was aware of not one but two factors that depend on judgment rather than fact: the "serious" nature of a risk, and the "primary" nature of a reason. Whilst, in the criminal law, it is acceptable to rely on proof that P was aware of one such factor, to rely on proof that P was aware of two such factors makes the test for liability too likely to be inconclusive, so far as proof is concerned. There is a risk that, confronted by two matters calling for judgment rather than fact-finding, the jury will too easily be satisfied with proof on the balance of probabilities.

[46] Legislating the Criminal Code: Corruption (1998) Law Com No 248, para 5.74.

Our revised approach to the wrongfulness element in P's conduct when P seeks a favour from R

3.67 We believe that by narrowing P's fault element to an *intention* that R behave improperly, we can achieve the necessary degree of certainty in determining where the line is drawn between acceptable behaviour and criminal behaviour, in giving, offering or promising advantages in exchange for favours. Accordingly, under our revised recommendation, there is a requirement that P's conduct element must be intended by P to induce R to act contrary to an expectation that R will act in good faith or impartially, or to induce R to betray a position of trust (or must be intended to reward R for such behaviour).[47] It will no longer be enough, as it would have been under the provisional proposals, that P realised that R might act in that way (primarily) as a result of having the advantage conferred.

3.68 We believe that this change will bring about the required degree of certainty and robust clarity in the law that people engaged in competing for business, as well as those performing public functions, are entitled to expect.

3.69 Here is an illustration of how the recommendation is to work:

> **Example 3E**
>
> P invites officials from the Ministry of Commerce in Blueland to an evening of hospitality at P's company's expense. P's intention is that the officials should be impressed by the business opportunities that the company has to offer, and accordingly offer P the chance to do business in Blueland. P realises that some of the officials may be so impressed by the hospitality that they would recommend that P be offered the chance to do business in Blueland irrespective of the real merits of the company. However, it is not P's intention that this should be the reason that the officials give him or her that chance (although, obviously, P may not especially mind why the officials do give it to him or her).

3.70 P should not be guilty of bribery in this kind of case.[48] As we have said, we now believe that the law would extend too far if it caught cases in which P merely realised that there was a serious risk that R would be motivated by the advantage to act improperly.[49] The law would also be too uncertain in scope. As the Council of HM Circuit Judges suggested, it should be a requirement that P intend the advantage (to be) provided to lead R to behave improperly.

[47] Clause 2(2)(b); clause 2(3)(b).

[48] It might be a different matter if P was aware that the officials were not allowed to accept hospitality *in any form*: see paras 3.73 to 3.76.

[49] See para 3.66.

MUST THE PERSON P APPROACHES BE THE ONE TO RECEIVE THE ADVANTAGE?

3.71 It should not be necessary for the person offered the advantage to be the same person as the one who receives it, and our recommended offence does not suppose that it will be. P may approach someone (X) in an organisation, and ask X who he or she (P) should offer an advantage to, in order to secure a favour of some kind. X may agree to find such a person (R) and ensure that the advantage is given to R. In such a case, it is possible that both P and X may be guilty of bribery as principal offenders, because they both make an offer or promise of some kind with regard to the giving of the advantage. However, where X makes it clear to R that X is only acting as P's agent, it may be that only P will commit the offence as a principal offender, and X will be complicit in P's offence.

Recommendation (Case E in the draft Bill)[50]

3.72 **Subject to the recommendation in para 3.77 below, we recommend that P must be shown to have intended to induce R or another to perform a relevant function or activity improperly, or to reward R or another for such conduct.**

The wrongfulness element in P's conduct: compromising R

3.73 In some instances, P may not be seeking a favour from R, in exchange for an advantage (to be) conferred. P may be simply be offering something P knows or believes that it would be wrong – a compromise of R's position – for R to accept.

> **Example 3F**
>
> R, a Government official, has issued a visa to P. Very grateful to have received the visa, P sends R £1000.

3.74 We believe that the law should cover these kinds of cases. It is true that when the advantages in question are trivial, conferring them might not be regarded by everybody as "bribery". Even so, their conferral can have a corrosive effect on standards meant to be observed by those who receive them, not least when such standards relate to the performance of public duties.

3.75 A slightly different approach to the wrongfulness element in such cases is desirable, because it will rarely be P's intention to compromise R by persuading him or her to accept the advantage. In example F, the improper conduct involved in R banking the £1000 is not what P necessarily seeks. P may simply be expressing his or her gratitude to R by providing a gift. Such cases can best be brought within our scheme if the wrongfulness element in P's conduct is defined in terms of 'knowing or believing' that the acceptance of the advantage by R will be improper.

[50] Clause 2(2).

3.76 So-called 'facilitation payments' are covered by this alternative route by which P can be guilty of bribery. Suppose R must by law issue P with a licence. Even so, P gives R £500 to issue the licence (for example, to rest assured in his or her own mind that R will issue the licence). In such a case, P will be guilty of bribery under our scheme if P knew or believed that it would be improper for R to accept the £500.

Recommendation (Case F in the draft Bill)[51]

3.77 **We recommend that even where P is not trying to persuade R to perform a relevant function or activity improperly (or to reward R for such conduct), it should still be bribery if P knew or believed that it would in itself be improper for R to accept an advantage.**

THE OFFENCE COMMITTED BY THE RECIPIENT

The basic element of R's offence

3.78 14/16 consultees who addressed the issue agreed that it was helpful to divide R's offence into what we are now calling a "basic" element and a "wrongfulness" element.

3.79 The basic element of the offence committed by R is that R must request, agree to receive, or accept an advantage (directly or indirectly) for him or herself or for another.[52] The advantage accepted, requested or agreed to can come in the form of a reward for improper conduct.[53]

3.80 For the most part, there is relatively little to add to the discussion of this part of the offence that has not already been considered above, in relation to the basic element of P's offence.[54]

3.81 However, there is an important point to explain in relation to the "acceptance" of an advantage by R. If R "agrees" to receive, or "requests" an advantage, there is a mental element involved in that conduct, just as there is in relation to the basic element of P's offence when he or she "promises" or "offers" an advantage. In these cases, R is taking an active part in securing the advantage.

3.82 By way of contrast, an advantage may be conferred "passively" on R, as in the case where P rewards R unexpectedly for a piece of improper conduct.[55] In such cases, R's liability should not simply be receipt-based (in other words, depend solely on whether R is in receipt). If liability were purely receipt-based, there would in some cases not be a sufficient connection between the improper conduct and the advantage:

[51] Clause 2(3).

[52] Clauses 1(2); 1(3)(a); 1(4).

[53] Clause 1(4).

[54] Paras 3.34 to 3.51. It follows, for example, that the request for or agreement to receive the advantage can be implied as well as express.

[55] See Example 3C in para 3.48 above.

Example 3G

R is a civil servant in the Ministry of Defence. R improperly releases documents to the media that reveal a damaging inconsistency between the viewpoints of two ministers on defence policy. Individuals hostile to the Government send R money as a mark of their approval for his or her actions.

3.83 Although R has behaved improperly, and has received advantages in consequence, R should not be regarded as guilty of the offence simply in virtue of having received the money. The offence should not be regarded as having taken place unless and until R accepts the money as a reward for the impropriety (suppose that, after initially resolving to send the money back, R changes his mind and banks it).[56] It would be a matter for the tribunal of fact, but the offence is almost certainly committed when R banks the money. At that point (but not until that point) a connection of the right kind has been established between R's impropriety and the advantages given, because in accepting them, R has been "active" in relation to them.

3.84 What counts as an "acceptance" of an advantage should be a matter for the tribunal of fact, and will differ from case to case. Proof that an advantage has actually been enjoyed is clearly a sufficient condition, but it is not a necessary one. If, for example, cheques are found in R's wallet, that may be enough to show that R has "accepted" the advantage, in that it may show that he or she had decided to bank them, or, depending on other circumstantial evidence, it may not.

Recommendation

3.85 **We recommend that R must be shown to have requested, agreed to receive, or accepted an advantage from another person, for him or herself or for another.**

The wrongfulness element of R's offence

The proposals in the CP

3.86 In the CP,[57] we expressed the wrongfulness element of R's offence in terms of a "breach of duty", in defined circumstances. In doing so, we were seeking to improve on the vague and legally contested notion of acting "corruptly" that is of central importance in the current law. In the CP, the breach of duty had to fulfil two conditions:

(1) There had to be the breach of a legal or equitable duty, including a duty of impartiality.

(2) It had to involve betrayal of a position or relation of trust, or breach of a duty of impartiality or of acting in the best interests of another.

[56] Naturally, we recognise that on such facts, if he or she faces a criminal charge at all, the civil servant is much more likely to be charged with misconduct in a public office rather than with bribery. That does not mean it is wrong that, at its outer limits, the offence of bribery covers such conduct.

[57] CP para 5.50.

3.87 Almost all consultees agreed that the reforms we proposed for bribery as a whole would be an improvement on the current law, but making this "breach of duty" model central to the reformed offence proved more divisive. 14/23 consultees who addressed the issue were broadly supportive of the model, but there was considerable disagreement. No consistent theme emerged from the criticisms of those who disagreed. However, in our recommended scheme we have tried to take account of the most significant criticisms, in the hope of creating a greater measure of consensus.

Should we retain the "legal or equitable duty" restriction?

3.88 An important change is that we no longer think that it is helpful to have to identify a breach of a legal or equitable duty, before going on to show that it took the form of a failure to act impartially, in good faith, and so on. It should be enough that there was an improper failure to act impartially or in good faith, or a betrayal of a position of trust.

3.89 The Crown Prosecution Service said that to make the offence dependent on whether a legal or equitable duty had been breached would import difficult and unwelcome questions of civil law into the criminal field.[58] We address this criticism below.[59]

3.90 Professor Alldridge was concerned that an employer could simply modify an employment contract with an agent (if not in writing then by verbal variation) to make it clear that the agent would not be under a contractual duty to resist giving or receiving bribes. In such a case, the absence of a legal duty under contract not to accept bribes would clash with what might in many circumstances be thought to be the agent's broader duty of good faith in a commercial context not to accept bribes. Professor Alldridge said:

> To the extent that the Commission's proposals rely upon these duties [to act impartially etc] being in individual contracts, they would provide a criminal law with an opt-out. That would not be satisfactory. It would be a defence of consent, which the Commission eschews … It seems that here the Commission's commendable desire for greater certainty in the law creates greater possibilities for avoidance. Unless a solution can be found to this problem the Commission's proposed formulation in this regard should be rejected.[60]

[58] Something that, in the closely related field of fraud and deception, the law has been keen to minimise.

[59] Paras 3.92 to 3.98.

[60] See now, Peter Alldridge, 'Reforming Bribery: Law Commission Consultation Paper 185 (1) Bribery Reform and the Law Commission – Again' [2008] *Criminal Law Review* 671, 683.

3.91 This is a very important objection. All consultees agreed that any reform of the law should avoid the kind of problems thrown up by the current regime's dependence on the need to show a betrayal of a principal by an agent.[61] We thought that we had avoided these problems through reliance on the "breach of a legal or equitable duty" notion, because that notion does not as such require the identification of a principal who is betrayed. We said, "by eliminating the need for an identified person [who is betrayed], we can reduce this [the duty] to the betrayal of a duty in general".[62] In retrospect, this was an over-optimistic claim. It seems that we did not entirely escape the problematic limitations of principal-agent relationships.

3.92 Moreover, the need to find that there was a breach of a legal or equitable duty as a matter of (civil) law, before leaving the question of breach to the jury, was a structure disliked by the Council of HM Circuit Judges, and by the higher court judges, as well as by the Crown Prosecution Service.

3.93 The higher court judges said:

> We take issue with the suggestion at 5.53 that "the presence of one of these duties will normally be a question of law for the judge, even though the question of whether such a duty existed may involve the judge in the determination of some questions of fact." The judge's role should extend no further than determining whether the facts *are capable* of establishing the duty; thereafter, it will be for the jury to determine, as one of the issues in the case, whether or not the relevant duty in fact existed on the facts. (emphasis in original)

3.94 The Council of HM Circuit Judges said:

> Once what should be a simple concept becomes, as a result of definition, partly a question of law for the Judge and partly a question of fact for the jury the situation is complicated still further – if the Judge decides the elephant is capable of being grey the jury then decides whether it is.

3.95 On this kind of issue, the judges are a key constituency for the obvious reason that it is the judges who will be dividing the issues of law from the issues of fact in each case. Their lack of enthusiasm for our provisional proposals is what led them to suggest that "duty" be left completely undefined (a solution we reject below).[63]

3.96 These objections have led us to the conclusion that the restriction of the duty in bribery cases to a legal or equitable duty is unnecessary. Indeed, the need to establish such a duty might in many cases add nothing in terms of certainty, and prove to be no more than a complicating distraction:

[61] CP para 5.101.

[62] CP para 4.43.

[63] Para 3.100 onwards.

Example 3H

A retired school teacher is asked by a prospective employer of two of his or her former pupils to assess their relative merits. The teacher has in fact been paid a large sum by one of the pupils to rate him more highly than the other former pupil.

3.97 What should matter, in this case, is not whether the teacher owes a civil law duty of care in tort not to cause loss to the employer or to the other pupil. Similarly, it should not matter that the teacher, being retired, is no longer under a contractual obligation to the school or university to provide accurate and unbiased references. All that should matter is whether, given the teacher's status as someone formerly engaged in a public function, the teacher is in the circumstances expected to write the references in good faith.[64]

3.98 The judges suggest that this question should be regarded as ultimately a matter of common sense in the analysis of the facts for the jury. We agree that this would be the right approach. It is further explained below.[65]

Consultees' alternative definitions of a "corrupt breach of duty"

3.99 As we have indicated, the majority of consultees wanted a definition of R's breach of duty for the purposes of bribery along the broad lines set out in the CP. However, it would be right to consider two quite radical alternatives to that definition that were suggested.

SHOULD THE "IMPROPER ACT" (BREACH OF DUTY) IN BRIBERY BE LEFT UNDEFINED?

3.100 In their response to the CP, the Council of HM Circuit Judges argued that, in the interests of simplicity, there should be no restriction on the kind of duties breach of which, if the other elements of the offence are fulfilled, can amount to bribery. The Council agreed with the argument in the CP that it is the connection between an "improper act", and an advantage promised or conferred, that constitutes the wrongful conduct in bribery. However, the Council did not favour seeking to define "improper act" in the way that the CP argued that it needed to be defined, in terms of a breach of a legal or equitable duty, involving a duty of trust or of impartiality, or a duty to act in another's best interests.

3.101 On this last point, the joint response of the Criminal Bar Association and the Law Reform Committee of the Bar Council argued along the same lines, in the interests of simplicity and accessibility. However, they did think it necessary to go some way towards qualifying the duty breach of which could form part of bribery. They suggested that the duty in question should be "a legal duty to act properly and impartially."

3.102 The Council of HM Circuit Judges favoured the much simpler formula of "a breach of duty to another", on the grounds that:

[64] See the discussion of the "good faith" expectation at para 3.141 below.

[65] Para 3.170 onwards.

> There have been too many instances of over complication in recent legislation and the addition of a definition which might be compared to seeking to describe an elephant when everyone knows what an elephant looks like is a classic example of over complication. Further once what should be a simple concept becomes, as a result of definition, partly a question of law for the Judge and partly a question of fact for the jury the situation is complicated still further…

3.103 The Council was not swayed by the argument in the CP that there was a need to ensure that the duty did not extent to situations in which no one would say that the breach of duty in question could be regarded as bribery. In the CP, it was argued that if a breach of any duty could – the other elements of the bribery offence being fulfilled – amount to bribery, that would involve extending the offence to inappropriate contexts.[66] It would mean, for example, that if X agreed to pay Y to kill Z, X and Y would be guilty of bribery, as well as of conspiracy to murder, because it was agreed that Y would be paid to breach a legal duty not to kill.

3.104 Someone might ask why, if sensible people would not regard such an example as falling within the scope of the offence of bribery, it is necessary to define the offence in such a way as to make this clear. Cannot common sense be trusted to prevail? The answer to that is "no".

3.105 Prosecutors may, in one way quite understandably, be tempted to rely on the broad and uncertain scope of a definition of bribery in terms of a "breach of duty", to gain advantages they are not given under offences that would more naturally apply to the conduct in question. These advantages might include greater extra-territorial jurisdiction, or an enhanced possibility of corporate liability. In other contexts, the Court of Appeal has questioned the use by prosecutors of widely defined offences to gain advantages not provided by offences that more naturally apply – in terms of "labelling" – to the conduct in question.[67] We do not wish to recommend the creation of an offence that will provide yet greater scope for the inappropriate labelling of offenders, this time as guilty of "bribery", when the appropriate offence was quite different (such as conspiracy to murder).

3.106 Naturally, we agree with the Council of HM Circuit Judges that the definition of bribery must be kept as simple as possible. We also agree with them that it is not necessary to restrict the "duty" concept in bribery to an already recognised legal or equitable duty. Whether a duty of a relevant kind – such as a duty to act in good faith – arises can be regarded as a matter of fact for the jury, not of law for the judge. We welcome their suggestion that the jury can and should (no doubt, with judicial guidance) be trusted to decide the question of duty as well as the question of breach of duty. We will say more about this below.

[66] CP paras 5.29 to 5.46.

[67] *CPS Nottinghamshire v Rose* [2008] EWCA Crim 239, [2008] 3 All ER 315; *R (Wilkinson) v DPP* [2006] EWHC 3012 (Admin).

3.107 Even so, we believe that the definition of bribery should identify those duties breach of which is relevant to the offence. It is, in this context, perhaps significant that the joint response of the Criminal Bar Association and the Law Reform Committee of the Bar Council suggested a definition of an improper act in terms of an absence of "impartiality". If, in a bribery context, one believes it is right to expand on the definition of improper conduct that far, why not go a little further in the interests of certainty, as was suggested in the CP? As we will see, "impartiality" is not the only virtue that may be compromised corruptly by the hope of advantage, and the law ought to reflect that fact if it is to avoid obvious gaps.

3.108 For example, as the Crown Prosecution Service, Corner House and Transparency International indicated, it may be important to include breach of a duty to act in good faith amongst those duties which, if breached, may form the subject of a bribery prosecution. A duty to act in good faith is not the same as a duty to act impartially.[68] Consider these two simple examples:

Example 3J

A referee is paid to write a reference that is unduly partial towards the person on whose behalf it is given.

Example 3K

An agent accepts a bid from a contractor, ahead of other worthy bids, because he or she has been given a secret payment by the contractor.

3.109 An academic referee is entitled to be to an extent "partial", to present the person for whom a reference is written in as favourable a light as their record will sustain. Those who obtain references understand this. So, in a case where the referee is paid to write a reference that is unduly partial in this way, the duty breached is not so much the duty of impartiality as a duty to write the reference in good faith. Similarly, an agent acting on behalf of a company in assessing bids for a contract may be under a duty to assess those bids in good faith, but is unlikely to be regarded as under a duty to assess them "impartially". Companies and their agents are quite free to be "partial" towards, for example, would-be contractors who have provided cheap and reliable services in the past.

[68] See the discussion below, in para 3.141 and following.

3.110 Having said that, the important point made by HM Circuit Judges and by the Criminal Bar Association and the Law Reform Committee of the Bar Council, that simplicity in definition must be maintained if at all possible, has led us to recommend a basic definition of the duty element that is simple in its terms. This is that the reformed offence of bribery should be centred on performing a function or activity "improperly", with respect to the advantage given or offered. This simple notion does no more than give a broad-brush picture at a basic definitional level of the relevant part of the external element of bribery. The basic definition needs to be elaborated on to provide a greater element of certainty in terms of scope. The duties which fill out the notion of performing a function or activity "improperly" for the purposes of bribery are set out below.[69]

SHOULD THE IMPROPER NATURE OF AN ACT BE LINKED TO WHETHER IT WAS DONE "DISHONESTLY"?

3.111 The Criminal Bar Association and the Law Reform Committee of the Bar Council would have made dishonesty central to the definition of bribery (a view long rejected by the House of Lords and by more recent authority),[70] just as it is central to the definition of theft. There is, of course, no doubt that this would make the offence simpler in definitional terms, drawing on a concept judges and juries are used to applying. The Council of HM Circuit Judges says, quite rightly, that the current law's understanding of "dishonesty" in theft, and of "corruptly" under the current law of bribery, are by and large left to the common sense understanding of jurors, without major problems arising. The joint response of the Criminal Bar Association and the Law Reform Committee of the Bar Council made a similar point.

3.112 We entirely appreciate what the Criminal Bar Association and the Law Reform Committee of the Bar Council are trying to achieve, through their suggestion; but in this context, there are difficulties with it.

3.113 An advantage of making an element of dishonesty central to the definition of bribery was said by the Criminal Bar Association and the Law Reform Committee of the Bar Council to be that defendants could then claim that they were not acting dishonestly in paying for advantages overseas (although, logically, the same argument could be employed respecting transactions in this country):

> In the context of facilitation payments jurors could be provided with the assistance of expert evidence as to the typical nature of payments made or "courtesies" offered in different business cultures overseas.

3.114 It may well be true that a requirement of dishonesty would open the way to such a defence, but in our view this is a disadvantage rather than an advantage. It seems inevitable that making the definition of bribery dependent on whether conduct was "dishonest" will, as this passage makes all too clear, effectively create a "defence" that what would elsewhere have been a corrupt action was only undertaken because the business environment was known to be steeped in corruption.

[69] Below, para 3.136 and following.

[70] See the discussion in the CP para 2.22.

3.115 In the CP, we firmly rejected this kind of approach. It would mean that the criminal law of this country effectively permitted, rather than outlawed, the use of bribery as a means of doing business in countries which may be struggling to enforce the rule of law and stamp out corruption. Such an approach would also not sit easily alongside our international obligations to combat bribery.[71] Moreover, it was not an approach supported by the majority of consultees. For example, organisations representing companies doing business overseas did not support it.

3.116 If and insofar as it is true that, for example, one country traditionally entertains all visiting business executives far more lavishly then is customary in other countries, that fact will still have a relevance to liability under our scheme. It would be evidence tending to show that, in spite of the fact that the hospitality was accepted, it did not mean that the executives departed from the standards of good faith or of impartiality that would be observed by a person of moral integrity.

3.117 Further, there is the risk that trials would become the scene of an unseemly battle of the experts over how corrupt another country really is. There is the associated risk that different juries will come to different conclusions on this question, as on the question of whether particular kinds of payments are or are not bribes. This would create unwelcome confusion for businesses seeking to do business in the countries in question.

3.118 We hope that our revised definition of bribery will bring the simplicity and clarity that the Criminal Bar Association and the Law Reform Committee of the Bar Council would like to see in the definition of the offence. We hope that our revised definitions will do this without importing some of the problems attendant upon using terms such as "dishonesty" to set limits to the offence.

Conclusion on the basic definition of the breach of duty

3.119 We have given reasons for disagreeing with the alternative formulations offered by the judges, and by the Bar. Nonetheless, we entirely accept the force of the argument lying behind those formulations, namely that the law must be clear as well as simply expressed. We believe that our recommendations strike an acceptable balance between the need for simplicity of expression, and the need for certainty in obligation.

[71] See Part 5 below.

Escaping the confines of "legal or equitable duty": bribery and fraud

THE ANALOGY BETWEEN BRIBERY AND FRAUD

3.120 The first advance that needs to be made, for the reasons given by consultees (discussed earlier),[72] is to ensure that our understanding of the element of wrongfulness in R's offence escapes the limitations of a model centred on "legal or equitable duty" (or the like). In re-formulating the definition, for the reasons explored in the CP,[73] we must also continue to avoid the limitations of the principal and agent model that arbitrarily restricts the scope of the present law. In order to improve on our provisional proposals in this respect, we have turned to the approach adopted in the "abuse of position" offence of fraud under section 4 of the Fraud Act 2006.

3.121 Section 4 of the Fraud Act 2006 covers cases in which D dishonestly abuses a "position" in which he or she is "expected to safeguard" financial interests. The language used in section 4 has attracted some criticism, on the grounds of its vagueness.[74] It was proposed in the Standing Committee that "expected to safeguard" be replaced by "under a fiduciary duty", for reasons of clarity and certainty. Most importantly, this proposal was ultimately rejected on the basis that the proposed amendment would draw the offence too narrowly. Examples were given of possible cases that should be regarded as fraud, which it was argued fell outside the ambit of fiduciary duty.

3.122 This rejection of the legal term "fiduciary duty" is highly significant. In the CP we rejected reliance on some existing private law concepts, such as "principal" and "agent", in part for essentially similar reasons: avoiding undue narrowness and technicality. The question is now whether we should carry through the logic of that approach, and avoid reliance on the civil law concepts of "legal or equitable duty".

3.123 Parliament has taken the view that section 4 satisfies the need to strike the right balance between the requirements of justice and of certainty when defining the conduct element of a fraud offence. In the closely allied field of bribery, we believe that our understanding of improper conduct in the context of the giving and receipt of advantages must strike a similar kind of balance. In seeking to do this, we believe that it would be best to avoid reliance on civil law concepts, and (as under section 4 of the Fraud Act 2006) leave more to the common sense of the jury.

3.124 Such a revision of approach is important, not least because there will inevitably be some overlap between fraud offences and the revised general offence of bribery. The offence created by section 4 provides an example of this. It provides that D is guilty of fraud if he or she:

> (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

[72] Paras 3.88 to 3.98 above.

[73] CP paras 4.14 to 4.43.

[74] Standing Committee B, cols 11 to 28 (20 June 2006). See also D Ormerod, "The Fraud Act 2006 – Criminalising Lying" [2007] *Criminal Law Review* 193.

(b) dishonestly abuses that position, and

(c) intends, by means of abuse of that position –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to the risk of loss.

(2) A person may be regarded as having abused his position even though his or her conduct consisted of an omission rather than an act.

There is no further definition in the Act of any of the terms used above.

3.125 Under section 4, abuse of a position in which someone was expected to safeguard another's financial interests may well be undertaken in exchange for an advantage conferred. In such instances, the offence may be bribery as well as fraud, although the offences will also diverge at a number of points, as we pointed out in the CP.[75] Overlapping in terms of scope between offences is not, as such, a weakness in the criminal law, not least because in practice it may be impossible to ensure that the boundaries between related offences are precisely contiguous. However, this is a point worthy of further exploration.

THE OVERLAP BETWEEN BRIBERY AND FRAUD

3.126 As we pointed out in the CP,[76] there is already a substantial overlap between fraud and bribery under the existing law. When a financial gain is made "corruptly", it may amount to fraud, or bribery, or both, depending on the circumstances. An example in which both offences may be committed would be where P pays R a secret commission to accept P's bid for a contract, when it would have been in R's employer's financial interests that someone else be awarded the contract. In this example, R's employer is the victim of fraud, but the payment in exchange for the favour is also bribery.

3.127 These long-standing overlaps have not caused significant problems, nor been the subject of judicial or other criticism. This is despite the fact that there is currently a significant "perverse incentive" to charge fraud instead of bribery in the most serious cases, because the maximum penalty (10 years' imprisonment) is higher than it is for bribery (7 years' imprisonment). In that regard, it is important to note that this perverse incentive will be removed if our recommendations are enacted, because we are recommending the same maximum sentence (10 years' imprisonment) for both fraud and bribery.[77]

[75] See the CP, Appendix E.

[76] See the CP, paras E.14 and following.

[77] See Recommendation in Part 9 below.

3.128 There will continue to be a legal distinction between fraud and bribery, in that fraud requires proof of dishonesty, whereas that is not an element of our recommended bribery offences. It may be that this will prove to be enough to sustain a distinction between the offences that can form the basis of developing prosecution policy. However, at least some instances of bribery involve dishonesty, so there will continue in practice to be overlap between them.

3.129 We have considered whether more could be done in law to distinguish bribery from fraud, and if so, whether the gains made by distinguishing the offences would outweigh any countervailing considerations. We have concluded that, where bribery and fraud overlap, it would be best to leave guidance on the question of which offence should be charged to those responsible for developing prosecution policy.

3.130 In broad terms, fraud is concerned with the making of certain kinds of dishonest gain.[78] If an abuse of position is involved in the making of the gain it will be purely a means to an end and not intrinsic to the very nature of the wrong. For example, D may use his or her position as a trusted employee to defraud his employer. However, if D believes that he or she can equally well or better defraud the employer by other means, D may adopt those means instead. The means adopted will not affect the fact – if fact it be – that the employer has been defrauded.

3.131 By way of contrast, in bribery cases, whilst R may be concerned with making a gain, if there is no abuse of position entailed in making the gain, no bribery can be committed. Likewise, P and R may commit bribery, because an abuse of position is involved, even though there is no fraud. This could happen if, for example, P bet R £1000 that R (who is trusted with full access to his or her firm's computers) would not dare to expose poor data security at R's firm by downloading and sending some data to a newspaper, and R accepted the bet.

3.132 We believe that these kinds of considerations may be helpful to prosecutors in developing a policy on when bribery and fraud respectively should be charged.[79] However, we have concluded that it would not be right to introduce greater complexity into the new law by seeking to carve out a clear distinction between these offences in law.

The wrongfulness element in R's conduct: general considerations

3.133 In the CP we called the duties of impartiality, of trust, and of acting in someone's best interests "secondary" duties.[80] What we meant was that they can arise on particular facts, and be superimposed on a (primary) legal or equitable duty or set of duties the person in question is there to perform. Under our revised scheme, these concepts – good faith, impartiality, and a position of trust – become central to the wrong of bribery itself, in much the same way as being in a position where one is expected to safeguard another's financial interests is central to the "abuse of position" offence under section 4 of the Fraud Act 2006.

[78] Or the dishonest imposition of loss, or exposure to the risk of loss.

[79] Of course, it would be possible to charge both bribery and fraud on the same indictment.

[80] CP para 4.113.

3.134 By analogy with section 4 of the Fraud Act, it will be for the tribunal of fact to decide whether there was an "expectation" that R would act in good faith or impartially, or in accordance with a position of trust. These concepts should not be given a technical legal gloss. They should be treated as ordinary concepts, although it will be for the judge in any Crown Court case to rule that there is evidence on which a properly instructed jury could find the element proven.[81]

3.135 We will now show how we see each of these concepts operating in context.

Expectations relating to good faith, to impartiality and to a position of trust

3.136 If the definition of R's conduct element were left simply as "an improper breach of duty", it would in our view be too wide and uncertain in scope. As we indicated in the CP, in the interests of certainty and predictability, there is a need to specify what is involved in a corrupt or improper breach of duty.[82]

3.137 It was recognised in the Fraud Act 2006 that there are different manifestations of acting in a criminally fraudulent way, each of which require definition in the interests of certainty (abuse of position; failure to disclose information one ought to disclose; making a false representation).[83] Similarly, there is a need to specify to some extent the kinds of conduct that, if the other elements of the offence are proved, will amount to bribery.

3.138 What are these kinds of conduct? In the CP we identified the relevant conduct as being a breach of a legal or equitable duty, involving (i) betrayal of a relationship of trust, or (ii) breach of a duty to act impartially or in the best interests of another. We asked consultees whether the formula could be improved on.

3.139 Of those consultees who addressed the issue, 14/23 thought that our formula could not be improved on, and there was no real agreement amongst those who suggested changes as to what those changes should be. A majority of legal practitioners who commented on this proposal (along with the Police Federation) agreed with it (6/9) as did a majority of business organisations (5/6). However, beyond saying that they agreed, these consultees did not subject our conceptual structure to any significant analysis.

3.140 We believe that improvements can and should be made. For example, we believe that we were too hasty in rejecting the "breach of good faith" notion that was at the heart of the Transparency International Bill.[84] There can be circumstances in which someone acts in bad faith that should be covered by the concept of improper conduct in any bribery offence. These circumstances may not overlap with the circumstances in which someone is required to be impartial,[85] or is occupying a position of trust.

[81] This point is discussed in paras 3.170 to 3.179 below.

[82] Beyond knowing that it must be in connection with trade or business activity or the performance of a public function: see para 3.3 above.

[83] See the Fraud Act 2006, ss 1 to 4.

[84] See the discussion in the CP, paras 4.136 and 5.36.

[85] See para 3.108 above.

ACTING IN GOOD FAITH

3.141 The expectation that someone will act in good faith was at the heart of the Bill presented to Parliament by Transparency International. It can have an important role to play in circumstances where impartiality and a position of trust are not necessarily at issue. It might be said that someone who acts impartially, or abides by their position of trust, necessarily acts in good faith. Whilst that will doubtless normally be true, whether it is always true is not an easy claim to assess, and it is not necessary to pass comment on it here. However, in the converse case, there will be instances in which someone should act in good faith, without impartiality or a position of trust being in issue:

Example 3L

R is P's former tutor, but has now retired from his post. P was not a good student, but needs a glowing reference from R if she is to have any chance of securing a lucrative job. P promises R a large sum of money if R will write such a reference for P. R agrees.

3.142 In this example, as in the similar one provided earlier,[86] R is no longer under an active duty to his own employer to provide an accurate reference respecting P, as he is no longer employed. It would also be misleading to say that R is in a "position of trust" with respect to anyone to whom P submits the reference, even though the person in receipt of the reference will normally trust R to be telling the truth about P. A "position" of trust normally involves more than a simple expectation that someone will tell the truth or be unbiased in their judgment.

3.143 Similarly, and by way of contrast with the earlier example, it would not be right to say that R is under a duty to be impartial. R has not been asked objectively to compare two candidates for a job, in which case an expectation that R will be impartial may arise. Referees are entitled and expected to be to some extent "partial", speaking in favour of those for whom they are writing references.

3.144 We believe that the best way to describe what R has done in this example is act improperly by failing to write a reference in good faith.[87] R has not merely been offered remuneration for his time and trouble, which would be perfectly consistent with acting in good faith. R has been paid to write what R knows is a misleadingly positive reference for P. Whilst prospective employers expect referees to be favourable to those for whom they write references, they expect opinions and judgments to be given in good faith, in the belief that they represent the truth. Knowing that this is what employers will expect from a referee, particularly from a former teacher, R fails to act in accordance with an expectation of good faith, when writing the misleading reference for P.

[86] Para 3.96 above.

[87] Clause 3(3).

Example 3M

The CEO of a major company is asked to assess the merits of taking over a smaller company. Her counterpart at the smaller company is keen that the takeover should go ahead. So, the latter offers the CEO of the larger company a substantial payment if she will recommend to her shareholders that the takeover goes ahead. The CEO accepts the offer.

3.145 In this example, it might be artificial (albeit not impossible) to describe the CEO's duty to the shareholders as one of "impartiality" in making her assessment. This is because the shareholders may legitimately be guided by the CEO's own views one way or the other, and are not necessarily looking solely for an objective presentation of the pros and cons on which they will then pass judgment. It seems more natural to describe the CEO's essential duty as one of acting in good faith when reporting on the merits of the takeover.

3.146 An expectation that someone will act in good faith may exist notwithstanding a contractual freedom to act otherwise:

Example 3N

An agent invites bids from contractors on behalf of a principal. The principal has told the agent that, if a large enough sum of money is offered "under the table" by one of the contractors to secure the contract, it may be awarded to that contractor. The agent agrees to split the sum in question with the principal.

3.147 In this example, for obvious reasons there will be no breach of a duty owed by the agent to the principal if the agent accepts money from a contractor to award the contract. Even so, we believe that it should be open to the jury to find that, in the circumstances, there was an expectation that the agent would act in good faith in dealing with all the contractors during the bidding process. It would be open to the jury to take the view that, unless the agent informed all bidders for the contract what they might really have to expect to pay to secure the contract, the agent did not act with the good faith expected of him or her in the circumstances.

3.148 It is perhaps arguable that there is also a conspiracy to defraud innocent contractors in this example; but that is not in itself a reason to prevent the law of bribery also having an application. In any event, it would be easy to imagine very similar circumstances in which there was no such conspiracy, and the law of bribery would be needed. An example might be where the principal simply tells the agent that he or she tolerates bribery during bidding processes, without making a specific agreement with the agent that the latter should accept a bribe in any given instance.

3.149 It might be said that in these kinds of cases there is also an expectation that the agent will act impartially, as between the bidders, and so a requirement of good faith need not be in issue. The point is not a crucial one, because the prosecution would be entitled to rely on a failure to do as expected either in terms of acting in good faith or impartially (or of both), in any bribery prosecution. Even so, it is probably not right to say that private companies must act "impartially" when assessing competing bids for a contract.[88] That sets the level of duty too high in a commercial context, as compared with the position of (say) a judge deciding between competing claims.

3.150 Some cases of doing the "right thing for the wrong reason" will be caught by this category of bribery. We discussed these cases in the CP.[89] An example might run as follows:

Example 3O

P knows that R is likely to favour P's bid for a contract, over the bids of competitors. P sends R £10,000 to "make sure" that R favours P's bid, even though P knows that R is meant to evaluate the bids in good faith. R knows he is sure to accept P's bid in any event. R banks the £10,000 without authority from his employer.

3.151 In this example, if P's competitors understood the bidding process to be "above board", then the tribunal of fact is likely to find that there was an expectation that R would act in good faith in assessing the merits of the bids. Accordingly, even if the £10,000 plays only the most minor role in R's thinking, that may be enough to ensure that the decision failed to live up to the expectation that R would act in good faith in deciding between the bids. It will be a matter for the tribunal of fact.

3.152 In the unlikely event that, in a case like this one, the jury cannot be sure that the advantage played a motivating role in R's conduct, however slight, it will usually be the case that R will in any event have assisted or encouraged P's attempt to commit bribery. This will happen if R indicates to P a willingness to accept the advantage before P's bid is accepted. Moreover, under our recommendations it would be open to the jury to find that, in virtue of the position R held, it was improper in and of itself to accept the £10,000 irrespective of any impact it may have had on R's thinking.[90] Therefore, the law will not usually lack adequate resources to secure R's convicted for a bribery-related offence in such circumstances.[91]

[88] See para 3.145 above.

[89] CP paras 4.77 to 4.83.

[90] Clause 1(3).

[91] Of course, P may confer the advantage after the licence has been granted, as a "reward". This situation was dealt with at paras 3.48 to 3.50 above.

REMAINING IMPARTIAL

3.153 The need for impartiality in the bribery context is most commonly associated with the duty of a judge to decide a case according to its merits. However, an expectation that someone will be impartial may arise in a broad range of activities where wholly objective judgment or advice on the merits is called for.[92]

3.154 One example would be that of a private mediator seeking to help the parties to reach a settlement out of court. Of course, such a person is entitled to fees agreed by the parties. However, if it turned out that the mediator was accepting lavish hospitality or extra income from one party without the knowledge or consent of the other party, that would severely compromise the expectation that the mediator impartially search for a willingness to compromise or for common ground between the parties. In such an example, of course, the mediator's good faith may also be called into question.

3.155 A mediator is in one sense in a position rather like that of a judge, in that he or she is a third party employed to bring an independent perspective to bear on a dispute, with a view to bringing it to an end. However, duties of impartiality may arise in other private law contexts. An example would be that of a trustee of a discretionary trust required to distribute income on the basis of need as between the beneficiaries.

A POSITION OF TRUST

3.156 In employing the concept of a "position of trust",[93] we do not wish to place special reliance on the *legal* concept of trust, for the reasons given earlier.[94] We have in mind something that may be found to exist on particular facts, like the "position in which [R] is expected to safeguard, or not to act against, the financial interests of another person", for the purposes of section 4 of the Fraud Act 2006. A betrayal of a position of trust in this broader sense is what is capable of amounting to improper conduct, for the purposes of bribery.

3.157 It follows that a "position" of trust should not be construed narrowly as if it was a recognised "relationship" of trust, such as exists between banker and client, doctor and patient, and so forth. People can be in a position of trust in some respect (say, with regard to access to documents or premises) whatever the nature and level of their duties.

3.158 In the CP, we were concerned to exclude breach of some legal duties from the scope of the bribery offence.[95] Simple breaches of contract, or tortious wrongs, were examples:[96]

[92] So, clause 3(4) speaks in general terms of an expectation that someone will behave impartially when performing a function or activity.

[93] Clause 3(5).

[94] See para 3.88 onwards, above.

[95] See CP paras 5.29 to 5.49.

[96] CP para 5.32 to 5.45.

Example 3P

P offers to pay R, a security guard, a higher salary if R will leave his or her existing job at the end of the shift to come to work for P.

3.159 This should not be regarded as bribery, even though it involves inducing R to breach a legal duty (a contractual duty), for a financial advantage. However, our recommended approach avoids over-complicating the law by seeking to specify which breaches of the civil law are, or are not, capable of amounting to bribery. Under our recommended approach, R will not be guilty of bribery in this example, because there is no basis for saying that R was in a "position of trust", so far as staying on in his or her job is concerned.

3.160 Contrast this example with the following example, also discussed in the CP:[97]

Example 3Q

A security guard is paid to look the other way while someone from a rival company sifts through confidential information about the guard's employer.

3.161 Unlike the last example,[98] this is a candidate for a bribery prosecution. It would ultimately be a matter for the tribunal of fact, but security guards should be in a position of trust, so far as their employer's interests in the security of their premises and the contents of those premises are concerned. A different example would be that of a traffic warden with regard to his or her employer's interests in law enforcement. It ought to amount to bribery to accept payments from motorists not to issue them with parking tickets.

3.162 These are examples where there is an exchange of advantage (from P) for favour (provided by R). To anticipate our later discussion of paths to liability,[99] if P offers R an advantage, and R accepts, R is liable by virtue of the combined effect of clause 1(2) or 1(4), clause 3(5) and clause 3(6)(a).[100] R has agreed to receive or accepted an advantage in exchange for the improper performance of a function or activity: clause 1(2) or 1(4).[101] That function or activity is one relating to a position of trust: clause 3(5). Finally, there has been a breach of an expectation associated with the position of trust (clause 3(6)(a)).

3.163 However, in some instances it will be the very occupation of a position of trust that makes it wrong – improper behaviour – for someone to request or accept certain kinds of advantages, irrespective of whether any favour is asked for or provided in return. Two examples would be a senior civil servant accepting a "thank you" payment, and a trust manager requesting a financial advantage from beneficiaries.

[97] CP para 5.41.

[98] Para 3.158.

[99] Para 3.193 below and following.

[100] See para 3.194.

[101] Which of these clauses is in issue depends on whether R has performed, or merely intends to perform, his or her function improperly.

3.164 The same analysis can be applied in the case of a judge who, long after the end of the dispute, accepts the gift of a chalet at a ski resort from the successful litigant. This is not a breach of an expectation of "impartiality", because that notion has no real application when there is no dispute in issue before the judge. Although it is a marginal case of "bribery", it is a case where it is improper for someone, in virtue of the position that they hold, to accept an advantage.

3.165 All the latter cases – civil servant, trust manager, judge – are caught by the combined operation of clauses 1(3), 3(5), and 3(6)(a). In short, R accepts the advantage in circumstances where to do so, given the expectations associated with the position of trust that R holds, constitutes improper conduct in itself.

3.166 An important point about positions of trust, specifically addressed in the draft Bill,[102] is that it can amount to a betrayal of trust that one acted for the wrong reason, and not solely that one's action was in itself wrong. In other words, acting in accordance with a position of trust does not mean simply conforming one's conduct to an external requirement, such as issuing a visa at a particular time to a particular person, awarding a contract to the highest bidder, or making a grant from a fund to a beneficiary entitled to it. It may in some instances mean avoiding doing these things for the *wrong reason* (an advantage offered or provided), even if in themselves they are the right things to do.

3.167 Normative rules, concerned with what one "ought" to do, include the reasons for which one acts as well as the actions in themselves.[103] Whereas this is implicit in the very nature of acting in good faith or impartially, we believe that it needs specifically to be provided for when the prosecution seeks to rely on breach of an expectation that someone will act in accordance with a position of trust.

3.168 An example would be one in which an official always intended to issue a passport to someone on a particular day, but is paid to issue it on that day by the applicant. In such an example, R behaves "improperly", in breach of a position of trust, if part of the reason for issuing the passport that day is the advantage provided by the applicant. Another example would be one in which the CEO of a major public company (R) has already decided to sign a contract merging his company with another company, but is then secretly paid a large sum by the other company to sign the contract. In this example, likewise, if receipt of the advantage plays a role – such as reinforcing R's resolve – in the signing of the contract, then R will be in breach of his position of trust within the company.[104]

[102] Clause 3(7)(b).

[103] Joseph Raz, *Practical Reason and Norms* (1990), 11 to 12.

[104] It is important to note that in both of these examples, if the payment played no part at all in motivating R's conduct, R may still be guilty of bribery. R will be guilty in accepting the payment, if accepting it would in itself constitute breach of a position of trust: clause1(3). This is a conceptually separate basis on which R may be guilty of bribery, even if in practice it is likely to overlap with the situation described in the text.

3.169 A small minority of consultees would have preferred at least some public servants, like judges, to be dealt with through specific clauses rather than through the application of general principles such as betrayal of a "position of trust". We address this argument below.[105] In short, we believe that it is simpler and clearer to have a law of bribery based on sound general principles applied by the tribunal of fact to particular cases. The criminal law of bribery should not, even in part, take the form of a disciplinary code directed at (particular kinds of) public officials.

Leaving the matter to the jury

3.170 In the CP we proposed that the question whether there had been a legal or equitable duty of the relevant kind should be one for the judge.[106] The jury would decide only whether, on the facts, there had been a breach of the duty.

3.171 There was no specific question asked of consultees about this (the nature of the judge/jury divide), but it was disliked by the Council of Circuit Judges, and by the judges in the higher courts. Both groups thought that the whole issue of whether there was a duty, and if so whether it was breached, should be one for the jury. They thought that the role of the judge should be confined to deciding whether the facts were capable of giving rise to such a duty. This view takes on particular significance in the context of our recommendation that the test for the "expectation or betrayal" element of P's conduct should be one where the ordinary meaning of words – "expectation", "good faith", "impartiality", or "position of trust" – is applied by the jury to the facts.

Analogous approaches in other areas of the criminal law

3.172 There are other examples in the criminal law where there is reliance on the common sense of the jury rather than on legal definition. In particular, the notion that the judge rules on whether facts are capable of giving rise to a duty of some kind, and the jury decides whether in fact there was a duty (and a breach thereof), is a notion applied in other areas of the criminal law where what are also regarded as civil law concepts are in issue.

3.173 This is how, for example, the duty of care concept is approached in cases of manslaughter. The jury decides not only whether there was such a duty but also, if so, whether there was a grossly negligent breach of it. The (non)-existence of the duty is not regarded as one for the judge.

[105] Para 3.212 onwards.

[106] CP, para 5.26.

3.174 An example is provided by *Willoughby*.[107] D and V spread petrol around D's property, with the intention of burning down D's property and claiming on D's insurance policy. When the petrol ignited, V was killed. D's conviction for gross negligence manslaughter was upheld. It had already been decided that there was no place for the doctrine of "ex turpi causa" in the law of gross negligence manslaughter.[108] In *Willoughby*, the Court of Appeal said, "whether a duty of care exists is a matter for the jury once the judge has decided that there is evidence capable of establishing a duty."

How the jury is to approach the issue

3.175 We are persuaded that a jury will be perfectly capable of deciding whether or not there was an expectation that R would act in good faith or impartially, or was in a position of trust, and if so, whether R failed to live up to expectations or betrayed the position of trust.

3.176 How is a jury to decide on the content of that expectation, on what was in fact expected of R in the circumstances? At the outset, we said that the expectation in question is that which would be had, in the circumstances, by people of moral integrity.[109] Again, it will be for the tribunal of fact to decide what that expectation amounted to, in the circumstances.

3.177 Not much is needed by way of elaboration. In Crown Court trials, we are content that the way in which this standard is put to the jury is left to the judge. Accordingly, we have not set the requirement out in the draft Bill. However, it is important to say something about its role. This is because it is not necessarily to be identified with the question whether the members of the jury would, in R's shoes, have regarded themselves as obliged (not) to behave in a certain way.

3.178 We have stressed the importance of ensuring that the question whether bribery has been committed is not made to turn on what happens to be accepted practice in particular countries (or regions).[110] We believe that the law should not open the door to advice to jurors that a case should turn on whether – had they been in R's shoes – they would have regarded it as expected that the prevailing practice (however corrupt) about accepting advantages in the country or region in question would be followed. We believe that the best way to do this is to require the jury to consider not what they themselves might, in certain circumstances, have done in R's position, but what they believe that a person of moral integrity would have regarded as (im)permissible, in R's shoes.

3.179 However, we will not make a specific recommendation about this matter, because it is essentially one to be worked out through the development of guidelines for judges directing juries in bribery cases.

[107] [2004] EWCA Crim 3365, [2005] 1 WLR 1880

[108] *Wacker* [2002] EWCA Crim 1944, [2003] QB 1207. Very broadly speaking, the doctrine of "ex turpi causa" prevents liability arising where the claim arises out of illegal activity in which someone was engaged.

[109] Para 3.10.

[110] See paras 3.114 to 3.117 above.

ILLUSTRATIVE DIFFICULT CASES

3.180 Here is an explanation of how the jury might approach two difficult cases:

Example 3R

R is employed by a normally reputable newspaper as a financial commentator. The newspaper's proprietor makes it clear to R that she does not mind if R supplements his low salary by taking payments from companies to promote their financial products. R receives a large payment from company P to promote their life insurance product. R writes an article comparing other life insurance products unfavourably with P's, but adding in conclusion that, "of course anyone reading this would be crazy to trust my judgment!"

3.181 In this example, R would normally be under an express or implied duty to his employer not to promote particular products in exchange for money. In this case, his employer has made it clear that there is no such duty. Under the existing law, and under the approach in the CP, that would be the end of the matter, and neither R nor the proprietor could be convicted of bribery. However, under our revised approach, which seeks to escape the confines of principal-agent disloyalty as the basis for bribery, the employer's connivance at R's conduct does not put an end to the case for establishing bribery on these facts.

3.182 We believe that it should be open to the jury to find that, given R's role as a writer for the newspaper, R was expected to act in good faith (or impartially), when recommending one financial product over another. R could, of course, claim that the rider he added to his recommendation meant that he was under no such duty, or not in breach of such a duty. It would be for the jury to decide whether the expectation of good faith or impartiality nonetheless existed, and was breached. The test would be whether someone of moral integrity would not have done as R did.

3.183 Here is another example:

Example 3S

Company C tells an employee, R, to do "whatever it takes" to secure a reliable supply of widgets for C from Blueland. To that end, R attends a trade fair in Blueland. At the trade fair, P is representing company D. D's widgets are advertised by P in the normal way, but P also says to each person expressing an interest – including R – that D is "very flexible indeed" in terms of what they will do to secure business. R is told by P that D prefers to "make it personally worth their while" for contractors to agree to purchase widgets from D. R agrees on behalf of C to purchase widgets from D.

3.184 In this example, it is perfectly possible that C will claim that it was not intended that R accept bribes in exchange for contracts, and will hence claim that R was acting independently if any bribes were accepted to secure contracts. If that claim is believed, then R as an individual, but not C, can be convicted of bribery under our scheme by virtue of clause 1.[111]

3.185 R may claim that he was only acting on C's instructions in accepting any bribe, where necessary to do business. That, in itself, *may* be a good defence for R, if it means that there is no breach of any expectation of good faith, impropriety or trust. If R *was* acting on C's instructions, and it is only C's expectations about R's conduct that matter in the circumstances, R clearly cannot commit bribery. Quite simply, there will have been no breach of any relevant expectation about R's conduct. However, it may not be only C's expectations about R's conduct that count, in setting the standards of conduct that R is expected to observe. R's claim to be acting on C's instructions is much less likely in itself to be a good defence if, for example, the well-understood working rule at the trade fair was that payments should not be offered to individual contractors or accepted by them, in exchange for business. In such circumstances, an expectation about the standards of conduct R must observe may have arisen quite independent of C's expectations.

3.186 Alternatively, R may claim that it was never his or her intention to accept a "bribe" from anyone, but simply to accept the terms most favourable to C when entering into contracts. If true, this would be a complete answer to a charge of bribery. The jury would have to be persuaded that the truth of the matter was that R showed that he was prepared to go to lengths to secure a contract that included improperly accepting payments for himself to sign contracts on C's behalf.

3.187 Whether it was improper for R to accept payments offered by P might depend on a number of factors. For example, as already indicated, it might depend on the standards of business ethics generally observed at the trade fair in Blueland. Alternatively, it may depend on the terms of the contract between C and R.

Conclusion on the nature of "improper" conduct

3.188 We believe that there is sufficient clarity and certainty in the notions of a failure to act in accordance with an expectation of good faith or of impartiality, or in accordance with a position of trust, as the defining features of "improper conduct" for the purposes of the law of bribery. We believe that these notions give people adequate guidance on what conduct is to be avoided. Our attempt in the CP to provide greater certainty, by making these notions secondary duties arising once a breach of a (primary) legal or equitable duty had been established, was in our view unsuccessful. Neither prosecutors nor judges supported it, because whatever extra certainty may have been created (and that is hard to measure), came at the cost of significant extra complexity and lack of clarity.

3.189 As the Council of HM Circuit Judges rightly said in their response, at some point the law must rely on the common sense of juries. If it does not, the irony is that the law may become too complex for juries to understand and apply.

[111] If it can be proved that R improperly agreed to accept a payment from P, it will not be necessary to go on to show that such a payment was in fact made: clause1.

R's awareness of the wrongful nature of his or her conduct

3.190 Amongst consultees who addressed the matter, there was strong support (8/9) for the view that it should be immaterial whether or not R was aware that the relevant action he or she performed was improper. Consequently, our draft Bill is silent on this issue. There is enough justification for regarding R as guilty of a bribery offence if R fulfils both the basic and the wrongfulness elements of the offence as we have defined them.

The link between the giving of the advantage and the impropriety

3.191 It should be irrelevant that R's act, contrary to the expectation in question, is not the one P intended the giving of the advantage to bring about. This is really a matter of common sense. 10/10 of consultees who addressed the matter agreed with the proposition. P may ask R to do a particular improper thing in exchange for an advantage, but R may realise that only by doing something else improper will P's ultimate aim be achieved. This should not affect the liability of either P or R. The wording of clause 1(2) to 1(5) achieves this result.

3.192 Secondly, it should not matter that someone other than R performs or is to perform the function or activity improperly. An example might be where P pays R to breach a duty of good faith, but the breach comes about when R orders one of his or her employees to do the act requested by P (for which the employee – who may remain innocent – is not rewarded). In this kind of example, it should be the fact that P has paid for a breach of duty that is crucial, not that R is the one who is him- or herself to breach the duty. Clauses 1(2) to 1(6) achieve this result.

Paths to the commission of bribery by R

3.193 R may commit bribery in one of two main ways, both of which we have included under a single "umbrella" offence. Broadly speaking, first, R may offer to or actually engage in a misuse of his or her position in exchange for an advantage ("doing P a favour"). Secondly, R may misuse his or her position simply by asking for or accepting an advantage in the first place ("compromising R's position"). A certain amount of complexity is involved in capturing all the forms in which these two ways of committing bribery may be manifested.

3.194 First, there are the "advantage in exchange for favour" cases. Under our recommendations:

(a) Either the advantage (or the prospect thereof) must be a reward for improper conduct,[112] or

(b) the advantage (or the prospect thereof) must be requested, agreed to or accepted with the intention that improper conduct will be performed,[113] or

(c) the improper conduct must be engaged in, in consequence of or in anticipation of, a request, agreement to or acceptance of the advantage.[114]

[112] Clause 1(4).

[113] Clause 1(2).

3.195 Secondly, there are the "compromise of R's position" cases. Under our recommendations the request for, agreement to accept, or acceptance of the advantage must in itself constitute improper conduct.[115]

3.196 In relation to both these ways of committing bribery "improper" conduct means the performance of a function or activity contrary to an expectation that R would act in good faith or impartially, or in accordance with a position of trust.[116] In that regard, a function or activity can be performed contrary to an expectation relating to a position of trust if it is performed because of the advantage (to be) conferred – in other words for the wrong reason – even if R does not behave differently in performing the function or activity.[117]

3.197 These key elements of the offence are at the heart of bribery as a form of wrong. We have divided them into four separate cases in the draft Bill.[118] Bribery can be committed at R's (as well as P's) initiation, as well as when R enters into a transaction with P. Improper conduct may come before the advantage is conferred, and the other way around. We believe that the law will be clearer if the key ways in which the offence can be committed are separately set out.

3.198 The first case (Case A) is where R requests, agrees to receive or accepts an advantage intending that, in consequence, a relevant function or activity will be improperly performed.[119]

3.199 The second case (Case B) is where R requests, agrees to receive or accepts an advantage and the request, agreement or acceptance in itself amounts to the improper performance of a relevant function or activity.[120]

3.200 The third case (Case C) is where R requests, agrees to receive or accepts an advantage as a reward for the improper performance of a relevant function or activity.[121]

3.201 The fourth case (Case D) is where, in anticipation of, or in consequence of, R requesting, agreeing to receive or accepting an advantage, a relevant function or activity is improperly performed.[122]

[114] Clause 1(5).

[115] Clause 1(3).

[116] Clauses 3(3) to 3(7). We have thought it right to indicate by express provision that the improper "performance" of a function or activity can come about through a failure to perform the function or activity, as well as through a positive act of impropriety (clause 3(6)(b)). The use of the unusual term "performance", rather than "act", to describe the relevant aspect of R's conduct element is what led us to believe that this would be appropriate.

[117] Clause 3(7).

[118] Clause 1(2) to clause 1(5).

[119] Clause 1(2).

[120] Clause 1(3).

[121] Clause 1(4).

[122] Clause 1(5).

3.202 In the CP, we concentrated on the classic case of bribery, in which P provides R with an advantage in exchange for a favour that (as P knows) R is improperly to provide for P. In the classic case, the assumption is that the role of the advantage to be provided by P is to motivate R to provide the favour. However, our scheme would not be wide enough if it extended only to such situations. In particular, it ought to be regarded as bribery in some situations that R's request for, agreement to receive or acceptance of the advantage is in itself a manifestation of impropriety, irrespective of whether there is a favour sought by P in exchange for the advantage.[123] Here are two examples:

Example 3T

R is a senior civil servant who has been working to secure a trade agreement between Britain and a foreign government. Her efforts ensure that agreement is reached. Some time later, the foreign Government sends R £10,000 as a "thank you" for all her efforts. R banks the cheque.

Example 3U

R is the manager of a charitable trust with a number of organisations who are beneficiaries. R has been a very successful manager but believes that he or she is underpaid for the work he has done for the trust. As R's income for acting as a manager cannot easily be increased using the proper procedures, R asks the head of each of the beneficiary organisations for a contribution from their funds to increase his income.

3.203 These two examples show that, both as regards the public and the not-for-profit sector, it may be necessary to catch within the scope of the offence the request for or receipt of advantages that are not provided in exchange for favours. The conduct in question may in some instances, such as Example 3T,[124] be caught by other offences, such as misconduct in a public office; but that is also true in the classic cases of bribery, which may involve fraud.

3.204 Under our recommended scheme, these examples will fall within the scope of bribery, but the path to liability through the draft Bill will take a slightly different course from that which is followed in a classic case. This can be explained as follows, assuming in both instances that the conduct in question meets the threshold condition.[125]

[123] This point was forcefully made to us by Professor Alldridge. See now Peter Alldridge, "Reforming Bribery: Law Commission Consultation Paper 185 (1) Bribery Reform and the Law Commission – Again" [2008] *Criminal Law Review* 671, 677 to 679.

[124] Para 3.202 above.

[125] See para 3.3 above.

3.205 In the classic case (Case D),[126] P pays R for a favour which it was or is improper for R to provide. One example would be where P pays R to rig a bidding process in P's favour. Another example would be where P pays R to move P up the list of priorities for the grant of planning consent. In such cases, R's conduct will be wrongful in that it breaches an expectation that R will act in good faith or impartially. R's normal path to liability will then be as follows:

> First, clause 1(5) of the draft Bill is satisfied if R accepts an advantage and in consequence engages in the improper performance of a relevant function or activity.
>
> Next, clause 3(3) or 3(4) will be satisfied if the activity in question is one R was expected to perform respectively in good faith or impartially, and
>
> Clause 3(6)(a) also needs to be satisfied. It will be satisfied if R did not live up to expectations (or promised or agreed not to), so far as one of the expectations in 3(3) or 3(4) is concerned (clause 3(7)(a)). These are the expectations that the function or activity is performed in good faith or impartially referred to above.

3.206 It is important to stress that this is by no means the only path to liability that a classic case might follow. However, it is likely to be the typical path.

3.207 By way of contrast, in the case where it is in itself improper for R to request, agree to receive or to accept the advantage (Case B in the draft Bill)[127] the wrongful nature of R's conduct lies in the request, the agreement or the acceptance, as such. The examples, given earlier,[128] involving respectively the civil servant and the trust manager, will in all probability follow this path to liability. In such cases, R's conduct will be wrongful in that it breaches an expectation that R will act in accordance with a position of trust. The typical path to liability will be as follows:

> First, clause 1(3) is satisfied if R requests, agrees to receive or accepts an advantage, and the request, agreement to receive, or acceptance itself constitutes the improper performance of a function or activity mentioned in clause 3.
>
> Clause 3(5) is satisfied if R, in performing a relevant function or activity, is in a position of trust by virtue of performing it.
>
> Clause 3(6)(a), must also be satisfied. It is satisfied if what was done breached an expectation arising from R's position of trust. Such an expectation may concern (clause 3(7)(b)) the manner in which, or the reasons for which, the relevant function or activity will be performed (3(7)(b)).

[126] Clause 1(5).

[127] Clause 1(3).

[128] Para 3.202 above.

3.208 In the examples given above,[129] both the senior civil servant and the trust manager are highly likely to be found by the tribunal of fact to be in positions of trust by virtue of performing their respective functions (clause 3(5)). That almost certainly means that the tribunal of fact will conclude that a mere request for, agreement to receive, or acceptance of the advantage in question had in itself the potential to be the improper performance of a relevant function or activity (clause 1(3)(b)). It seems equally likely that the tribunal of fact will further find that, in the circumstances, the request for or acceptance of the advantage was as such (clause 3(6)(b)) a breach of an expectation as to the manner in which the function would be performed (clause 3(7)(b)).

3.209 It is through this route that R becomes liable in the case where R requests or accepts a 'facilitation payment' to do what is in any event his or her duty. Even if R was doing only what he or she was bound to do, clause 3(7)(b) extends the scope of 'improper' conduct to conduct undertaken for the wrong reason (even where that reason is only a minor reason). The acceptance of a payment in these circumstances would mean that R's conduct would almost certainly be undertaken for the wrong reason.

3.210 Once again, it is important to emphasise that this is not the only path to liability that such cases might take. A certain amount may depend on differences in the circumstances.

3.211 For example, had the senior civil servant in Example 3L[130] been promised the £10,000 in advance, if negotiations ended successfully, this might have cast doubt over whether she was playing her role in the negotiations with the complete good faith required in the circumstances. That being so, the path to liability might have been the same as for the classic example, given above.[131] This is because the implication might be that R was now biased in favour of P when conducting the negotiations, thus making the case one of exchange of advantage for favour.

ARE "PUBLIC SERVANTS" IN A SPECIAL POSITION, JUSTIFYING A DISCRETE OFFENCE?

3.212 The foregoing analysis draws no distinction between public servants and the private sector, in determining the limits of the offences of bribery. Instead, there are simply different paths to liability, some of which are especially suited to, but by no means confined to, those who hold public office.[132] Nonetheless, we ought to say something about the common view that – as the present law does – a distinction should be drawn between offences applicable to the public sector and offences applicable to the private sector.

3.213 In the CP, we provisionally proposed that no distinction within the general offence of bribery should be drawn between the private and the public sector, even though some public officials should certainly never accept advantages of any kind other than those due under their contract of employment. 20/24 consultees agreed with this proposal.

[129] Para 3.202 above.

[130] Para 3.202.

[131] Case D, para 3.205 above.

3.214 The Association of Chartered Accountants agreed with that provisional proposal, as a matter of principle, although they said that it should be recognised that commission of bribery in the public sector was by its nature more serious. On a similar line, Peters & Peters said that the moral difference between private and public sector bribery was not sufficient to justify a different legal test, although Professors Green and Alldridge, and the Council of HM Circuit Judges, disagreed. Some consultees pointed to the difficulties in identifying the "public" sector for the purposes of distinguishing it from the private sector. Peters & Peters wondered, for example, whether the charitable or "not for profit" sectors would be included within any special offence by those who advocated the creation of one. A similar point was made by the Ministry of Defence Police about corruption in relation to private finance initiatives and public-private partnerships.

3.215 Naturally, there is an argument that "public servants" should in no circumstances accept advantages from people with whom they have dealings in an official capacity, and that the acceptance of advantages by public servants should in itself be a criminal offence. That argument is perhaps less persuasive than it at first sight appears to be. As we have ourselves indicated,[133] it is no easy matter to identify, without arbitrariness, who will and who will not count as a "public servant".

3.216 As some of our consultees pointed out, so many more private individuals and organisations are now contracted to provide public services, or to provide services to the private sector that have a "public interest" element to them.[134] In the private sector, the acceptance of advantages in doing business may be perfectly acceptable in many contexts. How, then, should such people or bodies be treated, if there is to be a separate bribery-related offence focused on the "public" sector? The fact that there is now so much more private sector provision of goods and services in the public interest, makes it hard to argue that no one should ever accept advantages in any form, simply because what they do involves a public service dimension.

3.217 In any event, under our recommendations, if the request for or acceptance of an advantage came in circumstances involving a breach of a position of trust, such conduct would fall within the scope of the offence. Further, there is and will continue to be an offence of misconduct in a public office.[135] It may be that that offence can be applied, in appropriate circumstances, to the wrongful acceptance of advantages in breach of a contract involving public office, whether or not there was a betrayal of trust, or a breach of an expectation of good faith or impartiality.

[132] See the analysis at paras 3.193 to 3.211.

[133] Paras 3.18 to 3.20.

[134] See para 3.19 above.

[135] For discussion of this offence, see Archbold (2008 ed), para 25-381.

3.218 This is significant, in that, where public office holders are concerned, it might be thought not to matter a great deal whether or not they misconduct themselves in exchange for an advantage. It is enough that they have misconducted themselves, whatever the reason was.[136]

Recommendations

3.219 **The prosecution must show that R requested, agreed to receive or accepted an advantage intending that, in consequence, a relevant function or activity should be performed improperly, whether by R or by another (Case A).**[137]

3.220 **Alternatively, it must be shown that R's request for, agreement to receive or acceptance of the advantage itself constituted the improper performance of a relevant function or activity (Case B).**[138]

3.221 **Alternatively, it must be shown that R requested, agreed to receive or accepted an advantage as a reward for the improper performance of a relevant function or activity (Case C).**[139]

3.222 **Alternatively, it must be shown that, in anticipation of, or in consequence of R requesting, agreeing to receive or accepting an advantage, a relevant function or activity was performed improperly by R, or by another at R's request or with R's assent or acquiescence (Case D).**[140]

3.223 **The impropriety in the performance of the function or activity must be shown to have turned on an expectation that R will act in good faith, or impartially.**[141]

3.224 **Alternatively, the impropriety in the performance of the function or activity must be shown to have turned on an expectation that relates to a position of trust which R held by virtue of performing that function or activity.**[142]

3.225 **It must be shown that there was a breach of an expectation that R will act in good faith or impartially, or in accordance with his or her position of trust.**[143]

[136] Assuming that it was not a reason with full justificatory or excusatory effect.

[137] Clause 1(2).

[138] Clause 1(3).

[139] Clause 1(4).

[140] Clause 1(5).

[141] Clause 3(3) and 3(4).

[142] Clause 3(5).

[143] Clause 3(6); clause 3(7).

A "SHORT FORM" SUMMARY OF P'S AND R'S OBLIGATIONS

3.226 There will almost inevitably be some legal complexity to crimes designed not just to replace the common law in its entirety (as well as older statutes), but also to catch sophisticated kinds of transaction or interaction that may have been structured in order to conceal the wrong that the crime seeks to prohibit. Having said that, it ought to always be possible to capture the essence of a criminal wrong both in plain language and in a short form, so that adequate guidance can be given to those who do not, unlike lawyers dealing with legal cases, need to know the full legal details.

3.227 In that respect:

(1) We believe that it will generally be sufficient guidance to those in a position to make payments to say:

> Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position.

(2) We believe that it will generally be sufficient guidance to those in a position in which they may receive payments (or other favours) to say:

> Do not misuse your position in connection with payments (or other favours) for yourself or others.

PART 4
BRIBERY OF A FOREIGN PUBLIC OFFICIAL – THE BACKGROUND TO AND DEFICIENCIES OF THE CURRENT LAW

4.1 This Part considers the provisions of Part 12 of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act"), which sought to fulfil the UK's international obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Convention").[1] It highlights the main requirements of the OECD Convention and sets out Parliamentary background to Part 12 of the 2001 Act; it then considers the deficiencies in the current law in order to demonstrate why the current law on bribery of a foreign public official is not satisfactory.

THE UK'S OBLIGATIONS UNDER THE OECD CONVENTION

4.2 The OECD Convention entered into force on 15 February 1999 and requires signatory states to establish under their domestic law the offence of bribery of a foreign public official.[2] The basic obligation under Article 1, which our recommended offence is intended to meet,[3] is as follows:

> 1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
>
> 2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
>
> 3. […]
>
> 4. […]

[1] The issue of bribery of a foreign public official was addressed in Part 7 of the CP: Reforming Bribery (2007) Law Commission Consultation Paper No 185.

[2] www.oecd.org/dataoecd/4/18/38028044.pdf.

[3] As described in Part 5 below.

4.3 The OECD Convention targets “active" bribery only. That is to say that it is only the payer of the bribe who is caught, not the public official in receipt of the bribe. Paragraph 3 of the Commentaries on the Convention also makes it clear that “Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws”.[4]

4.4 Article 2 of the OECD Convention extends the ambit of the offence to bribery of foreign public officials committed by legal persons:[5]

> Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

4.5 Articles 3 to 17 are concerned with wider issues relating to the application and enforcement of the offence and the practical implementation of the OECD Convention.[6] However, Part 5 of this report is confined to the formulation of the substantive offence, designed to meet the core obligations under Articles 1 and 2.

THE CURRENT LAW

The Parliamentary background

4.6 In order to ensure UK compliance with the OECD Convention, the Government inserted Part 12 into the Anti-terrorism, Crime and Security Act 2001. Part 12 came into force on 14 February 2002 and its purpose is summarised in paragraph 32 of the Explanatory Notes to the Act:

> Part 12 brings in provisions to strengthen the law on international corruption. The sections put beyond doubt that the law of bribery applies to acts involving officials of foreign public bodies, Ministers, MPs and judges; and to “agents” (within the meaning of the 1906 Act) of foreign “principals”. They give courts jurisdiction over crimes of bribery committed by UK nationals and UK incorporated bodies overseas. There is also a technical provision, to ensure that the existing presumption of corruption in the Prevention of Corruption Act 1916, which it is intended to abolish, does not apply any more widely as a result of these new provisions.

[4] The Commentaries can be found at the link in n 2 above, after the text of the Convention.

[5] Part 6 contains our recommendations on corporate liability for bribery of a foreign public official.

[6] Article 3: Sanctions; Article 4: Jurisdiction; Article 5: Enforcement; Article 6: Statute of Limitations; Article 7: Money Laundering; Article 8: Accounting; Article 9: Mutual Legal Assistance; Article 10: Extradition; Article 11: Responsible Authorities; Article 12: Monitoring and Follow-up; Article 13: Signature and Accession; Article 14: Ratification and Depositary; Article 15: Entry into Force; Article 16: Amendment; Article 17: Withdrawal.

4.7 The 2001 Act itself was passed in response to the terrible events of 11 September 2001.[7] Although the connection between the threat of terrorism and the need for the UK to satisfy its international bribery obligations is not immediately apparent, it was maintained that "corruption engenders the conditions that cause terrorism and allow it to flourish".[8] The inclusion of the provisions contained in Part 12 was approved without difficulty: "there was agreement between the three main parties that those measures were not controversial because everybody had argued for them and they were potentially linked to terrorism".[9]

4.8 Part 12 was intended as a temporary measure, pending the introduction of comprehensive corruption legislation. The Privy Counsellor Review Committee stated in a report in 2003, which monitored the ongoing application of the 2001 Act, that:

> It is welcome that these measures, which have little direct bearing on terrorism, but are in themselves largely uncontroversial, are going to be repealed and replaced in their proper context, the Corruption Bill, which is currently subject to consultation [sic].[10]

4.9 The lack of progress made by the Corruption Bill has meant that the provisions of Part 12 continue to govern the current law.

The Part 12 provisions

4.10 The method by which Part 12 sought to meet the requirements of the OECD Convention was by widening the scope of the existing offences to include extra-territorial bribery.

4.11 Section 108 of the 2001 Act extends the application of the common law and statutory bribery offences to include bribery of persons and bodies outside or with no connection to the UK:

> (1) For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.
>
> (2) In section 1 of the Prevention of Corruption Act 1906 (c 34) (corrupt transactions with agents) insert this subsection after subsection (3):
>
> (4) For the purposes of this Act it is immaterial if:

[7] The long title states that it is "an Act to amend the Terrorism Act 2000; to make further provision about terrorism and security; to provide for the freezing of assets; to make provision about immigration and asylum; to amend or extend the criminal law and powers for preventing crime and enforcing that law; to make provision about the control of pathogens and toxins; to provide for the retention of communications data; to provide for implementation of Title VI of the Treaty on European Union; and for connected purposes".

[8] *Hansard* (HL), 27 November 2001, vol 629, col 152, by Lord Rooker.

[9] Orders of the Day, *Hansard* (HC), 19 November 2001, vol 375, col 57, by Simon Hughes MP.

[10] Anti-terrorism, Crime and Security Act 2001 Review: Report (2003) HC 100, para 415.

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

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

(3) In section 7 of the Public Bodies Corrupt Practices Act 1889 (c 69) (interpretation relating to corruption in office) in the definition of "public body" for "but does not include any public body as above defined existing elsewhere than in the United Kingdom" substitute "and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above".

(4) In section 4(2) of the Prevention of Corruption Act 1916 (c 64) (in the 1889 and 1916 Acts public body includes local and public authorities of all descriptions) after "descriptions" insert "(including authorities existing in a country or territory outside the United Kingdom)".

4.12 The extension to encompass cases with the necessary "foreign" element would then include instances of bribery committed by legal persons, as mandated by Article 2 of the OECD Convention, because "person" is defined in Schedule I to the Interpretation Act 1978 as "includ[ing] a body of persons corporate or unincorporate".

4.13 Section 109 of the 2001 Act establishes jurisdiction over bribery offences committed abroad by UK nationals or bodies incorporated under UK law:

(1) This section applies if:

(a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and

(b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).

(2) In such a case:

(a) the act constitutes the offence concerned, and

(b) proceedings for the offence may be taken in the United Kingdom.

(3) These are corruption offences:

(a) any common law offence of bribery;

(b) the offences under section 1 of the Public Bodies Corrupt Practices Act 1889 (c 69) (corruption in office);

(c) the first two offences under section 1 of the Prevention of Corruption Act 1906 (c 34) (bribes obtained by or given to agents).

(4) A national of the United Kingdom is an individual who is:

(a) a British citizen, a [British overseas territories citizen], a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 (c 61) is a British subject, or

(c) a British protected person within the meaning of that Act.

4.14 Finally, section 110 states that the presumption of corruption is not to apply to any offences committed by virtue of the extensions made by Part 12. The reason for this, as contained in the Explanatory Note reproduced at paragraph 4.6, was that the Government did not wish to widen the application of a presumption which it intended to abolish in any event.

DEFICIENCIES OF THE CURRENT LAW

4.15 The problems of the current law on bribery generally were addressed in Parts 1 and 2 of the CP.[11] This section highlights how those difficulties have an impact on the clarity and effectiveness of the law on bribing foreign public officials. An important role in assessing this impact is played by the OECD's Working Group on Bribery in International Business Transactions ("the WGB"). Its task is to monitor compliance with the OECD Convention, and it is therefore well placed to comment on the weaknesses of the current law in fulfilling the UK's obligations.

4.16 The WGB assessed the changes made by Part 12 of the 2001 Act in its Phase 1 bis review of 3 March 2003.[12] Whilst acknowledging the "very significant steps" taken by the UK, there remained some "areas of uncertainty".[13] Consequently, the Phase 1 bis report recommended that the UK "enact a comprehensive anti-corruption statute" to clarify the law.[14]

4.17 Two years later, on 17 March 2005, the WGB published a Phase 2 report,[15] which reassessed the state of implementation and, in particular, the actions taken to remedy the uncertainties highlighted in the earlier Phase 1 bis report. However, with the progress of the Corruption Bill having stalled, the WGB noted that:

> since Phase 1 bis the United Kingdom has not enacted any new foreign bribery offence. The Working Group therefore recommends that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official.[16]

[11] Reforming Bribery (2007) Law Commission Consultation Paper No 185.

[12] www.oecd.org/dataoecd/12/50/2498215.pdf.

[13] Above, at E(a) para 3.

[14] Above, at E(b) para 1.

[15] www.oecd.org/dataoecd/62/32/34599062.pdf.

[16] Above, at para 248.

4.18 The following subheadings summarise the "areas of uncertainty" left by the 2001 Act which it is hoped our recommendations would remedy.

The agent/principal relationship

4.19 Section 108 of the 2001 Act extended the territorial application of the Public Bodies Corrupt Practices Act 1889 ("the 1889 Act"), the Prevention of Corruption Act 1906 ("the 1906 Act"), and common law bribery. While bribery of a foreign public official would most likely be prosecuted under the 1889 Act or at common law, it is at least possible that such cases could be brought under the 1906 Act. For example, if the person bribed were an official working for a public international organisation, it is not entirely clear that the public international organisation would be regarded as a "public authority" for the purposes of the 1889 Act. By contrast, a prosecution could be brought under the 1906 Act, since the official would be an "agent" within the meaning of that Act. This would require conceptualising bribery as an agent's betrayal of his or her principal's trust.

4.20 There are two main strands of criticism of the agent/principal model. First, "principal" may not be an accurate way to describe the victim, such as where the person who suffers loss and whose trust is betrayed is not the same person as the "principal". Secondly, the agent/principal model fails where there is no personal victim or principal at all, such as where the person committing bribery is a worker in the public sector and does not owe a duty to any identifiable individual. The criticisms of the model were reproduced in CP[17] and the vast majority of our consultees agreed that it should be abandoned. Yet, while the 1906 Act is in force, there remains the risk that it could lead to interpretations that are not compliant with the OECD Convention. In particular, the WGB was concerned that foreign public official "agents" might seek to raise as a defence the consent of the person conceived to be their "principal".[18]

[17] CP, paras 4.14 to 4.43.

[18] Phase 2 report, para 182. This was despite the assurances of the UK authorities, noted at para 182 of the Phase 2 report, that a defence of consent would have "no basis in current UK law".

Uncertainty within and inconsistency between definitions

4.21 The current law lacks an autonomous definition of "foreign public official". The 2001 Act has simply prefixed the "foreign" extension to the existing "public officers", "public bodies" and "agents" capable of being bribed. This uncertainty could give rise to instances of bribery contrary to the OECD Convention which are not caught by the current range of definitions,[19] or which are more difficult to prosecute precisely because of the difficulties of interpretation.[20]

4.22 In a similar vein, the WGB expressed discomfort at having to assume that the different formulations of the nature of the bribe[21] or the methods for giving or obtaining it[22] would satisfy the "offer, promise or give any undue pecuniary or other advantage" proscribed by the OECD Convention.[23]

Application to intermediaries and third party beneficiaries

4.23 The Serious Fraud Office emphasised in its response to the CP that cases of bribery where payments are made through intermediaries are frequent and difficult to investigate and prosecute. Also, it should make no difference that the beneficiary of the corrupt transaction is a third party, which could be commonplace where multiple companies are involved. Although the current law is probably sufficiently flexible to deal with these scenarios, the WGB and some of our consultees[24] felt that they should be outlawed expressly. At the least, the current law may be open to criticism for not being clear on these points.

Possible inadequacies of corporate criminal liability

4.24 While convicting a legal person for bribery of a foreign public official is possible under the current law, it is not easy. The problems associated with attribution of corporate criminal liability are considered in detail in Part 6, but suffice it to say that the obstacle they present to the prosecution of bribery means that

[19] Phase 1 bis report, pp 13 to 14; Phase 2 report, para 183. Again, this was despite the assurance of the then Attorney General when s 108 of the 2001 Act was being debated in the House of Lords that the extension to the current law would "cover all the categories of public officials that the OECD Convention require[s]": *Hansard* (HL), 4 December 2001, vol 629, col 818.

[20] For example, it might be argued that MPs are excluded from the ambit of the Prevention of Corruption Acts on the basis that they are not "agents" under the 1906 Act and the Houses of Parliament are not "public bodies" under the 1889 Act. On the other hand, the UK authorities cited to the WGB the case of *Greenway and others* (Central Criminal Court, June 1992), which did not proceed to full trial but which was presided over by Buckley J, as supporting the view that MPs would be caught at common law as "public officers". See the Phase 2 report, fn 126.

[21] "Any undue reward" at common law; "any gift, loan, fee reward, or advantage" under the 1889 Act; and "any gift or consideration" under the 1906 Act.

[22] "Offering" at common law; "give, promise, or offer" under the 1889 Act; and "gives or agrees to give or offers" under the 1906 Act.

[23] Phase 1 bis report, p 14; Phase 2 report, para 181.

[24] Phase 2 report, paras 187 to 188; responses of Corner House and Transparency International (UK) in particular.

> in present cases of corruption it is extremely difficult to prove corporate responsibility. Accordingly, it is mainly individuals who tend to be prosecuted.[25]

4.25 Although it is not disputed that the doctrines of criminal corporate liability are far from perfect, a separate question is whether the OECD Convention obliges the UK to reform them. Article 2 requires that the UK "in accordance with its legal principles … establish the liability of legal persons for the bribery of a foreign public official". On a straightforward understanding, this is already the case: the legal principles apply, even if they do pose evidential difficulties. However, the interpretation adopted by the WGB[26] further requires that those legal principles be effective principles in practice. This important issue is also addressed in Part 6.

Consent to prosecution

4.26 Article 5 of the OECD Convention forbids considerations of international relations or economic interest to influence the investigation or prosecution of bribery of a foreign public official.[27] Our recommendations concerning prosecutorial decision-making are contained in Part 9 below.

[25] Consultation response of the Serious Fraud Office.

[26] Phase 2 report, paras 195 to 206.

[27] Phase 2 report, paras 168 to 177.

PART 5
A DISCRETE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

INTRODUCTION: A NEW OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

5.1 In order to meet our international obligations to deter and punish corrupt transactions taking place overseas, section 108 of the Anti-terrorism, Crime and Security Act 2001 extended the law of bribery so that it applies to acts of bribery taking place outside the UK. As a way of meeting our international obligations, that approach is in some respects over-broad, and in some respects too narrow.

5.2 The current approach is broader than is required to meet our international obligations, in that it extends the law of bribery taking place outside the UK beyond the business contexts that are the focus of our international obligations. It is too narrow, in that it carries over into the domain of international corruption all the deficiencies of the existing (domestic) law of bribery, such as the principal/agent restriction.[1]

OVERVIEW OF OUR CONCLUSIONS

5.3 In our view there should be a new, discrete offence of bribing a foreign public official, covering advantages given to third parties at the foreign public official's request or with their assent or acquiescence.

5.4 In this Part, we explain this recommendation, which is meant specifically to meet our international obligations to deter and punish corrupt transactions in an international business context. The overwhelming majority of consultees who addressed this issue (16/19) agreed that this would be the right approach.

5.5 Clause 4 of the draft Bill sets out the main elements of the discrete offence as follows:

> (1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
>
> (2) P must also intend to obtain or retain –
>
> (a) business, or
>
> (b) an advantage in the course of business.
>
> (3) P bribes F if –
>
> (a) directly or through a third party, P offers, promises or gives any financial or other advantage, either to F or to another person at F's request or with F's assent or acquiescence, and

(b) the advantage is not legitimately due to F, or (if offered, promised or given to another person as mentioned in paragraph (a)) it would not be legitimately due if offered, promised or given to F.

(4) If the law applicable to F permits or requires F to accept a particular financial or other advantage, it is legitimately due.

5.6 There will also be a defence in clause 5:

(1) It is a defence to a charge under section 4 to prove that P reasonably believed that what P did was required or permitted under the law applicable to F (as defined in section 4).[2]

This defence is discussed in Part 7 below.[3]

5.7 There are provisions in clauses 4 and 6 to ensure that the offence can be committed if part of the conduct element takes place in England and Wales, or even if the offence takes place entirely outside the United Kingdom. In the latter case, it must be shown that the acts done would have constituted an offence under the Act if done in England and Wales, and that P satisfies certain criteria. These are criteria such as being a British citizen, or being a body incorporated under the law of any part of the UK.[4]

5.8 "Foreign public official" is defined in clause 4(6) of the Bill. It obviously includes anyone holding legislative, administrative or judicial positions, but it extends to cover someone exercising a public function for a foreign country or territory, or for one of that foreign country or territory's public agencies. It also includes officials of public international organisations, which are themselves defined in clause 4(7).[5]

THE PROVISIONAL PROPOSALS IN THE CP

5.9 In Part 7 of the CP, we provisionally proposed that there should be a discrete offence of bribery of a foreign public official. Our reasons are set out in paragraphs 7.2 to 7.5 of the CP. The reasons for confining the offence to bribery of foreign public officials are set out in paragraphs 7.7 to 7.14 of the CP.

5.10 With regard to the elements of the discrete offence, we provisionally proposed that it should be an offence if:

(1) in order to

(a) obtain business;

1 See the discussion in the CP, paras 4.14 to 4.43.

2 Discussed at para 5.133 below.

3 See paras 7.22 to 7.44 below.

4 For the full list of qualifying criteria, see clause 6 of the draft Bill and Part 8 below.

5 For the definition of foreign public official, see the discussion starting at para 5.120 below. For officials of public international organisations, see para 5.130 and following.

(b) retain business;

(c) obtain or retain a business advantage;

(2) P gives, offers or agrees to give an advantage to or for any person, being an advantage to which the recipient or intended recipient is not legitimately due, and

(3) P does so

(a) intending to influence that person or another person in respect of any act or omission by that person or another person in his or her capacity as a foreign public official; or

(b) realising that there is a serious risk that the advantage will influence that person or another person in respect of any act or omission by that person or another person in his or her capacity as a foreign public official; or

(c) intending to influence a third party to use their influence over another person in respect of any act or omission by that person or another person in his or her capacity as a foreign public official.

5.11 The discrete offence, as set out in the CP, would require the prosecution to prove, first, that P intended[6] the advantage to influence the conduct of the FPO in his or her capacity as an FPO and, secondly, that the advantage that P conferred was "not legitimately due". Whether the conduct of the FPO that the "undue" advantage was intended to influence would constitute a breach of any duty under the law of the FPO's country would be irrelevant. So, the fact that the FPO's conduct would not constitute a breach of any duty would not in itself prevent P being convicted.

THE RESPONSES OF CONSULTEES TO THE CP

Those in favour of a discrete offence

5.12 A substantial majority (16/19) of the responses that addressed the issue agreed that there should be a discrete offence of bribery of a foreign public official. The Serious Fraud Office said that the reasons set out for a discrete offence were "compelling". Transparency International (UK) "commends" the proposals in Part 7 of the CP, adding that, with some reservations, it thought that the wording of the Commission's proposal was "an improvement upon the wording in the TI Bill's discrete offence".

5.13 A number of consultees stressed that having a discrete offence would be a visible sign of the UK's commitment to ensuring compliance with the international Conventions to which it is a signatory. For example, Colin Nicholls QC and his colleagues thought that a foreign bribery offence could "properly be criminalised within a generic definition" but that creating a distinct offence would have:

[6] Or foresaw a serious risk that the advantage would influence the FPO.

> the advantage that convention obligations … can be reflected explicitly by the use of language which mirrors the language of the conventions.

5.14 The Council of HM Circuit Judges said that there was a case for a discrete offence subject to recognising that, before such an offence was enacted, it would be necessary to ensure recognition and, more importantly, enforcement of similar principles internationally. It said that there could be serious political implications in seeking to impose criminal sanctions upon persons in the UK where competitors are not subject to the same constraints.

5.15 This point seems to go beyond the issue of whether or not there should be a discrete offence. Rather, the suggestion is that, regardless of whether there is a discrete offence, in order to protect the competitiveness of its commercial concerns, the UK should not criminalise conduct that goes beyond the minimum standards required by the OECD Convention.[7] In broad terms, we agree with that view, although it must be kept in mind that the language of the Convention is often the language of broad principle, not of precise obligation. So, there can be room for argument over what it would mean to be doing no more than the minimum required to comply with the Convention.

Those against the provision of a discrete offence

5.16 Some respondents did question the need for a separate offence. The Law Society Criminal Law Committee said that having a separate offence was not consistent with the Commission's stated aim of simplifying the law of bribery. In fairness, our recommendations, as a whole, do amount to a considerable simplification of the current law.

5.17 Having said that, it is certainly true that the OECD Convention does not *require* a separate offence. Our recommended general offences are focused on R's impartiality, good faith, or on his or her need to act in accordance with a position of trust. In that regard, paragraph 3 of the Commentaries to the Convention provides:

> … a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the public official's country.

5.18 Peters and Peters were "not sure" that the Commission had made out a sufficiently persuasive case for a separate offence. They questioned the Commission's concern that reliance on general offences of bribery for prosecuting bribery of foreign public officials would give rise to evidential problems. In fact, it may be that the general offences we are now recommending will give rise to fewer such problems than the general offence that we proposed in the CP. In that regard, it is worth pointing out that the offences, two general and one specific, would not be mutually exclusive.

[7] See para 5.2 above.

5.19 The UK Anti-Corruption Forum said that its members did not have a unanimous view as to whether there should be a discrete offence. However, even those members who did favour a discrete offence, because it would demonstrate compliance with the OECD Convention, believed that the offence should be defined in a similar way to the general bribery offence, and in particular that it should include the element of "improper act". This view was shared by the Institute of Chartered Accountants.

5.20 There is force in all of these arguments. Nonetheless, we believe that the creation of a discrete offence is the right course, for reasons given below.[8] Naturally, the separate offence of bribing a foreign public official that we are recommending, focused broadly on conferral of an advantage not legitimately due, covers much the same ground as an offence focused on directly on an "improper act". However, it does not follow that, if a particular kind of conduct should be regarded as bribery if directed at a foreign public official, it should also be bribery if directed at a private individual or company.

5.21 For example, in the private sector it may not be in the slightest way inappropriate to seek to influence someone in the performance of their duties, as by directing advertising of a product at someone who is under an obligation to buy that kind of product from a supplier. Further, in the private sector, it may be much harder to give clear meaning to the notion of an advantage not being "legitimately" due. This is one of the reasons that we rejected the "improper payment" model for the general offences of bribery.

5.22 In addition, in this context, there are reasons for using language similar to that used by the Convention, and by other countries to meet Convention obligations.

5.23 Simmons and Simmons adopted a neutral stance. From a pragmatic viewpoint, they saw merit in the creation of a separate offence. However, they had "some sympathy" for the view that, in circumstances where the accused is more likely to have been operating in an unfamiliar cultural and legal environment, it would be wrong to depart from the test for the general bribery offence.

5.24 We see the logic of this view. However, in our opinion, it would in fact be advantageous for businesses operating in an unfamiliar environment overseas to have to look for their obligations to an offence defined in language used by the applicable Convention, and followed by other countries whose businesses also may operate in that environment.

5.25 We turn to specific arguments in favour of a discrete offence below.[9]

[8] See paras 5.61 to 5.71.

[9] Paras 5.61 to 5.71.

THE UNITED KINGDOM'S INTERNATIONAL OBLIGATIONS

The OECD Anti-Bribery Convention[10]

5.26 The OECD Convention provides minimum standards for establishing criminal liability in relation to bribery of foreign public officials. Paragraph 2 of the Commentaries on the OECD Convention ("the Commentaries") states:

> This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

5.27 Parties to the OECD Convention are at liberty to impose criminal liability in respect of conduct outside that proscribed by the OECD Convention. However, if a Party does so, there is the danger that the competitiveness of its businesses and companies may suffer in comparison to the businesses and companies of Parties which are content to do no more than create offences that reflect the minimum standards set out in the OECD Convention.

The core obligation imposed by the OECD Convention

5.28 Article 1.1 of the OECD Convention requires:

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

5.29 Accordingly, there is an international obligation on the UK to make it a criminal offence for a person ("P") directly or indirectly to bribe a foreign public official ("FPO"). This is so-called "active" bribery: bribery committed by the payer. The obligation is in substance met by the definition of the offence in clause 4 of the draft Bill.

5.30 However, the OECD Convention does not require the UK to take measures to make it a criminal offence for the FPO to accept or solicit a bribe. This is so-called "passive" bribery, committed by the recipient (or the person who condones receipt by a third party), which in this context means the FPO.

[10] The Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (November 1997).

5.31 By virtue of Article 4.2,[11] the obligation under Article 1.1 extends to criminalising bribery of a foreign public official that occurs outside the UK if the act of bribery is perpetrated by a national of the UK. This is now accounted for in clauses 4(9) and 6 of the Bill.

5.32 The obligation also goes beyond the central case where P directly gives[12] an advantage to the FPO for his or her own benefit.

5.33 First, it requires coverage of cases where the advantage is given to the FPO by an intermediary acting on behalf of P. A wide range of natural and legal persons can perform the role of intermediary. Examples would be customs agents, sales representatives, consultants, suppliers, sub-contractors, joint venture partners, lawyers and foreign subsidiaries of UK companies. In addition, foreign political parties and party officials can perform the role.

5.34 Secondly, the obligation under Article 1.1 requires coverage of cases where P gives an advantage to the FPO for the benefit of "a third party". Foreign public officials may want to obtain benefits for a third party, such as a spouse, friend, business partner, a company in which the foreign public official or his or her relatives have a financial interest, a political party or a party official.

5.35 Both of these requirements are addressed in clause 4 of the draft Bill.

5.36 Article 1.4(a) of the OECD Convention provides a broad definition of "foreign public official":

> Any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

5.37 In turn, paragraphs 12 to 18 of the Commentaries define broadly "public function", "public agency", "public enterprise", "public international organisation" and "foreign country".

5.38 Clause 4 of the draft Bill broadly follows this understanding of a "foreign public official".

The limitations of the OECD Convention, and our recommendations

5.39 Central to the discrete offence as defined in the OECD Convention is the notion of an "undue" advantage, which we will also refer to as an advantage that is "not legitimately due". The OECD Convention envisages this advantage being conferred on someone who is a FPO him or herself, for his or her own benefit or ultimately for the benefit of another person. This structure sets limits to the scope of the offence that may sometimes not be defensible.

[11] "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles."

[12] Or "offers" or "promises".

FPO EXCHANGES INFLUENCE FOR AN ADVANTAGE FOR A THIRD PARTY

5.40 First, the OECD Convention does not appear expressly to cover a situation in which P advantages a third party directly in exchange for influence over the FPO, when this is at the FPO's request or with their consent. Tolerating such a major gap in the coverage of the discrete offence would not be right. It is equivalent to a case in which P has provided an undue advantage to the FPO him or herself. This is because the FPO has requested or assented to the provision of the benefit to the third party. This is conduct that is akin to the FPO accepting a benefit to which he or she is not entitled. Our definition of the discrete offence will therefore cover this situation.

THIRD PARTY ADVANTAGED, WITH A VIEW TO P INFLUENCING THE FPO

5.41 Secondly, the OECD Convention does not cover the situation in which, even though the FPO did not request or assent to this, P advantages a third party who is connected (perhaps through a family or political association) to the FPO, with the intention of later using the fact that the benefit has been provided to secure influence over the FPO. In this situation, P's provision of the benefit to the third party may in a broad sense rightly be regarded as part of a strategy corruptly to secure influence over the FPO. However, it may not involve the provision of an advantage that is "undue". There may be nothing unlawful, as such, in the provision of an advantage to the third party by P. Further, even if providing an advantage to the third party would be unlawful under the law of the FPO's state, the third party may reside in a state where it is not unlawful to ask for or to receive such advantages.

5.42 We will not be recommending that the discrete offence cover this situation. To make it do so would be to depart too far from the requirement that the provision of the advantage itself be "undue", a requirement at the heart of the OECD Convention. As we will explain below, such an extension of the offence may also leave those who (as it happens, quite properly) seek to do business with FPOs through the use of connections at risk of prosecution, or under suspicion, when they have done nothing wrong.

PROVIDING ADVANTAGES TO A THIRD PARTY TO INFLUENCE THE FPO

5.43 Thirdly, the Convention does not extend to what we referred to in the CP as the "pure trade in influence".[13] This is the situation where P provides an advantage to T, the third party, so that T will seek to use influence with a FPO to obtain or retain business for P. In such a case, the advantage provided to T may not be undue, and no advantage may ever be given to the FPO. Here is an example:

> The Government sets up an agency in Urbania to promote British companies. It is meant to be self-financing, through fees paid by firms who wish to use the agency. The agency arranges periodic meetings with FPOs in Urbania. At these meetings, the agency provides information about, and supports the services and products provided by, firms who have paid the fee.

[13] CP, paras 7.25 to 7.27.

5.44 This is generally acknowledged to be a controversial area of the law. It is discussed at some length in the Woolf Report.[14]

5.45 As we indicated in the CP,[15] the Government has exercised its right to opt out of a provision of Europe's Criminal Law Convention on Corruption that would have addressed trading in influence. Article 12 of that Convention covers:

> The promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to [in relation to the principal offence].

5.46 The Government has consistently maintained its intention not to extend the criminal law into this area, for fear that lobbyists might be caught by the expanded offence.[16] In the CP, consultees were not asked specifically for their views about this situation, although it was covered in the proposed discrete offence that was supported by a clear majority of consultees. In the example just given, the firm would have committed an offence under the proposals in the CP, because when the fee was paid, the company was, "intending to influence a third party [the agency] to use their influence over another person [an Urbanian FPO] in respect of any act or omission by that person …in his or her capacity as a foreign public official".[17]

5.47 However, we do not now believe that it would be right to make recommendations at this juncture that would undermine the point and purpose of the Government's opt-out with respect to Article 12 of Europe's Criminal Law Convention on Corruption. It will always be the case that firms sometimes seek to use personal, business or other connections to secure contracts ahead of their competitors. It is not our intention to turn the use of such connections to that end into a criminal offence. Further, we do not believe that the consultees who agreed that there should be a discrete offence of bribing a FPO were necessarily also agreeing that that offence should have such a wide application, when intermediaries are involved.

5.48 What we believe is necessary is to ensure that the discrete offence covers corrupt trading in influence. Having done that, we need to ensure that there is a clear demarcation between this kind of corrupt conduct and ordinary lobbying activity that should not be prohibited by the criminal law.

5.49 In that regard, we have found Corner House's comments on this aspect of the proposed discrete offence particularly helpful. They pointed to the US Foreign Corrupt Practices Act 1977 ("FCPA"), which outlaws the making of a payment to:

[14] Woolf Committee, *Business Ethics, Global Companies and the Defence Industry* (2008, www.woolfcommittee.com), at paras 3.34 to 3.42.

[15] CP, para 5.81 to 5.82.

[16] See the CP, para 5.86.

[17] CP, para 12.30 3(C).

> any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official… for the purposes of influencing any act or decision of such foreign official… in his official capacity [or] inducing such foreign official… to do or omit to do any act in violation of the lawful duty of such foreign official…[18]

5.50 Corner House suggested that:

> The most appropriate way in which to cover payments through intermediaries, particularly in the context where most foreign bribery is shielded through commission payments made to agents, would be to create an additional offence similar to that under the US FCPA …

5.51 We believe that we can include payments through intermediaries in a single discrete offence, but apart from that we agree that the approach of the FCPA on this point is on the right lines. The crucial point about the FCPA offence is that, although directed at payments involving intermediaries, it involves the conferral of some or all of the advantage on the FPO. It does not cover a pure trade in influence, where the FPO is persuaded to do something but not through the conferral on him or her of any advantage. The discrete offence that we are recommending will cover instances in which an advantage is given to an intermediary but the FPO receives some of the (or additional) advantage.

5.52 By taking this approach, a clear line is drawn in the right place. There are cases in which agents (intermediaries or lobbyists) are paid simply to persuade FPOs to award contracts, and so forth: this will be a legitimate practice. Then there are cases in which such third parties are paid to pass on advantages to FPOs to influence their decisions: this will be an illegitimate practice.[19]

ADVANTAGE EXCHANGED FOR INFLUENCE WITH PROSPECTIVE FPO

5.53 Finally, the OECD Convention does not cover the situation in which P provides R with advantages to secure influence with R, if and when R becomes a FPO (when R is not yet a FPO). It is perhaps surprising that this situation is not covered by the Convention. The point at which candidates (perhaps, from countries where corruption is regarded as acceptable) are seeking high office within, say, a public international organisation, would seem to be a good time at which to seek influence over them through the provision of advantages. As Professor Zerbes has said of the OECD Convention:

> Perhaps a little surprisingly, persons who apply for office within the civil or public service … are not regarded as, de facto, carrying out public functions. This is the case notwithstanding the obvious public profile of such offices and their proximity to the state.[20]

[18] FCPA, 78dd-2(a)(3).

[19] Assuming, of course, that the conferral of the advantage on the FPO in such circumstances is not required or permitted by the law of the land governing the FPO.

[20] Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 67.

5.54 An important point about this kind of case is that it will not be easy to identify a clear sense in which a payment was "undue". Consider the following example:

> F is shortly to become King in place of his brother in Urbania. Before the brother abdicates in F's favour, P pays F a large sum of money to ensure that, when F becomes King, F will reward P with lucrative contracts.

5.55 Even if it is right to describe P's conduct as unethical in this situation, there may be difficulties in determining in law how F's conduct can be regarded as involving the making of a payment that was not legitimately due. In any event, in other cases where F is a candidate for office-holding with a public international organisation, one could argue that it is a situation best addressed though the threat of dismissal, or other action in civil law, if and when it is subsequently discovered that F (now a FPO) accepted an advantage in exchange for influence before taking up office. Of course, whilst that would deal with the person who became a FPO, it would leave the corrupt payer free from the prospect of a deterrent sanction.

5.56 However, it may be that the general offences of bribery that we are recommending would cover both P and F in such cases. This would be so if, for example, P gave an advantage in exchange for influence to F, at a point in the appointment process where it could be said that F was expected to act in good faith in dealing with his or her prospective employer.[21]

5.57 Consequently, we are not recommending that the specific offence be extended to cover prospective FPOs.

FPOS AND FOREIGN POLITICAL PARTIES

5.58 Although Article 1.4(a) provides a broad definition of "foreign public official", it does not include foreign political parties or foreign political party officials. This might be thought to be a strange omission. In single political party states there is clearly the potential to bribe political party officials in order to obtain advantages in the conduct of international business.

5.59 Even so, we will not be recommending that the discrete offence covers this kind of case. There is too great a risk that all advantages conferred in order to secure influence with politicians on certain issues will be turned into bribes. The taking of such a large step, in a highly controversial area, is more appropriately considered as part of a review of standards in public life, and not as part of the reform of the law of bribery.

5.60 Having said that, the way in which clause 4 of the draft Bill seeks to implement the general policy of the Convention would ensure that the following cases are covered:

(1) P uses a foreign political party or a foreign political party official as an intermediary to bribe the FPO, and

[21] See Part 3.

(2) P gives an advantage to the FPO for the FPO to transmit to a foreign political party or a foreign political party official.

THE CASE FOR A DISCRETE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

5.61 As we have already said, a substantial majority (16/19) of the consultees who addressed the issue thought that there should be a discrete offence of bribing a foreign public official. We believe the following important reasons support the creation of a discrete offence.

Demonstrating a commitment to our international obligations

5.62 First, consultees who supported our provisional proposal, such as the British Bankers' Association, and the Confederation of British Industry, stressed that creating a discrete offence would demonstrate not merely a symbolic but a real commitment on the part of England and Wales to meeting its international obligations. We entirely agree that this is a strong reason to create such an offence. To take an analogous situation, "torture" almost always involves the commission of an offence under the Offences Against the Person Act 1861, and "genocide" always involves murder; but the UK has nonetheless made torture and genocide offences in English law, to demonstrate its commitment to fulfil its international obligations.[22] The analogy may not be precise but the point about tangible signs of commitment is the same.

Making it easier to interpret the law in the light of international obligations

5.63 Secondly, the discrete offence is specifically focused on advantages promised to or conferred on FPOs, to obtain or retain business. Maintaining such a focus should make it easier and more straightforward for the courts to interpret the scope and nature of the offence against the evolving background of the OECD Convention. The OECD Convention is an international agreement subject to the law regulating international treaties, including the 1969 Vienna Convention on Treaties ("the Vienna Convention"). In the recent case of *R (Corner House Research and Campaign Against Arms Trade) v Director of the Serious Fraud Office and BAE Systems Plc*,[23] Lord Justice Moses referred[24] to Article 31(1) of the Vienna Convention:

> A treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in that context and in the light of its object and purpose.

[22] See, respectively, ss 134 and 135 of the Criminal Justice Act 1988, and ss 50 and 51 of the International Criminal Court Act 2001.

[23] [2008] EWHC 714 (Admin), [2008] All ER (D) 151.

[24] Above, at para 129.

5.64 Where domestic legislation is passed to give effect to an international convention, and a court needs to refer to the convention in order to interpret the legislation, "there is a presumption that Parliament intended to fulfil its international obligations".[25] A Convention is, though, commonly understood to be a "living instrument", meaning that the obligations it generates are subject to change over time in order to meet new challenges and to adapt to evolving policies. In the case of the OECD Convention, the Working Group on Bribery has the task of ensuring that the obligations under the Convention keep pace with developments in international commerce, and with changes in the nature and practice of corruption in that context (such as a change from advantages conferred in the making of contracts to advantages conferred in the fulfilment of contracts already made).[26]

5.65 A discrete offence aimed solely at giving effect to Convention obligations should make it easier for the courts confidently to interpret the language of the offence against this background, without having to be concerned about the knock-on effects for the offence of bribery as it occurs in other contexts. It is not desirable that the courts should, in interpreting an offence of bribery, be concerned at one and the same time with ensuring that the interpretation keeps the law in step with evolving international standards in a changing trans-national commercial context, and also with ensuring that the interpretation will not have undesirable ramifications for the scope of bribery in a domestic context.

5.66 Naturally, a single compendious offence could have a provision or sub-clause dealing with bribery in a commercial context which would be applicable to international business transactions. However, the difference between a single offence with specialised applications, and three distinct offences (two general, and one special), does not seem to be one of great significance. Moreover, a separate, specialised offence will be easier to adapt to practices and developments more common in the conduct of international than domestic commercial transactions, such as the use of foreign agents, and of "offset".[27]

[25] Brownlie, *Principles of International Law* (5th ed 1999) p 47. See also the statement of Lord Diplock in *Garland v British Rail* [1983] 2 AC 751, 771: "It is a principle of construction of United Kingdom statutes now too well established to call for citation of authority, that the words of a statute passed after the treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it." See also P Sales and J Clement, "International law in domestic courts: the developing framework" (2008) *Law Quarterly Review* 388, 402.

[26] See OECD, *Bribery in Public Procurement: Methods, Actors and Counter-Measures* (2007) p 23, citing evidence provided by the World Bank.

[27] The Woolf Committee defines offset as "the requirement placed on the contractor to provide industrial, commercial or other economic benefits to the recipient country as compensation for the main contract to supply…equipment or services": "Business Ethics, Global Companies and the Defence Industry" (2008) p 27: www.woolfcommittee.com. "Offset" may be beneficial to the recipient country. On occasion, however,what should benefit a community is wrongly diverted for the benefit of an individual.

Facilitating a comparative approach

5.67 Finally, by trying where possible to construct the discrete offence using language used to implement the discrete offence by other jurisdictions which are Parties to the Convention, we are hoping to make it possible for the courts to draw readily on comparative jurisprudence in interpreting the scope of the offence.

5.68 There never has been, and is unlikely to be, a very large number of bribery cases making their way to the higher courts in such a way that an authoritative interpretation of the offence or offences can be settled satisfactorily by the English courts over time. That may well be one of the problems that has led to the uncertain state of the current law, which is very infrequently litigated, decades sometimes passing between opportunities to settle meanings.

5.69 Accordingly, we believe that it would greatly assist the courts if the language of the Convention itself were adopted where possible. This would allow not only courts, but also businesses and their legal advisors, to consider the comparative jurisprudence in understanding the obligations imposed by the offence. An example is the decision of the US State Court of Appeals in *US v Kay*,[28] which held that money paid to customs and tax officials in Haiti, in order to obtain a reduction of import duties and taxes, would assist "in obtaining or retaining business".

5.70 The language of "obtaining or retaining business" is to be found not only in the US Federal Corrupt Practices Act 1977, as in this last example, but also in section 105(C)(1) of the New Zealand Crimes Act 1961, and in Division 70.2, Schedule of the Australian Criminal Code Act 1995. Similar language ("obtain or retain an advantage in the course of business") can be found in section 3 of the Canadian Corruption of Foreign Public Officials Act 1998. So, as time goes by, there is the potential for a range of comparative source material to emerge, on which the courts will be able to draw in interpreting any discrete offence using such language.

Recommendation

5.71 **There should be a new, discrete offence of bribing a foreign public official, covering advantages given to third parties at the foreign public official's request or with their assent or acquiescence.**

THE ELEMENTS OF THE DISCRETE OFFENCE

The offence itself

5.72 The essential elements of the offence were set out above.[29]

Changes in the offence from the version in the CP

5.73 The recommended offence is in two significant respects narrower than the offence proposed in the CP.[30]

[28] SD Tex, Case No H-01-914, April 16, 2002.

[29] Para 5.5.

[30] Set out at para 5.10 above.

5.74 It is narrower in that in clause 4 we have confined the fault element respecting influence sought to an "intention" to influence. We have removed the alternative possibility that P might be guilty if he or she foresaw a serious risk of influence being obtained. This respect in which the offence has been narrowed will be explained in due course.[31]

5.75 It is also narrower in that, as indicated above,[32] we have eliminated from the scope of the offence cases in which P pays T to influence a FPO, where no undue advantage is conferred on the FPO (or on someone whom the FPO wishes to benefit) at any stage.

5.76 The discrete offence necessarily comprises a number of quite complicated elements and alternatives. This is because there are a number of different ways in which unacceptable conduct involving the conferral of advantages may occur that ought to be regarded as bribery. However, in very broad terms, under our scheme people can almost always rely on a simple rule of thumb to guide them in their conduct:

> Do not intentionally give advantages to foreign public officials, to gain or retain business, without a legal justification.

Illustrating the elements of the offence

The basic case of bribery

5.77 The basic case is bribery of a FPO directly, or through someone acting in effect as an agent. There are two kinds of situation, both covered by clause 4 of the draft Bill:

(1) P offers to reward a FPO if he or she will award P a contract, which the FPO can do in his or her capacity as a FPO.[33]

(2) P entrusts a payment to Z, requesting that Z give it to such FPO as has the power to award the contract to P.

5.78 The first situation is straightforward. In the second situation, P gives the advantage to Z, but crucially it is for an FPO. P likewise seeks to influence not Z but the FPO acting in that capacity.

Requests by the FPO to benefit a third party

5.79 Here is an example:

> P is asked by a FPO to pay T a sum of money, in exchange for the FPO's award of a contract to P.

[31] Paras 5.112 to 5.118 below. See also the discussion of the same issue in relation to the general offences in Part 3.

[32] Paras 5.43 to 5.52 above.

[33] In the case where P thinks the FPO has the official power to award the contract but the FPO does not, it ought to be possible to find P guilty of an (impossible) attempt to commit the discrete offence.

5.80 In this situation, we have to assume that the laws of the FPO's country do not permit him or her to accept advantages for others, in exchange for influence. It may sometimes be the case that it is lawful for a FPO to accept advantages offered to third parties. A benign example would be where the FPO is entitled to accept donations to reputable charitable foundations in his or her country from those seeking to obtain or retain business. However, if such conduct is not permitted by law, then the conduct should be regarded as involving bribery, even though it is not unlawful for T to receive a payment from P. If such conduct were not to be regarded as involving bribery then there would be a loophole for this indirect form of bribery. Our recommendation, therefore, encompasses such conduct and clause 4 of the draft Bill gives effect to it.

Advantages "not legitimately due", and facilitation payments

The OECD Convention and the CP

5.81 At the core of the offence, Article 1.1 of the OECD Convention refers to "any undue pecuniary or other advantage". The Commentaries do not specifically refer to "undue". However, paragraphs 7 and 8 of the Commentaries provide some guidance:

> It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.
>
> It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

5.82 The first paragraph explains our provisional proposal that, for the purposes of determining whether an advantage is "legitimately due" no account should be taken of

(1) the fact that the advantage may be customary, or perceived to be customary, in the circumstances; nor

(2) any official tolerance of the advantage.[34]

5.83 It was our intention to reflect the OECD Convention minimum standard that the advantage must be "undue" and to emphasise that a payment could be "undue" despite being customary or tolerated in the country in question. In this respect, we were not proposing that the UK should go beyond the OECD minimum standard.

[34] CP, para 7.37. See, further, Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) at p 104.

5.84 Clause 4 of the draft Bill carries through this policy. In addition to using the language of advantages that are "not legitimately due", the draft Bill restricts the understanding of advantages that are legitimately due to those permitted or required by law.[35]

The OECD's and the CP's position on facilitation payments

5.85 Our approach raised the question whether so-called "facilitation payments" do or do not fall within the scope of "undue" advantages, and if they do, whether they should be specifically exempted (and if so, in what circumstances) from the category of "undue" advantages.[36]

5.86 "Facilitation payment" is not a legal term of art. The law of England and Wales does not recognise facilitation payments as a distinct category. In the CP, we said:

> It is generally accepted that a facilitation (or "speed" or "grease") payment is a payment made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform.[37]

5.87 In the CP, we said that the current law prohibits facilitation payments and that our provisional view was that they should remain prohibited.[38] In justifying our position, we set out some of the corrosive aspects of facilitation payments.[39]

5.88 The OECD's position on facilitation payments is not so straightforward. We have referred to paragraph 7 of the Commentaries[40] in which it is said that the value of an advantage conferred is irrelevant. By way of contrast, paragraph 9 of the Commentaries provides:

> Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licences or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

[35] Paras 5.80, 5.82 and 5.83 above; clause 4(4) of draft Bill.

[36] See Appendix D.

[37] CP Appendix F, para F.5.

[38] CP Appendix F, para F.9.

[39] CP Appendix F, paras F.21 to F.24.

[40] See para 5.81 above.

5.89 A number of Parties to the Convention have accordingly provided that payments made to a foreign public official in order to "expedite", "ensure" or "secure" the performance of a routine government action are not prohibited.[41] Some of those Parties expressly require that the payment is of "a minor nature"[42] or "small"[43] and some require that a record be kept of the payment.[44]

5.90 It should be noted that the OECD Working Group on Bribery has identified two problems that can arise where Parties have provided a defence for small facilitation payments:

(1) a certain level of confusion on the part of the private sector and sometimes the public sector concerning the differentiation between facilitation payments and bribes; and

(2) an absence of judicial interpretations of the scope of the defence.

The views of consultees

THE PHRASE "NOT LEGITIMATELY DUE"

5.91 Concern was expressed by some consultees about the proposed requirement that the advantage be one "not legitimately due" to the FPO.

5.92 Both the Serious Fraud Office and the Crown Prosecution Service observed that requiring that the advantage be "not legitimately due" is to make the offence one based on an improper payment. They regarded that as problematic.

5.93 According to the Crown Prosecution Service, the adoption of a different conceptual approach from that underpinning the proposed general bribery offence – the latter centred on the impropriety of conduct – would be at the expense of clarity. It would give rise to difficulties in cases where a person is charged with bribing both foreign public officials and persons who are not foreign public officials.

5.94 We understand this view, but gave our reasons for not adopting it earlier.[45]

5.95 The Serious Fraud Office's concern is that it will be difficult to establish that the advantage was "not legitimately due". Having said that, it also said that removing those words was problematic because:

[41] For example, the USA, Canada, Australia and New Zealand.

[42] Australia.

[43] New Zealand.

[44] Australia.

[45] See para 3.47 above.

> … if "not legitimately due" is removed where does the impropriety lie? It lies in the undue influence intention and not in any act. However the FCPA[46] does not demand that the value offered is "undue". It also rolls up just about everything in the intention lying behind the influence: with intent to corruptly influence … or induce a violation of duty … or secure an improper advantage. However it also includes intent "to induce an act" (in essence) for a business reason. [This] is much more wide ranging and unlikely to pass muster here.

5.96 In other words, the Serious Fraud Office is saying that one possibility, as under the Foreign Corrupt Practices Act 1977 ("the FCPA"), is to have an offence that requires neither an "undue" payment nor an intention to induce a breach of duty, but only an intention to influence for reasons connected with business advantages. However, it doubts whether that approach would be acceptable.

5.97 By contrast, Corner House supports the approach adopted in the FCPA and, like the Serious Fraud Office, believes that a requirement of "not legitimately due" will create evidential problems. They also point to the fact that the general offence of bribery proposed in the CP did not require that the advantage was "not legitimately due".[47]

5.98 The reason for relying on a requirement that an advantage be "not legitimately due" is, as explained on behalf of the OECD by Professor Zerbes, in part to respect the autonomy of states in determining when their official are legally entitled to accept advantages for themselves or on behalf of the state.[48] The Official Commentary on the anti-bribery convention itself says, "It is not an offence…if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law".[49] Most signatories to the Convention have accordingly provided that it is not illegal to provide an advantage in this situation. So far as offences applicable within a single jurisdiction such as England and Wales are concerned, there is not really a basis for regarding this justification for an "illegal payment version" as applicable to the two general offences.

FACILITATION PAYMENTS

5.99 Turning to the specific issue of facilitation payments, in contrast to Corner House, the Council of HM Circuit Judges said that serious consideration had to be given to the fact that the standards of conduct in the UK and European Union "are not universally recognised as the standards to be applied elsewhere". The Council continued:

[46] The Foreign Corrupt Practices Act 1977 is one of a number of US public bribery statutes: CP Appendix C.

[47] This is true, but the proposed general offence of bribery did require that the advantage be conferred for the primary reason of inducing a breach of duty.

[48] Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M. Pieth (ed), *The OECD Convention on Bribery* (2007), 105.

[49] Commentary 8.

> We would be concerned if the law in England and Wales results in the prosecution of a defendant in England and Wales for an offence arising from activities in a foreign jurisdiction where those activities were not criminal acts in that jurisdiction but were acts that were accepted as a normal feature of life or business in that jurisdiction.

5.100 It might be thought that what concerned them was the prospect of Z being prosecuted in England and Wales for conduct that was a normal feature of life in his or her country. However, the example that they give makes it clear that the person they had in mind was P and that they were concerned that P might be criminally liable for conferring an advantage the giving and receipt of which was "a normal feature of life" in the particular foreign country.

5.101 The UK Anti-Corruption Forum ("the Forum") distinguished between facilitation payments and bribes: a bribe should relate to the provision of an advantage for an improper act. This would include any payment that is made with the intention of inducing the recipient to give preferred treatment to the payer, for example by moving the payer up the queue or awarding a permit which is not due. It said that such payments are sometimes mistakenly believed to be facilitation payments.

5.102 The Forum said that a facilitation payment should relate to the provision of an undue advantage to induce a person to perform his duty without resulting in preferred treatment. The Forum made the point that a facilitation payment may in terms of amount be very considerable.

5.103 The Forum said that the act of making a facilitation payment was far less reprehensible than paying a bribe, because the payer will usually be the victim of extortion or be under considerable commercial or personal pressure, but it was nevertheless wrong. It considered how facilitation payments should be addressed but said that it had been unable to reach a consensus.

5.104 The Forum was nevertheless of the view that facilitation payments are wrong, even if they are, in its view, less reprehensible than bribes.

5.105 The Institute of Chartered Accountants ("the Institute") questioned the assertion in the CP that nearly all facilitation payments would be caught by an offence based on the "improper conduct" model. It said that many payments are made to simply ensure that "minor public duties are carried out at all", for example releasing goods from customs.

5.106 The Institute acknowledged that payments made simply to secure the carrying out of a public duty or function may tend to lead to a culture where they are expected universally and may grow to be unaffordable by the poor, leading to unfair social disadvantage. However, the Institute thought that there were many "grey areas" which would be inappropriately criminalised if payments, whether large or small, made to secure the performance of a public duty fell within the scope of a criminal offence of bribery.

5.107 We believe that the points made by the Forum and the Institute are well made. In fact, they advocate a view which in substance is similar to that which we put forward in the CP.[50]

Our recommended approach to facilitation payments

5.108 We believe that facilitation payments are best handled through sensible use of the discretion not to prosecute.

5.109 Whilst it will clearly be a matter for the prosecution authorities, we suggest that it will rarely be in the public interest to prosecute individuals or organisations for the payment of small sums to secure the performance of routine tasks.

5.110 In summary, we believe that it is not necessary to make special provision or exception for facilitation payments. Sensible use of prosecutorial discretion should ensure that, where no public purpose would be served by securing a conviction in respect of a facilitation payment, a prosecution is not undertaken at all.

Conclusion

5.111 The discrete offence should create no special exception for "facilitation payments", howsoever defined.

The fault element of the offence

Intention alone, not recklessness

5.112 In the CP, we provisionally proposed that the fault element of the proposed discrete offence should be either intention to influence someone in his or her capacity as a FPO or foresight of a serious risk that the advantage would influence someone in his or her capacity as a FPO.[51]

5.113 We explain, as a matter of general principle, why we are restricting P's fault element to intention in our discussion of the general offences of bribery.[52] However, it is worth reflecting on the arguments that apply in this particular context.

[50] See CP Appendix F, paras F.31 to F.37.

[51] CP, para 12.30.

[52] Part 3, paras 3.67 to 3.70.

5.114 The language of the OECD Convention is itself that of intention.[53] It is in part for that reason that, in our recommended offence, P must intend to obtain or retain business or business advantages, and must intend to influence the conduct of a FPO in his or her official capacity.[54]

5.115 It is important to remember that the offence is defined in the inchoate mode. In other words, it will suffice that P simply offered or promised to confer an advantage on a FPO. In such cases, reliance on intention alone as the fault element relating to conduct is the principled approach in English law.[55] We also believe that tribunals of fact can be trusted to deal sensibly with cases where P (falsely) claims that, in conferring an advantage to obtain or retain business, it was not actually his or her intention that a FPO should be influenced in his or her official capacity.

5.116 As indicated in our discussion of the issue in relation to the general offence,[56] we also believe that, by confining the fault element relating to P's conduct to intention, we will be promoting certainty and clarity. By including cases in which P was aware of a "serious risk" that a FPO would be influenced in his or her official capacity, the provisional proposal in the CP introduced a large measure of uncertainty into the fault element. That kind of "recklessness" may be an acceptable fault element when it is likely to be relatively easy to assess the risk that conduct will bring about the forbidden outcome, as in cases of criminal damage or manslaughter. It is a less helpful – indeed, potentially unfair - fault element when that risk is inherently likely to be harder to assess.

5.117 We believe that this context provides an instance in which it may well frequently be hard to assess whether there is a serious risk that officials will be influenced by the provision of certain kinds of advantages. For example, someone may be communicating with unknown officials remotely, or language difficulties may make it unclear what officials' attitudes really are.

5.118 We have concluded that, in this context, considerations of simplicity, certainty and fairness combine to favour a fault element confined to an intention to influence a FPO (or an intention to see that the FPO is influenced by a third party) in his or her official capacity.

[53] See para 5.28 above.

[54] Clause 4. A fault requirement of intention will capture most cases in which P foresees it as virtually certain that the advantage will influence an FPO in his or her official capacity, under the rule in *Woollin* [1999] 1 AC 82. There is every reason to think that this standard common law understanding of intention is wide enough to satisfy the Convention: see Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) pp 157 to 158.

[55] See Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183.

[56] See Part 3, para 3.68.

Recommendation

5.119 **In relation to the discrete offence it must be shown that, where P intended to obtain or retain business or an advantage in the conduct of business, P (directly or indirectly) through the provision of an advantage intended to influence the foreign public official in his or her capacity as such, in circumstances where the advantage was not legitimately due.**

Defining foreign public official

An autonomous definition

5.120 In the CP, we did not set out a proposed definition of "foreign public official". A number of consultees said that it was essential that any new offence should contain a definition of "foreign public official". Corner House said that any definition must be one that reflects paragraphs 12 to 19 of the Commentaries on the OECD Convention.

5.121 We agree that the Bill would need to define "foreign public official" and must do so in a way that complies with the definition contained in the OECD Convention. That has been the approach of many other Parties to the Convention.

5.122 Article 1.4 of the Convention, cited above,[57] provides an autonomous definition of a FPO. In other words, it is a definition that is to be followed irrespective of how particular states themselves define a FPO.

5.123 States have sometimes given more detailed consideration to these basic requirements in their law. For example, in Canada, the Corruption of Public Officials Act 1998 defines FPO in the following way:

> a person who holds a legislative, administrative or judicial position of a foreign state;
>
> a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
>
> an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

5.124 We believe that, in broad terms, the Canadian model is a sound one.

5.125 Our definition, in clause 4 of the draft Bill, is as follows:

> "Foreign public official" means an individual who –

[57] Para 5.36 above.

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(b) exercises a public function for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or for any public agency or enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

5.126 However, two issues arise out of the OECD Convention definition that are unresolved by Canadian law.

The problem of political parties and their officials

5.127 The first, discussed above,[58] is whether the definition should extend beyond the OECD Convention, to include foreign political party officials and foreign political parties. Such an extension would be of particular significance in one-party states.

5.128 The OECD is aware that the definition of "foreign public official" in the OECD Convention means that there is a gap in the coverage of bribery under the Convention. Paragraph 16 of the Commentaries provides that:

> In special circumstances, public authority may in fact be held by persons (eg political party officials in single party states) not formally designated as public officials. Such persons, through their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

5.129 There is thus no obligation on Parties to provide for the case in which P confers an advantage on a political party, or party official. We will not be recommending such an extension. It is true that the problems addressed in the Convention may well be engaged when people seek to do business with party officials in one-party states. However, it would in practice be difficult to distinguish between party officials in such states, who may or may not be able to put business someone's way in an official capacity on behalf of the state, and party officials in other states who may be perfectly entitled to accept advantages in exchange for (say) seeking greater influence within the party for the person providing the advantage. Further problems may lie in deciding when someone is, or is not, a member of a "political party".

[58] Paras 5.58 to 5.60 above.

Officials of public international organisations

5.130 The second issue concerns officials within "public international organisations". The designation of an organisation as a "public international" one is not free from difficulty. For example, under Canadian law, an organisation would be "public international" in character if formed to handle matters arising between Italy and the Vatican state.[59] Under New Zealand law, there is a more detailed definition of organisations that are public international in character. Section 105C(1) of the Crimes Act 1961 defines such organisations as an organisation or part thereof:

> (a) of which 2 or more countries or 2 or more governments are members, or represented on the organisation;
>
> (b) which is constituted by an organisation to which paragraph (a) applies or by persons representing 2 or more such organisations;
>
> (c) which is constituted by persons representing 2 or more countries or 2 or more governments.

5.131 We accept as a matter of course that the discrete offence must apply to public international organisations. The European Community (and hence its officials) is very obviously one such organisation, as are the United Nations and the OECD itself. Professor Zerbes has provided the following definition, in a commentary on the Convention:

> An international organisation can therefore be defined as an association of entities possessing either full or partial sovereignty under international law, which pursues certain common goals by means of common institutions and by means of an international treaty.[60]

5.132 Professor Bindschedler has defined a public international organisation as one:

> established and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organisation.[61]

5.133 A further problem with public international organisations is that the question whether an advantage was or was not legitimately due will turn, in the case of public international organisations, not on the ""written law", in the normal sense of state law, but on the rules of the organisation in question. These rules may not have been drafted in such a way that they can be regarded as authoritative in the same sense as state law.

[59] For further discussion, see Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007), at pp 70 to 75.

[60] Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 75.

[61] RL Bindschedler, "International Organisations, General Aspects", in R Bernhardt (ed), *Encyclopedia of Public International Law*, vol 2 (1996) p 1289.

5.134 This is, of course, a matter that cannot really be helped. It is for public international organisations to ensure that the rules governing advantages that may be accepted, or which must be refused, by their officials provide the kind of clarity that the officials themselves, as well as courts, are entitled to expect.

5.135 Bearing in mind all these considerations, our definition of a public international organisation, in clause 4(7) of the draft Bill, is as follows:

> an organisation whose members are any of the following –
>
> (a) countries or territories,
>
> (b) governments of countries or territories,
>
> (c) other public international organisations,
>
> (d) a mixture of the above.

Recommendation

5.136 **A "foreign public official" should be understood as someone who holds a legislative, administrative or judicial position of any kind of a country or territory outside the United Kingdom, or exercises a public function for or on behalf of a country or territory outside the United Kingdom, or for any public agency or enterprise of that country or territory, or is an official or agent of a public international organisation.**

Should the discrete offence also inculpate the foreign public official who accepts or solicits a bribe?

The views of consultees

5.137 In the CP, we made no provisional proposal on this issue, we merely asked the question. The majority of consultees (10/14) who answered the question thought that the discrete offence should inculpate the foreign public official.

5.138 Even were it to apply to the foreign public official, it is unlikely that prosecutors in England and Wales would resort very frequently to the offence in order to prosecute a foreign public official. However, it is not difficult to think of examples where a prosecution would be possible. The Serious Fraud Office offered two examples:

(1) The Defence Minister of a foreign state is protected by his wider family who hold other positions within the government of that state. He regularly holidays in the south of France. It would be possible to have him arrested under a European arrest warrant and tried in England and Wales.

(2) The Prime Minister of a foreign state is forced to stand down in the face of mounting domestic pressure. He flees to the UK and is living in exile. Subsequently, allegations are made that he has been involved in bribery. The briber is identified as a UK-based company.

5.139 The Serious Fraud Office added that it may be unrealistic to expect that the FPO will be prosecuted in their own country. That country may lack the resources to undertake such a prosecution, or even if it has such resources it may care little about the official's conduct. There might also be litigation advantages in making the FPO subject to potential prosecution. If the FPO was immune from prosecution, he or she might readily give false evidence to support a defence offered by P.

5.140 A number of consultees thought that, even if the number of cases where it would be possible to prosecute the foreign public official was small, that was no reason for excluding the foreign public official from the ambit of the offence. It could be, for example, that the FPO him or herself was active in seeking a bribe from someone seeking to do business in the FPO's country, and pressurised that person to provide one even though they were initially disposed not to engage in such conduct.

5.141 However, there were some consultees who opposed the extension of the offence to the FPO him or herself. The response of the Institute of Chartered Accountants was very concise: "it should not be the remit of the UK to decide what is or is not permissible to foreign public officials". The Crown Prosecution Service thought that it would be distasteful for the FPO to face criminal sanctions in England and Wales for conduct that may have been perfectly in accordance with his or her own national law. The Council of HM Circuit Judges thought that extending the law to cover the FPO would achieve little in practice.

5.142 The OECD Convention is primarily concerned with active bribery (bribery by the person who provides the advantage), and does not require states to grant themselves power to prosecute FPOs.[62] Further, it is, of course, a principle of international law that criminal jurisdiction should ordinarily be based on territory (the "territorial principle"),[63] and the UK has long been a supporter of that principle. Exceptions to the principle can sometimes be justified, and the Serious Fraud Office pointed to some advantages to criminalisation.

5.143 However, the objections or concerns raised by the Crown Prosecution Service and the Council of HM Circuit Judges have persuaded us that the case for extending the offence to cover the conduct of FPOs themselves is insufficiently compelling. As a representative of the International Chamber of Commerce (UK) pointed out to us, were the UK to depart in this instance from the territorial principle, other states – including those where trials fail to meet basic standards of fairness – would feel entitled to extend their criminal law to cover officials from the UK. We would not want to set such developments in train.

Conclusion

5.144 **The new, discrete offence should not be extended to cover conduct on the part of the foreign public official him or herself.**

[62] See the General section at the beginning of the Commentaries on the OECD Convention.

[63] Oppenheim, *International Law* (9th ed), vol 1, at p 466.

Should the offence extend to bribery of foreign private persons?

5.145 In paragraphs 7.7 to 7.14 in the CP we said why we did not think the offence should extend to bribery of foreign private persons. Two consultees questioned our thinking.

5.146 The Fraud Advisory Panel said that the experience of their members was that the distinction between public and private persons had become blurred as much state-owned business had become partially privatised (Public Private Partnerships) or fully privatised.

5.147 Professor Gaoneng Yu thought that the Commission was being inconsistent. On the one hand, we were proposing that in the domestic context the law should not draw a distinction between public and private sector bribery, partly because of the difficulty in drawing a clear distinction between the two spheres. Further, he said that identifying the legal and equitable duties of foreign private persons could be as difficult as identifying the legal and equitable duties of foreign public officials. Finally, he thought that the difficulty of non-cooperation by other states was not limited to public sector bribery.

Conclusion

5.148 We are not persuaded that the discrete offence should also extend to bribery in the private sector. It is not required by the OECD Convention. We believe that it would be better for the discrete offence to focus on foreign public officials and for the general offences of bribery to cover private sector bribery. This view is implicit in our recommendation that the new, discrete offence be concerned only with foreign public officials.

PART 6
THE LIABILITY OF COMPANIES AND LIMITED LIABILITY PARTNERSHIPS FOR BRIBERY

A NEW OFFENCE APPLICABLE TO COMPANIES AND LIMITED LIABILITY PARTNERSHIPS

6.1 In this Part, we recommend the creation of a new offence, applicable to some organisations. This is the offence of *negligently failing to prevent* bribery committed by a person performing services on behalf of the organisation in question.[1] Those capable in law of committing the offence will be companies and limited liability partnerships whose registered office is in England or Wales.[2]

6.2 It will be for the Government to decide to what extent, if at all, it should be possible for organisations (including Government Departments) other than companies and limited liability partnerships to commit the offence.[3]

6.3 In making this recommendation, we are consequently not recommending at this stage extending the scope for findings of *direct* liability beyond the existing limits. Under our recommendations, traditional criminal liability should be extended only as far as the creation of an offence of negligently "failing to prevent" bribery committed by a person performing services on behalf of the organisation in question.[4] This is because we believe, especially where larger organisations operating nation-wide and world-wide are concerned, that it is such failures that are a key factor in the perpetuation of the practice of bribery. This is especially (but not solely) the case when bribery takes place in environments where there is, or is believed to be, a "culture" of bribe-taking.[5]

6.4 Accordingly, the bribery offences to which the "failure to prevent" offence applies are those contained in clause 2 and clause 4 of the draft Bill. These are the

1 Clause 7.

2 Clause 7(1). It will be for other criminal jurisdictions within the UK to decide whether or not to introduce this offence and apply it to companies and partnerships with registered offices in their jurisdiction. The use of the term "registered office…situated in England and Wales" reflects the fact that companies are "incorporated" in the UK, and not in England and Wales or in some other part of the UK as the case may be. So the use of the term "incorporated in the UK" will remain inappropriate until such time as all the criminal jurisdictions within the UK introduce this offence. Clause 7 of the draft Bill extends liability to limited liability partnerships. For the sake of convenience, in this Part when referring to companies, we are including limited liability partnerships.

3 Under the Corporate Manslaughter and Corporate Homicide Act 2007, it is possible for a wide range of organisations to be liable for the relevant offence. So far as the bribery of foreign public officials is concerned, the Chairman of the OECD Working Group on Bribery has said, in this regard, that "Certainly, where the state has endowed entities with powers to engage in contracts on its behalf, these bodies should not be allowed to escape regulation": M Pieth, "The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 186.

4 Clause 7(1)(a).

5 A factor influencing our approach has been the report of the Woolf Committee which looked into the broader issue of business ethics and global companies, as part of its report on BAE Systems plc (www.woolfcommittee.com). The Committee reported after the publication of our CP. The report is considered further below, at paras 6.43 to 6.51.

offences of so-called "active" bribery that can be committed by P, the provider of the advantage.

6.5 It might seem odd to leave a gap in the coverage of corporate liability for a failure to prevent bribery where, for example, there has been a failure to prevent an employee *taking* a bribe (a clause 1 offence). However, new criminal offences should extend no further than is necessary. The principal justification for the introduction of this offence is to deter companies from giving direct or indirect support to a practice or culture of bribe-taking on the part of those with whom they do business. Its main purpose is not to encourage companies to do more to prevent their employees and agents from acting in a corruptly self-interested way.

6.6 We are recommending that it should be a defence to this new offence for a company to show that there were adequate procedures in place to prevent bribery by a person performing services on behalf of the organisation in question.[6] The existence of this defence is an important limitation on liability for the offence. It shows that our concern is to direct the criminal law at companies that fail to make continuing and systematic efforts to ensure that active bribery is not committed on their behalf, even when the risk of that happening may be high. Our focus is not on ethically well-run companies which have made an error (albeit culpable) in a particular case leading to the commission of bribery by someone providing services on their behalf.

6.7 However, the defence should not be available when the negligence that led to the failure to prevent bribery being committed was attributable to a director of the company (or equivalent person) him or herself.[7] The defence is concerned with procedures set down on high authority within a company to apply to those working on its behalf at a lower level. When it comes to the liability of a company in respect of the conduct of those with high authority (at directorial level or equivalent) themselves, so far as fault is concerned, liability is avoided only if no negligence can be proved on their part.

RECOMMENDATION[8]

6.8 **It should be an offence for a company or limited liability partnership of which the registered office is situated in England and Wales negligently to fail to prevent bribery where**

> **someone (A) performing services on that organisation's behalf bribes another person,**
>
> **the bribe was in connection with the business of that organisation, and**
>
> **someone (other than A) connected with or employed by the organisation, who has responsibility for preventing bribery, negligently fails to prevent A bribing the other person.**[9]

[6] Clause 7(6).

[7] Clause 7(7) of the draft Bill addresses this point.

[8] See clause 7(1).

6.9 **The bribery offences to which the offence of negligently failing to prevent bribery applies should be the offences that can be committed by P (the payer), whether the general offence of bribery[10] or the bribery of a foreign public official.[11]**

6.10 **Except where the negligence in question is alleged to be on the part of a director (or equivalent), it should be a defence for the company or limited liability partnership to show that it had adequate procedures in place designed to prevent bribery being committed by people performing services on the organisation's behalf**.[12]

INDIVIDUAL LIABILITY FOR CONSENTING TO OR CONNIVING AT THE COMMISSION OF BRIBERY

6.11 In this Part, we are also recommending that it should be possible to hold directors, managers, secretaries or similar officers[13] criminally liable as individuals if they are proved to have consented to or connived at the commission of bribery by a body corporate, contrary to the offences in clause 1, 2 or 4.[14] This will bring the law of bribery into line with the law governing the offence of fraud, and in particular with section 12 of the Fraud Act 2006, and with section 18 of the Theft Act 1968.

RECOMMENDATION

6.12 **It should be possible to hold directors, managers, secretaries or similar officers of a body corporate individually liable if they consent to or connive at the commission of bribery by the body corporate**.

CRIMINAL LIABILITY IN CONTEXT

6.13 Anyone recommending the creation of a new criminal offence bears a heavy burden of justification. Our justification runs as follows.

6.14 It is companies (and those acting on their behalf) who are undoubtedly in the best position to ensure that the enormous damage done by toleration of bribery – especially in relation to overseas trade – is reduced or even eliminated world-wide.[15] Yet, at present it is very difficult effectively to bring either criminal or civil proceedings in English law against companies who are quite prepared to allow bribes to be employed as a means of establishing or enhancing their trading position.[16] Companies that would like to adopt and enforce ethical trading policies should not find that other companies indifferent to ethical standards are highly

9 Clause 7(1)(c).

10 Committed under clause 2.

11 Committed under clause 4.

12 Clause 7(6) and (7).

13 See clause 8(3) and (4).

14 Clause 8.

15 See paras 6.43 to 6.51 below.

16 See para 6.27 below.

unlikely to face any significant sanction if they tolerate bribery.[17] As actionable damage may not be suffered when bribery is committed, this difficulty must be addressed through the strengthening of the criminal law rather than through modification of the civil law.[18] Further, our argument will be that it is in the spirit (even if not required by the letter) of our international obligations to do more to prevent bribery, by providing enhanced means of deterring and punishing companies indifferent to the commission of bribery on their behalf.[19]

6.15 Any legislature that considers imposing criminal liability on companies can choose between a number of different forms that such liability can take. For example, a company could automatically be made liable for the criminal conduct of any of its employees or agents. In England and Wales, that route has traditionally been pursued only when less serious wrongdoing is concerned. To follow that route when a serious offence such as bribery is in issue would be a major step that it may not be advisable to take in relation to one offence in isolation. It is a matter for consideration as part of a broader review of the nature and scope of corporate criminal liability.[20] Alternatively, the company can itself be regarded as having committed the offence – even a serious offence – if a selected range of its senior officers (beyond directors or equivalent persons) was culpable. This approach has recently been adopted in relation to manslaughter committed by companies.[21] We explain below that special features of manslaughter as a crime make this approach to corporate liability for committing it an approach that cannot straightforwardly be employed to address corporate liability for bribery.[22]

6.16 Another approach is the one we recommend. This makes the company liable not for the offence itself, but for culpably failing to prevent that offence when committed on the company's behalf. We will explain why we have chosen this form of (vicarious) liability in due course.[23]

6.17 However, at the outset we should explain how we see the introduction of this new offence relating to another way in which a legislature might seek to address the liability of companies. That is through the imposition of so-called "regulatory" penalties for misconduct. Depending on their nature, regulatory penalties stand somewhere between civil liability (when enforcement relies on someone who has suffered loss taking legal action against the wrongdoer), and full criminal liability (when enforcement is under the supervision of a prosecution authority, and conviction upon proof beyond reasonable doubt entails a criminal record). Parking offences, many environmental or licensing offences, and offences connected with, for example, failures to file accounts in a particular form, are "regulatory" in nature. Professor Gardner has aptly described regulatory offences

[17] See the discussion at paras 6.52 and 6.53 below.

[18] See paras 6.68 to 6.70 below.

[19] Paras 6.83 to 6.93 below.

[20] See paras 6.25 to 6.28 below.

[21] Corporate Manslaughter and Corporate Homicide Act 2007.

[22] Paras 6.33 to 6.37 below.

[23] See paras 6.40 to 6.61 below.

as aiming "to institutionalise clear standards of success and failure where the internal standards are in doubt or come to be widely disregarded".[24]

6.18 In that regard, regulatory offences often target conduct that may in itself involve no harm or wrong done, but which is of a kind conducive to harmful, risky or wrongful outcomes. In itself, a given instance of parking on a double yellow line may pose no risk or significant obstruction, but (assuming the yellow lines have been correctly located) parking in that particular place is conducive to such nuisances or dangers.

6.19 By these standards, the new offence that we are recommending is not regulatory in nature. A culpable failure by a company to prevent bribery depends upon proof that bribery – a serious criminal wrong – was in fact committed on the company's behalf. The new offence is not concerned exclusively with conduct conducive to the commission of bribery. However, the new offence does have a regulatory dimension to it in that the defence – proof that the company had adequate procedures designed to prevent bribery being committed on its behalf – is concerned with measuring the adequacy of "internal standards", to use Professor Gardner's words, that might otherwise be disregarded.

6.20 We regard this inclusion of a regulatory element as a positive virtue, but so also is the fact that the offence is in itself an ordinary criminal offence. Criminal offences, especially those with fault elements like this one, may be difficult to prove beyond reasonable doubt; but that is as it should be given the serious nature of the wrongdoing involved. In practice, it is likely to follow that the offence will only be prosecuted in clear cases, and against the worst offenders.[25] Again, that might be thought to be an entirely appropriate outcome, so long as the presence of the regulatory element also encourages companies more generally to introduce anti-bribery policies and procedures appropriate for their own size and operational nature.[26]

6.21 Having said that, the Commission is currently in the early stages of a general review of the liability of organisations, and hopes to start consulting on it in 2009. That review may encompass wider consideration of the extent to which truly regulatory supervision and enforcement should be preferred to, or set alongside, the imposition of more traditional forms of criminal liability.

6.22 Professor Macrory's 2006 Report[27] found that criminal prosecution was not always the best way to secure enforcement. He found that administrative penalties might better enable regulators to impose proportionate, flexible and meaningful sanctions. The Report was accepted in full by the Government.

[24] John Gardner, "On the General Part of the Criminal Law", in Antony Duff (ed*), Philosophy and the Criminal Law: Principle and Critique* (1998) p 231.

[25] See the discussion at paras 6.57 and 6.58 below.

[26] See paras 6.43 to 6.51.

[27] "Regulatory Justice: Making Sanctions Effective" (Final Report, November 2006).

6.23 As part of a response to the Macrory Report, the Ministry of Justice has introduced guidelines for Departments on the creation of (amongst other things) new regulatory crimes.[28] Amongst the factors to be considered are:

a. What is the conduct that you are seeking to target? A *particular event* such as late filing of compulsory information? Or behaviour such as dishonesty, negligence, or repeated non-compliance?

b. What is the range of conduct that you are targeting? Can different kinds of conduct be identified and some of them addressed with more targeted sanctions? For example, can dishonest evasion of a regulatory obligation be separated from the *wider non-compliance* of failure to provide information to the regulator, where there may be little or no dishonest intent?[29]

6.24 No doubt these kinds of factors will be central to consideration of further regulatory intervention to prevent corporate criminal wrongdoing, including bribery. However, consideration of the issues cannot be undertaken here.

SHOULD CONSIDERATION OF THE EXTENT OF DIRECT LIABILITY OF COMPANIES BE DEFERRED PENDING A GENERAL REVIEW OF THEIR CRIMINAL LIABILITY?

The "identification" doctrine

6.25 It has for many years been possible in English law to prosecute companies for criminal offences, including bribery. In that regard, a special principle (sometimes known as the "identification" doctrine) applies in cases where companies are charged with offences involving a fault element. Bribery is such an offence.

6.26 Conviction of a company for bribery can be obtained under the existing law if the fault element of the offence was attributable to someone (such as a director) who was at the relevant time the "directing mind and will" of the company,[30] the "embodiment of the company".[31] In short it must be possible to identify the fault element with someone who is, to use the language of the draft Criminal Code,[32] a "controlling officer" of the company.[33]

[28] www.justice.gov.uk/guidance/regulatory-offences.htm.

[29] www.justice.gov.uk/guidance/regulatory-offences.htm, at p 2 (our emphasis).

[30] *JF Alford Transport Ltd* [1997] 2 Cr App R 326, 331.

[31] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170.

[32] Codification of the Criminal Law (1985) Law Com No 143, para 11.6, and cl 34.

[33] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, discussed in AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (3rd ed 2007) pp 258 to 260. It has been suggested that there is in fact no "identification doctrine" as such, and that the basis of attribution of liability to companies is a matter of statutory interpretation in each case: see the observations of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 511. Naturally, it is always open to a court to find that a particular statute cannot be interpreted in the light of the identification doctrine, without defeating the purpose of the statute, as was found in the *Meridian* case; but we believe that the identification doctrine is now too well established to be regarded as nothing more than an aid to interpretation. It is a rule of law, whose application may be displaced by the context in which a particular statute must be interpreted.

6.27 It has often been claimed that the identification doctrine makes it too difficult to prosecute companies directly for offences that require proof of fault.[34] It has been said that the doctrine is not adequate in a world where corporate decision-making may be highly decentralised, and may take place in a multi-national context.[35]

6.28 However, in the CP, we did not provisionally propose any extension of direct liability beyond the limits of the identification doctrine. We provisionally proposed that consideration of the limits of direct liability of legal persons for bribery should be deferred to our general review of such liability in criminal law.[36]

Consultees' responses

6.29 Our provisional proposal was supported by the great majority (18/24) of consultees who addressed the issue. In their response, the Council of HM Circuit Judges said:

> We agree that this should be seen as part of a much larger review of corporate liability for criminal offences. The topic is potentially difficult and the consequences far reaching … Thus we agree that consideration of the law relating to direct liability of legal persons (incorporated and unincorporated bodies) should be deferred until the Law Commission's wider review of this area.

6.30 The senior judiciary agreed, saying that "This entire area should be dealt with at the same time".

6.31 It is important to note, in this respect, that countries that have broadened their regime of liability for legal persons have tended to do so as part of a general review of corporate liability. They have tended not to devise an entirely new structure of corporate liability solely for the purpose of applying it to the offence of bribery.[37]

6.32 Amongst the minority who believed that we should have addressed the issue of direct liability in the CP, Corner House said that they did not understand the Commission's position that piecemeal change makes for poor law reform. They thought that our concern must be for what they called the "orderliness of the statute book". On the contrary, we believe that the avoidance where possible of piecemeal reform is a matter of justice, part of a concern for the rule of law; it is not something as purely technical as orderliness in the statute book.

[34] For a critique of the existing law and a clear exposition of the alternatives, see C Wells, *Corporations and Criminal Responsibility* (2nd ed 2001) chs 5, 7 and 8; GR Sullivan, "Reforming the Law of Bribery: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution" [2008] *Criminal Law Review* 687.

[35] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) pp 179 to 80; GR Sullivan, "Reforming the Law of Bribery: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution" [2008] *Criminal Law Review* 687.

[36] CP, para 9.20. In this context, when speaking of "direct liability", we include the possibility that an organisation can automatically be made liable for offences committed by its employees.

[37] Section 12.3(1) of the Australian Model Penal Code, drafted by the Model Criminal Code Officers' Committee, *General Principles of Criminal Responsibility*, Report (1992) ch 2, p 109.

6.33 Some consultees pointed to the new regime for direct liability introduced by the Corporate Manslaughter and Corporate Homicide Act 2007 as an attractive regime in this context. Assuming the other elements of the offence are fulfilled, this regime permits the conviction of an organisation for manslaughter if, at least in part, there is what amounts to gross negligence on the part of senior managers. It is not necessary to show that there was gross negligence on the part of directors.

6.34 However, the corporate manslaughter offence has special features, some of which are tied to the unique character of manslaughter as a crime. This makes it premature to consider simply transplanting the regime of the 2007 Act into a reformed offence of bribery.

6.35 For example, individual directors cannot be made complicit in the offence of corporate manslaughter. Further, manslaughter is, most unusually, a serious crime whose fault element is gross negligence. It is not necessary to prove that anyone possessed a subjective fault element. This makes it possible – and in the context of corporate conduct desirable – to aggregate negligent acts (whether confined to or extending beyond the acts of senior managers) to come to a "global" view that an unlawful killing was caused by gross negligence on the part of the company. Bribery, by way of contrast, is an offence that depends on proof of subjective fault elements.

6.36 In their response, the International Chamber of Commerce (UK) said that, in their view:

> The provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 do not provide a great deal of help, because health and safety factors which form the basis of that legislation are very different from the conduct associated with bribery.

6.37 It might be possible to create a rule imputing to a company, for example, "knowledge" of certain facts, by aggregating the knowledge possessed by persons with different roles within a company. However, that it is not quite the same as aggregating negligent acts for the purpose of saying that a company was "grossly" negligent. It is a matter that needs further thought and consultation.[38]

6.38 Bearing in mind the views of the great majority of our consultees, we have concluded that the extension of direct liability for bribery should not be recommended at this stage.

Recommendation

6.39 **Consideration of the extension of the scope for imposing direct liability on companies should form part of a general review of corporate criminal liability.**

[38] Our future work on general principles of corporate liability will enable us, for example, to consider Article 3(1) of the Second Protocol of the Convention on the Protection of the European Communities' Financial Interests, which considers the categories of person who should be considered persons representing the company for the purposes of the imposition of liability: see the discussion in the CP, paras 9.14 to 9.17.

SHOULD THE WHOLE QUESTION OF ORGANISATIONAL LIABILITY FOR BRIBERY BE DEFERRED TO A GENERAL REVIEW?

6.40 Direct liability for an offence is not the only way in which an organisation can be subjected to criminal liability for wrongdoing involving fault. In English law, criminal liability for an offence (whether or not involving proof of fault) can be imposed indirectly, as through the creation of organisational liability for a *failure to prevent* wrongdoing by another. In the CP, we asked consultees to consider whether this kind of liability should be introduced respecting a failure adequately to supervise those who in consequence commit bribery offences.[39] We also asked whether the whole issue should be left to the more general review of organisational liability.

Consultees' responses

6.41 Fourteen of 22 consultees who addressed the issue agreed with the view that consideration of indirect liability should be deferred to a general review of organisational liability. They did so on the same kinds of grounds that were given for deferring the issue of direct liability.[40] Those who thought we should not leave this issue to a wider review of organisational liability generally thought that such liability should be introduced alongside, and not in place of, a greater degree of direct liability. More generally, Mr Richard Kelly, of Shearman and Sterling, said of our provisional proposals in the CP:

> If the purpose of the proposed new law is simply to cover the individual that actually pays or receives the bribe, then the proposed law would serve that purpose. However, if the aim of that law is also to encourage and develop a culture of corporate compliance through deterrence, that goal will be seriously undermined by postponement of the question of corporate liability.

6.42 Although a majority of consultees favoured deferring the issue, we have now decided that this would not be the right course. After the end of the consultation period, following the publication of the CP, the Woolf Committee published its report on ethical business conduct in BAE Systems PLC.[41] The findings and recommendations in that report have led us to the view that it would be right to recommend that the criminal law be used to address the issue of culpable organisational failure to prevent bribery offences.

The Woolf Committee report[42]

6.43 The Woolf Committee report's terms of reference required the Committee to (1) identify the high ethical standards to which a global company should adhere, (2) identify the extent to which the company [BAE Systems] may currently meet these standards, and (3) recommend the action that the company should take to achieve such standards. In this report we will obviously not be concerned with

[39] CP, para 12.46.

[40] See paras 6.29 to 6.37 above.

[41] Woolf Committee, *Business ethics, global companies and the defence industry* (May 2008), www.woolfcommittee.com.

[42] Woolf Committee, *Business ethics, global companies and the defence industry* (May 2008), www.woolfcommittee.com.

(2), which is a matter for BAE Systems. However, the Woolf Committee's findings and conclusions in relation to both (1) and (3) are of relevance to our recommendations.

6.44 Of the Woolf Committee's 24 recommendations and five "observations", some are of particular relevance here. The first of these is recommendation 9:[43]

> The Company should develop formal processes to ensure business decisions are only taken following an explicit consideration of ethical and reputational risks. Where such risks are identified, the process should ensure any decision to proceed is taken at an appropriate level and should include ratification by the Board.[44]

6.45 The importance of this recommendation is that it involves the introduction of a supervisory role at Board level over decisions further down the line that carry risks of unethical behaviour. In that regard, recommendation 9 needs to be set in the context of recommendation 4, which makes the development of high standards in ethical business conduct in all the Company's activities an obligation binding on the Board itself:

> The Board should develop its increasingly proactive role in ensuring high standards of ethical business conduct in all the Company's activities. It should be a standing item on the agenda. There should be an explicit assessment of ethical and reputational risks in all business decisions taken by the Board. Board members should themselves be exemplars of the standards [to be set out in a global code of conduct] and receive regular briefings on emerging issues in business ethics.[45]

6.46 BAE Systems is, of course, a very large public company, and such companies are vastly outnumbered in the UK by private companies, very many of which have few (or no) employees. In 1998, for example, of the 3.7 million businesses in the UK, over 2.3 million were "size class zero" (being sole traders or partners without employees).[46] The former Department for Trade and Industry estimated that in 2005, over 90% of companies have five shareholders or fewer.[47] For the very smallest companies, it may mean little or nothing to speak of ethical business conduct as "a standard item on the agenda", or to speak of Board members as "exemplars of [high] standards". However, a company with only one employee is still capable of having a policy about ethical and reputational risks, and of ensuring that its employee knows the importance of that policy. So, the emphasis placed by the Woolf Committee on the supervisory responsibilities of a

[43] It is also relevant to note the Committee's 5th observation: "In the light of the results of the consultation on the Law Commission's proposals for reform of bribery, the Government should quickly bring forward the necessary legislative proposals" (pp 33 and 63).

[44] Woolf Committee, *Business ethics, global companies and the defence industry* (May 2008), www.woolfcommittee.com, p 45.

[45] Woolf Committee, *Business ethics, global companies and the defence industry* (May 2008), www.woolfcommittee.com p 41.

[46] J Freedman, "Limited Liability: Large Company Theory and Small Firms" (2000) 63 *Modern Law Review* 317, 320 to 21.

[47] Department for Trade and Industry, *Company Law Reform* (2005), p 13.

company's Board is capable of adaptation so that it applies in a cost-effective way even to very small companies.

6.47 The focus on the role of the Board, both in setting ethical standards and in ensuring that employees adhere to them, may be considered particularly important when a company is seeking to do business in a country that is prepared for its officials to ignore such standards "if the price is right". Following on from recommendations 4 and 9, the Woolf Committee goes on to say, in recommendation 13:

> The company should continue to forbid facilitation payments as a matter of global policy. While it may not be possible to eliminate such payments immediately in some countries, management and employees in those countries need to be supported to ensure all such payments are reported to senior executives and to the Board, and the means developed to eliminate them completely over time.

6.48 In this respect, some commentators have in fact gone further, suggesting that, if corruption is endemic in a country's business culture, "consideration may have to be given to withdrawal from or limiting activities in that country".[48]

6.49 In this report, we have not recommended any change to the policy of the present law, which is to forbid "facilitation" payments. It will continue to be a matter for the prosecution authorities whether, in any individual instance in which it is alleged that a facilitation payment has been made, evidentiary considerations and the public interest point in favour of or against a prosecution.[49]

6.50 However, recommendation 13, seen together with recommendations 4 and 9, highlights the importance of Board supervision of a company's activities where they may involve ethical or reputational risk – something that may be a very real possibility in some countries outside the UK. For example, it is only natural that, in seeking to do business overseas, companies will seek to secure the services of local individuals or companies who can provide advice in relation to securing contracts for the company. As the Woolf report goes on to say of such cases:

[48] George Grammas, of Squire, Sanders & Dempsey LLP, in his "Globalisation of the Battle Against Corruption", http://eurfpn.advisen.com/articles/article77315610-106210071.html, p 2.

[49] Facilitation payments are discussed in Appendix D, and were considered in detail in the CP at Appendix F.

> Advisers are often incentivised by commission payments on the successful award of sales contracts, and at a percentage of the contract price. These contracts can be of very large monetary value and commission payments correspondingly large. This can mean an Adviser will have the capability, and some will be tempted, to obtain contracts with the aid of corrupt payments either with or without the knowledge or connivance of the company…*A reputable company should take all practicable action to prevent this happening*…A defence company must therefore only appoint Advisers where…stringent control measures, based upon ethical and reputational risk, are followed to ensure due diligence in their selection, appointment, management and payment. The company's Board should be kept fully informed of action taken which should be closely audited.[50]

6.51 The emphasis throughout the Woolf report on the pro-active role of the Board in securing high standards of ethical business conduct is very important. However, we believe that, as a matter of law reform policy, it is not enough to leave such a role as a purely aspirational one for company Boards. Incentives to adopt good practice must be underpinned by legal duties that, if breached, may lead to legal action to punish and deter bad practice.

Our revised view

6.52 In our view, it is important to emphasise the benefits to companies of modernising and strengthening the law governing corporate criminal liability for bribery, in so far as that will provide greater incentives to avoid bribery. As one commentator puts it:

> Companies with multinational operations or sales should…endorse anti-corruption policies, because in the end they increase market efficiency and decrease costs. Concerted action by the business community will help expand the market sector driven by value-based competition rather than bribery.[51]

6.53 This is an important point, because it shows how the effective deterrence of bribery by companies themselves (in response to the threat of criminal sanctions) can be very much in their own business interests. For example, a British company may spend a great deal of money to prepare a bid for a major contract. If it turns out that the British company was not awarded the contract because (say) a rival foreign company bribed the official awarding the contract, then these costs will have been wasted for entirely unacceptable reasons. In his response to our CP, Professor Sullivan, an acknowledged expert in this area, endorsed the introduction of a form of "failure to prevent" offence, especially in so far as this might make one (English) company responsible for bribery committed by another (foreign) company. He said:

[50] Woolf Committee, *Business ethics, global companies and the defence industry* (May 2008), www.woolfcommittee.com, para 3.34 (footnote omitted; our emphasis).

[51] George Grammas, of Squire, Sanders & Dempsey LLP, in "Globalisation of the Battle Against Corruption", http://eurfpn.advisen.com/articles/article77315610-106210071.html, p 2.

> [A]n offence of inadequate supervision in no way alters or undermines the structure of company law. The offence would merely recognise that in some circumstances one independent person should have a legal responsibility to concern itself with the conduct of another independent person. This truism is particularly in point where the legal entities which are separate and independent in law are commercially integrated.[52]

6.54 Professor Sullivan also supported the introduction of a "due diligence" defence, broadly of the kind that we are recommending. He said that even when there had been fault of some kind on the company's part that led to the commission of bribery:

> A company should be allowed to demonstrate that it has robust anti-bribery culture and practices, even though, as regards a particular payment, it is unable to prove the absence of any instruction by someone acting on behalf of the company to offer or give an advantage…[such] defences [are] essential to the fairness and acceptability of this domain specific form [of] corporate liability.[53]

6.55 The nature of the offence we are recommending – in particular, its fault and defence elements[54] – is in part shaped by the need to ensure that companies do not find themselves saddled with disproportionate administrative burdens, and exposed to a serious form of criminal liability respecting conduct they were effectively helpless to prevent. We believe that organisations must be persuaded to contribute constructively towards the reduction of bribery by the adoption of a positive attitude towards reform of their own practices, as the Woolf report recommends.

6.56 The burdens of legal compliance on an ongoing basis must not be so great, or the standards so difficult to meet, that even well-disposed companies come to regard legal requirements in a negative light. It is important that business organisations come to regard breach of the criminal law of bribery as an automatic indication of serious wrongdoing. Breach of bribery laws should not come to be seen as something that might easily have been no more than a venal failure to take bureaucratic "red tape" seriously enough.

6.57 An approach to criminal liability that focuses on a culpable failure to prevent offending by those who act on its behalf, but with a systems-based "due diligence" defence, fits well with the view of corporate fault endorsed by some leading commentators. For example, one of our consultees, Professor Wells, has argued that:

[52] GR Sullivan, "Reforming the Law of Bribery: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution" [2008] *Criminal Law Review* 687, 698. However, Professor Sullivan's own preference was for the introduction of a wider-ranging form of vicarious liability respecting bribery committed by employees or agents of a company.

[53] GR Sullivan, "Reforming the Law of Bribery: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution" [2008] *Criminal Law Review* 687, 697.

[54] See clauses 7(1)(c) and 7(6).

> Corporations … are mini-jurisdictions and their operating policies are broad, general principles … Once the idea that a corporation's fault can be approached through its policies is established … [corporate internal decision structures] can be used both to lead a corporation towards liability but also to give it the opportunity to escape. The corporation should be able to rebut the attribution of corporate responsibility to any act of its high managerial staff on the grounds that it is against established internal policy.[55]

6.58 Along similar lines, Professors Gobert and Punch have argued that:

> Locating corporate criminal liability in organisational fault offers at the same time a more restrictive and a more expansive model of corporate criminality than vicarious or imputed liability…The proposed approach is more limiting … in that it would allow the company to avoid liability for crimes of both employees and officers when it has conducted its affairs with due diligence to prevent criminal activity. Conversely, the proposed model is more expansive than the traditional tests in that it envisages situations where the company can be liable where the resultant crime is committed by a third party who is not an employee or agent of the company, and in situations where no individual can be charged with a corporate crime for, say, lack of mens rea.[56]

6.59 It is also important to put the imposition of a new form of criminal liability in context. Even those countries that have much broader doctrines of organisational liability for bribery than England and Wales see few (if any) prosecutions of companies.[57] Even in the USA, which is one of the most vigorous prosecutors of bribery relating to overseas activity, only 21 companies were convicted under the Foreign Corrupt Practices Act 1977 between 1997 and 2001.[58]

6.60 In short, we believe that the offence that we are recommending will make it easier for prosecutors to pursue companies who, in effect, do something to perpetuate the culture and practice of bribery, by operating without safeguards to promote high standards of integrity, in industries, regions or countries vulnerable to the lure of malpractice. However, we also believe that the fault element and defences applicable to the offence will both emphasise the seriousness of conviction, and ensure that companies who make good faith efforts to avoid the commission of the offence will duly escape its net.

[55] C Wells, *Corporations and Criminal Responsibility* (2nd ed 2001), p 158. Professor Wells' remarks are not confined to "failure of supervision" offences.

[56] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (2003), p 114. The authors' remarks are not confined to "failure of supervision" offences.

[57] For the figures respecting statutory offences of bribery in England Wales, see the CP, para 2.30.

[58] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007), p 201. There have been a greater number of prosecutions since then, but we do not have accurate figures for a later period.

6.61 We now turn to consideration of the role the recommended offence will play in relation to our international obligations to combat bribery, a role that is of special significance so far as the bribery of foreign public officials is concerned.

INTERNATIONAL OBLIGATIONS BINDING THE UK

The "failure to supervise/ failure to prevent" offence: a broader European perspective

6.62 There are four European Conventions that require liability of legal persons to be established, which we discussed in the CP.[59] One of these is the OECD anti-bribery Convention. This will be discussed further below, but we will begin by considering those Conventions that specifically address the issue of an organisation's failure to prevent bribery.

6.63 Having addressed the question of direct liability of legal persons for bribery (which already exists in England and Wales), these Conventions also require liability to be established for an inadequate failure to supervise an employee (or other person) who has in consequence committed bribery:

(1) Article 3(2) of the Second Protocol of the Convention on the Protection of the European Community's Financial Interests;

(2) Article 18(2) of the Council of Europe's Criminal Law Convention on Corruption; and

(3) Article 5(2) of the European Council's Framework Decision 2003/568/JHA.

6.64 Each provision requires that:

> [Each party] can be held liable where the lack of supervision or control by a [natural] person … has made possible the commission of [a bribery offence] for the benefit of that legal person by a [natural] person under its authority.

6.65 With the possible exception of Article 5(2), these provisions leave jurisdictions free to meet their obligations by imposing either civil or criminal liability. This is a freedom that does not exist in an unfettered form under the OECD Convention. The Convention requires jurisdictions to follow their legal principles governing the imposition of liability for bribery, which may entail the imposition of criminal liability, if there is no effective "tort" of bribery or special administrative sanction directed at its prevention.

6.66 Respecting Article 5(2), the European Commission has offered the view that:

> The liability is a criminal liability, which must be matched by a criminal sanction and that such a criminal sanction may be supplemented by other measures which are administrative or civil in nature.

[59] CP, paras 9.39 to 9.58.

6.67 In the CP we took the view that the European Commission was not right to suggest that, in virtue of its failure to impose criminal liability for failure adequately to supervise, the UK was in breach of its obligations under Article 5(2).[60] However, we also took the view that there must be some doubt whether existing civil remedies or sanctions were in reality likely to provide any kind of incentive to promote adequate supervision.[61] We said:

> It may be questioned whether it is sufficient to use the civil law to address the involvement of individuals in bribery committed by companies. The aim of the law of tort is to put the parties back in the position they were in before the loss resulting from the commission of the tort was incurred. This does not seem to reflect the ambition of the Conventions. These seem at least to imply that there must be the possibility of imposing liability irrespective of whether the bribery has caused loss giving rise to a claim for compensation.[62]

6.68 The law of tort is not, of course, the only possible source of a private law remedy for bribery. It could be argued that action against corporate tolerance of unethical practice is a matter for shareholders, as through the bringing of a minority shareholders' action.[63] However, even putting aside the obstacles that shareholders may face in bringing such actions, there is no evidence that such actions are – or could ever be – effectively used to hold company Boards to account. In 2006, for example, there were only three reported instances of judgments concerned with such actions, even though there are millions of companies.[64]

6.69 In an indirect way, evidence of bribery may also be revealed by a Financial Reporting Review Panel investigation of material departures by a large company from accounting standards. However, the ultimate sanction involved in the small number of such cases where action is taken (on average, 44 cases per year) is only a court order that the company revise its accounts appropriately; and there are no reported instances in which such an order has been made.[65]

6.70 We asked consultees to consider the possibility that lack of corporate supervision or control is best tackled systematically through regulatory measures and non-criminal sanctions. Of the four consultees who considered it, three were against it. That is not an adequate basis on which to make specific recommendations about a regulatory approach to bribery.

[60] CP, para 9.51.

[61] CP, paras 9.53 to 9.57.

[62] CP, para 9.57.

[63] Companies Act 2006, ss 260 to 264 and 994.

[64] John Armour, "Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment", Law Working Paper No 106/2008 (April 2008) p 14 http://www.ecgi.org/wp/search_title.php?title=enforcement+strategies. See also, Shareholder Remedies (1996) Law Commission Consultation Paper No 142, pp 235 to 238.

[65] John Armour, "Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment", Law Working Paper No 106/2008 (April 2008) http://www.ecgi.org/wp/search_title.php?title=enforcement+strategies, p 23.

6.71 However, we believe that the introduction of our recommended offence would banish any doubt that there might be over the adequacy of the existing law, respecting European Convention requirements regarding the combating of bribery committed or tolerated by companies. We believe that the offence is capable of providing a strong central pillar supporting anti-bribery prosecutorial initiatives against companies, perhaps particularly when employees or agents of the organisation have seemingly been involved in bribery more than once, or in more than one region or country.

The requirements of the OECD Convention respecting the liability of legal persons for bribery of a foreign public official (FPO)

6.72 We now re-consider whether the law in England and Wales is compliant with the requirements of the OECD Convention. This is, in part, because some of our consultees disagreed with the conclusion in the CP that England and Wales complied with its obligations under that convention in relation to the liability of companies for bribery of FPOs.

6.73 Article 2 of the OECD Convention says:

> Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

6.74 Article 3 adds that sanctions for those found guilty of bribing a foreign public official must involve "effective, proportionate and dissuasive criminal penalties".

6.75 In England and Wales, liability for bribery is criminal in nature, whether it is committed by a natural or a legal person. In the CP, we took the view that England and Wales was compliant with Article 2. We did this because it would automatically be possible to hold legal persons liable for bribery of a foreign public official, "in accordance with its [the UK's] legal principles", as Article 2 requires. These principles do not exclude bribery in any form from the scope of corporate criminal liability. So far as Article 3 is concerned, when a company is convicted of bribery, in the UK it will be subject to a fine, and so long as that fine is high enough to meet the demands of justice and deterrence (and well-publicised enough), it ought to be perfectly capable of being, "effective, proportionate and dissuasive".

6.76 Most importantly, Article 2 does not say that the measures adopted to establish the liability of legal persons must themselves take (or not take) a particular form, in order to be "effective, proportionate and dissuasive". That phrase only appears in Article 3 in relation to penalties following conviction. Neither does Article 2 say that a Party must seek to follow "best practice" amongst Parties to the OECD Convention, in relation to principles of corporate liability. Indeed, it says that it is consistency with a Party's own legal principles of liability that counts.[66] As the Chair of the OECD Working Group has himself said:

[66] See para 4.4 above.

> Article 2 of the OECD Convention indicates just how mindful the drafters were of national particularities … The interpretation of the Convention therefore has to respect such differences.[67]

6.77 Some consultees were critical of this interpretation of Article 2, and its relationship with Article 3. Transparency International (UK), for example, said that the argument that the UK complied with the Convention was unsustainable. They took this view because they said that what matters is whether a Party makes legal persons liable "in an effective manner", and this could not be said of English law relating to the liability of legal persons.

6.78 We have already pointed out, and the Chair of the OECD Working Group's own observations confirm, that Article 2 requires only that Parties draw on their own legal principles when establishing the criminal liability of legal persons for bribery of a foreign public official. If particular regimes of liability for legal persons (such as the identification doctrine)[68] were not to be regarded as "effective, proportionate and dissuasive", then it might have been expected that Article 2 would say so, or, like Article 3, would at least include that phrase to indicate what is expected of a Party's principles of liability. The conjunction of two related clauses (like Articles 2 and 3), one of which does include a key phrase, and one of which does not, should in the interests of certainty be regarded an indication that the clause which does not include the phrase was not meant to do so. As the Chair of the OECD Working Group has said:

> The texts of Articles 2 and 3 of the Convention are not very articulate when it comes to defining the minimum standard to be implemented by state Parties.[69]

6.79 Indeed, we regard Article 2 as requiring no minimum standard to be observed by all contracting Parties, precisely because it requires liability (whether criminal or civil) to be established by each Party in accordance with its own domestic law principles.

6.80 However, like some of our consultees, the Chair of the OECD Working Group has recently suggested that, "It is not just sanctions and sanctioning practice, but also the choice of attribution model, which needs to pass the test of "effectiveness, proportionality and dissuasiveness".[70] Clearly, this view is at odds with the understanding of the obligation imposed by Article 2 that we have just defended. It would be right to say that, even if this view were shared by the Working Group as a whole, as the House of Lords has recently indicated, the Working Group does not – and was never intended to – perform the function of a court, giving binding interpretations of the Convention.[71] The role of the Working Group is,

[67] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007), p 184.

[68] See paras 6.25 to 6.28 above.

[69] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007), pp 183 to 184.

[70] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007), p 192.

[71] *R (On the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant)* [2008] UKHL 60, [45] (per Lord Bingham).

given the wide varieties of ways in which Contracting Parties seek to understand and meet their obligations, to provide, as Lord Brown puts it, "continuing processes [through which] it is hoped a consensus view will emerge".[72] This point is taken up further below. Still less, of course, is it the function of the Working Group to extend the reach of the Convention beyond that to which the Contracting Parties agreed.

6.81 We reject as unsustainable the view that the England and Wales is in breach of its obligations under Article 2 of the Convention.

6.82 Having said that, it must be acknowledged that the OECD Working Group has the difficult executive task of seeking to some degree to harmonise the Contracting Parties' anti-bribery policies. The importance of that task provides a useful perspective from which to assess the role of our recommended offence, because it may well be that identification doctrine, as the sole route to organisational liability for bribery in England and Wales, is a significant hindrance to the successful pursuit of that task.

Building on the basic obligations under the OECD Convention

6.83 What is required in law by Article 2 is one thing; what is desirable in the interests of the spirit of the law is another thing. The pursuit of greater legal and policy convergence between Contracting Parties should properly be regarded as part of maintaining the spirit of the Convention. As the Chair of the OECD Bribery Working Group puts it:

> The interpretation of the Convention … has to respect … differences. Nevertheless, within the process of evaluation the [Working Group on Bribery] is forced to develop standards. The anchor point for "benchmarking" is contained in Article 3.[73]

6.84 What this means is that (whatever the strict legal position) the form and extent of liability imposed on legal persons should be "effective, proportionate and dissuasive", and not just the nature of the sanctions that are imposed when legal persons are found guilty. We entirely accept that, as part of the effort to promote more uniform and (to an extent) higher standards across legal systems, it is legitimate for the OECD Working Group to take the view that contracting Parties' obligations must evolve and converge over time. We can see that the OECD Working Group rightly wishes to reduce the scope for the following kind of situation to arise:

[72] *R (On the application of Corner House Research and others) (Respondents) v Director of the Serious Fraud Office (Appellant)* [2008] UKHL 60, [65]. See also Phillip Sales QC and Joanne Clement, "International Law in Domestic Courts: The Developing Framework" [2008] 124 Law Quarterly Review 388, 406.

[73] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 184

> Company A (registered in Country A, a signatory to the Convention) is bidding for a contract in Country X against Company B (registered in Country B, also a signatory to the Convention). Country A imposes liability on companies who bribe foreign public officials only in a very limited range of circumstances. Country B imposes such liability in a much wider range of circumstances. Company A is thus in a position lawfully to make payments to secure the contract which, had it been registered in Country B, would have been regarded as bribery of a foreign public official.

6.85 We believe that all Governments who are signatories to the Convention would accept that, if stark differences emerge between contracting Parties, in terms of the nature and scope of corporate liability for bribery of a foreign public official that they impose, there will not be proper incentives to avoid bribery. Instead, there may be greater (so-called "perverse") incentives for companies registered in countries that have high standards to register subsidiary companies in countries (themselves signatories to the Convention) that provide much more limited scope for imposing liability on companies.

6.86 This may pose particular difficulties in industries where corruption is prevalent. For example, an Ernst & Young survey of 1,186 executives suggested that almost half of those involved in the mining sector said that corruption was prevalent in that sector, compared with about 30% saying that corruption was prevalent in the banking and energy industries.[74] Australia, which is heavily involved in the mining industry, and also a signatory to the OECD Convention, has one of the most extensive forms of corporate criminal liability in the world.[75] In our view, there is no obligation on OECD signatories to impose such far-reaching forms of liability on companies. Even so, it would be unfair if Australia were to lose mining business to companies registered in other countries party to the Convention solely because those companies benefit from a far less extensive regime for imposing such liability in bribery cases.

6.87 In a broader context, it would also be right to note that the reduction of corruption is a global goal sought by more organisations than the OECD. As Mr George Grammas, a partner of Squire, Sanders & Dempsey LLP, has commented:

[74] http://news.bbc.co.uk/1/hi/business/7399678.stm. These are average, global figures. Corruption is reported in the survey to be much more prevalent outside Europe than within Europe.

[75] See the Australian Model Criminal Code, *General Principles of Criminal Responsibility*, Report (1992), s 12(3), p 109.

> The World Bank estimates that more than US$1 trillion in bribes is paid annually. Bribery on such a grand scale exerts a significant drag on developing economies, and therefore the World Bank has made elimination of bribery and related practices a major policy objective … [A]nti-corruption enforcement does not look to slow down [*sic*] in the foreseeable future … [Companies] must take effective steps to be certain they are not directly engaged in corrupt activities and they should review their joint venture, distributorship, sales agency and consultancy arrangements … a company must ensure it has an effective global compliance program in place, including adequate periodic training, in the interest of both the prevention of violations and the mitigation of penalties … [76]

6.88 The OECD Convention itself provides in a preamble that "achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the OECD Convention" (although that is in the context of proscribing derogations from it). It is in that context that one must understand the remarks of the Chair of the OECD Bribery Working Group when he says:

> With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations … would in our view fail to meet the requirements of "effective, proportionate and dissuasive sanctions".[77]

6.89 When we met the Chair of the OECD Working Group during the course of the consultation exercise, he confirmed that the test of what is "effective, proportionate and dissuasive" is indeed to be applied to regimes of liability under Article 2, and not just to sanctions under Article 3. However, we do not believe that a regime of criminal liability that is "effective, proportionate and dissuasive" necessarily entails either the removal of the identification doctrine,[78] or the introduction of a concept of "aggregate knowledge" in imputing criminal fault.[79] There must necessarily be different ways in which Parties can seek to ensure that their regime imposing liability on companies is effective, proportionate and dissuasive.

6.90 We believe that our recommended offence, the "failure to prevent bribery" offence, will make the regime of liability of companies in England and Wales more "effective, proportionate and dissuasive". It would be an important step in following the spirit, and not just – like the current legal position – in observing the letter, of the obligations under the OECD Convention.

[76] George Grammas, "Globalisation of the Battle Against Corruption", http://eurfpn.advisen.com/articles/article77315610-106210071.html, p 2.

[77] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 202, cited by Cornerhouse in their response to the CP.

[78] Something the vast majority of our consultees did not wish to see before consideration had been given to its application in a broader context.

[79] On "aggregate knowledge" that a company may possess, see M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) p 202.

6.91 The Chairman of the OECD Working Group on Bribery has himself indicated that this kind of structure (regulatory offence; due diligence defence) can meet the OECD Convention requirements, as he understands them:

> We believe that the test of "effectiveness, proportionality, and dissuasiveness" can be met only if this approach [focussing on the (in)activity of directors] deems management failure to include the lack of due diligence in hiring, the absence of education and instruction, *and a failure of supervision and control*. Those laws which comply with the requirements of Article 18(2) of the COE Convention or with the similar terms of Article 3(2) of the Second Protocol of the EU can therefore also be regarded as consistent with the requirements of the OECD Convention regarding corporate liability.[80]

6.92 Although Professor Pieth separates the elements of due diligence in supervision and control, on the one hand, and in hiring, education and instruction on the other, we consider that the latter three elements can easily be seen as a part of a broad duty to exercise supervision and control in the prevention of offending.

ORGANISATIONAL LIABLITY FOR CULPABLY FAILING TO PREVENT SOMEONE ACTING ON THE ORGANISTION'S BEHALF COMMITTING BRIBERY

What kind of offence is needed and what kind of defences should there be?

6.93 There are examples in English law (considered below) of criminal liability being imposed on companies, subject to a defence such as "due diligence" on the part of the legal person in question. Such a defence may operate even when the offence to which it is a defence has a fault element and is not one of strict liability. In such a case, what the defendant is saying is, "There may have been fault on this occasion, but that fault was not a reflection of the way that I run my affairs generally. Indeed, my business is run with systems in place whose aim it is to prevent this kind of incident".[81]

6.94 A number of jurisdictions in mainland Europe and beyond impose liability on companies when it is a failure of adequate supervision that has led to the commission of bribery offences. In such jurisdictions, liability is imposed on the basis of "*culpa in eligendo, instruendo, et custodiendo*"[82] (known as the "lack of supervision rule"). Such jurisdictions include Austria, Finland, France, Germany, Greece, Italy, Japan, and Sweden. Such liability is often very general in nature, rather than being focused on bribery alone. For example, under the Finnish Criminal Code:

[80] M Pieth, "Article 2: The Responsibility of Legal Persons", in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) pp 192 to 193 (our emphasis).

[81] See the passage cited from Professor Sullivan, at para 6.54 above.

[82] Broadly translated as, responsibility for selection, education and supervision.

> (1) A corporation may be sentenced to a corporate fine, if a person belonging to a statutory body or other management thereof has been an accomplice to an offence or allowed the commission of an offence or if the care and diligence necessary for the prevention of the offence has not been observed.[83]

6.95 Some countries extend the company's duty of supervision beyond employees to agents and other third parties engaged in the company's interests. Such jurisdictions include Iceland, Switzerland, Korea and the United States of America. Whilst the United States of America imposes a form of strict liability for a failure to supervise, other states – such as Finland, Japan, Korea, Sweden and Switzerland – insist on proof of a fault element in relation to lack of supervision.

6.96 Are there examples of this kind of legal structure in English law? In fact there are a considerable number, although they are concentrated in the regulatory area of criminalisation, which broadly speaking is concerned with imposing liability as an incentive to good practice in a particular area. Such structures often focus on health and safety issues, broadly construed.

6.97 An example of offences coupled with a "due diligence" defence can be found in the Food Safety Act 1990.[84] Under section 21(1) of this Act, under the heading "defence of due diligence", it is provided that:

> In any proceedings for an offence under any of the preceding provisions of the Part … it shall … be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control … .

6.98 Where it is alleged by a company that, in relation to some of the offences under the 1990 Act, they were committed by someone other than him or herself (or by someone under his or her control), the defence in subsection (1) can be established if the legal person proves:

> (a) that the commission of the offence was due to an act or default of another person who was not under his control … ;
>
> (b) that he carried out all such checks … as were reasonable in all the circumstances … ; and
>
> (c) that he did not know and had no reason to suspect at the time of the commission of the alleged offence that his act or omission would amount to an offence under the relevant provision.

6.99 Other examples of a defence of a "due diligence" kind can be found in section 34 of the Weights and Measures Act 1985, section 141A of the Criminal Justice Act 1998, and section 24 of the Trade Descriptions Act 1968.

[83] Ch 9, section 2 ("Prerequisites for Liability").

[84] For an analysis, see Smith and Hogan, *Criminal Law* (11th ed, 2005), pp 161 to 162.

Should English law follow this model for bribery?

A FAULT REQUIREMENT

6.100 We would not recommend that a "failure to prevent bribery" offence should be one of strict liability. That would run entirely counter to the normal approach to serious offences. It would also be wholly inconsistent with the view of consultees, such as the Law Society's Criminal Law Committee, Peters & Peters and Clifford Chance, that liability should not be imposed without proof of criminal intent or awareness. A positive requirement of fault can be a qualitative way of distinguishing the offence from a purely regulatory or administrative penalty, respecting which liability is more likely to be strict. As indicated above, a number of states insist on proof of a fault element in relation to lack of supervision.[85]

6.101 Accordingly, our recommended offence requires proof of negligence in failing to prevent bribery.[86] This negligence must be proved against an individual connected with or employed by the company. It must be shown that one of the functions (express or implied) of this individual, was to prevent the commission of bribery by persons (such as the one who committed bribery) performing services for the company. It is implicit in this that proof of a higher fault element than negligence will be sufficient. If a company intentionally does nothing to prevent the commission of bribery, that should obviously be regarded as satisfying the fault element of the offence.

6.102 The offence may thus involve circumstances in which a company is found to be at fault on a vicarious basis (but only when a fault element can be attributed to someone down the chain of command). The offence would be too narrow in scope if *only* the negligence of a director (or equivalent) could fix the company with liability. Indeed, there would be little point in recommending the offence at all if liability could not in some instances be established on a vicarious basis. If the prosecution always needed to show negligence on the part of a director (or equivalent), they would encounter almost all the same difficulties of proof of fault on the part of a company that make so problematic proof of the commission of the substantive offence of bribery itself by a company.

6.103 Even so, the prosecution will still have to show that the negligence of an individual connected to the company led to the failure to prevent bribery, and that (expressly or impliedly) one of this person's functions was to prevent bribery.[87] Without that requirement, the prosecution could fall back on proof of a negligent failure to prevent bribery through proof of a series of acts or omissions (by one or more people connected to the company) that cumulatively amount to such negligence. Attractive though that prospect might be from the prosecution's point of view, it would be inconsistent with the provision of a defence of "adequate systems" that we describe below.

6.104 Of course, it may prove impossible to identify anyone as a person responsible for preventing bribery by others connected to the company. It is in such a case that the proper course will be to allege that the negligent failure to prevent bribery was

[85] Para 6.95 above.

[86] Clause 7(1)(c).

[87] Clause 7(1)(c).

attributable to the directors (or equivalent) themselves, who have the residual responsibility to ensure that criminal offences are not committed on the company's behalf. In such a case, the "adequate systems" defence will not apply.[88]

AN "ADEQUATE SYSTEMS" DEFENCE

6.105 If a negligent failure to prevent bribery is the basis of the offence, can it logically nonetheless be a defence for the company to show that it has adequate systems in place designed to avoid the commission of bribery on its behalf? It can, if a distinction is drawn between instances of carelessness leading to the commission of bribery that even good preventative systems cannot completely eliminate, and instances of carelessness that tend to reveal either the absence of preventative systems or their inadequacy.[89]

6.106 A company should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness, if it can show that it had robust management systems in place to prevent bribery taking place. Clause 7(6) of the draft Bill makes it a defence to show that there were such systems in place. Here are two examples of carelessness leading to the commission of bribery that, in all probability, even an adequate preventative system could not reasonably be expected to have stopped in advance:

> An English company, C, that has anti-bribery policies of which employees are periodically reminded, takes over a company (YCo) based in a country where bribery by companies is common. Immediately following the take-over, a former employee of YCo (now an employee of C) bribes an official to secure a contract. The employee's supervisor (also a former employee of YCo) says that he or she was still coming to terms with C's new ways of operating, and had not fully appreciated the wholly categorical nature of the new policy. C is charged with negligently failing to prevent bribery by the employee.
>
> An English company, C, wishes to do business in Blueland. C employs an agent (X) living in Blueland to establish business contacts on C's behalf with Government officials in Blueland. X bribes those officials to place contracts with C. C can show that it gave Y, their regional manager, the task of ensuring that all foreign agents complied with the company's anti-bribery policy. Y had failed in her task, as she was busy looking for a job with a rival company.

6.107 In both these examples, if the relevant employee's negligence is a significant contributing factor in the failure to prevent bribery, that is a sufficient contribution for causal purposes to make the failure to prevent bribery a negligent one in law.[90] Further, the fact that the negligence was on the part of an employee, and

[88] Clause 7(7).

[89] See the discussion in C Wells, *Corporations and Criminal Responsibility* (2nd ed 2001), p 158.

[90] In law, a causally relevant factor need not be the sole or main cause of the event, so long as it is significant: *Smith* [1959] 2 QB 35.

not a director, will not allow C to escape liability: the failure to prevent bribery is C's failure even though it came about through the negligence of an employee.[91]

6.108 However, in both examples, C will have a good defence to the charge of negligently failing to prevent bribery, if C can show that its systems designed to prevent the commission of bribery were adequate.[92] As in these examples, individual failings of particular members of staff do not necessarily illustrate systematic failures in the way that it is sought to prevent the commission of bribery.

6.109 An important point to note, in relation to this last point, is that the adequacy of a system can be made to depend on the size (and, we might add, the resources) of the company in question. In a small company with five employees, it might be perfectly adequate for the managing director simply to remind the employees (and others) periodically of their obligations.

6.110 Consider, by way of contrast, the following example:

> A British company, C, with no previous experience of operating overseas, sets up a subsidiary company to act on its behalf, ZCo, in a country where the payment of bribes to secure contracts is commonplace. C does not have any anti-bribery policies, and does not look closely into how ZCo does its business. ZCo pays a bribe in order to secure an important contract on C's behalf.

6.111 In this example, C has failed to prevent bribery by someone providing services for it, who was acting on its behalf.[93] Clearly, with no anti-bribery policy in place, the "adequate systems" defence will not be available. So, liability will turn on whether it was negligence that led to the failure to prevent bribery.[94] If such negligence is found, it may be on the part of the directors (or equivalent) of C itself, who will always have an express or implied responsibility to prevent persons connected with C committing bribery. The negligence may also be proved against someone such as, say, a regional manager, so long as that person satisfies the test of being a person responsible (expressly or impliedly) for preventing bribery.

6.112 As indicated earlier,[95] the "adequate systems" defence will not be available in the case of a negligent failure to prevent bribery on the part of a director (or equivalent, someone who is the "mind and will" of the company). Here is an illustrative example:

[91] Clause 7(1)(c) of the draft Bill.

[92] Clause 7(6) of the draft Bill.

[93] See the discussion in the next section.

[94] Clause 7(1)(c).

[95] Para 6.7 above.

> A British company, C, takes over a company (YCo) in Kickbackland, with the former YCo employees now acting on C's behalf, and one of the former directors of YCo becoming a director of C. The payment of bribes to secure contracts is commonplace in Kickbackland, and so an anti-bribery policy in introduced as company policy by C. When visiting Kickbackland to evaluate progress in securing new contracts, the former director of YCo does not ask whether bribes have been asked for, or paid, to secure contracts for C. Taking this as a signal that the anti-bribery policy is a low priority, C's employees in Kickbackland pay bribes to secure contracts.

6.113 In this example, it may well be that C's anti-bribery policy constitutes an "adequate system" for preventing bribery being committed on C's behalf. However, that would not avail C in this instance, if the failure to prevent bribery was causally attributable to negligence on the part of a director. The "adequate systems" defence does not[96] and should not apply in such circumstances. The company itself must take responsibility for the directors' (or equivalent persons') own negligence, if that leads to a failure to prevent bribery by someone acting on the company's behalf.

THE SCOPE OF THE SUPERVISION RULE

6.114 Obviously, a company should be under a duty to prevent its own employees committing bribery. However, we noted above that a number of countries extend the scope of the "supervision rule" to agents and other third parties who act in the company's interests.[97] We believe that this must be the right approach if the offence is to be of any real significance in an international context.

6.115 It is perfectly possible, indeed quite likely, that a company may seek to secure the services of someone with local power, expertise and perhaps also influence, in an overseas jurisdiction, to do business on the company's behalf. If such a person does an act on behalf of the company, which would amount to bribery in English law, then it ought to be possible to raise the question whether due diligence was exercised to ensure that that person did not commit the offence. If there was a negligent failure to supervise that person, the question should ultimately be, "were the management systems in place adequate to ensure that such persons would not commit bribery?"

SHOULD A COMPANY BE LIABLE FOR FAILING TO PREVENT BRIBERY COMMITTED BY ONE OF ITS SUBSIDIARIES?

6.116 In the CP, we provisionally proposed that this issue should be deferred for consideration in a general review of corporate criminal liability. Of the eight consultees who addressed the issue, six agreed with the provisional proposal. It is also not a requirement that such liability be established under the OECD Convention, when bribery of foreign public officials is in issue.

6.117 Those who disagreed with the provisional proposal said that unless such liability could be imposed, there would be an unacceptably large loophole in the law. A situation might arise in which a company would be liable for bribery committed by

[96] Clause 7(7).

a local individual on the company's behalf, but not liable if the same act of bribery was committed by a local subsidiary organisation on the company's behalf.

6.118 We agree with the majority of consultees who addressed the provisional proposal that the broad issue of a company's liability for failing to supervise the acts of its subsidiaries should be left to consideration in the wider review.

6.119 However, in one respect we believe that, under the new structure we are recommending for corporate liability for bribery, the law will be too narrow if it fails to provide that liability may arise in respect of the acts of a subsidiary. This is in the situation mentioned above,[98] in which a subsidiary can be proved to have acted "on behalf of" the accused company. Under our scheme, a company may be held liable (subject to a due diligence defence) for a negligent failure to prevent bribery being committed by *anyone* who is proved to have acted on behalf of the company.[99] It would be anomalous if subsidiary companies were specifically to be excluded from the range of persons who may be considered to be acting on behalf of the company, for the purpose of establishing the company's liability in this respect.

6.120 In that regard, the test of whether a subsidiary company is providing services "on behalf of" a main company should be a substantive rather than a formal test. In other words, the question of whether the test has been satisfied will depend on all the circumstances.[100] It should not depend simply on whether, for example, the subsidiary company does business with foreign officials using papers that all say, "none of the (subsidiary) company's actions are done on behalf of the main company". It could be that, in such a case, there is clear evidence that the official sought, and received, an assurance that an advantage was to be conferred on behalf of the main company. If that were the case, then the advantage would be one to be conferred "on behalf of" the main company, notwithstanding the contrary indication on the paperwork.

6.121 This kind of situation is different from the situation in which a question arises whether liability should be imposed on a company for a failure adequately to supervise a subsidiary, when that subsidiary has committed bribery on its own account, and not specifically on behalf of the main company. It is this difficult question that we believe is best left to the general review of corporate liability.

SHOULD THERE BE A NEED FOR THE BRIBERY TO HAVE BEEN PROVED IN SEPARATE PROCEEDINGS?

6.122 If a company is charged with a failure to prevent bribery, should there be a need to show that the person the company is accused of failing adequately to

[97] Para 6.95 above.

[98] Paras 6.110 and 6.111.

[99] Clause 7(2).

[100] Clause 7(3).

supervise, in that respect, has in fact been convicted of bribery themselves? We believe that this would be too onerous and too restrictive a requirement.[101]

6.123 In a case where the individual was an agent living overseas, such a person might never be prosecuted. It should be enough that, in the proceedings against the company for a failure to prevent bribery, the tribunal of fact is satisfied by the prosecution so that they are sure that the bribery offence was committed by someone on behalf of the company.[102]

CONCLUSION

6.124 We believe that the creation of an offence of negligent failure to prevent bribery (with an "adequate systems" defence), as described above, is the right way to modernise the criminal law relating to bribery by companies. Our recommendation is founded on the important insights and conclusions of the Woolf Committee Report, as well as on the desirability of following the spirit as well as the letter of our international obligations.

6.125 Our aim is not to place bureaucratic barriers in the way of British businesses wishing to compete in foreign markets. Our aim is to ensure that British businesses do not compete on terms that are unfairly advantageous, solely in that they involve freedom from a developing set of international legal standards aimed at reducing the incidence of bribery. Beyond that, however, we have not sought to go. It must be kept in mind that these developing standards must also be met by other signatories to the OECD Convention, whose businesses also seek to compete in foreign markets.

INDIVIDUAL LIABILITY FOR FAILURE TO PREVENT BRIBERY

6.126 In the CP, we asked whether the question of individual liability (respecting directors or persons of equivalent status) for negligent supervision should be left to a general review of corporate criminal liability. Of the 16 consultees who addressed this question, 13 agreed that consideration of this question should be deferred. Accordingly, we will not make a recommendation in this report respecting such liability. It must be kept in mind that we are recommending in this report that it be possible to find individual directors (or equivalent persons) liable on a "consent or connivance" basis when bribery has been committed by their company.

SHOULD IT BE POSSIBLE, AS IT IS UNDER THE FRAUD ACT 2006, TO CONVICT HIGH-RANKING INDIVIDUALS WHO CONSENTED TO OR CONNIVED AT THE COMMISSION OF THE NEW OFFENCE?

6.127 We asked consultees whether it should be possible to fix high-ranking employees with criminal liability for bribery, on the basis that they consented to or connived at the commission of the bribery offence. Of the seven consultees who addressed the matter, six agreed that it should be possible.

[101] For more general supporting argument, see the Tasmanian Law Reform Institute, *Criminal Liability of Organisations*, Final Report No 9 (April 2007), para 6.4.17.

[102] Clause 7(2).

6.128 Our question was prompted by what we thought would be the desirability of having the same regime of liability for bribery as for fraud. Section 12 of the Fraud Act 2006 provides:

> (1) Subsection (2) applies if an offence under this Act is committed by a body corporate.
>
> (2) If the offence is proved to have been committed with the consent or connivance of –
>
> (a) a director, manager, secretary or other similar officer of the body corporate, or
>
> (b) a person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.[103]

6.129 A number of consultees thought that there were strong reasons to apply this regime of liability to bribery offences.

6.130 In that regard, we would cite what Professor Wells had to say on the relationship between bribery and fraud:

> It is in the pursuit of corporate objectives that individual employees use bribes. Individuals do the bribing, corporations benefit. Thus to sideline the key player/offender is to ignore the essence of the problem. This is not a case of an offence which sometimes corporations also commit, such as for example fraud, or even manslaughter. The mischief at which bribery offences are directed is almost entirely confined within business activity (or organisational activity if public authorities are included).

6.131 This point is well made. However, it does seem to us arguable that fraud (unlike manslaughter) can in fact become part of "business activity" in the same way as bribery. An example might be where employees within companies knowingly exaggerate to potential customers the benefits or value of financial products, holiday homes, and the like, in order to increase sales, with the encouragement or tolerance (consent or connivance) of the company itself. While they would have preferred the matter to have been left to a more general review of corporate criminal liability, the International Chamber of Commerce (UK) also considered that, "some assistance may be gained from the Fraud Act 2006 in its references to consent and connivance in section 12".

6.132 It seems to us that there is a compelling case to extend the "consent and connivance" regime applicable in fraud cases to bribery offences, including bribery of a foreign public official.[104]

[103] This regime is also applied by the Theft Act 1968 to the offence created by section 17 of that Act.

[104] Clause 8(2).

6.133 Before leaving this subject, however, we should mention the analogous provisions of the Financial Services and Markets Act 2000. This Act provides for the liability of individual company officers respecting misrepresentation offences in investment matters committed by the company. Section 400 says:

> If an offence under this Act committed by a body corporate is shown –
>
> (a) to have been committed with the consent or connivance of an officer,[105] or
>
> (b) to be attributable to any neglect on his part,
>
> the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

6.134 Section 400 thus imposes individual liability for a fraud-like offence not only when there has been "consent or connivance" but also when there has been "neglect" on the part of the individual officer. By way of contrast, under section 12 of the Fraud Act 2006, proof of neglect will not suffice in establishing individual liability; only proof of "consent or connivance" will do.

6.135 In general, companies, and their officers, should not face very different standards of liability depending on which charge they face from amongst such closely related offences. A more consistent approach ought to be developed. In the present context, we do not believe it is right to impose liability on an individual respecting a fraud offence, a fraud-like offence, or a bribery offence, if that individual has merely been careless. That is, in this context, a standard of liability that should be regarded as sufficient only to justify civil liability. Nothing short of proof of "consent or connivance" should be enough in this context to justify individual criminal liability.

[105] "Officer" is defined in section 400(5).

PART 7
DEFENCES

INTRODUCTION

7.1 In Part 8 of the CP, we considered what specific defences, if any, should be applicable to the new offences.[1] We began[2] by affirming a view taken in our previous report on corruption:[3] there should be no recognition of defences of disclosure, no obligation to account, normal practice, small value, entrapment and public interest. No consultee has suggested that we were wrong to maintain that view.

7.2 In our previous report,[4] we recommended that there should be two defences, namely principal's consent and proper remuneration. In the CP,[5] we said that these two defences were no longer necessary, because the model for a reformed offence of bribery that we were proposing made such defences superfluous. Again, no consultee has suggested that, in the new context, we were wrong to reject these two defences. They will be of no relevance to liability for the offences of bribery that we are now recommending.

7.3 In the CP we provisionally proposed[6] that there should be two defences:

(1) conferring an advantage in order to avert what was reasonably believed to be an imminent danger of physical harm to him or herself or another,[7]

(2) conferring an advantage in the reasonable belief that to do so was legally required.

7.4 In each case the accused would bear the evidential burden of adducing sufficient evidence to raise the defence. If the accused discharged that burden, the legal burden would be on the prosecution to negative the application of the defence.

7.5 In addition, we asked consultees whether it should also be a defence if an advantage was conferred in the reasonable belief that to do so was legally permissible.

7.6 In the following sections, we consider the responses of consultees to the provisional proposals and question about defences. We also have to re-consider the issue of which defences should be available, in the context of the reformed offences that we are recommending.

1 In Part 6 we recommended a defence to the corporate offence of negligently failing to prevent bribery. We do not discuss that defence further in this Part.

2 CP, para 8.2.

3 Legislating the Criminal Code: Corruption (1998) Law Com No 248, paras 5.135 to 5.150.

4 Above.

5 CP, para 8.6.

6 CP, paras 8.7 to 8.32.

7 This would be in addition to the common law defences of duress by threats and necessity. It would be a wider defence than duress by threats because the latter is restricted to imminent threats of death or *serious* injury.

7.7 Our conclusion is that it should be a defence to the discrete offence of bribery of a foreign public official for P to prove on a balance of probabilities that the reason for conferring an advantage was that P reasonably believed that he or she was legally obliged to do so by the law of the foreign country. In deciding whether such a belief was reasonable, regard should be had to the steps taken to discover the true legal position before the advantage was conferred.

7.8 For reasons that we will set out, we will not be recommending the creation of any specific defences to the two general bribery offences.[8]

7.9 We turn first to consideration of one defence that was provisionally proposed in the CP, to be applied to both offences.

CONFERRING AN ADVANTAGE IN ORDER TO AVERT WHAT THE PAYER REASONABLY BELIEVED TO BE AN IMMINENT DANGER OF PHYSICAL HARM TO HIM OR HERSELF OR ANOTHER

7.10 In the CP, we provisionally proposed the creation of a discrete "emergency" defence, aimed principally at the need to make facilitation payments in emergencies that fall outside the scope of the current defences of duress or necessity.[9] These common law defences cover only imminent threats of death or serious harm. We argued in the CP that it might be perfectly understandable if a payment was made in a situation less dire than that, and the law of bribery should recognise this.

7.11 Consequently, we proposed that a defence should be available when the person making the payment or conferring the advantage was (or reasonably believed that they, or another person, were) in imminent danger of physical harm if the payment was not made.[10] The defence was to be available in a slightly wider range of circumstances than the defences of necessity or duress, because it extended to an imminent threat of some physical harm, not just serious harm or death. We gave the example of a mother on holiday who finds that a facilitation payment must be paid if her sick child is to be treated in hospital, in circumstances where the child is not facing the threat of serious harm or death.[11]

The views of consultees

7.12 There was strong support for the existence of an "imminent danger of harm" defence to any offence of bribery. 15/18 consultees who addressed the issue supported the creation of such a defence. Indeed, the Financial Services and Markets Legislation City Liaison Group suggested extending it further to cover threats of imprisonment abroad.

[8] See paras 7.34 and 7.35 below.

[9] CP, paras 8.9 to 8.14.

[10] CP, para 8.14.

[11] CP, para 8.11.

7.13 However, most consultees who supported it did not specifically address the question whether the ambit of the existing common law defences of duress and necessity was too narrow, which was the main reason for the creation of a new, slightly wider defence. They simply indicated that they thought that a defence along these general lines (imminent threat of harm) was desirable.

7.14 The small minority who opposed the creation of a special defence thought that most situations where the case for a defence was compelling would be covered by the existing defences of duress and necessity, or could be dealt with through the proper use of prosecutorial discretion. The Council of HM Circuit Judges opposed the creation of special statutory defences to cover this kind of situation except in "exceptional situations". The creation of such a defence was also opposed by the higher court judges.

7.15 The Council of HM Circuit Judges would have preferred that the matter be dealt with through an expansive definition of the fault element for bribery, such that in emergency situations P could be found not to have intended to act improperly (corruptly). Peters and Peters said that if the fault element of the offence is defined correctly,[12] so that the payer is guilty of bribery only if he or she knew or believed that the recipient has done or intends to do an improper act, there would be no need for such a defence. They referred to example 8A in the CP.[13] In this example, P, who is on holiday abroad with her children, pays money to ensure that her sick child receives treatment which, were the payment not made, the child would not receive. They say that, in the example, the payment, "is not made in the belief that [Z] will do an improper act; on the contrary the belief is that [Z] will do that which [Z] should (i.e. treat the child)".

7.16 Our response to these comments is that, except in rare (and controversial) circumstances when the law is dealing with a belief in the lawfulness of the use of force, dealing with the issue of threats through manipulation of the fault element is unusual, and would require special justification. Even existing offences that have expansive fault elements, such as the element of "dishonesty" in theft, do not deal with duress in this way. No doubt it is possible to run an argument in a theft case that an appropriation of someone's property under duress is not a "dishonest" appropriation; but the accepted course in procedural terms is for D to claim duress in such circumstances.

7.17 *If* it is right for there to be an escape from liability for payments made under duress, then the defence should be cast in such terms, but we do not think it is helpful if the offence itself is defined in such a way as to accommodate what is really a defence. If D is claiming that he or she was intimidated into making a payment, the law should set the conditions under which that claim exculpates by making it the subject of a defence of duress. The key issue is consequently whether there should be a specific (wider) defence of duress or necessity for offences of bribery.

7.18 The higher court judges opposed the creation of a specially tailored defence on a different basis. They said:

[12] In their view, the proposals in the CP governing the fault element were flawed.

[13] CP, para 8.11.

> We are very concerned at this proposed dilution of the defence of duress/necessity. Whilst it may be appropriate to look at the definition of this defence and its application across the criminal justice spectrum generally, it should not be incrementally diluted in this way… On a practical, day-by-day implementation of the criminal law, consistency has a high value, and inconsistent defences between like offences are highly undesirable. Whilst particular examples can often be found where the implementation of the criminal law may be said, at least potentially, to be harsh, these are often more theoretical than practical in nature, and they can be ameliorated by appropriate charging and sentencing decisions (eg an absolute discharge).

7.19 On reflection, we have come to the view that this is a decisive argument against the creation of a specially tailored defence of "imminent threat of harm".

7.20 We have a duty to keep criminal law reform as a whole directed at the creation of a simpler system, something some of our consultees on bribery would quite naturally have no reason to keep in mind. Whilst that goal cannot always be achieved, here *is* a case where greater simplicity and consistency would be the result of leaving the issue of threats to be dealt with through what is a relatively settled body of common law. In cases where a threat can only be averted if a relatively small payment is not received, it seems overwhelmingly likely that the prosecution authorities would decide that the person making the payment has endured enough already without facing a prosecution for bribery.

7.21 Consequently, we will not be recommending the creation of a specially tailored (wider) defence of duress application to bribery offences.

CONFERRING AN ADVANTAGE IN THE REASONABLE BELIEF THAT TO DO SO IS LEGALLY REQUIRED OR PERMITTED

7.22 In the CP, we proposed that P should have a defence in circumstances where he or she could show that he or she reasonably believed that an advantage was legally required.[14] As we explain below, we now conclude that this defence should only apply in relation to the offence of bribing a foreign public official.

The views of consultees in favour of the defence

7.23 Of those who addressed the proposal, the majority (14/19) agreed that it should be a defence to the discrete offence, and to the general offence, if an advantage was conferred in the reasonable belief that to do so was legally required. For the most part, consultees who agreed with the proposal did no more than record their agreement. The Association of Council Secretaries and Solicitors said specifically that they thought that the defence was particularly important in the public sector context. They considered that there is great reliance by the public on the word of a councillor or senior official as to what might constitute "legal requirements". We might add that the same could be said of high-ranking officials overseas. The Serious Fraud Office also agreed with the proposal.

[14] CP, para 8.31.

7.24 In the light of consultees' responses, we considered whether there is a case for introducing the defence but restricting its application to cases where the advantage is given to a foreign public official whose country is not a Party to the OECD Convention or to the United Nations Convention against Corruption.[15] It is an interesting option but one that, on balance, we do not favour. It makes the availability of a defence depend on an arbitrary factor and it is quite possible for a country to be a Party to a Convention but nevertheless to be regarded as a "failing" Party.

The views of consultees against the defence

7.25 The response of the Crown Prosecution Service to our proposal was more cautious. It said that there was a danger in providing too many defences to the offence of bribery, and that there was a potential for the defence to be used successfully where a payer ought to have been aware that the payment constituted a bribe. It said that proper application of the Code for Crown Prosecutors should weed out cases where there is no public interest in prosecuting.

7.26 When we met representatives of the OECD Working Group on Bribery, they indicated that the Working Group did not favour the creation of the defence, in so far as it applied to bribery of a foreign public official. However, some representatives said that it might possibly be acceptable if there was a requirement that the defendant pleading the defence show "due diligence " in seeking to discover the true legal position. We have now incorporated a "due diligence " element into the defence, in the form of a requirement that the tribunal of fact consider the steps that P took to discover the legal position, in forming the belief that the payment was required or permitted.[16]

7.27 By way of contrast, both Corner House and Transparency International (UK) criticised the proposal, especially in so far as it was to apply to the offence of bribing a foreign public official. Corner House said that the proposed defence would undermine recent developments in corporate practice in relation to corruption, where detailed and extensive due diligence is undertaken before employing agents, making payments and engaging in business in general in a foreign jurisdiction. It believes that the defence would most likely be employed in cases of bribery occurring overseas and that it would place an additional burden on prosecutors.

7.28 Transparency International (UK) also said that, so far as research has shown, every country of the world has laws that criminalise bribery. Accordingly, those operating in or from the UK have no grounds for reasonably believing that to offer an advantage of the type that could constitute the offence of bribery could be either legally required or be legally permissible.

7.29 The higher court judges also said that the defence was not necessary. They added:

[15] The United Nations Convention against Corruption now has 140 signatories. Articles 15 and 19 require Parties to criminalise bribery of national public officials.

[16] See para 7.49 below and cl 5(2) of our draft Bill.

> Although the maxim "ignorance of the law is not a defence" is imperfect, it nonetheless captures the spirit of our approach, and if this defence is embodied in this offence and not in others, it will cause "knock-on" problems.

7.30 The higher court judges asked whether, given that the offence is aimed at corrupt behaviour, it might be preferable to build into the fault element that the accused acted "dishonestly". This approach runs counter to our wish to move away from the use of terms such as "corruptly" or "dishonestly" to carry the burden of describing what is wrong with bribery.

7.31 This is a substantial and significant body of opinion opposed to the creation of the defence, even if the majority agreed that there should be such a defence.

7.32 In response to the higher court judges' observation that "ignorance of the law is [generally] no excuse" in English law, as they concede, the maxim is an imperfect one. Not all the English authorities support a completely unyielding adherence to that maxim.[17] At least one other jurisdiction – also a signatory to the OECD Convention – takes a more generous approach, at least where the error was induced by an official.[18] Where the law in question, of which the defendant was ignorant, is not English law but the law of another jurisdiction, the case for adhering to the maxim very strictly seems even less persuasive.

7.33 Further, strictly speaking, it is not "ignorance" of the law that is the basis of the defence that we are recommending, in so far as that implies that a mere absence of knowledge of the law would in and of itself amount to an excuse. The defence we are recommending requires a positive, and adequately grounded, belief that a payment is required or permitted by law.

7.34 Having said that, we will be dealing with this issue through the fault element, where the general offence of bribery is concerned. Unlike the offence of bribing a foreign public official, the general offence is not founded on a hybrid "influence/undue payment" model.[19] It is founded on a hybrid "influence/improper conduct" model. The focus of the general offence is hence on the propriety of R's conduct, and not on the (supposed) legal propriety of the advantage.

[17] Compare *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 1 QB 426, with *Postermobile PLC v Brent London Borough Council*, *The Times*, 8 December 1997, both discussed in Andrew Ashworth, "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in Stephen Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002).

[18] See the Canadian case of *R v Cancoil Thermal Corporation* (1986) 52 CR (3rd) 188.

[19] For discussion of the different models for a bribery offence, see CP, Part 4.

7.35 What does this mean, in the case of the general offence? It means that where P believes that a payment is lawfully required or permitted, he or she believes that R will *not*, in accepting the payment, be falling short of an expectation that he or she would act in good faith, impartially, or be betraying a position of trust. Such a belief is in itself not a mistaken belief about what the law requires or permits; it is a belief about the propriety of R's conduct. It is a belief about whether R will (or will not) fall short of expectations or betray a position of trust by accepting an advantage. Under our recommendations, unless P intends R, by accepting the advantage offered, to do something involving either falling short of expectations or the betrayal of a position of trust, P does not have the fault element for the offence. There is therefore no need, within the general offences, for a special defence of belief that the payment is lawfully required or permitted. The same reasoning does not apply to the discrete offence of bribing a foreign public official, where there is no requirement that R's conduct should be improper.

7.36 In response to the criticisms made by Transparency International (UK), naturally we concede that bribery is subject to almost universal prohibition across the globe. That does not solve the problem of whether particular payments or other advantages are, or could reasonably be appreciated to be, bribes. "Taxes", "fees", "administration payments", and so forth, may all be legally required, or permitted in certain circumstances. Those paying them may quite understandably believe that they are legal requirements, or are legally permitted in particular circumstances (when the administration involved is time-consuming, for example). Given that we are not recommending that there should be a gap in the law to permit the making of "facilitation payments" without incurring liability, we believe that the defence we are recommending provides some protection for "innocents abroad".

7.37 In that regard, in response to the criticisms of Corner House, we have to keep in mind that the recommended offence will extend not only to companies but also to individuals travelling abroad, such as tourists. The latter do not have the opportunity, time or resources to find out if demands for payments held out as legally required or permitted are indeed what they are said to be. So it is right and just that such persons should have a defence that they reasonably believed an official when he or she said that a payment was required or permitted by law.

7.38 The difference between the individual and a large corporation seeking to make use of the defence is that the latter should face a much more daunting task in showing that their belief in the lawfulness of the payment was reasonable. In practice, companies seeking to make use of the defence should have to show, as part of their business strategy for dealing with the officials in question, that they took appropriate steps to discover whether any payments requested would indeed be required or permitted by law.

Conferring an advantage in the reasonable belief that to do so was legally permissible

7.39 In the analysis just given, we have not distinguished between payments legally required and payments permissible in law. In the CP, we drew a distinction between the two, and said that we had doubts about whether it should be a defence that a payment was reasonably believed to be legally permissible (as opposed to legally required).[20] We did this because we were concerned that the extension of the defence to cover "permissible" payments might provide scope for a claim that a payment was tolerated in a particular country's business environment. To permit such a claim to form the basis for a defence would undermine the offence of bribing a foreign public official.[21]

Views of consultees

7.40 Of those consultees who considered this issue, a small majority (9/17) were of the view that it should not be a defence, either to the discrete offence or the general offence, that P reasonably believed that the conferral of the advantage was legally permissible.

7.41 Some of those who opposed the extension to "permission" cases thought that there was a risk that P would then be able to rely on official tolerance, or the social and political acceptability of payments.[22] However, it was only our intention to ask whether the offence should be extended to legally permitted advantages. It should never be a defence, as such, that a payment was permitted as a matter of social or political practice.

7.42 The Crown Prosecution Service would have preferred that the whole matter be dealt with as a matter of prosecutorial discretion. However, we regard the matter of innocent belief in the lawfulness of conferring a payment or other advantage to be too major an issue to be left to prosecutorial discretion where a serious criminal offence is in issue.

7.43 Of those who supported the extension of the defence to cases in which the payment was legally permissible, the Law Society's Criminal Law Committee commented that the defence ought to be extended that far because, from P's point of view, P will believe that he or she has acted lawfully. With respect to that belief, no distinction can sensibly or should be drawn between beliefs about legal requirements, and beliefs in legal permissions.

7.44 We regard that as a decisive argument in favour of extending the defence to include cases where P reasonably believes that an advantage is legally permitted.

[20] CP, para 8.29.

[21] Paragraph 7 of the Commentaries to the OECD Convention distinguishes between "the written law" of a foreign territory and what is customary or tolerated. To confer an advantage on a foreign public official because it is tolerated or customary is an offence in the absence of a written law that makes it permissible or required. English law does not have a concept of "written law" and it does not seem to us helpful to introduce a distinction between "written law" and informal "unwritten law".

[22] See further, GR Sullivan, "Reforming the Law of Bribery (LCCP No185): Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution" [2008] *Criminal Law Review* 687, 698-699.

Conclusion

7.45 After further consideration, we do not now believe that a workable distinction could be drawn between legal requirements and legal permissions, in seeking to set limits to the defence that we are recommending. If a payment must be made, if certain conditions are met, it could be argued that the payment is still one that is required, but only in certain circumstances. However, if the circumstances in which the payment is required depend on evaluative as well as factual criteria, then the distinction between a requirement and permission becomes blurred. An example would be where an administration payment is required when the administration involved has been time-consuming or burdensome. It would be undesirable if the courts had to conduct pedantic interpretive exercises to determine the availability of a defence. To require the courts to distinguish between legal requirements and legal permissions in foreign legislation might be, in many instances, to set them an impossible task.

7.46 Moreover, in practice we believe that if the defence is confined to what is *legally* permitted (as well as required), then there should be no risk that factors such as the prevailing business environment, custom and practice, will have an impact on the availability of the defence.

7.47 Accordingly, clause 5 extends the defence of reasonable belief that a payment is legitimately due to cases in which it is reasonably believed that the payment is legally permitted, alongside cases in which it is reasonably believed that the payment is lawfully required.

Burden of proof

7.48 In the CP, we said that the evidential burden should be on P but that the legal burden of disproving the defence should be on the prosecution. In the light of consultees' responses, we now believe that the legal burden should be on P. We do not believe that placing the burden on P would contravene Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms. P will be in a position to explain what steps he or she took to ascertain the law of the foreign country and to give an explanation as to why it was his or her belief that the advantage was legally required.

Recommendation

7.49 **We recommend that it should be a defence to the discrete offence of bribery of a foreign public official for P to prove on a balance of probabilities that the reason for conferring an advantage was that P reasonably believed that he or she was legally obliged or legally permitted to do so by the law of the foreign country. In deciding whether such a belief was reasonable, regard should be had to the steps taken to discover the true legal position before the advantage was conferred.**

PART 8
BRIBERY COMMITTED OUTSIDE THE JURISDICTION

INTRODUCTION

8.1 In this Part, we consider the circumstances in which English law should recognise as an offence an act committed outside England and Wales (an extra-territorial act) which, if committed in England and Wales, would be an offence of bribery. We conclude that an act of bribery, or an act of bribery of a foreign public official, which, if done in England and Wales, would constitute a bribery offence, should constitute a bribery offence triable in England and Wales if

> done outside the United Kingdom by a person who at that time was:
>
> (a) a national of the UK,
>
> (b) a body incorporated under the law of any part of the United Kingdom, or
>
> (c) a natural person who was ordinarily resident in the United Kingdom.

8.2 We start with a brief description of the current law. We then explain our view of the UK's international obligations. Drawing on those two sections, we then state what we consider to be the defects in the current law. Before progressing to discuss the proposals in the CP and our conclusions, we address a preliminary issue raised by Council of HM Circuit Judges.

8.3 In that regard, however, we will not make any recommendations in this report in relation to our proposals concerning the criminal liability of accessories, or concerning criminal liability for assisting or encouraging bribery, or for conspiring or attempting to commit bribery.[1] We believe that issues raised in relation to accessorial liability, or inchoate liability for assisting and encouraging crime, have been adequately dealt with by our past recommendations in relation to those particular issues.[2]

[1] See paras 8.58 to 8.67 below.

[2] Participating in Crime (2007) Law Com No 305; Law Commission, Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300. See now the Serious Crime Act 2007, Part 2.

THE JURISDICTION OF ENGLISH COURTS

8.4 At common law, the general principle is that conduct which would constitute an offence if committed in England and Wales is not an offence under English law if perpetrated outside England and Wales.[3] This is so even if it is a British citizen who perpetrates the conduct. Conversely, conduct in England and Wales that is an offence if engaged in by a British national or a body incorporated under English law is also an offence if engaged in by a foreign citizen or body incorporated under a foreign law. The function of the criminal law is to deter and punish the commission of offences in England and Wales. In order to do so effectively, English courts have jurisdiction to try all natural and legal persons whose conduct in England and Wales constitutes an offence. By contrast, conduct perpetrated outside England and Wales is not within the jurisdiction of English courts unless the reach of the courts is extended by a clear rule.

8.5 Parliament is supreme and, when enacting an offence, can stipulate that it can be committed by conduct occurring outside England and Wales.[4] When interpreting a statutory offence, the courts start from a "strong presumption" that Parliament did not intend to enact an extra-territorial offence:[5] for the presumption to be displaced, there have to be clear words. For corruption offences, such clear words are contained in section 109 of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act").

Section 109, Anti-terrorism, Crime and Security Act 2001[6]

8.6 Neither the 1889 Act nor the 1906 Act created extraterritorial offences. Section 109 of the 2001 Act altered the position. It did so by providing that an act, which if done in the United Kingdom would constitute a corruption offence, constitutes a corruption offence if done outside the United Kingdom provided it is done:

(1) by a national of the United Kingdom; or

(2) by a body incorporated under the law of any part of the United Kingdom

There is no requirement that the act must also constitute an offence under the law of the foreign territory.

8.7 "Corruption offence" means not only the common law offence of bribery and the offences under section 1 of the 1889 Act but also the first two offences under the 1906 Act. The inclusion of offences under the 1906 Act means that, unlike some other jurisdictions, it is an offence under English law (for a British national or company) to bribe a private agent outside England and Wales.

8.8 The categories of natural and legal persons to which section 109 applies are restricted. Further, section 109 does not apply to acts done in Scotland or Northern Ireland.

[3] For the purposes of this report, the common law exceptions are not important.

[4] Equally, it can extend the scope of a common law offence to conduct occurring outside England and Wales.

[5] *Treacy* [1971] AC 537, 551 by Lord Reid; *Air India v Wiggins* [1980] 1 WLR 815.

[6] A similar provision applies in relation to Scotland: Criminal Justice (Scotland) Act 2003, s 69.

8.9 Section 109 only applies to bodies that are incorporated under any part of the law of "the United Kingdom". "The United Kingdom" means Great Britain and Northern Ireland.[7] Crown Dependencies ("CD")[8] and Overseas Territories ("OT")[9] are not part of Great Britain. It follows that section 109 does not apply to companies that are incorporated in the Crown Dependencies and Overseas Territories.

8.10 Section 109 is restricted to bodies that are incorporated. The requirement that a body must be incorporated means that unincorporated bodies - such as most types of partnerships, unincorporated foundations and associations and many trusts - fall outside the ambit of section 109. Nonetheless, individual natural persons such as trustees and partners who make up the unincorporated bodies may still be prosecuted.

8.11 Section 109 applies to acts done outside the United Kingdom. As Scotland is part of the United Kingdom, if, when P is in Carlisle, P bribes R in Dumfries, P commits no offence known to English law.[10] In such a case, P is liable to be prosecuted for a corruption offence under Scottish law.

[7] Interpretation Act 1978, s 5 and Sch 1.

[8] Of which there are three.

[9] Of which there are 14.

[10] Both the 1889 and the 1906 Acts apply to Scotland and Northern Ireland. However, even if an offence-creating provision does apply to other parts of the United Kingdom, the general rule is that any offences committed wholly in Scotland or Northern Ireland are offences under Scots or Northern Ireland law alone.

THE UNITED KINGDOM'S OBLIGATIONS UNDER INTERNATIONAL CONVENTIONS

8.12 In Part 11 of the CP we pointed out[11] that, under the various international Conventions that it has ratified,[12] the only legal obligation that the UK has in relation to bribery committed outside the UK is to take measures to criminalise extra-territorial acts of bribery that are committed by natural persons who are its nationals.[13] The fact that the obligation is limited to extra-territorial acts that are committed by its nationals is the result of the government exercising its entitlement to derogate from some of the obligations that would otherwise apply under the Conventions that it has ratified.[14]

8.13 We said[15] that in relation to principal offenders, the obligation to take measures to criminalise extra-territorial acts of bribery that are committed by natural persons who are its nationals had been satisfied by the enactment of section 109 of the 2001 Act and section 69 of the Criminal Justice (Scotland) Act 2003.

8.14 In addition, we said[16] that the current law goes beyond the minimum obligations imposed on the UK under the international Conventions to which it is a signatory. This is because sections 109 and 69 also apply to bodies incorporated under the law of any part of the UK.

DEFECTS IN THE LAW

8.15 While we thought that the current law satisfies the UK's international obligations,[17] we also said we thought there were arguably defects in the law. First, a foreign national does not commit an offence known to English law if he or she commits an act of bribery outside the UK (or assists or encourages such an act) even if he or she is ordinarily resident in England and Wales.

8.16 Secondly, sections 109 and 69 only apply to bodies that are incorporated under any part of the law of Great Britain and Northern Ireland. They do not extend to bodies incorporated under the laws of the Crown Dependencies or the Overseas Territories.

[11] Para 11.9.

[12] We referred to Art 4 of the OECD Convention, Art 17 of the Criminal Law Convention on Corruption, Art 7 of the Council of the European Union's Framework Decision of 22 July 2003 on combating corruption in the private sector and Art 42 of the United Nations Convention Against Corruption.

[13] The UK's obligations under the OECD Convention are confined to active bribery of foreign public officials. By "active" bribery we mean the offence committed by the person who promises or gives the bribe as opposed to the offence committed by the person who solicits or receives the bribe – sometimes referred to as "passive" bribery. Under other Conventions, the UK's obligations extend to both active and passive bribery whether in the public or private sector. The proposals that we set out in Part 11 of the CP were not confined to the discrete offence that we were proposing and made no distinction between active and passive bribery and between bribery of foreign public officials and bribery of persons in the private sector.

[14] CP, para 11.8.

[15] CP, para 11.9.

[16] CP, para 11.10.

[17] At least in relation to principal offenders.

8.17 Thirdly, the enactment of sections 109 and 69 does not guarantee that a national of the UK or a body incorporated under the law of any part of the UK ("X") will be convicted of an offence of bribery if X assists or encourages the commission outside the United Kingdom of an act of active bribery by another natural or legal person ("P").

8.18 If P is either a national of the United Kingdom or a legal person incorporated under the law of any part of the United Kingdom then it is possible to convict X of the offence as an accessory. However, if P is neither a national of the United Kingdom nor a legal person incorporated under the law any part of the UK, it is not possible to convict X. This is so even if X's act of assistance or encouragement is done in England and Wales. P, the principal offender, does not commit an offence known to English law and under the doctrine of secondary liability, the criminal liability of an accessory derives from and is dependent upon an offence having been committed by a principal offender.

PRELIMINARY ISSUE

8.19 In response to what we perceived to be the major defects of the current law, we made a number of proposals. In the following sections, we consider the proposals and the responses that they attracted, as well as setting out our recommendations in the light of the responses. However, before we do so, we need to refer specifically to the response of the Council of HM Circuit Judges because it raises a fundamental issue.

8.20 The Council of HM Circuit Judges said they would be concerned if:

> the law in England and Wales results in the prosecution of a defendant in England and Wales for an offence arising from activities in a foreign jurisdiction where those activities were not criminal acts in that jurisdiction but were acts that were accepted as a normal feature of life or business in that jurisdiction.

It is clear that the Council had in mind cases of active bribery.

8.21 We will take the Council to be asking the question whether P should stand to be judged by the same legal test for the legitimacy of a payment, irrespective of the difference in that regard between jurisdictions.

8.22 Section 109 makes it an offence triable in the United Kingdom for a national of the UK[18] to do anything outside the UK which, if done in the UK, would constitute a corruption offence, *irrespective of whether the act would be an offence in the territory where it is perpetrated*. In this regard, section 109 goes beyond the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials. This is because paragraph 8 of the Commentaries on the Convention makes it clear that under the Convention a Party does not have to criminalise the giving of an advantage to a foreign public official if acceptance of the advantage was permitted or required by the law of the foreign public official's country, including case law.[19]

8.23 Under our recommendations, the latter approach is adopted (involving the exception in paragraph 8 of the Commentaries), the approach that is more generous to P. That is to say, it will be a complete defence, a justification for P's conduct, to show that the conferral of the advantage was permitted or required by the law of the foreign public official's country. In this particular instance, it would be unfair to P to require him or her to abide by English law in refusing a payment, when the official asking for payment is himself or herself permitted or required by law to do so.

8.24 The legal-bureaucratic structures governing interaction between (and the definition of) the private and the public sector may vary a great deal from one country to the next. Even if what is merely customary or tolerated in practice is put on one side as irrelevant, there may still be understandable variation between countries in the circumstances in which payments can and should be made as a matter of law. A realistic and fair law of bribery must account for this.

8.25 In this regard, the scheme we are recommending goes further towards meeting the concern of the Council of HM Circuit Judges. This is the concern that the criminal law may be too harsh in its policy towards British businesses operating in countries with different legal approaches to payments to officials or other persons. We are recommending that P should have a defence if he or she bribed a foreign public official in the *reasonable belief* that the advantage was required or permitted by the law of the foreign jurisdiction.[20] This approach is more generous than section 109 because there is no such defence in that section.

[18] Or a body incorporated under the law of any part of the United Kingdom.

[19] However, in paragraph 7 of the Commentaries a distinction is drawn between "the written law" of a foreign territory and what is customary or tolerated. To confer an advantage on a foreign public official because it is tolerated or customary is an offence in the absence of a written law that makes it permissible or required. (The distinction between "written" and "customary" law is not one that is recognised in English law.) The Council of HM Circuit Judges appears to believe that it should not be an offence if the advantage conferred is a normal feature of life or business in the territory concerned.

[20] See 7.49 above.

FOREIGN NATIONALS WHO RESIDE IN THE UNITED KINGDOM, CROWN DEPENDENCIES OR OVERSEAS TERRITORIES

Proposal

8.26 We provisionally proposed[21] that an act which, if done in England and Wales, would constitute a bribery offence should constitute a bribery offence if done outside the United Kingdom provided that it was done by either a national of the UK, or a natural person who was resident in the United Kingdom.

8.27 The proposal would extend the law by making individuals who are resident in the United Kingdom criminally liable for acts of bribery, which they are not under the current law. Such an extension would put them on the same footing as UK nationals.

Views of consultees

8.28 Of those that commented on the proposal, all supported the proposal in principle. Both the Crown Prosecution Service and the Serious Fraud Office described the arguments for extending the current law to foreign nationals who are resident in the United Kingdom as "compelling". The Institute of Chartered Accountants said that it had some concern that "such a provision could smack of unnecessary extra-territoriality". However, it added that it recognised the need to ensure that the whole of the business community in the UK is held to the same standards and that on balance, subject to clear and well defined definitions of residency, it supported the proposal.

8.29 The Financial Services and Markets Legislation City Liaison Group ("the FSMLCLG") said that, as a matter of principle, the proposal "looks sensible" although they sounded a cautionary note that it might significantly diminish the commercial attractiveness of the UK. On the latter point, we believe that foreign nationals who might be deterred from residing and doing business in the UK – because they would face the prospect of prosecution if they committed an act of bribery of a foreign public official outside the UK – are not persons that the UK should be seeking to attract.

8.30 The Law Society Criminal Law Committee ("the LSCLC"), while not hostile to the proposal, raised two issues. First, the Committee asked whether it is important that the foreign national was "resident" in the UK before the commission of the offence, during the commission of the offence and after the commission of the offence.

8.31 Secondly, the Committee said that careful consideration would need to be given as to how residency should be defined: "Does a person have to be ordinarily resident in the UK, frequently resident, primarily resident?"

8.32 On the first point raised by the LSCLC, we believe that the policy requires that the foreign national be "resident" in the UK at the time that he or she commits the act of bribery. The fact that a foreign national happened to reside in the United Kingdom before or after the commission of the offence should not suffice if at the time of committing the offence he or she was not resident in the United Kingdom.

[21] CP, para 11.54.

8.33 On the second point raised by the LSCLC, we have concluded that "resident", in this context, should mean "ordinarily resident", as we now explain.

"Ordinarily resident"

8.34 Dicey and Morris offer the following comment on the term, "ordinary residence":

> It has sometimes been said that "ordinary residence" means nothing more or less than "residence", but it is submitted that the better view is that the adjective does add something, an element of continuity, order, or settled purpose.[22]

8.35 This view is supported by dicta from early income tax cases: "if [ordinarily resident] has any definite meaning I should say it means according to the way in which a man's life is usually ordered".[23] Although it might be thought that the interpretation used in these tax cases should be confined to that context, that view was unanimously rejected by the House of Lords in *R v Barnet LBC, ex parte Nilish Shah*.[24] Lord Scarman, with whom the rest of the House agreed, held as follows:[25]

> It was urged upon your Lordships by counsel for Brent and Barnet Borough Councils (but not, as I understood her ultimate position, by counsel for the Shropshire County Council) that these two decisions of the House were authority only for a special meaning limited to the Income Tax Acts. The converse is the case. The true reading of the speeches delivered is that the House decided to construe the words in their tax context as bearing their natural and ordinary meaning as words of common usage in the English language: note particularly the words of Lord Warrington of Clyffe. In the present cases Lord Denning MR adopted the same view of the natural and ordinary meaning of the words … I agree with Lord Denning MR that in their natural and ordinary meaning the words mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration." …
>
> … Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

8.36 Since the courts' approach has largely been to defer to the normal meaning of the words "ordinarily resident" (absent specific statutory intentions), we think that it would be readily understood by natural persons within the UK.

[22] *Dicey and Morris, The Conflict of Laws* (14th ed 2006), para 6-120.

[23] *Levene v IRC* [1928] AC 217, by Lord Warrington at 232.

[24] [1983] 2 AC 309.

[25] Above, at 341 and 342.

8.37 The 2001 Act has set a precedent for the use of "ordinarily resident" in the criminal context.[26] Prior to that Act, statutes establishing criminal liability for UK residents did so without further definition.[27] We think it is desirable to ensure consistency of approach with the 2001 Act, particularly given that that Act is also concerned with combating international crime effectively.

8.38 It is also worth noting the discussion of the meaning of the term during the passage of the International Criminal Court Bill through Parliament. Lord Goodhart said that, by way of contrast with its use in tax legislation, "the residence test will be applied for the purpose of founding jurisdiction over criminal offences. In those circumstances, the court is likely to interpret the residence test strictly."[28]

Foreign nationals ordinarily resident in Crown Dependencies or Overseas Territories

8.39 In the CP, we did not consider whether our proposals concerning bribery overseas should apply to foreign nationals resident in a Crown Dependency or Overseas Territory, as well as to foreign nationals resident in the UK. In the light of the strong support for our proposal as it concerns foreign nationals resident in the UK, we believe that it would be right to make the following observation.

8.40 To put the matter briefly, it does not seem right that a foreign national ordinarily resident in Southampton could face prosecution in England and Wales for committing bribery overseas, but could avoid such a prosecution by the expedient of becoming ordinarily resident in, say, Guernsey. However, this is not a matter for the Law Commission, but one which we suggest the Government may wish to pursue.

[26] Section 113A of the Anti-terrorism, Crime and Security Act 2001 makes it an offence for a "United Kingdom resident" to commit an offence contrary to s 113. Section 9(2) defines "resident of the United Kingdom":

> A resident of the United Kingdom is—
> an individual who is ordinarily resident in the United Kingdom,
> a body incorporated under the law of any part of the United Kingdom, or
> a Scottish partnership

The section 113 offence referred to is the use, or threatened use, of a noxious substance or other noxious thing, where that use or threat is designed to influence the Government or intimidate the public.

[27] For example, War Crimes Act 1991, s 1; Terrorism Act 2000, s 63A, s 63B; International Criminal Court Act 2001, s 51; Sexual Offences Act 2003, s 72

[28] *Hansard* (HL), 8 March 2001, vol 623, col 421.

CORPORATE BODIES

8.41 We noted above that section 109 of the 2001 Act provides that an act, which if done in the United Kingdom would constitute a corruption offence, constitutes a corruption offence if done outside the United Kingdom provided it is done by "a body incorporated under the law of any part of the United Kingdom".[29] The 2001 Act thus extends the reach of its overseas bribery provisions to bodies incorporated in Scotland and in other parts of the UK with a legal existence separate from that of England and Wales for this purpose.

8.42 The international anti-bribery conventions to which the 2001 Act is relevant, in particular the OECD Convention, were signed on behalf of the UK, and not just on behalf of England and Wales. Accordingly, we have retained the approach of the 2001 Act in relation to the two general offences of bribery and to the discrete offence of bribery of a foreign public official. Under that approach, liability for overseas bribery may be incurred by any body incorporated in the UK. This aspect of the existing approach was not called into question by any consultee.

8.43 That leaves the question whether liability should be extended to incorporated bodies in Overseas Territories or Crown Dependencies, and to such bodies in jurisdictions outside the UK.

Companies not incorporated under the law of any part of the United Kingdom nor under the law of a Crown Dependency or Overseas Territory

8.44 In the CP we said that we did not think that criminal liability for extra-territorial acts of bribery should extend to bodies that are incorporated under the law of a territory *outside* the United Kingdom, its Crown Dependencies or its Overseas Territories.

8.45 One consultee, the UK Anti-corruption Forum, said that extra-territorial jurisdiction should extend not only to foreign nationals who were resident in England and Wales but also to companies which had a place of business in the UK even if they were not incorporated under the law of any part of the UK.

8.46 This is not an issue on which we consulted. It is a question best suited to a more general review of corporate liability, because it raises an issue of relevance to many crimes committed by legal persons, not just bribery. Accordingly, we believe that we should not at this stage make the recommendation suggested by the UK Anti-corruption Forum.

Bodies incorporated under the law of the Crown Dependencies and the Overseas Territories

8.47 That brings us to the question whether an act which, if done in England and Wales would constitute a bribery offence, should constitute a bribery offence if done outside the United Kingdom by a body incorporated under the law of a Crown Dependency or an Overseas Territory. We invited consultees to comment on this issue.[30]

[29] This includes limited liability partnerships: Limited Liability Partnerships Act 2000, s 1.

[30] CP, para 11.57.

Views of consultees

8.48 The overwhelming majority of consultees who commented said that they thought that such an act should be an offence.

8.49 Of those who disagreed, the Crown Prosecution Service said that they did not think that it should be an offence because of the particular difficulty in prosecuting companies incorporated in the CDs and OTs. Such companies may not have any link with the UK and there would be a need to rely on evidence obtained through mutual legal assistance. This could be a costly and time-consuming process. It was not aware of any precedent whereby companies incorporated in the CDs and OTs had been made subject to extra-territorial jurisdiction.

8.50 We accept that a criminal investigation into a company incorporated under the law of a CD or OT may be costly and time-consuming. However, in itself, we do not believe that this is a sufficient reason for declining to extend extra-territorial jurisdiction to such companies. The OECD Working Group has commented on the fact that under the current law extra-territorial jurisdiction does not extend to such companies.[31]

8.51 The Serious Fraud Office took a contrary view to that of the Crown Prosecution Service. The Serious Fraud Office said that they did not believe that it should be possible to escape criminal liability for bribery overseas by the simple expedient of using a subsidiary company incorporated in a Crown Dependency or Overseas Territory to make payments. Of course, a subsidiary company incorporated in another jurisdiction may be used for the same purpose. However, in such instances there is a strong case for saying that, as a matter of constitutional and international law, a bribery prosecution is for the authorities in that jurisdiction. That case is much weaker when the subsidiary company is incorporated in a jurisdiction that is constitutionally dependent on the UK (with respect, for example, to foreign policy), such as a Crown Dependency.

8.52 We believe that an act, which if done in England and Wales would constitute an offence of bribery or the discrete offence of bribery of a foreign public official, should constitute an offence triable in England and Wales if done outside the United Kingdom by a body incorporated under the law of a Crown Dependency or an Overseas Territory. Such a change would fill what we said in the CP was a significant gap in the current law.[32] However, as we are the Law Commission of England and Wales, this is not a matter about which it is appropriate for us to make a recommendation, but it is an issue the Government may wish to take up in negotiation with the appropriate authorities.

Unincorporated bodies

8.53 In its response to the Joint Committee in its scrutiny of the Draft Corruption Bill, the Home Office said:

[31] See further, Mark Pieth, "Jurisdiction" in M Pieth, L Low, and P Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2007) pp 275 to 276.

[32] CP, para 11.43. See para 8.16 above.

> An unincorporated body does not have legal personality so criminal liability for corruption could not attach to the body itself. Any criminal liability would have to attach to the people who were members of the unincorporated body. So it would be possible, for example, to bring within the scope of the corruption offences individual members of a partnership where the partnership was drawn up under English law. But we think this would be taking extraterritorial jurisdiction too far. Many people will make their agreements subject to English law even though they have no connection with this country. It would not be fair for them suddenly to find that they were personally subject to English criminal law jurisdiction because of this.[33]

8.54 This first part of this statement may not be right, because the law may permit partnerships to be prosecuted and convicted even though they are not incorporated bodies. Under sections 5 and 11 of the Interpretation Act 1978, the word "person" is to be construed as extending to "a body of persons corporate or unincorporate". Our offences of bribery use the term "person" to describe the offender. Unless the interpretive context otherwise dictates, the term is apt to cover bribery committed by unincorporated bodies (for example, Trade Unions or some partnerships).

8.55 However, whilst other criminal jurisdictions in the UK, along with England and Wales, have accepted the application of bribery offences to acts outside the UK if those acts are done by natural persons, or by bodies "incorporated" within the UK, they have not accepted such extra-territorial application of the law in so far as it relates to unincorporated bodies. As it is not for us to recommend that other jurisdictions within the UK should accept the widening of the range of bodies subject to the extra-territorial application of the law, this will be a matter for Government, in consultation with the law reform agencies in the separate criminal jurisdictions within the UK.

AT WHAT POINT IN TIME MUST A PERSON FALL WITHIN THE RELEVANT CATEGORY?

8.56 The relevant time for determining whether a person falls into one of the categories is the time when the act was done. In other words, the offences apply to persons who are a UK national, a body incorporated under UK law, or a natural person ordinarily resident in the UK at the time when he, she or it commits the act of bribery.

RECOMMENDATION

8.57 **We recommend that an act of bribery which, if done in England and Wales, would constitute a bribery offence or an offence of bribing a foreign public official, should constitute an offence triable in England and Wales if done outside the United Kingdom by a person who at that time was:**

(1) a national of the UK,

[33] Annex 1 to Draft Corruption Bill Report and Evidence, Joint Committee on the Draft Corruption Bill (2002-03) HC 705.

(2) a body incorporated under the law of any part of the United Kingdom, or

(3) a natural person who was ordinarily resident in the United Kingdom.

THE PROPOSALS RELATING TO SECONDARY PARTIES

8.58 In the CP, we made a number of proposals in relation to secondary parties which were consistent with those that we made in our report Participating in Crime.[34]

8.59 We provisionally proposed[35] that if the payer or recipient, with X's assistance or encouragement, commits an offence of bribery in England and Wales, X also commits an offence of bribery under English law irrespective of:

(1) where the assistance or encouragement was rendered; and

(2) the payer's or the recipient's citizenship, nationality or place of residence.

This proposal did no more than re-state the common law.

8.60 We also provisionally proposed[36] that if the payer or the recipient, with X's assistance or encouragement, perpetrates an act of bribery outside England and Wales, X commits an offence of bribery under English law if:

(1) X's assistance or encouragement takes place wholly or partly within England and Wales; and

(2) the payer's or the recipient's act of bribery:

(a) constitutes an offence of bribery under English law; or

(b) would have constituted an offence of bribery under English law had the payer or the recipient satisfied a condition relating to citizenship, nationality or residence.

8.61 Our third proposal on secondary liability[37] was that if the payer or the recipient, with X's assistance or encouragement, does an act of bribery outside England and Wales, X commits an offence of bribery known to English law if:

(1) X's assistance or encouragement takes place wholly outside England and Wales; and

[34] Participating in Crime (2007) Law Com No 305.

[35] CP, para 11.59.

[36] CP, para 11.60.

[37] CP, para 11.64.

(2) irrespective of whether the payer or the recipient committed an offence known to English law, X would have committed an offence known to English law had he or she done the act of bribery in the place where the payer or the recipient did it.[38]

8.62 We noted above[39] that the UK has an obligation to criminalise extra-territorial acts of bribery of foreign public officials that are committed by persons who are its nationals. Section 109 of the 2001 Act ensures that the United Kingdom complies with this obligation in relation to principal offenders but it does not do so in relation to secondary parties.[40]

8.63 The proposals that we made would rectify the position by providing that in cases where P perpetrates an act of bribery outside England and Wales with X's assistance or encouragement, the fact that P does not commit an offence known to English law – for example, because P is a foreign national who is not resident in the UK or is a foreign subsidiary of a UK company – would not in itself preclude X being criminally liable.

Views of consultees

8.64 Of those who addressed the proposals, the overwhelming majority (14/17) said that they agreed with them. Peters and Peters considered that they were "complex and unwieldy". They said that there should be "a thorough review of the issues of jurisdiction and secondary/inchoate liability". However, they added, "pending such a review these amendments are necessary to cope with the realities of international commerce".

Conclusions

8.65 It is right to acknowledge that our recommendations are complex: this is a necessary reflection of the fact that a wide variety of factual situations can and does occur. For example, the principal offender may commit the offence in England or Wales but the act of assistance or encouragement may be done outside England or Wales. Alternatively, the principal offender may commit the offence outside England and Wales, and the act of encouragement or assistance may take place in England or Wales.

8.66 As mentioned above, our proposals in relation to the liability of accessories drew directly on our earlier work. If the recommendations in our report Participating in Crime are accepted, and if our recommendation in this report to create an offence of bribing a foreign public official is accepted, and the draft provisions giving effect to those recommendations are enacted, then English law will be compliant with the OECD Convention, and secondary parties who help others commit bribery will be liable to prosecution in appropriate circumstances.

[38] Eg, X is a Spanish national ordinarily resident in London. He flies to Stockholm and assists P, a Japanese national resident in Tokyo, to bribe R. Under our recommendation at para 8.57 above, X's liability to prosecution depends on whether X falls within the list in clause 6(3) of the draft Bill because whether X could have been tried if he had committed P's offence where P had committed it depends on precisely that fact.

[39] See para 8.12 above.

[40] See para 8.17 above and Article 1(2) of the OECD Convention.

8.67 We have explained in the CP and in this report what we think the position should be, and we have already published our recommendations (and draft clauses) in relation to secondary parties. We therefore do not think that we need to make separate recommendations on the issue in this report.

THE PROPOSALS RELATING TO INCHOATE LIABILITY

Assisting and encouraging

8.68 The proposals that we made in the CP in relation to inchoate liability[41] were designed to be consistent with the recommendations that we made in our report Inchoate Liability for Assisting and Encouraging Crime.[42] Those recommendations are now contained in the Serious Crime Act 2007 ("the 2007 Act") and we do not think that we need make any further recommendations in relation to them. The inchoate offences of assisting or encouraging crime will apply to any new statutory bribery offences when they are brought into force.

Conspiracy and attempt

8.69 Despite the fact that in the CP we made proposals in relation to conspiracy,[43] we now think that the best way forward is to make no recommendations in relation to either conspiracy to commit bribery or attempt to commit bribery.

8.70 We plan to publish a separate report and draft Bill on Conspiracy and Attempt in 2009,[44] and in that report we will be making recommendations on extra-territorial jurisdiction consistent with those that we made in relation to assisting and encouraging, which are now contained in the 2007 Act.

THE NEW OFFENCE OF FAILING TO PREVENT BRIBERY

8.71 The new offence that we are recommending, that of failing to prevent bribery, can only be committed by a person other than a natural person.[45] Such persons may, of course, in law be separately recognised in jurisdictions within the UK in a way that natural persons may not. So, whereas one speaks of "British" citizens, when referring to natural persons, one refers to "English" companies, to "Scottish" partnerships, and so on.

8.72 The new offence we are recommending involves the extension of criminal liability into an entirely new area. Accordingly, we have concluded that it would not be appropriate to recommend that bodies other than those incorporated and whose registered office is situated in England and Wales should at this stage be liable to prosecution in this jurisdiction for the offence of failing to prevent bribery. It will be for the other criminal jurisdictions within the UK to decide whether or not they wish to extend their bribery laws to create this new offence, or some variation on it.

[41] See paras 11.70 to 11.77 of the CP.

[42] (2006) Law Com No 300.

[43] See paras 11.71, 11.75 and 11.78 of the CP.

[44] Following on from our CP, Conspiracy and Attempts (2007) Law Commission Consultation Paper No 183.

[45] See Part 6 above.

PART 9
CONSENT TO PROSECUTION; OTHER MATTERS

CONSENT TO PROSECUTION

9.1 Under the current law, certain bribery offences require the consent of the Attorney General (AG) to prosecution.

9.2 In the CP,[1] we recommended that the consent of the AG should be required only in cases with an international dimension to them. In other cases, we provisionally proposed that it was to be the Director of the prosecution authority who was to give the consent.[2]

9.3 Putting aside cases with an international element, our proposal was what all of our consultees who addressed the matter (13/13) wished to see. In cases involving an international element, our provisional proposal that the AG should continue to have a role was less well supported, with only a minority of those who addressed the issue agreeing with the proposal (7/16). Only 2/16 consultees thought that a consent requirement should be abolished altogether.

9.4 Our provisional proposals have now been overtaken by events. The Government has now published a White Paper and draft Constitutional Renewal Bill. In Part 2 of the Bill, there is a requirement that the consent of the Director of the relevant prosecution authority be obtained for prosecutions for bribery under statute (the 1889 and 1906 Acts), in place of the existing requirement that the AG give consent.[3]

9.5 Under the draft Bill, the role of the AG in relation to prosecution is to be restricted to intervening in cases where he or she is satisfied that it is necessary to do so in order to safeguard national security.[4] This proposal has been contested by the Joint Committee on the draft bill, who recommended that the AG should retain the power to give a direction in relation to any individual case.[5]

9.6 There is a need for consistency in the basic powers to consent to prosecution for both the general offence and the specific offence, not least because in some instances both offences may be charged together. In that regard, it must be kept in mind that whatever consent requirements are imposed for the substantive offences, ought also to be applicable when an inchoate offence relating to a bribery offence is charged.

1 Para 12.37.

2 CP, para 12.36.

3 Constitutional Renewal Bill, cl 7 and Schedule 1, cls 1 and 2.

4 Constitutional Renewal Bill, cls 2 and 12.

5 Draft Constitutional Renewal Bill, Volume I Report of the Joint Committee on the Draft Constitutional Renewal Bill (2007-08) HC 551-I, para 114. The report of the Joint Committee was published too late for us to conduct meaningful discussions or consultation on the issue.

Recommendation

9.7 **We recommend that the consent of the Director of the relevant prosecution authority should be required in relation to a decision to commence proceedings for a bribery offence, or for an inchoate offence relating to that offence.**

MODE OF TRIAL

9.8 13/13 of our consultees agreed that bribery offences should be triable either way (on indictment or summarily).

Recommendation

9.9 **We recommend that both the new offences of bribery and the offence of bribing a foreign public official should be triable either way.**

PENALTIES

9.10 In the interests of simplicity and (where possible) uniformity, our recommendation is that the potential penalties for bribery should be broadly the same as those available for fraud. Accordingly, in respect of the offences (other than that under clause 7):

> **we recommend that on summary conviction, a person may be sentenced to imprisonment for no more than 12 months, to a fine not exceeding the statutory maximum, or to both.[6] Following conviction on indictment, a person may be sentenced to imprisonment for no more than 10 years, or to a fine, or to both**.[7]

9.11 Only a company may be guilty of the "failure to prevent bribery" offence under clause 7. Accordingly we recommend the following penalties:

> **a fine up to the statutory maximum upon summary conviction, or a fine upon conviction on indictment**.[8]

DISQUALIFICATIONS IN ELECTORAL LAW

9.12 Section 165(1) of the Representation of the People Act 1983 provides that a Parliamentary candidate can be disqualified if he or she employs an agent who has been "convicted more than once of an offence under the Public Bodies Corrupt Practices Act 1889". The attached Bill repeals the 1889 Act; accordingly, unless a provision is enacted to replace section 165(1), the Bill will effectively abolish this disqualification.

[6] Clause 10(1)(a).

[7] Clause 10(1)(b).

[8] Clause 10(2).

9.13 Acts that, at present, constitute an offence under the Public Bodies Corrupt Practices Act 1889 will also constitute an offence under the attached Bill. However, the converse is not true, and it would be a wide extension of the law to disqualify a candidate for employing an agent who has been engaged in private commercial bribery. A possible solution, though it would not coincide exactly with the scope of the 1889 Act, would be to require the agent to have been convicted of an offence under the Bill involving a "function of a public nature" within clause 3(1)(a). However, this might create evidential difficulties, as it will not always appear on the face of an indictment or other public record whether a particular conviction for bribery involves public functions or not. For this reason, the Bill in its present form does not contain a provision replacing section 165(1).

9.14 As the matter falls outside the scope of this Report, the Government will have to give consideration at a later point to the consequences for electoral law of the repeal of the 1889 Act.

PART 10
LIST OF RECOMMENDATIONS

THE GENERAL OFFENCES

10.1 We recommend that the offences should relate to conduct undertaken in connection with the past or present performance of a public function, or in connection with past or present trade, employment or business activity, or activity on behalf of a body of persons (whether corporate or incorporate).

Paragraph 3.28

TWO GENERAL OFFENCES OF BRIBERY

10.2 We recommend that there should be two general offences of bribery: one concerned with the conduct of the payer, and the other with the conduct of the recipient.

Paragraph 3.33

The offence committed by the payer

10.3 We recommend that P must be shown, directly or through a third party, to have given, offered or promised an advantage (to be left undefined) to R or to someone else.

Paragraph 3.51

10.4 Subject to the recommendation at 10.5 below, we recommend that P must be shown to have intended to induce R or another to perform a relevant function or activity improperly, or to reward R or another for such conduct.

Paragraph 3.72

10.5 We recommend that even where P is not trying to persuade R to perform a relevant function or activity improperly (or to reward R for such conduct), it should still be bribery if P knew or believed that it would in itself be improper for R to accept an advantage.

Paragraph 3.77

The offence committed by the recipient

10.6 We recommend that R must be shown to have requested, agreed to receive, or accepted an advantage from another person, for him or herself or for another.

Paragraph 3.85

10.7 We recommend that the prosecution must show that R requested, agreed to receive or accepted an advantage intending that, in consequence, a relevant function or activity should be performed improperly, whether by R or by another (Case A).

Paragraph 3.219

10.8 Alternatively, it must be shown that R's request for, agreement to receive or acceptance of the advantage itself constituted the improper performance of a relevant function or activity (Case B).

Paragraph 3.220

10.9 Alternatively, it must be shown that R requested, agreed to receive or accepted an advantage as a reward for the improper performance of a relevant function or activity (Case C).

Paragraph 3.221

10.10 Alternatively, it must be shown that, in anticipation of, or in consequence of R requesting, agreeing to receive or accepting an advantage, a relevant function or activity was performed improperly by R, or by another at R's request or with R's assent or acquiescence (Case D).

Paragraph 3.222

10.11 We recommend that the impropriety in the performance of the function or activity must be shown to have turned on an expectation that R will act in good faith, or impartially.

Paragraph 3.223

10.12 Alternatively, the impropriety in the performance of the function or activity must be shown to have turned on an expectation that relates to a position of trust which R held by virtue of performing that function or activity.

Paragraph 3.224

10.13 We recommend that it must be shown that there was a breach of an expectation that R will act in good faith or impartially, or in accordance with his or her position of trust.

Paragraph 3.225

A DISCRETE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

10.14 We recommend that there should be a new, discrete offence of bribing a foreign public official, covering advantages given to third parties at the foreign public official's request or with their assent or acquiescence.

Paragraph 5.71

10.15 We recommend that in relation to the discrete offence it must be shown that, where P intended to obtain or retain business or an advantage in the conduct of business, P (directly or indirectly) through the provision of an advantage intended to influence the foreign public official in his or her capacity as such, in circumstances where the advantage was not legitimately due.

Paragraph 5.119

10.16 We recommend that, a "foreign public official" should be understood as someone who holds a legislative, administrative or judicial position of any kind of a country or territory outside the United Kingdom, or exercises a public function for or on behalf of a country or territory outside the United Kingdom, or for any public agency or enterprise of that country or territory, or is an official or agent of a public international organisation.

Paragraph 5.136

DEFENCES

10.17 We recommend that it should be a defence to the discrete offence of bribery of a foreign public official for P to prove on a balance of probabilities that the reason for conferring an advantage was that P reasonably believed that he or she was legally obliged or legally permitted to do so by the law of the foreign country. In deciding whether such a belief was reasonable, regard should be had to the steps taken to discover the true legal position before the advantage was conferred.

Paragraph 7.49

LIABILITY OF COMPANIES AND LIMITED LIABILITY PARTNERSHIPS

10.18 We recommend that it should be an offence for a company or limited liability partnership of which the registered office is situated in England and Wales negligently to fail to prevent bribery where

> someone (A) performing services on that organisation's behalf bribes another person,
>
> the bribe was in connection with the business of that organisation, and
>
> someone (other than A) connected with or employed by the organisation, who has responsibility for preventing bribery, negligently fails to prevent A bribing the other person.

Paragraph 6.8

10.19 We recommend that the bribery offences to which the offence of negligently failing to prevent bribery applies should be the offences that can be committed by P (the payer), whether the general offence of bribery or the bribery of a foreign public official.

Paragraph 6.9

10.20 We recommend that, except where the negligence in question is alleged to be on the part of a director (or equivalent), it should be a defence for the company or limited liability partnership to show that it had adequate procedures in place designed to prevent bribery being committed by people performing services on the organisation's behalf.

Paragraph 6.10

10.21 We recommend that it should be possible to hold directors, managers, secretaries or similar officers of a body corporate individually liable if they consent to or connive at the commission of bribery by the body corporate.

Paragraph 6.12

10.22 We recommend that consideration of the extension of the scope for imposing direct liability on companies should form part of a general review of corporate criminal liability.

Paragraph 6.39

EXTRA-TERRITORIALITY

10.23 We recommend that an act of bribery which, if done in England and Wales, would constitute a bribery offence, or an offence of bribing a foreign public official, should constitute an offence triable in England and Wales if done outside the United Kingdom by a person who at that time was:

(1) a national of the UK,

(2) a body incorporated under the law of any part of the United Kingdom, or

(3) a natural person who was ordinarily resident in the United Kingdom.

Paragraph 8.57

CONSENT TO PROSECUTION; OTHER MATTERS

Consent to prosecution

10.24 We recommend that the consent of the Director of the relevant prosecution authority should be required in relation to a decision to commence proceedings for a bribery offence, or for an inchoate offence relating to that offence.

Paragraph 9.7

Mode of trial

10.25 We recommend that both the new offences of bribery and the offence of bribing a foreign public official should be triable either way.

Paragraph 9.9

Penalties

10.26 We recommend that a person guilty of the general offence of bribery, or of the offence of bribing a foreign public official, should be liable:

(a) on summary conviction to imprisonment for not more than 12 months, or to a fine up to the statutory maximum, or to both.

(b) on conviction on indictment to imprisonment for up to 10 years or, to fine, or to both.

Paragraph 9.10

10.27 We recommend that a company guilty of negligently failing to prevent bribery should be liable to a fine (up to the statutory maximum, on summary conviction).

Paragraph 9.11

(*Signed)* TERENCE ETHERTON, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
JEREMY HORDER
KENNETH PARKER

WILLIAM ARNOLD, *Chief Executive*
2 October 2008

Appendix A - Bribery Bill

CONTENTS

DRAFT

OF A

B I L L

TO

Make provision for offences relating to bribery; and for connected purposes.

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

General offences

1 Bribery: requesting, agreeing to receive or accepting an advantage

(1) A person ("R") is guilty of an offence in cases A to D.

(2) Case A is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a function or activity to which section 3 applies should be performed improperly (whether by R or another person).

(3) Case B is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a function or activity to which section 3 applies.

(4) Case C is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a function or activity to which section 3 applies.

(5) Case D is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a function or activity to which section 3 applies is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases A to D it does not matter—

(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,

(b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) An offence is committed under this section in England and Wales if any part of the conduct element of the offence takes place in England and Wales; but this section is to be read subject to section 6 if no part of the conduct element of the offence takes place in England and Wales.

2 Bribery: offering, promising or giving an advantage

(1) A person ("P") is guilty of an offence in cases E and F.

(2) Case E is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage to induce a person to perform improperly a function or activity to which section 3 applies, or to reward a person for the improper performance of such a function or activity.

(3) Case F is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a function or activity to which section 3 applies.

(4) In case E it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity in question.

(5) In cases E and F it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

(6) An offence is committed under this section in England and Wales if any part of the conduct element of the offence takes place in England and Wales; but this section is to be read subject to section 6 if no part of the conduct element of the offence takes place in England and Wales.

3 Sections 1 and 2: functions and activities

(1) This section applies to those of the following functions and activities which satisfy one or more of conditions 1 to 3—

(a) any function of a public nature,

(b) any activity connected with a business, trade or profession,

(c) any activity performed in the course of a person's employment, and

(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

(2) It applies even if the function or activity—

(a) has no connection with the United Kingdom, and

(b) is carried out in a country or territory outside the United Kingdom.

(3) Condition 1 is that a person performing the function or activity is expected to perform it in good faith.

(4) Condition 2 is that a person performing the function or activity is expected to perform it impartially.

(5) Condition 3 is that a person performing the function or activity is in a position of trust by virtue of performing it.

(6) For the purposes of sections 1 and 2 a function or activity to which this section applies—

(a) is performed improperly if it is performed in breach of a relevant expectation, and

(b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

(7) In subsection (6) "relevant expectation"—

(a) in relation to a function or activity which satisfies condition 1 or 2, means the expectation mentioned in the condition in question, and

(b) in relation to a function or activity which satisfies condition 3, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(8) Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a function or activity mentioned in subsection (1) is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

Bribery of foreign public officials

4 Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

(a) business, or

(b) an advantage in the conduct of business.

(3) P bribes F if—

(a) directly or through a third party, P offers, promises or gives any financial or other advantage, either to F or to another person at F's request or with F's assent or acquiescence, and

(b) the advantage is not legitimately due to F, or (if offered, promised or given to another person as mentioned in paragraph (a)) it would not be legitimately due if offered, promised or given to F.

(4) If the law applicable to F permits or requires F to accept a particular financial or other advantage, it is legitimately due.

(5) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(6) "Foreign public official" means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(b) exercises a public function for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or for any public agency or enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

(7) In subsection (6)(c), "public international organisation" means an organisation whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organisations,

(d) a mixture of any of the above.

(8) For the purposes of subsection (4), the law applicable to F is—

(a) the law of the country or territory in relation to which F is a foreign public official, or

(b) if F is an official or agent of a public international organisation, the applicable rules of that organisation.

(9) An offence is committed under this section in England and Wales if any part of the conduct element of the offence takes place in England and Wales; but this section is to be read subject to section 6 if no part of the conduct element of the offence takes place in England and Wales.

5 Defence

(1) It is a defence to a charge under section 4 to prove that P reasonably believed that what P did was required or permitted under the law applicable to F (as defined in section 4).

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps P has taken to find out what was required or permitted under the law applicable to F.

Extra-territorial application

6 Offences under sections 1, 2 and 4: extra-territorial application

(1) Subsection (2) applies if—

(a) no part of the conduct element of an offence under section 1, 2 or 4 takes place in England and Wales,

(b) a person's acts done outside the United Kingdom would constitute such an offence if done in England and Wales, and

(c) that person falls within subsection (3).

(2) In such a case—

(a) the acts constitute the offence referred to in subsection (1)(a), and

(b) proceedings for the offence may be taken in England and Wales.

(3) A person who was one of the following at the time the acts were done falls within this subsection—

(a) a British citizen,
(b) a British overseas territories citizen,
(c) a British National (Overseas),
(d) a British Overseas citizen,
(e) a person who under the British Nationality Act 1981 (c. 61) was a British subject,
(f) a British protected person within the meaning of that Act,
(g) an individual ordinarily resident in any part of the United Kingdom,
(h) a body incorporated under the law of any part of the United Kingdom.

Failure to prevent bribery

7 Failure to prevent bribery

(1) A company or limited liability partnership whose registered office is situated in England and Wales (or in Wales) ("C") is guilty of an offence under this section if—

(a) a person ("A") performing services for or on behalf of C bribes another person,
(b) the bribe was in connection with C's business, and
(c) any person (other than A) connected with or employed by C, whose functions at the time of the bribe included preventing persons such as A from committing offences under section 2 or 4 in connection with C's business, was negligent in failing to prevent A from bribing the other person mentioned in paragraph (a).

(2) The capacity in which A was performing services for or on behalf of C does not matter, and accordingly A may (for example) be C's employee or agent, or a subsidiary of C.

(3) Whether or not A was performing services for or on behalf of C at the time when A bribed the other person is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(4) But if A was an employee of C, it is to be presumed unless the contrary is shown that A was performing services for or on behalf of C.

(5) For the purposes of subsection (1), A bribes another person if A is, or would be, guilty of an offence under section 2 or 4, whether or not A has been prosecuted for such an offence (and for this purpose it is to be taken that all or part of the conduct element of the offence occurred in England and Wales).

(6) Except as provided in subsection (7), it is a defence to a charge under this section to prove that C had in place adequate procedures designed to prevent persons performing services for or on behalf of C from committing offences under section 2 or 4.

(7) The defence in subsection (6) is not available—

(a) if C is a company and the negligence referred to in subsection (1)(c) was that of a director, manager, secretary or other similar officer of C, or a person purporting to act in any such capacity,

(b) if C is a limited liability partnership and the negligence referred to in subsection (1)(c) was that of a member of C, or a person purporting to act as a member of C.

(8) In this section "company" has the same meaning as in the Companies Acts (see section 1(1) of the Companies Act 2006 (c. 46)).

General

8 Offences by bodies corporate

(1) Subsection (2) applies if an offence under section 1, 2 or 4 is committed by a body corporate.

(2) If the offence is proved to have been committed with the consent or connivance of a person mentioned in subsection (3), that person (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) The persons are—

(a) a director, manager, secretary or other similar officer of the body corporate, or

(b) a person who was purporting to act in any such capacity.

(4) Where the affairs of a body corporate are managed by its members, this section applies in relation to the acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

9 Consent to prosecution

(1) No proceedings for an offence under this Act may be instituted against any person except by or with the consent of—

(a) the Director of Public Prosecutions,

(b) the Director of the Serious Fraud Office,

(c) the Director of Revenue and Customs Prosecutions,

(d) a person authorised by any of those Directors.

(2) A Director's authorisation by virtue of subsection (1)(d)—

(a) may relate to a specified person or to persons of a specified description, and

(b) may relate to specified circumstances.

10 Penalties

(1) An individual guilty of an offence under this Act is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

(2) Any other person guilty of an offence under this Act is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine.

(3) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (1)(a) to 12 months is to be read as a reference to 6 months.

11 Consequential provisions

(1) The common law offences of bribery and embracery are abolished.

(2) Schedule 1 contains consequential amendments.

(3) Schedule 2 contains repeals.

12 Commencement and savings

(1) This section and section 13 come into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(2) An order under subsection (1) may—

(a) appoint different days for different purposes;

(b) make such provision as the Secretary of State considers necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of any provision of this Act.

(3) This Act does not affect any liability, investigation, legal proceeding or penalty for or in respect of—

(a) a common law offence of bribery or embracery committed wholly or partly before the coming into force of section 11(1) of this Act, or

(b) an offence under the Public Bodies Corrupt Practices Act 1889 (c. 69) or the Prevention of Corruption Act 1906 (c. 34) committed wholly or partly before the coming into force of the repeal of the Act by Schedule 2 to this Act.

(4) For the purposes of subsection (3) an offence is wholly or partly committed before a particular time if any part of the conduct element of the offence occurred before that time.

(5) Subsections (3) and (4) are without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

13 Short title and extent

(1) This Act may be cited as the Bribery Act 2008.

(2) The following provisions of this Act have the same extent as the enactments to which they relate—

(a) paragraphs 1, 2, 6 and 7 of Schedule 1, and

(b) the entry in Schedule 2 relating to the Armed Forces Act 2006 (c. 52).

(3) The remaining provisions of this Act extend to England and Wales only.

SCHEDULES

SCHEDULE 1

Section 11

CONSEQUENTIAL AMENDMENTS

Ministry of Defence Police Act 1987 (c. 4)

1 In section 2 of the Ministry of Defence Police Act 1987 (jurisdiction of members of Ministry of Defence Police Force), in subsection (3)(ba), after "1916" insert "and under the Bribery Act 2008".

Criminal Justice Act 1987 (c. 38)

2 In section 2A of the Criminal Justice Act 1987 (Director of SFO's pre-investigation powers in relation to bribery and corruption: foreign officers etc.), at the end add—

"(7) This section also applies to any conduct—

(a) which, as a result of section 3(2) of the Bribery Act 2008, constitutes an offence under section 1 or 2 of that Act, or

(b) which constitutes an offence under section 4 of that Act."

Serious Organised Crime and Police Act 2005 (c. 15)

3 The Serious Organised Crime and Police Act 2005 is amended as follows.

4 In section 61 (offences in respect of which investigatory powers apply), for subsection (1)(h) substitute—

"(h) in England and Wales, any offence under the Bribery Act 2008."

5 In section 76 (financial reporting orders), in subsection (3), for paragraphs (d) to (f) substitute—

"(da) an offence under any of the following provisions of the Bribery Act 2008—

section 1 (bribery: requesting, agreeing to receive or accepting an advantage),

section 2 (bribery: offering, promising or giving an advantage),

section 4 (bribery of foreign public official),".

Armed Forces Act 2006 (c. 52)

6 In Schedule 2 to the Armed Forces Act 2006 (which lists serious offences the possible commission of which, if suspected, must be referred to a service

police force), in paragraph 12, at the end add—

"(av) an offence under section 1, 2 or 4 of the Bribery Act 2008."

Serious Crime Act 2007 (c. 27)

7 In Schedule 1 to the Serious Crime Act 2007 (list of serious offences), for paragraph 9 substitute—

"Bribery

9 An offence under any of the following provisions of the Bribery Act 2008—

(a) section 1 (bribery: requesting, agreeing to receive or accepting an advantage);

(b) section 2 (bribery: offering, promising or giving an advantage);

(c) section 4 (bribery of foreign public officials)."

SCHEDULE 2

Section 11

REPEALS

Short title and chapter	*Extent of repeal*
Public Bodies Corrupt Practices Act 1889 (c. 69)	The whole Act.
Prevention of Corruption Act 1906 (c. 34)	The whole Act.
Prevention of Corruption Act 1916 (c. 64)	The whole Act.
Criminal Justice Act 1988 (c. 33)	Section 47.
Anti-terrorism, Crime and Security Act 2001 (c. 24)	Sections 108 to 110.
Armed Forces Act 2006 (c. 52)	In Schedule 2, paragraph 12(l) and (m).
Local Government and Public Involvement in Health Act 2007 (c. 28)	Section 217(1)(a). In Schedule 14, paragraph 1.

BRIBERY BILL: EXPLANATORY NOTES

A.1 The purpose of the Bill is to create new offences of bribery. These offences are designed to replace both the common law offence of bribery and the offences under the Prevention of Corruption statutes (which are repealed: see Schedule 2).

CLAUSE 1

A.2 This clause defines the offence of bribery as it applies to the recipient or potential recipient of the bribe, who is called R. It distinguishes four "Cases" from A to D.

A.3 In Cases A, B and C there is a requirement that R "requests, agrees to receive or accepts" an advantage, whether or not R actually receives it (the meaning of "advantage" is to be left to be determined as a matter of common sense by the tribunal of fact). This requirement must then be linked with R's "improper performance" of a function or activity. The nature of this function or activity is addressed in clause 3(1) to (5), and "improper performance" is defined in clause 3(6) and 3(7).

A.4 The link may take three forms:

(1) R may intend improper performance to follow as a consequence of the request, agreement to receive or acceptance of the advantage (Case A, in subsection (2)).

(2) Receiving, agreeing to receive or accepting the advantage may itself amount to improper performance of the relevant function or activity (Case B, in subsection (3)).

(3) Alternatively, the advantage may be a reward for performing the function or activity improperly (Case C, in subsection (4)).

A.5 In Case D (subsection (5)) what is required is improper performance by R (or that of another person, where R requests it, assents to or acquiesces in it). This performance must be in anticipation or in consequence of a request, agreement to receive or acceptance of the possible advantage.

A.6 In cases A and C, it does not matter whether the improper performance is by R or by another person. By way of contrast, subject to subsection (6), in case B it must be R him or herself who requests, agrees to receive or accepts the advantage.

A.7 Subsection (6) is concerned with the role of R him or herself in requesting, agreeing to receive or accepting advantages, or in benefiting from them, in cases A to D.

A.8 First, subsection (6) makes it clear that in cases A to D it does not matter whether it is R, or someone else through whom R acts, who requests, agrees to receive or accepts the advantage ((6)(a)).

A.9 Secondly, subsection (6) indicates that the advantage can be for the benefit of R, or of another person ((6)(b)).

A.10 Subsection (7) explains the jurisdictional limits to the offence. If no part of the conduct element takes place in England and Wales, then the offence is to be read subject to clause 6.

CLAUSE 2

A.11 This clause defines the offence of bribery as it applies to the giver or potential giver of the advantage. It is divided into two cases, Case E (subsection (2)) and Case F (subsection (3)).

A.12 Case E concerns cases in which the advantage is intended to bring about the improper performance or to reward it. It is not necessary that the person to whom the advantage is promised or given be the same person as the person who is to engage in the improper performance of an activity or function, or to be rewarded for have engaged in it. This is made clear in subsection (4).

A.13 Case F concerns cases in which P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance. In most cases, the person offered the advantage will be the one for whom it would be an improper act to accept it, but this is not a requirement of Case F.

A.14 Subsection (5) makes it clear that the advantage can be offered, promised or given by P him or herself or by P through someone else.

A.15 Subsection (6) explains the jurisdictional limits to the offence. If no part of the conduct element takes place in England and Wales, then the offence is to be read subject to clause 6.

CLAUSE 3

A.16 This clause defines the fields within which bribery can take place, in other words the types of function or activity that can be improperly performed for the purposes of the first two clauses.

A.17 The purpose of the clause is to ensure that the law of bribery applies equally to public and to selected private functions without discriminating between the two. Accordingly the functions or activities in question include all functions of a public nature and all activities connected with a business, trade or profession. The phrase “functions of a public nature” is the same phrase as is used in the definition of “public authority” in the Human Rights Act 1998, section 6(3)(b). In addition, the functions or activities include all activities performed either in the course of employment or on behalf of any body of persons: these two categories straddle the public/private divide.

A.18 Subsection (2) clarifies that the functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK. This preserves the effect of section 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001.

A.19 Not every defective performance of one of these functions for reward or in the hope of advantage engages the law of bribery. Subsections (3) to (5) impose the further condition that these functions or activities must have a special character: there must be an expectation that the functions be carried out in good faith, or impartially, or the person performing it must be in a position of trust. Subsections (6) and (7) then define "improper performance" as performance (including non-performance) which breaches that expectation or that trust. Subsection 3(6)(b) makes it clear that an omission can in some circumstances amount to improper "performance".

A.20 Subsection (8) addresses the case where R is no longer engaged in a given function or activity but still carries out acts related to his or her former function or activity; these acts are treated as done in performance of the function or activity in question.

CLAUSE 4

A.21 This clause creates a separate offence of bribery of foreign public officials. This offence closely follows the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A.22 Unlike the general bribery offences, it only covers the giving or offering of bribes, and not the acceptance of them. Also, it requires that the advantage given or offered must be "not legitimately due", but does not require that the action expected in return must itself be improper. However, the giver of the bribe must intend to influence the recipient in the conduct of his or her duties, and must intend to obtain or retain business or a business advantage.

A.23 Foreign public officials are defined in subsection (6) to include both government officials and those working for international organisations. The definition draws on Article 1.4(a) of the OECD Convention. Similarly, the definition of "public international organisation" in subsection (7) draws on Commentary 17 to the OECD Convention.

The conduct element

A.24 The conduct element of the offence – what a person must do in order to commit the offence – is set out in subsection (3). The offence may be committed in a number of ways.

A.25 If a person (P) offers, promises or gives any advantage to a foreign public official (F) which is not legitimately due to that official, with the requisite intention (see below), that person commits the offence.

A.26 The offence will also be committed if the advantage is offered to someone other than the official, if that happens at the official's request, or with the official's assent or acquiescence. In such a case, the advantage will be regarded as "not legitimately due" if that condition would have been satisfied, had it been offered to the official him or herself (subsection (3)(b)).

A.27 It does not matter whether the offer, promise or gift is made directly to the official or through a third party (subsection (3)(a)).

A.28 Subsections (4) and (8). If the law governing or rules applicable to the official permits or requires the official to accept the advantage, then it is legitimately due and no offence is committed by offering, promising or giving it. If an advantage is merely customary or apparently officially tolerated, that does not amount to it being required or permitted by law.

A.29 If none of the conduct element takes place within England and Wales, then the persons who may commit this offence are limited to those listed at clause 6(3) (provided that clause 6(1)(b) is satisfied also). This is the effect of subsection (9) of clause 4.

A.30 The language of the international Conventions to which the United Kingdom is a party is mirrored in the phrase "offers, promises or gives" and in the word "advantage" in subsection (3), and in the words "public function" in subsection (6)(b).

The fault element

A.31 The fault element of the offence – what a person must intend in order to commit the offence – is specified in subsections (1), (2) and (5).

A.32 Subsections (1) and (5) have the effect that, in order to commit the offence, a person must intend to influence a foreign public official in the performance of his or her functions as a public official, including any failure to exercise those functions and any use of his or her position, even if he or she does not have authority to use the position in that way.

A.33 In order to commit the offence a person must also intend to obtain or retain business or an advantage in the conduct of business (subsection (2)).

CLAUSE 5

A.34 Clause 4 already confines the scope of the offence of bribing foreign public officials to cases where the advantage is not legitimately due, and defines "legitimately due" as meaning that the recipient is either required or permitted to accept it by the applicable law or rules.

A.35 Clause 5 supplements this with a defence, available to the payer if he or she reasonably believed that the payment was required or permitted by the law.

A.36 The reasonableness of the belief is a matter of fact for the tribunal of fact which should take into account all relevant circumstances, including the efforts made by the person charged to find out what the law required or permitted in relation to the official.

CLAUSE 6

A.37 This clause governs the extra-territorial application of the offences under clauses 1, 2 and 4.

A.38 Those clauses all provide that, subject to clause 6, the respective offences are only committed if some part of the conduct element takes place in England and Wales. Clause 6 provides for the case where no part of the conduct element takes place in the United Kingdom. (If a part of the conduct element takes place in Scotland or Northern Ireland but none of it in England and Wales, no offence under this Bill is committed. There may or may not be an offence under the law of Scotland or of Northern Ireland.)

A.39 The effect of clause 6 is that, even though the actions in question took place abroad, they still constitute the offence if the person performing them was a British national or resident, a national of a British overseas territory or a body incorporated in the United Kingdom.

CLAUSE 7

A.40 Subsection (1). This clause creates an offence that can only be committed by a company or limited liability partnership. The offence consists of negligent failure to prevent bribery being committed in connection with the company's or partnership's business. "Bribery" here only means the giving or offering of bribes, contrary to sections 2 and 4; there is no corresponding offence of failure to prevent the taking of bribes.

A.41 The offence is committed when (a) a person employed by or performing services for the company or limited liability partnership gives a bribe, (b) the bribe is in connection with the company's or partnership's business and (c) another person connected with the company or partnership, with the responsibility of preventing bribery, negligently fails to do so.

A.42 Subsections (2), (3) and (4). Whether someone is "performing services for or on behalf of C [the company/limited liability partnership]" is a question relating to the actual activities being undertaken at the time rather than of the person's general position; but where the person is an employee this is to be presumed unless the contrary is shown.

A.43 Subsection (6). Where the negligent failure is that of someone below senior management (as defined in subsection (7)) level, it is a defence that the company or limited liability partnership has shown that it had adequate procedures in place to prevent bribery being committed on its behalf. Senior management, here, includes directors, the company secretary and anyone in a similar position, including members of a limited liability partnership.

CLAUSE 8

A.44 This clause is the converse of clause 7: instead of aiming at companies or partnerships which fail to prevent bribery by individuals, it is aimed at individuals who consent or connive at bribery, contrary to sections 1, 2 or 4, committed by their institution. As well as applying to bribery committed by companies, it extends to bribery committed by bodies corporate of all kinds. It does not apply to the offence in clause 7.

A.45 The first step is to ascertain that the body corporate has indeed been guilty of an offence under clause 1, 2 or 4. That established, the clause provides that a director or similar senior manager of the body corporate is guilty of the same offence if he or she has consented to or connived at the commission of the offence. In a body corporate managed by its members, the same applies to members.

A.46 It should be noted that in this situation, the body corporate and the director are both guilty of the main bribery offence. This clause does not create a separate offence of "consent or connivance".

CLAUSE 9

A.47 A prosecution under the Bill can only be brought with the consent of one of the three senior prosecuting authorities, that is to say the DPP, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions.

A.48 Any of these three may also authorise someone to give consents to prosecution. That person may be authorised either generally or in relation only to a particular description of person or case.

CLAUSE 10

A.49 This clause concerns sentencing. Any offence under the Bill committed by an individual is punishable either by a fine or imprisonment for up to 10 years (12 months on summary conviction), or both. An offence committed by a body is punishable by a fine. In either case, the fine may be up to the statutory maximum if the conviction is summary, unlimited if it is on indictment.

A.50 Section 154 of the Criminal Justice Act 2003, which is not yet in force, sets the maximum sentence that can be imposed by a magistrates' court at 12 months. Where an offence under this Bill is committed before section 154 comes into force, the magistrates' court's power is restricted to 6 months.

CLAUSE 11

A.51 This clause abolishes the common law offences of bribery and embracery (bribery of jurors), and refers to the two Schedules, which contain amendments and repeals.

CLAUSE 12

A.52 This clause covers commencement, which is by order of the Secretary of State; this order may contain appoint different days for different purposes and contain transitory, transitional or saving provisions. The clause also contains express saving provisions, which allow offences under the old law to be prosecuted if any part of the conduct element takes place before the abolition or repeal of the law in question.

CLAUSE 13

A.53 This clause covers citation and extent. The Bill is generally confined to England and Wales, except that some of the amendments and repeals relate to enactments with a wider extent than this, and therefore themselves have this wider extent.

SCHEDULE 1

A.54 This Schedule contains amendments to other legislation. These are as follows.

Ministry of Defence Police Act 1987

A.55 Section 2 of that Act gives the Ministry of Defence Police the same powers as normal police, in relation to services property or personnel, including offences involving the bribery of such persons. At present these offences are those under the Prevention of Corruption Acts 1889 to 1916. The amendment adds the present Bill to the list. (As the 1987 Act extends to the whole of the United Kingdom, and the Prevention of Corruption Acts remain in force in Scotland and Northern Ireland, it was necessary to leave the references to these Acts in being.)

Criminal Justice Act 1987

A.56 Section 2A of that Act gives the Director of the Serious Fraud Office power to investigate corruption offences. Again the section extends to the whole of the United Kingdom, and the amendment leaves the references to the Prevention of Corruption Acts and adds offences under this Bill to the list. The offences in question are the bribery of foreign officials (clause 4), and the general bribery offence (clauses 1 and 2) where the functions in question are performed outside or unconnected with the United Kingdom.

Serious Organised Crime and Police Act 2005

A.57 Chapter 1 of Part 2 of that Act gives investigatory powers to the Director of Public Prosecutions and other prosecuting authorities in relation to offences listed in section 61. This list was amended by SI 2006/1629 to include common law bribery and offences under the Prevention of Corruption Acts: this amendment extends only to England and Wales. Accordingly it is amended by substituting the offences under the Bill, again only in England and Wales.

A.58 A similar amendment applies to section 76, which gives the court power to make a financial reporting order in dealing with a person convicted of (among other offences) corruption offences.

Armed Forces Act 2006

A.59 Schedule 2 creates a number of military offences with world-wide application, by reference to civilian offences existing in the law of England and Wales. The list of civilian offences is amended to include the offences under the Bill; but as this has the effect of creating new military offences, the application of the amendment is also world-wide.

Serious Crime Act 2007

A.60 This Act gives power to make a "serious crime prevention order" in relation to offences listed in Schedule 1 of the Act. Part 1 of that Schedule, relating to offences in England and Wales, includes offences under the Prevention of Corruption Acts. The present amendment replaces this reference with offences under clauses 1, 2 and 4 of the Bill. The amendment extends to England and Wales and Northern Ireland, as a court in Northern Ireland may make a serious crime prevention order in relation to offences in England and Wales.

SCHEDULE 2

A.61 This Schedule contains repeals.

A.62 The three Prevention of Corruption Acts are repealed in their entirety. These offences are wholly replaced by the offences under the Bill. The repeal extends only to England and Wales: in Scotland and Northern Ireland the Acts remain in being.

A.63 Sections 108 to 110 of the Anti-terrorism, Crime and Security Act 2001, which extend the geographical scope of the offences under those three Acts, are also repealed, as is section 47 of the Criminal Justice Act 1988, which inserts provisions about penalties into those three Acts.

A.64 In the Armed Forces Act 2006, those paragraphs in the list in Schedule 2 which refer to offences under the Prevention of Corruption Acts are repealed. This repeal is a corollary of the amendment to that list in Schedule 1 to this Bill.

A.65 Section 217(1)(a) of the Local Government and Public Involvement in Health Act 2007 gives the Secretary of State power to define an "entity under the control of a local authority" for the purposes of section 4(2) of the Prevention of Corruption Act 1916. This is now repealed. Paragraph 1 of Schedule 14 to the 2007 Act, which contains amendments to the 1916 Act, is also repealed.

APPENDIX B
LIST OF THOSE WHO COMMENTED ON CONSULTATION PAPER NO 185

Judicial and legal practitioners/bodies

Bar Council

Mr George Brown

Mr Jeremy Carver

Clifford Chance

Council of HM Circuit Judges

Criminal Bar Association

Crown Prosecution Service

Mr Tim Daniel

Mr Justice Fulford (on behalf of the President of the Queen's Bench Division and the Senior Presiding Judge)

Mr John Hatchard

Justices' Clerks' Society

Mr Richard Kelly

The Law Society of England and Wales (Criminal Law Committee)

Mr Colin Nicholls QC

Peters & Peters

Mr Martin Polaine

Mr Graham Rodmell

Mr Eoin O'Shea

Simmons & Simmons

Academics

Professor Peter Alldridge (Queen Mary, University of London)

Mr John Child

Professor Stuart Green (Rutgers School of Law, Newark)

Sally Ramage (The Criminal Lawyer)

Professor G R Sullivan (University College London)

Professor Celia Wells (Durham University)

Professor Gaoneng Yu (Northwest University, Xi'an, China; Durham University)

Government departments and police organisations

Mr Nicholas van Benschoten (Department for Business, Enterprise and Regulatory Reform)

Mr N Dickerson (Foreign and Commonwealth Office)

Mr Piers Harrison (Department for International Development)

Joanna Kuenssberg (Foreign and Commonwealth Office)

Mr D McMillan (Foreign and Commonwealth Office)

Mr C Monteith (Serious Fraud Office)

Ministry of Defence Police

Police Federation of England and Wales

Business persons/organisations

Association of Chartered Certified Accountants

International Chamber of Commerce (UK)

Mr Andrew Berkeley

British Bankers' Association

Mr Gary Campkin

Confederation of British Industry

Ernst & Young

Financial Services and Markets Legislation City Liaison Group

Institute of Chartered Accountants

Other individuals or organisations

The Corner House

Fraud Advisory Panel

Susan Hawley (The Corner House)

Public Administration Select Committee

Transparency International (UK)

UK Anti-Corruption Forum

APPENDIX C
THE WIDER CONTEXT OF CORRUPT PRACTICES

C.1 As we explained in paragraph 2.39, our second review of the law on corruption has dealt specifically with bribery. However, the third mandate of our terms of reference was that:

> The review will also look at the wider context of corrupt practices to see how the various provisions complement the law of bribery. This will provide the wider context in which the specific reform of bribery law can be considered. This part of the review will comprise a summary of provisions, not recommendations for reform.

C.2 In this Appendix, we highlight existing corruption-related offences and consider how our recommended offence of bribery might operate alongside them.

MISCONDUCT IN PUBLIC OFFICE[1]

C.3 The courts have struggled to define the common law offence of misconduct in public office.[2] The most recent appellate authority to consider its elements was *Attorney-General's Reference (No 2 of 2003)*,[3] in which Pill LJ held the offence to require:

(1) a public officer acting as such;

(2) wilfully neglecting to perform his or her duty and/or wilfully misconducting himself or herself;

(3) to such a degree as to amount to abuse of the public's trust in the office holder;

(4) without reasonable excuse or justification.

C.4 The necessary mental elements have caused yet more confusion. "Wilful" refers to that which is deliberate, rather than accidental, and the public officer must know, intend or be subjectively reckless as regards the existence of the duty and the conduct neglecting it. Foresight of the consequences of the misconduct is not an ingredient of the offence as such, but will be relevant to determining whether the misconduct went so far as to amount to abuse of the public's trust. The threshold of abuse of trust is a high one, such that a mistake, however serious, will be insufficient.

1 Misconduct in public office is not affected by our recommendations on bribery of foreign public officials. It should also be distinguished from the tort of misfeasance in public office: see the comments of Pill LJ in *Attorney-General's Reference (No 3 of 2003)* [2005] QB 73, 88.

2 For a comprehensive analysis, see Nicholls, Daniel, Polaine and Hatchard, *Corruption and Misuse of Public Office* (2006), ch 3.

3 [2005] QB 73.

C.5 In one sense, misconduct in public office is narrower than our recommendations by virtue of its application to the public sector only. In another, it is broader, since the range of possible misconduct is not limited by an instance of bribery. More generally, whereas bribery always requires at least two parties, a briber and a bribee,[4] a public officer can be capable of criminal misconduct entirely of their own devising and involving no-one but themselves.

C.6 The situation may arise where a person commits both bribery and misconduct in public office, such as where public officer R accepts a large sum of money to leak highly confidential information. Here, R may well have satisfied the elements for both offences. However, we do not believe that this is problematic. The fact that the actions or omissions involved in any particular instance of bribery might also amount to the commission of another offence is not a sound reason for disapplying the law of bribery. Offences exist in their own right to distinguish particular forms of wrongful conduct as criminal; that they overlap where conduct is especially criminal serves only to highlight the very grave nature of the activities concerned. In such circumstances, it is right that the prosecution decide on the facts of the case which charge, or combination of charges, properly reflects the criminality of a defendant's conduct.

C.7 Our recommendations would replace the current law on bribery, which has operated in conjunction with the law on misconduct in public office for well over a century without apparent difficulty. We are confident that our offence would continue this complementary framework.

SALES OF PUBLIC OFFICES

C.8 It is an offence at common law to buy or sell offices of a public nature.[5] It is also an offence contrary to section 1 of the Sale of Offices Act 1551 and sections 3 and 4 of the Sale of Offices Act 1809 to buy or sell, or pay or receive any money or other reward for, or solicit or negotiate the purchase or sale of, any office in the gift of the Crown, including military and naval commissions, or any place under the control of a Government department, whether in the United Kingdom or abroad. Sections 5 and 6 of the 1809 Act forbid the opening or advertising of premises to house the business of sales of office; and sections 27 and 29 of the Sheriffs Act 1887 outlaw the sale or purchase of the offices of a sheriff or bailiff.

C.9 We are not aware of any reported cases under the Sale of Offices Acts for over 140 years. This is in part due to changes in the methods of appointment to and dismissal from public office, which have virtually eliminated the problems that these Acts were passed to solve. It is also in part due to the breadth of the common law offence of bribery and the Prevention of Corruption Acts 1889 to 1916.

[4] Although under our recommendations, their respective offences are committed independently of the guilt of the other party.

[5] *R v Vaughan* (1769) 4 Burr 2494; *Russell on Crime* (12th ed, 1964), vol 1, p 374.

C.10 While the Sale of Offices Acts remain in force, they are superseded to a large extent by the current law and by our recommendations. The sale of a public office, if at all possible any longer, would clearly be contrary to a reasonable expectation that R would act in good faith or in the best interests of the public.[6] The particular acts of opening or advertising premises for conducting the business of sales of office would then be characterised as assisting or encouraging the substantive offence of bribery.

CORRUPTION OF CUSTOMS OFFICERS

C.11 The former statutory offence of bribing a customs officer[7] was repealed by section 52(1)(a)(ii) of the Commissioners for Revenue and Customs Act 2005. Such cases are currently governed by the Prevention of Corruption Acts and the common law, and would continue to be so under our recommendations.[8]

CORRUPTION IN THE COURTROOM

Embracery

C.12 *Russell on Crime* states that embracery consists of:

> [a]ny attempt whatsoever to corrupt or influence or instruct a jury … or in any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of counsel in open court … .[9]

C.13 This common law offence is now virtually obsolete and the conduct involved is in any event more likely to be charged as contempt of court or an attempt to pervert the course of justice.[10] These alternative avenues would continue to be available alongside our recommendations and would often be the most suitable charging option.[11] Nonetheless, the influencing of a juror by means of an advantage would almost certainly contravene a reasonable expectation that the juror act in good faith and impartially. Consequently, a prosecution for bribery would be possible in the appropriate circumstances.

6 For the avoidance of doubt, the sales of office offences do not apply to offices held by foreign public officials.

7 Customs and Management Act 1979, s 15.

8 It would make no difference that R is a customs officer.

9 *Russell on Crime* (12th ed, 1964), vol 1, p 357.

10 *Archbold: Criminal Pleading, Evidence and Practice* (2008), paras 28–47 and 28–151. See also the comments of Lawton LJ in *R v Owen* [1976] 1 WLR 840, at 841, and the approach taken in *Attorney-General v Judd* [1995] COD 15.

11 Particularly since the influencing of a jury may well not involve a corrupt transaction of any sort, and given the summary nature of contempt of court proceedings.

Contempt of court; perverting the course of justice

C.14 Whereas embracery addresses bribery of jurors, proceedings for contempt of court or perverting the course of justice can deal with wider instances of corrupt conduct, such as an attempt to intimidate a witness. Here again our recommendations would provide the court or prosecution with an alternative charging option, which would be available where the corrupt conduct could aptly be characterised as bribery. This could be, for example, where the defendant offered prosecution counsel a large sum of money not to adduce a particular piece of evidence.

CORRUPTION AT ELECTIONS

C.15 Bribery, treating, undue influence and personation at elections are corrupt practices at common law. They are also forbidden expressly by the Representation of the People Act 1983 ("the 1983 Act"), the provisions of which have largely superseded the common law offences.

Bribery

C.16 Section 113 of the 1983 Act provides for the various modes by which bribery at elections can be committed:

> (1) A person shall be guilty of a corrupt practice if he is guilty of bribery.
>
> (2) A person shall be guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf—
>
> (a) gives any money or procures any office to or for any voter or to or for any other 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
>
> (b) corruptly does any such act as mentioned above on account of any voter having voted or refrained from voting, or
>
> (c) makes any such gift or procurement as mentioned above to or for any person in order to induce that person to procure, or endeavour to procure, the return of any person at an election or the vote of any voter,
>
> or if upon or in consequence of any such gift or procurement as mentioned above he procures or engages, promises or endeavours to procure the return of any person at an election or the vote of any voter.
>
> For the purposes of this subsection—
>
> (i) references to giving money include references to giving, lending, agreeing to give or lend, offering, promising, or promising to procure or endeavour to procure any money or valuable consideration; and

(ii) references to procuring any office include references to giving, procuring, agreeing to give or procure, offering, promising, or promising to procure or to endeavour to procure any office, place or employment[; and

(iii) references to procuring the return of any person at an election include, in the case of an election of the London members of the London Assembly at an ordinary election, references to procuring the return of candidates on a list of candidates submitted by a registered political party for the purposes of that election].

(3) A person shall be guilty of bribery if he advances or pays or causes to be paid any money to or for the use of any other person with the intent that that money or any part of it shall be expended in bribery at any election or knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

(4) The foregoing provisions of this section shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses incurred in good faith at or concerning an election.

(5) A voter shall be guilty of bribery if before or during an election he directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan or valuable consideration, office, place or employment for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting.

(6) A person shall be guilty of bribery if after an election he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting.

(7) In this section the expression "voter" includes any person who has or claims to have a right to vote.

C.17 It is not surprising that the statutory offence of bribery under the 1983 Act has a very similar structure to our recommended offence. However, it is doubtful whether every instance of electoral bribery would in fact be covered by the recommended offence. An elector is in a sense exercising a public function or activity, but it is not clear that there is a position of trust or an expectation of impartiality or even good faith.

C.18 On the assumption that an elector is expected to act in good faith, there would be a significant overlap between the existing electoral offence and the proposed general offence. Even so, we are of the view that the new offence would not supersede section 113 of the 1983 Act, which retains an important labelling function. Section 113 creates a specific offence for a specific mischief. Whereas a person convicted under our general offence would be found guilty of bribery, and the electoral context would simply form the background,[12] a conviction under section 113 labels the defendant as a person who attempted to undermine the democratic process, and who tried to do so through bribery. Section 113 therefore criminalises two wrongs: the bribery and the democratic harm.

C.19 Furthermore, the penalties for committing the section 113 offence are tailored to the context. They include, for example, disqualification from the electoral register, being incapable of election to the House of Commons, or being unable to hold any elective office.[13] Part III of the Representation of the People Act 1983, entitled "Legal Proceedings", establishes a detailed electoral scheme and provides for the consequences of non-compliance with it. Our recommendations would not subsume this role and we are therefore of the view that they can operate properly alongside section 113.

Treating

C.20 Section 114 of the 1983 Act provides that:

> (1) A person shall be guilty of a corrupt practice if he is guilty of treating.
>
> (2) A person shall be guilty of treating if he corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person—
>
> (a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
>
> (b) on account of that person or any other person having voted or refrained from voting, or being about to vote or refrain from voting.
>
> (3) Every elector or his proxy who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.

[12] It is acknowledged that the electoral nature of the offence may be considered an aggravating factor in terms of sentencing.

[13] Representation of the People Act 1983, s 160.

C.21 It may be thought, and we take the view, that treating is simply a specialised instance of bribery. There is some difference in popular perception: "bribery" suggests a significant amount of money given as part of an explicit corrupt bargain, while "treating" suggests smaller favours with no strings attached given in order to create good will towards the candidate. However, the statutory definition of bribery includes payments made simply with a view to influencing the voter and without any condition imposed. The only apparent difference between section 113 and section 114 is the nature of the thing conveyed in return for the voting favour. A treat is "meat, drink, entertainment or provision", whereas a bribe takes the form of money or an office. The line between these benefits is unclear, since there is no apparent limit to the extravagance to which a treat could extend. Moreover, we see little difference between a "treater" providing a lavish meal in order to influence a vote and a briber simply giving the voter the money to pay for the lavish meal, in order to influence the same vote. This uncertainty is compounded by the expansive interpretation given to "money" under section 113(2)(i) as including "any valuable consideration".

C.22 The various benefits identified as bribes and treats in sections 113 and 114 of the 1983 Act are conflated in our term "advantage". Hence, treating at elections would be covered by our recommendations to the same extent as bribery at elections, provided in both cases that the doubt about whether an elector is expected to act in good faith can be surmounted. Equally, however, the independent function of section 114 is justified by the same reasoning as that applied to section 113.[14] Section 114 targets the wrongs both of this type of bribery and of the improper influence over an election. The latter aspect is the critical difference between this specific offence and the general offence of bribery that we are recommending. In addition, the regime of sanctions available under Part III of the 1983 Act for committing the section 114 offence is designed to deal with this particular form of corrupt conduct. Our recommendations would not therefore impinge on the proper application of section 114.

Undue influence

C.23 Under section 115 of the 1983 Act:

> (1) A person shall be guilty of a corrupt practice if he is guilty of undue influence.
>
> (2) A person shall be guilty of undue influence—
>
> (a) if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or

[14] Paragraphs C.18 and C.19 above.

(b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents[, or intends to impede or prevent,] the free exercise of the franchise of an elector or proxy for an elector, or so compels, induces or prevails upon[, or intends so to compel, induce or prevail upon,] an elector or proxy for an elector either to vote or to refrain from voting.[15]

C.24 This offence addresses a different type of corrupt practice to that encompassed by our recommended offence of bribery. It is concerned with corruption through the use or threat of force, or through some deception, neither of which have any real place in the concept of bribery. It should also be noted that typical instances of undue influence are more clearly one-sided than typical cases of bribery: a voter can solicit a bribe, in which case the corrupt conduct is more evenly balanced, but it is difficult to imagine a voter soliciting undue influence. Given the disparate nature of the corrupt practices concerned, we believe that our recommendations would operate independently of section 115.

Personation

C.25 According to section 60 of the 1983 Act:

(1) A person shall be guilty of a corrupt practice if he commits, or aids, abets, counsels or procures the commission of, the offence of personation.

(2) A person shall be deemed to be guilty of personation at a parliamentary or local government election if he—

(a) votes in person or by post as some other person, whether as an elector or as proxy, and whether that other person is living or dead or is a fictitious person; or

(b) votes in person or by post as proxy—

(i) for a person whom he knows or has reasonable grounds for supposing to be dead or to be a fictitious person; or

(ii) when he knows or has reasonable grounds for supposing that his appointment as proxy is no longer in force.

(3) For the purposes of this section, a person who has applied for a ballot paper for the purpose of voting in person or who has marked, whether validly or not, and returned a ballot paper issued for the purpose of voting by post, shall be deemed to have voted.

C.26 Personation is a very specific type of corrupt practice. It is entirely distinct from bribery and would not be affected by our recommendations.

[15] The words in square brackets in section 115(2)(a) were inserted by the Electoral Administration Act 2006, s 39(1)(a) and by the Local Electoral Administration and Registration Services (Scotland) Act 2006, s 141(1), (2)(a). The words in square brackets in section 115(2)(b) were inserted by the Electoral Administration Act 2006, s 39(1)(b), (2) and by the Local Electoral Administration and Registration Services (Scotland) Act 2006,s 14(1), (2(b).

Election expenses

C.27 It is an offence contrary to section 82(6) of the 1983 Act knowingly to make a false declaration as to election expenses. As with undue influence and personation at elections, this corrupt practice is of a wholly different character to bribery and our recommendations would have no foreseeable impact on prosecutions for it.

POLITICAL PARTIES, ELECTIONS AND REFERENDUMS ACT 2000

C.28 The Political Parties, Elections and Referendums Act 2000 provides for the establishment of the Electoral Commission, the primary function of which is to regulate and ensure the accountability of political party funding. The Act establishes a number of offences for failing to comply with the rules contained therein and some of these offences may have a corrupt taint to them, such as making a false statement to the Commission.[16]

C.29 However, our recommendations would operate separately to the provisions of the Political Parties, Elections and Referendums Act 2000. The possible extent to which they overlap is where a person may be bribed to engage in conduct which breaches the rules set down by that Act, thereby committing both bribery and one of the statutory offences. However, as was noted in relation to misconduct in public office in paragraph C.6 above, there are innumerable things which P could bribe R to do and the fact that these things may entail other offences cannot be a reason to restrict the proper ambit of an offence of bribery. We believe that any such coincidences would not impede the effective prosecution either for bribery or for a simultaneous offence under the Political Parties, Elections and Referendums Act 2000.

HONOURS (PREVENTION OF ABUSES) ACT 1925

C.30 Under the Honours (Prevention of Abuses) Act 1925 it is an offence to deal in honours. Section 1 provides that:

> (1) If any person accepts or obtains or agrees to accept or attempts 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 a misdemeanour.
>
> (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 a misdemeanour.

[16] Political Parties, Elections and Referendums Act 2000, s 39.

C.31 The conduct proscribed by these offences is in many respects similar to bribery under the Prevention of Corruption Acts. Although it does not require the defendant to have acted "corruptly", which is the hallmark of the current law on bribery, the corrupt nature of the conduct is inferred from the fact that the defendant is accused of trading in honours.

C.32 The similarity between this legislation and the current law on bribery is reflected in the degree to which our recommendations are sufficiently broad to catch criminal activity of this sort. In simplistic terms, where P offers R an advantage in return for the grant of an honour, intending thereby for R to breach a reasonable expectation that R act in good faith and impartially, P will be guilty of bribery. Conversely, R will also be guilty where he or she knows that the acceptance of the advantage or the grant of the honour would breach a reasonable expectation that R act in good faith or impartially.

C.33 However, we believe that our recommendations would in no way supersede or eclipse the offences established under the Honours (Prevention of Abuses) Act 1925. This was the view expressed in our previous consultation paper on corruption[17] and we remain of the same opinion. Parliament took the deliberate step of enacting the honours legislation in addition to the Prevention of Corruption Acts. In doing so, it clearly intended that this specific form of criminal wrongdoing should be prosecuted in its own right, rather than as a form of corruption generally. It would therefore be inappropriate for our recommendations to be applied to a context that Parliament has demarcated as separate to the law on bribery.

THEFT ACT OFFENCES AND CONSPIRACY TO DEFRAUD

C.34 The corrupt conduct substantiating a bribery offence may at the same time result in the commission of offences under the Theft Act 1968. These could include theft,[18] false accounting,[19] suppression of documents[20] or dishonest retention of wrongful credit.[21] Where the bribery entails a dishonest agreement between two or more people to cause loss to another, this may also amount to conspiracy to defraud.

C.35 The overlap of our recommendations with these offences is unavoidable. There is already a large degree of overlap within the various theft offences themselves, and between those offences and the offences under the Fraud Act 2006. In all such instances it remains up to the prosecution to proceed with the most appropriate charges on the facts of a given case. Our recommendations should not affect the way in which these prosecutorial decisions are taken.

[17] Corruption (1997) Law Commission Consultation Paper No 145, para 2.36.

[18] Theft Act 1968, s 1.

[19] Above, s 17.

[20] Above, s 20.

[21] Above, s 24A.

EXTORTION AND BLACKMAIL

C.36 The common law offence of extortion was abolished by section 31(2)(a) of the Theft Act 1968 and replaced by blackmail.[22] However, instances that would previously have been characterised as extortion may also amount to bribery. For example, bribery might foreseeably be committed where R refuses to perform his or her duties unless P gives him an advantage. In these circumstances, the prosecution would have the option of charging either blackmail or bribery.

COMPETITION LAW AND FRAUD

C.37 The relationships between bribery and competition law, and between bribery and fraud, were examined in depth in the CP.[23]

[22] Under section 21 of the Theft Act 1968 Act, blackmail is committed where a person, with a view to gain for himself or another, or intending to cause loss to another, makes an unwarranted demand with menaces.

[23] Appendices D and E.

APPENDIX D
SPECIAL CASES

INTRODUCTION

D.1 In this Part we discuss the application of our general definition to three types of payment, namely:

(1) facilitation payments;

(2) commission payments;

(3) corporate hospitality.

D.2 The purpose of this discussion is partly to test the general definition, and partly to explain why no special provisions are required for these payments, either extending or restricting liability. All three types of payment were discussed in detail in Appendix F to the CP. Here the discussion can be briefer, but needs to take account of the fact that our recommended definition of bribery is not the same as the proposal in the CP.

FACILITATION PAYMENTS

D.3 A facilitation payment is given to an official as encouragement to do something which in any case would fall within the official's functions.[1] The misconduct is commonly the simple receipt of the unauthorised payment.

D.4 It is generally agreed that, on broad social grounds, a culture in which facilitation payments are regular and accepted is undesirable and that such payments should be discouraged.[2] However, there are degrees of undesirability, and different situations can be distinguished.

(1) At one extreme, there is the case where the official, if not paid, either will not fulfil the duty at all or will do so only after a seriously damaging delay.

(2) In the middle, there is the case where the official generally fulfils the relevant duties correctly, but accepts payment for dealing with a particular matter with exceptional despatch or effort.

(3) Also in the middle are cases in which the official fulfils the relevant duties correctly, but a payment made is part of his or her reason for so doing.

(4) At the other extreme, there is the case where the payment makes no difference at all to the performance of the official's functions, but is expected simply as a matter of courtesy in the local culture.

[1] Facilitation payments are discussed at length in the CP, paras 4.52 to 4.64 and Appendix F, paras F.4 to F.37.

[2] Reasons for this are listed at length in the CP, Appendix F paras F.7 to F.25.

D.5 Under our scheme, bribery will not include every payment received in breach of duty, because the request for or acceptance of the payment must amount to a betrayal of a position of trust.[3] A mere courtesy payment or tip is unlikely to satisfy this criterion. So, many examples of situation (4) will not be covered. It will depend on whether the tribunal of fact finds that to have requested or to have accepted the payment or other advantage in question was in the circumstances a breach of trust. An official can breach trust expressly or impliedly placed in them simply by accepting certain kinds of payments.

D.6 By way of contrast, situations (1) to (3) will all be covered by our scheme in principle. Obviously, they will vary either in terms of whether any particular instance is worth prosecuting, or if so, in terms of how serious the wrongdoing involved really is. In cases where an official speeds up paperwork in exchange for payment, or delays it, or threatens to delay it, if no payment is received, it is the "manner in which" the official is expected to perform his or her duties that falls short of expectations.[4] In the case where the official does only as he or she was bound to do, but in part because of a payment made, it is the "reasons for which" the official does the duty that involve a breach of expectations.[5]

D.7 So far as the payer (P) is concerned, where the prosecution relies on the speeding up of an official response (or some other special favour) at P's request, P must be found to have intended the payment to induce the official to behave improperly.[6] If, by contrast, the prosecution relies simply on the fact that it was wrong as such for the official to accept the advantage, then it must show that P knew or believed that the acceptance was improper.[7]

COMMISSION PAYMENTS

D.8 Many brokers, agents and the like are remunerated by a commission, payable by the supplier of the product which is sold, even though the agent is supposed to be acting for the buyer. The situation has a superficial resemblance to bribery, in that the agent is performing duties for the buyer, but is motivated by the prospect of the commission (the advantage).

D.9 Much of the discussion in the CP[8] concerned the question whether the commission was the primary reason for the agent's actions. In one sense it obviously is: if there were no commission the agent would not act at all. On the other hand, the commission is not, or ought not to be, the agent's reason for recommending one product rather than another. If the agent deliberately recommended the most expensive product in order to maximise the commission, without regard to the interests of the client, that would arguably be corrupt.

3 Clauses 1(3), 3(5) and 3(6)(b), operating together.

4 Clause 3(7)(b).

5 Clause 3(7)(b).

6 Clause 2(2)(b).

7 Clause 2(3)(b).

8 CP, Appendix F, paras F.38 to F.58.

D.10 Our recommended definition does not now incorporate a primary reason test.[9] However, we do not believe that the omission of this test will have the effect of rendering criminal normal commission payments.

D.11 One requirement of our recommended definition is that the recipient must be, or propose to be, in breach of an expectation that he or she will act in good faith or impartially, or must betray a position of trust.[10] In the case of a broker or agent acting for the client, perhaps in the financial services market, the relevant duty is to act in the best interests of the client. Accordingly, if the agent is honestly seeking the best product for the client, there is no question of bribery, even if the agent receives a commission if the client purchases that product. The scope of bribery will be confined to the case where the agent recommends a product for the sake of the commission, although he or she does not believe, or care, whether it is in the best interests of the client.[11] The practical result is the same as if the "primary reason" test had been retained.

D.12 Consequently, there is no need for a special provision for commission payments, either less inclusive or more inclusive than the general definition.

CORPORATE HOSPITALITY

D.13 Many trade and similar organisations have expressed concerns about the potential for the provision of corporate hospitality to fall within the scope of bribery. These concerns fall into two categories: ensuring that conventional corporate hospitality practices should not fall into the ambit of bribery, and providing guidance on what kind and degree of corporate hospitality is or is not acceptable.

D.14 Where a supplier provides corporate entertainment to regular customers, the purpose is normally to cement existing links with the customers, provide information, and keep the existence of the supplier at the forefront of the customers' minds when it comes to the placing of orders. In that sense it is obviously designed to assist in the acquisition and retention of business, and would be a pointless exercise if it were not. Where those entertained are employees of potential customers, and have responsibility for choosing among possible suppliers, the potentiality for bribery is present.

[9] See the discussion in Part 3.

[10] Clause 3.

[11] Clause 1(5), clause 3(1)(b), clause 3(3) and clause 3(6)(a), operating together.

D.15 This issue was discussed in detail in the CP,[12] and the conclusion was similar to that of the discussion of commission payments, in that it relied on the primary reason test. Where the entertainment was only one factor amongst a number in the employee's mind leaning in favour of doing business with the supplier, the placing of business with the supplier would not have been bribery. This is for the simple reason that it would not have been the primary reason that the business was placed with the supplier. If however the entertainment was the main factor in the employee's mind, overwhelming all other considerations, it would have amounted to bribery, under the proposals in the CP, because it would then have been the primary reason for doing business with the supplier.

D.16 Once more, we need to consider whether this is affected by the removal of the primary reason test. In our current recommendation, the test is whether R was influenced by the hospitality, as an advantage accepted by him or her, in a way that breached an expectation that R would act in good faith or impartially, or in accordance with a position of trust.[13]

D.17 In run-of-the-mill cases in which people accept hospitality in a private sector context, there is simply no breach of a relevant expectation about the way that they will behave that is raised by that acceptance. So, the ordinary giving and receiving of hospitality remains well outside the scope of the law of bribery under our recommendations, in such circumstances. However, in (say) a public sector or trust administration context, that may not be true. In some instances, for a public servant or trustee to accept hospitality of any kind, or of a special kind, from a particular individual would amount to a breach of an expectation concerning the position of trust that that person holds.[14]

D.18 Even in a private sector context, rare though this will be, the provision of hospitality may be of such a nature or extent that it amounts to an inducement to employees or agents of potential contractors to breach an expectation that they will act in good faith or impartially. In such circumstances, the provision and acceptance of the hospitality can amount to bribery. An example might involve the covert entertainment of potential contractors' employees at a "lap dancing" club, where the company providing the entertainment intends the employees to feel obliged to favour the company in case the nature of the entertainment they received comes to the attention of their employer.

[12] Appendix F, paras F.59 to the end.

[13] Clauses 3(3) to 3(5).

[14] Clause 3(5) and 3(6)(b).