House of Lords

House of Commons

Joint Committee on the Draft Corruption Bill

Draft Corruption Bill

Report and evidence

Session 2002–03

HL Paper 157
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Report together with formal minutes, oral and written evidence

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The Joint Committee on the Draft Corruption Bill

The Joint Committee on the Draft Corruption Bill was appointed by the House of Commons and House of Lords on 24 March 2003 to examine the Draft Corruption Bill and report to both Houses no later than four months after the presentation of the draft Bill.

Membership

Lord Slynn of Hadley *(Crossbencher)* (Chairman)
Lord Bernstein of Craigweil *(Labour)*
Lord Campbell-Savours (*Labour*)
Lord Carlisle of Bucklow *(Conservative)*
Baroness Scott of Needham Market *(Liberal Democrat)*
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Mr Richard Shepherd MP *(Conservative, Aldridge-Brownhills)*
Mr Paul Stinchcombe MP *(Labour, Wellingborough)*
Dr Desmond Turner MP *(Labour, Brighton Kemptown)*

Powers

The committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet away from Westminster, to meet at any time, (except when Parliament is prorogued or dissolved), to appoint specialist advisers, and to make Reports to the two Houses.

Publication

The Report and evidence of the Joint Committee is published by The Stationery Office by Order of the two Houses. All publications of the Joint Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/jcdcb.cfm

Committee staff

The staff of the Committee were drawn from both Houses and comprised Andrew Kennon and Mary Robertson (Clerks), John Vaux (Speaker's Counsel), Ruth Winstone (House of Commons Library), Fiona McLean (Assistant Legal Adviser), Jennifer Smookler (Researcher), Richard Dawson (Committee Assistant), Claire Little (Secretary) and Tes Stranger (Office Support Assistant). This was the first Joint Committee on a draft Bill to be supported by the Scrutiny Unit in the House of Commons Committee Office.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on the Draft Corruption Bill, Scrutiny Unit, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8365; the Joint Committee's email address is scrutiny@parliament.uk

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Summary

The draft Bill is the product of a long policy-making process dating back nearly thirty years. The Law Commission published a draft Bill on corruption in essentially similar terms five years ago. The written and oral evidence we have received has been highly critical of the Bill from a wide range of different viewpoints. While no one has challenged the need for new legislation, there have been many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility.

At the start of this report we list the key questions we have addressed in this inquiry. Our answers to those questions are as follows:

Is the existing law on corruption so deficient that it is necessary now to legislate?

Yes.

If so, does the draft Bill criminalise all conduct which is corrupt without criminalising any conduct which is not?

It fails to cover some corrupt conduct such as when the head of one firm bribes the head of another firm or when an employer consents to the bribery of his agent.

Further, does the draft Bill state clearly what types of conduct are punishable as corrupt in language which can readily understood by the police, by prosecutors, by jurors and by the public, including – especially – the business and public sector communities, and their advisors, both here and abroad?

No.

What is the essence of corrupt conduct? How might it be defined? What distinguishes corrupt conduct from lawful conduct? Does this Bill draw that line in the correct place? In particular, is the definition in the Bill – which confined corruptness exclusively to a principal/agent relationship - both complete and robust, and is it clear so that it can readily be understood by all relevant parties?

We believe that (leaving aside related offences) the essence of corruption would be better expressed in the following terms:

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

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

Should parliamentary privilege be waived in corruption cases?

Yes – but in a narrower form than proposed in the draft Bill.

Should the Attorney General's consent for prosecution for corruption offences be required?

No – the consent of the Director of Public Prosecutions or one nominated deputy would be sufficient.

Should the Intelligence Services be exempt from prosecution for corruption offences?'

The compatibility of this provision with international law needs to be re-considered.

The Committee invites the Home Office to bring forward a revised Bill taking account of these points.

1 Introduction

1. The Joint Committee was appointed on 24 March to consider the draft Corruption Bill published on that day as Cm 5777. The draft Bill is based on a Law Commission draft issued in 1998 as part of the planned codification of the criminal law. This draft Bill is thus the product of a long and detailed process of consultation. Its provenance includes:

- Royal Commission on Standards in Public Life (the Salmon Commission) 1976 Cmnd 6524
- First Report from the Committee on Standards in Public Life 1995 Cm 2850
- Home Office paper Clarification of the Law Relating to the Bribery of Members of Parliament December 1996
- Law Commission paper *Legislating the Criminal Code: Corruption* 1997 Consultation Paper no 145
- Home Office paper *The Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889-1906: A Government Statement* June 1997
- Law Commission report *Legislating the Criminal Code: Corruption* 1998 Report no 248
- Joint Committee on Parliamentary Privilege report March 1999 HL Paper 43 and HC 214
- Home Office White Paper *Raising Standards and Upholding Integrity: the prevention of Corruption* published in June 2000 as Cm 4759 January 2000 Cm 4557
- Fourth Report 2000-01 from International Development Committee of the House of Commons on Corruption March 2001HC 39-I.

2. The draft Bill seeks to replace both the common law offence of bribery and most of the statutory offences contained in this legislation:

- Public Bodies Corrupt Practices Act 1889
- Prevention of Corruption Act 1906
- Prevention of Corruption Act 1916.

3. The draft Bill also seeks to ensure that UK law complies with various international agreements which are either in force or in preparation, such as:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997 (Cm.3994)

- Council of Europe, Criminal Law Convention on Corruption (ETS no.173) and Civil Law Convention on Corruption (ETS no. 174) (both Strasbourg 1999)
- The Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union
- The Draft UN Convention on Corruption

Conduct of the inquiry

4. At the outset the Committee set out the main matters on which it wished to take evidence:

a) What is the background to the draft Bill and what other options could have been pursued? What are the reasons for any changes from the Law Commission's 1998 report (No. 248) and the 2000 White Paper (Cm. 4759)?

b) Whether proposed definitions are workable and sufficient:

c) Whether they will be readily understood by police, prosecutors, jurors, the public etc

i. Whether specific offences should have been proposed for specific situations

ii. The effect of not making the new offences retrospective

iii. The effect of removing the presumption of corruption

iv. Whether the agent/principal analogy is still relevant, in particular in the case of public acts

v. The treatment of facilitation payments

vi. Should there be a public interest defence?

d) Whether the proposals are compatible with international obligations and how they compare with equivalent law in other countries.

e) Omission of misuse of public office and trading in influence.

f) Waiver of parliamentary privilege in cases involving peers and MPs:

i. Attorney General's consent to prosecution

ii.relationship with Registration of Interests, Codes of Conduct and Electoral Commission requirements on political donations

5. As our inquiry into the draft Corruption Bill progressed, the Committee realised that these matters might require to be refocused. The principal questions we have thus considered are:

a) Is the existing law on corruption so deficient that it is necessary now to legislate?

b) If so, does the draft Bill criminalise conduct which is corrupt without criminalising any conduct which is not?

c) Further, does the draft Bill state clearly what types of conduct are punishable as corrupt in language which can readily understood by the police, by prosecutors, by jurors and by the public, including – especially – the business and public sector communities, and their advisors, both here and abroad?

d) Should parliamentary privilege be waived in corruption cases?

e) Should the Attorney-General's consent be required for prosecution for corruption offences?

f) Should the intelligence services be exempt from prosecution for corruption offences?

6. It is under the above headings - and especially the second and third - that all of the other questions, important but subsidiary, fall properly to be considered: what is the essence of corrupt conduct? How might it be defined? What distinguishes corrupt conduct from lawful conduct? Does this Bill draw that line in the correct place? In particular, is Clause 5 of the Bill – which confined corruptness exclusively to a principal/agent relationship - both complete and robust, and is it clear so that it can readily be understood by all relevant parties?

7. We sought evidence from interested parties and are publishing with this report the memoranda we received and the transcripts of the eight sessions of oral evidence taken in the course of this inquiry. The full list of memoranda and witnesses appears on pages 98 and 99.We are very grateful to all those who gave us the benefit of their knowledge and experience. As specialist adviser we appointed Peter Alldridge, reader at Cardiff Law School and Professor-elect at Queen Mary College, London. His advice and commitment have been invaluable. The other Committee staff are listed on the inside cover of the report.

8. The Committee was not appointed until the day the draft Bill was published: 24 March. We thus had no time to prepare for the inquiry in advance of publication. The Committee was ordered to report in four months – by 24 July. Prior commitments and the Easter recess meant we could not start taking oral evidence until early May. In all we have held 18 meetings, usually convening twice a week.

9. We have considered first what are the essential elements of corruption and how the criminal offences should be framed. Secondly, we have examined the issue of parliamentary privilege. Thirdly, we have looked at the Attorney-General's consent, the intelligence services and other matters.

The need for new legislation

10. The existing law covers:[1]

> a) The common law offence of bribery. This is said in the legal textbook *Russell on Crime* to be the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.[2]
>
> b) The Public Bodies Corrupt Practices Act 1889. This created an offence of corruptly giving to (or receiving by) an official of a public body. It uses terms such as "corruptly give, promise, or offer any gift, loan, fee, reward, or advantage … as an inducement to or reward for …. doing or forbearing to do anything …. actual or proposed, in which such public body ….is concerned…"
>
> c) The Prevention of Corruption Act 1906. This extended corruption to the private sector and introduced the concept of an agent as someone acting for another person or for a public authority.
>
> d) The Prevention of Corruption Act 1916. This increased the penalty and now defines 'public body' widely to include 'public and local authorities of all descriptions'. It also introduced the presumption of corruption in public sector cases. This shifted the burden of proof onto the defence to show that a given payment was not corrupt.

11. The number of prosecuted offences of corruption in recent years is set out in the chart below. The Audit Commission told us that very few cases of corruption are reported to them. Since 1995/96 the number of detected cases has averaged 43 a year, with annual losses averaging £262,000.[3] On average, 21 people were prosecuted under three Prevention of Corruption Acts in each year between 1993 and 2003.[4] Since 1988, the Serious Fraud Office has prosecuted seven cases where corruption was a charge and a further three are currently under investigation.[5] By comparison, an average of 23,000 defendants were prosecuted each year for fraud between 1997 and 2001[6] and an average of three people have been prosecuted for insider dealing in the 10 years to 2002.[7] The figures for corruption offences need to be treated with caution, partly because the borders between these and other offences are uncertain and partly because there is thought to be under-reporting of offences.

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1 For a full description of the present law, see the Law Commission's 1998 Report *Legislating the Criminal Code: Corruption* No 248

2 12th ed 1964 p 361

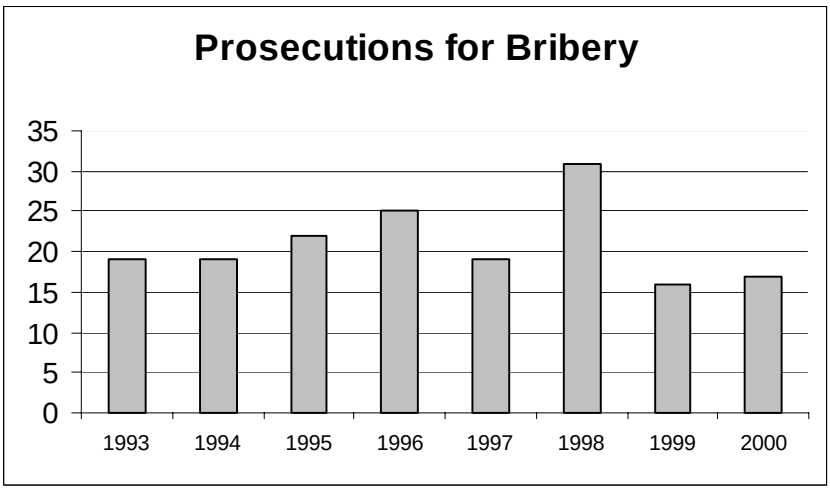
3 Ev 159 DCB 28 para 6

4 Official Report I July 1999 col 252-3W and 6 November 2001 col 187w

5 Ev 16

6 Crime in England and Wales 2001/02, supplementary volume, Home Office

7 Official Report 26 January 2002 c1144w



12. We have received no evidence which causes us to dissent from the conclusion of the Law Commission in 1998 that the present law is in an unsatisfactory state and that the common law offences of bribery and statutory offences of corruption should be replaced by a modern statute.[8] As Mr Justice Silber, who was responsible for the Law Commission report, told us:

> "The present law suffers from numerous defects. It is drawn from a multiplicity of sources. Corruption offences are to be found in at least eleven statutes, the most important of which are the Prevention of Corruption Acts 1889 to 1916. Much of that legislation was impulsive being prompted by contemporary problems or fears. Thus it is neither comprehensive nor consistent. There are also many overlapping common law offences such as misconduct in public life, specific bribery offences, embracery (bribery of juries). Against that background, it was not surprising that the Royal Commission on Standards of Conduct in Public Life (Chairman: Lord Salmon) recommended the rationalisation of the statute law on bribery in its report in 1976".[9]

13. Over the past few years there has been a growing international movement on the part of the developed and the developing world to eradicate corruption, demonstrated by a number of international instruments and initiatives. It is in the interests of the United Kingdom to be seen to play an effective part in this field, not least because of its pre-eminent position in world financial markets. While the passage of time and new international obligations are two factors pointing to the need for new legislation, a third is the increasingly complex relationship between the public and private sectors. The old statutes are based on a clear separation that may no longer be appropriate .

14. If the current law is "obscure, complex, inconsistent and insufficiently comprehensive"[10], we must consider whether the draft Bill avoids these criticisms. In particular, our evidence shows there is a general desire for clarity in the new legislation on corruption. This is not just

8 Law Commission No 248 para 2.33

9 Ev 98 para 3

10 Law Commission 1998 No 248 para 1

for the benefit of those who may be involved in a trial – judge, jury, defendant, lawyers. It is even more important that the law should be understood by those going about their normal business so that they understand how to abide by it and do not take decisions which lead to the commission or apparent commission of a criminal offence. So clarity is a key test when considering this draft Bill. The wording should be easily translatable into foreign languages to enable mutual legal assistance with other jurisdictions. Such clarity may be aided by guidance notes but the Bill itself should be clear and understandable.

15. Cases involving corruption can often involve other offences and people have been prosecuted for those other offences as well as, or instead of, corruption. The variety of cases involving corruption which have been handled by the Crown Prosecution Service in recent years is set out on page 160 of our written evidence. These offences include:

- Offences under the Theft Acts
- Conspiracy to defraud
- Misconduct in public office
- Perjury
- Perverting the course of justice

The criminal offences

16. Following the scheme in the Law Commission's draft Bill of 1998, this draft Bill builds on the current statutory corruption offences and the common law bribery offence to create three broad new offences:

a) Corruptly conferring an advantage (Clause 1),

b) Corruptly obtaining an advantage (Clause 2) and

c) Performing functions corruptly (Clause 3).

17. In these Clauses the only word which implies illegality is 'corruptly'. So it is important to know how 'corruptly' is interpreted. While most people think they know what it means, in practice opinions differ. 'Corruptly' in Clause 1 is defined in Clause 5 in terms of conferring an advantage, giving examples of the actions and intentions of three people, A, B and C. This definition is expressed in terms of agents and principals. The offences, drawn from the existing statutes, are combined in the draft Bill to apply both to the public and private sector. There is a distinction in that the 'consent of the principal' (Clause 7) is a defence in private but not in public sector cases. Defining offences in terms of A, B and C could be read as illustrative or as exclusively definitive. It is not clear which it is.

2 Evidence received

18. The written and oral evidence we have received has been highly critical of the Bill from a wide range of different viewpoints. While no one has challenged the need for new legislation, there have been many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility. Some have argued that the new corruption offences should be specific rather than broad-based. Among our witnesses, only the responsible Minister argued unequivocally for the Bill in its current form although he was willing to contemplate improvements. Comments on specific parts of the Bill are set out in the paragraphs below. Detailed points raised by witnesses, together with comments by the Home Office are set out in Annex 1.

Clarity

19. On the general clarity of the Bill we have been told:

> "The draft Corruption Bill sets out the proposed new offences in very abstract terms, which may not be easily understood by ordinary or business people. The objective of all legislative wording should be clarity and certainty, and this is especially important in legislation that imposes criminal sanctions". (CBI)[11]

> "I do not believe that the drafters of the Bill understand the workings of corruption". (Bob McKittrick).[12]

> "The intention of the UK legislative drafters seems to have been to construct an offence that is as broad as possible. This approach is certainly coherent, but it does not make for legislation which is clear and readily understandable to those charged with enforcing it". (OECD)[13]

> "I have considered whether the proposed definitions will be readily understood by police, prosecutors, jurors and the public, and have concluded that the way in which the proposed legislation is drafted will not, without considerable study, be readily understood by any of those groups". (George Staple)[14]

> "It is very difficult to understand". (Professor Pieth)[15]

11 Ev 111 CBI DCB 17 para 3

12 Ev 31 McKittrick DCB 4 para 4.1

13 Ev 165 DCB 26 part 2(a) – OECD Secretariat

14 Ev 153 DCB 19 para 17 (George Staple)

15 Q373 (Prof Pieth)

"I think the technical provisions in the Bill will make a field day for lawyers but will not be helpful to the average person who has to refer to it in terms of seeing what it is driving at". (Transparency International (UK))[16]

"[The offences in the Bill could be translated into other languages] in the same way as they could be translated to your jurors but it would take quite a bit of effort to do so and you would raise a lot of issues that would leave your opposite number [in other countries] puzzled". (Professor Pieth)[17]

"To attempt to explain an offence as defined in the draft Bill to other jurisdictions, vital for the effective operation of mutual legal assistance and necessitating translation into other languages, would be formidable, resulting in huge expense and abandonment of cases". (Transparency International (UK)).[18]

20. The Director of the Serious Fraud Office told us:

"I think the Bill will be understandable to juries, at least as far as Clauses 1, 2, and 3 are concerned. There may be disadvantages in the wording which explains the meaning of corruption and the like, which I think juries may find quite difficult. Otherwise, I think it is a helpful Bill overall.[19]

21. The Director of Public Prosecutions said:

"This Act seems to me to fall short of the clear, comprehensive statement of the law that one would like. On the other hand, it is an extremely complex area because as soon as you try to define corruption in one sense, you find that you have included behaviour which people find perfectly acceptable, and you then move to another one and find you have excluded by mistake behaviour which people find unacceptable. I have great sympathy with the draftsmen, but [the Bill] is very, very complex ….."[20]

16 Q10 Mr Rodmell

17 Q367 (Prof Pieth)

18 Ev 2 DCB 18 para 3.5

19 Q56 Mr Wardle (SFO)

20 Q57 Sir David Calvert-Smith (DPP)

22. The Home Office position was explained thus:

> "The need to express concepts in terms of statutory drafting often leads to apparent complexity. This is particularly so in the present case where the criminality involves three parties. (This contrasts with most criminal law where the basic offences have two parties, the defendant and complainant – where three parties are concerned, as for example in conspiracy, further complexity is inevitable.) But we would argue that in spite of the apparent complexity, the underlying principles are clear and simple. We believe that when it comes to its operation in the courts - in particular cases with their individual circumstances, as opposed to its consideration as a Bill as a whole with all the various permutations possible to be considered - it will not in fact prove troublesome. But we would welcome any suggestions from the Committee on how to make the Bill more accessible".[21]

Specific or broad offences

23. Both the Crown Prosecution Service and the Serious Fraud Office favoured the approach of "one broadly-based and general offence of corruption".[22] On the other hand, Transparency International (UK) said: "Practice elsewhere would suggest that corruption should be broken down into a series of readily identifiable specific offences".[23] They drew attention to a new Bill being considered in South Africa.[24] In a subsequent memorandum, Transparency International (UK) argued for combining the three general offences of corruption in the draft Bill with a small number of specific offences.[25] They pointed out that the latest version of the South African Bill had reduced the number of specific offences to 16. The Bill would provide for specific offences such as:

- Corruptly accepting gratification
- Bribery of public officer
- Corruption of witnesses
- Bribery of foreign public official
- Bribery in relation to auctions
- Bribery for giving assistance in regard to contracts
- Corruption in relation to sporting events.

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21 Ev 74 DCB 27 para 7

22 Ev 16 DCB 13 (SFO) Ev 17 DCB 15 Para 1.2 (CPS)

23 Ev 2 DCB 18 para 3.2

24 Prevention of Corruption Bill 18 April 2002 [B19-2002]

25 Ev 163 DCB 31 paras 3.2 and 5.1

24. The Home Office's response to the argument for a Bill based on the South African model was:

> "Whatever the merits of this model in the South African situation, we are not minded to adopt it for the UK. That would be to move in the opposite direction to that recommended by the Law Commission – not only in their Corruption Report, but also in their Fraud Report (2002), which recommends the replacement of the existing 8 separate offences of deception under the Theft Acts 1968-96, and the common law of conspiracy to defraud. The multiplicity of offences has not proved helpful in practice in the case of fraud, or of corruption. By contrast, the South African legislation creates 23 separate offences, as well as reinstating the common law of bribery, which they abolished in 1992. Some of these offences are very clearly covered by the general offences in our Bill (for example, "bribery of public officer" and "bribery of foreign public officials"). Others are dealt with by other offences in our law (for example "intentional obstruction of investigation of offence"). Others criminalise behaviour which we do not think should be criminal (offence for a public official not to report a corrupt offer)".[26]

Definition of corruption

25. What constitutes corruption lies at the heart of this Bill. Mr Justice Silber told us:

> "At the forefront of the criticisms of the present law is the use of the ambiguous word 'corruptly' in each of the main corruption statutes. This term is not defined in the legislation and its meaning has been the subject of probably six different conflicting judicial interpretations [dating from Cooper v. Stade (1858) to R v Harvey (1999)]. [The Law Commission] were told that this has led to difficulties for lawyers in advising and prosecutors in determining whether to prosecute".[27]

26. We have received a variety of comments on the definition used in the Bill:

> "The high-level, abstract language used is difficult to translate into concrete terms. This is especially so with regard to the key definition of 'corruptly', which seeks to define the mental element of the offence by reference to exceptions which are themselves unclear". (OECD)[28]

> "At least one of the definitions of 'corruptly' remains circuitous, in that it depends ultimately on knowing what is meant by 'corruptly'". (Transparency International (UK))[29]

> "Dishonestly could either be an alternative to 'corruptly' or an additional element in all the new offences". (Criminal Bar Association)[30]

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26 Ev 75 DCB 27 para 14

27 Ev 98 DCB 30 para 7

28 Ev 165 DCB 26 2(a) line 17-19

29 Ev 2 DCB 18 para 3.4

> "It is doubtful whether this [wording: '<u>primarily</u> in return for the conferring of the advantage'] is in line with the requirements of international conventions. … the insertion of the word 'primarily' in the draft can give rise to difficulties of implementation in everyday practice". (Drago Kos)[31]

> "There has been a lot of negative comment from employers about the ambiguity in Clauses 6 and 7". (CBI)[32]

27. In response to this, Lord Falconer, the Minister responsible for the draft Bill, set out what he considers to be the options and how he and his colleagues eventually adopted what they considered to be a middle course:

> "There were a range of alternatives. You could have a Bill without any definition of 'corruption' or 'corruptly' in it at all and simply, as it were, leave it to the good sense of the jurors or the common law to determine what 'corruption' meant. The difficulty with that would be you would end up with potentially differing definitions of 'corruptly' from one case to another. We also took the view that if you did that you would be dealing with a situation where unlike the phrase, say, 'dishonesty' there is not a popular view necessarily of what 'corruptly' means. We were not attracted by the idea of having no definition of 'corruptly'. An alternative approach is to take the approach in the South African Bill. I am told it is not law yet in South Africa. What the South African approach has been is effectively to create 23 different sorts of offences of corruption, so it will be much, much more specific. We thought the problem in relation to that was if we were too specific we might catch things we would not necessarily as a matter of policy want to catch and you were not leaving it enough to the jury to decide what the right solution was. Yes, the answer is we did consider other solutions, and the range is really from having a Bill but no definition of 'corruption', to having something pretty precise like you have got in the South African Bill, and we have gone for a middle course which we think embraces both simplicity but also clarity and codification".[33]

30 Ev 155 DCB 20 para 9

31 Ev 142 DCB12

32 Q740 (John Cridland)

33 Q446 (Lord Falconer)

Agent/principal relationship

28. Several witnesses were critical about how the agent/principal relationship applies in the public sector:

> "In particular, I think that extending the concept of principal and agent to so many different relationships, particularly that between a public official and the public at large, is likely to cause confusion and uncertainty and may result in a reluctance to prosecute cases where, under the existing law, prosecution would be seen to be justified". (George Staple)[34]

> "The concept of agency, although well developed in common law, has been stretched unreasonably in this Bill". (Transparency International (UK))[35]

> "It is very difficult nowadays for a company to be able to say whether it is acting in a public capacity or not. We are thinking perhaps of utility supply companies or the press or the media, the television service - whatever. How is a company to know whether, for the purposes of the Bill, it is acting in a public capacity or not?" (CBI)[36]

29. The Minister told us:

> "We think the essence of corruption is cheating on the person who trusts you or cheating on the public. That is why we have focused, as you rightly say, on the principal/agent or agent/public relationship".[37]

Consent of the principal

30. Clause 7 provides one of the defences to a charge of corruption: that the principal consents to the conferring of an advantage. As the Crown Prosecution Service told us:

> "A private principal can consent to something which would otherwise be corrupt but where functions are of a public nature the principal's consent cannot exonerate. This could give rise to problems where the public/private functions are blurred".[38]

31. Public Concern at Work pointed out that the draft Bill does not contain the same proviso as the explanatory notes about the defendant having a mistaken but genuine belief in his principal's consent.[39] They argue that the draft Bill is currently too broad at this point and that it should state that the belief must be 'reasonable' or 'genuine'. Public Concern at Work also suggested that, to encourage employers to adopt clear policies on and routes for reporting about corruption, there should be some form of defence for an employer in relation to corrupt

34 Ev 153 DCB 19 para 17 (George Staple, Clifford Chance)

35 Ev 2 DCB 18 para 3.4 (Transparency International (UK)

36 Q743 (CBI)

37 Q464 (Lord Falconer)

38 Ev 17 DCB 15 para 1.1

39 Ev 139 DCB 9 Section 1 lines 3-11

activity by employees.[40] The Home Office argued against using either 'reasonable' or 'genuine'.[41]

Advantage

32. Clause 5 defines corruptly in terms of someone acting 'primarily' in return for the 'advantage' conferred on them. It is unclear whether 'primarily' posits a causal test, one of intention or one of purpose. The OECD argued that 'advantage' should be qualified with the word 'undue'.[42] We were told by the Chairman of GRECO:

> "The Council of Europe's Criminal Law Convention on Corruption refers repeatedly to 'undue advantage', a concept which is explained in detail in the explanatory memorandum. By comparison, the text of sections 4 and 5 of the draft Bill refers only to 'an advantage'. The reference of an unqualified 'advantage' entails a widening of the scope of the offence, which would cover more ground than required by CoE and other international standards. This leads to the need to provide for exceptions in sections 6 and 7".[43]

33. The CBI said:

> "We are certainly strongly of the view that it is insufficient to rely upon 'primarily' and that it would be a much better approach to adopt either 'improper' or 'undue' or some other word that has international currency from the OECD or other appropriate international bodies".[44]

Dishonesty

34. We have heard a variety of evidence on whether dishonesty should be an element in the offence of corruption. The Criminal Bar Association has argued:

- 'dishonestly' should be an alternative to 'corruptly' or
- 'dishonestly' should be an additional element in all the new offences.[45]

35. The Director of the Serious Fraud Office said:

> "I think that the Law Commission consultation paper concluded that corruption was not necessarily an offence of dishonesty, although in our cases I think very often, if not always, dishonesty is present. In practical terms, I think juries are very unwilling to

40 Ev 140 DCB 9 Section 2 lines 12-14

41 Annex 1

42 Ev 165 DCB 26 Part 2 (b)

43 Ev 142 DCB 12 (Drago Kos) Section 2 (text in the Bill)

44 Q 694 (Mr Cridland)

45 Ev 155 DCB 20 para 11

> convict unless they see some sort of dishonesty, or at least moral turpitude that they can really get a grip on in the way that people have behaved. Very few of the cases that we would prosecute would not involve dishonesty".[46]

36. The Director of Public Prosecutions agreed but pointed to other considerations:

> "It is hard to imagine cases which we prosecute in which it could not be said that there was an element of dishonesty, but when one moves to the sort of behaviour which is probably better characterised as misuse of public office or some form of really outrageous behaviour as a public servant, then you are moving away from dishonesty into another kind of concept, some of which would be caught by this new Corruption Bill, I believe. So if the legislature decides it wants to include that sort of behaviour, I think dishonesty might limit the scope of the Bill beyond what was intended".[47]

37. On the other hand, the Minister (Lord Falconer) said: "We think that dishonesty is a different concept from corruption".[48] Mr Justice Silber told us: "the word 'dishonestly' is a very uncertain word. It means different things to different people…. [in many statutory offences] the word 'dishonestly' is used where the matter would normally be criminal in itself …. 'dishonestly' does not add very much to it…. it has a totally uncertain meaning".[49] The Committee understands that in most circumstances of corruption, if dishonesty is involved, there will also be conspiracy to defraud, an offence which is widely drawn.

Compatibility with international conventions

38. Several witnesses have expressed concern that the draft Bill does not meet the United Kingdom's international obligations (set out in Annex 2). In this section we concentrate on those concerns relating to the definition of corruption. There are also issues (connected with parliamentary privilege, the Attorney-General's consent to prosecutions and the authorisation of the intelligence agencies to engage in activities which would otherwise be unlawful), which have international implications (see paragraphs 101 to 154 below).

39. The main concerns in relation to the definition of corruption are:

- Absence of an explicit offence of bribery of a foreign public official – in relation to the OECD Convention
- Absence of an explicit offence of trading in influence – as required by the Council of Europe Criminal Law Convention[50]

46 Q63 (Mr Wardle)

47 Q66 (Sir David Calvert-Smith)

48 Q505 (Lord Falconer)

49 Q648 (Mr Justice Silber)

50 Ev 3 DCB 18 para 3.12 (Transparency International)

- The formulation '*primarily* … conferring … an advantage' rather than 'conferring an *undue* advantage' may not be entirely consistent with the requirements of international conventions.[51]

40. Professor Mark Pieth, Chairman of the OECD Working Group on Bribery in International Business Transactions, told us:

> "The one requirement we are looking for is that it says the active bribery of a foreign public official is captured….. You could save a lot of the situation if you inserted one Clause making it very clear that the foreign, public officials are covered…… all the other countries have simply picked up in one way or the other the language of the Convention".[52]

41. On the other hand we have been told by Khawar Qureshi, an expert on international law:

> "The core of the activity of corruption identified in the Bill is rooted in the conferral of an advantage in return for a gain. This is often described as 'transactional' corruption, and it is reflected in the majority of definitions of corruption contained in international agreements, or the domestic law of most states. Accordingly the definition of corruption contained in the Bill accords with the UK's obligations under public international law".[53]

Trading in influence

42. Neither the Law Commission report in 1998 nor the draft Bill contains an offence of 'trading in influence'.[54] The Home Office White Paper in 2000, however, did propose the inclusion in the offence of corruption of 'trading in influence' where the decision-making of public officials by intermediaries is targeted.[55] Support for inclusion of such an offence came from the Corner House.[56] Transparency International (UK) noted that this was a specified offence in the Council of Europe Criminal Law Convention.[57] But the chairman of the Council of Europe's corruption body, GRECO, did not criticise this omission.[58]

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51 Ev 142 Part 2 DCB 12 (GRECO)

52 Q356-8 (Professor Pieth)

53 Ev 136 DCB 7 para 6 (Khawar Qureshi)

54 "Trading in influence" is defined in the Council of Europe Criminal Law Convention on Corruption as: "intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyonewho asserts or confirms that he or she is able to exert an improper influence over the decision-making of [domestic public officials, members of domestic public assemblies, foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, and judges and officials of international courts] in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."

55 Cm 4759 p21

56 Ev 128 DCB 1 para 6.1

57 Ev 3 DCB 18 para 3.12

58 Ev 142 DCB12

43. The Director of Public Prosecutions told us that "looking at some of the continental legislation on trading in influence, it would actually be caught, the behaviour that they are attempting to criminalise would be covered almost certainly by the current provisions of the draft Bill".[59] The Minister said that the activity of trading in influence would be covered by the draft Bill where an agent/principal relationship existed.[60]

Misuse of public office

44. The draft Bill does not contain a statutory offence of 'misuse of public office'. The Committee on Standards in Public Life (under Lord Nolan) published a consultation paper in July 1997 recommending a new statutory offence of 'misuse of public office' as a replacement for surcharges on councillors. This issue was not mentioned in the Law Commission report of 1998. Meanwhile the common law offence of 'misconduct in public office' has been revived in recent years as a means of prosecuting police officers in particular.[61] There is also, in civil law, the tort of 'misfeasance in public office'. The Law Commission has recently proposed a statutory offence of misconduct in the context of new fraud legislation.[62]

45. The Director of Public Prosecutions told us : "I can see great advantage for public servants in having a misconduct offence which was statutory rather than dredged up from the Middle Ages".[63] Transparency International (UK) said: "A separate offence committed by a public official or servant could be a useful tool for upholding public integrity in cases where to mount a full corruption prosecution would present insuperable difficulties eg the corruptor is beyond the jurisdiction".[64]

Non-resident subsidiaries of UK companies

46. The Corner House was "deeply concerned that intermediaries including agents and subsidiaries of UK companies are not covered by the new corruption offences…..[it] is a serious loophole which will be damaging to the efficacy of the Bill….evidence shows that it is through agents and subsidiaries that the vast majority of bribes are paid".[65]

47. PricewaterhouseCoopers told us:

> "In the UK, the law generally does not automatically impute to parent companies absolute control over or knowledge of the actions of their subsidiaries. This means that a corrupt act committed by an overseas subsidiary may not necessarily render the UK parent company criminally liable under the Bill. To do so would appear to require

59 Q125 Ev 29 (Sir David Calvert-Smith)

60 Q525 and footnote (Lord Falconer)

61 Q116-8 (Sir David Calvert-Smith)

62 Q116 (Sir David Calvert-Smith)

63 Q126

64 Ev 3 DCB18 para 3.13

65 Ev 28 DCB1 paras 7.1 - 7.2

evidence that the UK parent company had in some way directed or otherwise influenced the subsidiary to commit the corrupt act".[66]

48. Transparency International (UK) said:

> "United Kingdom prosecutors should be able to prosecute companies which are responsible for the actions of subsidiaries or effectively controlled joint ventures so that very few bribes or corrupt acts would take place directly from a UK based company or any country in the world. In nearly all cases, it would be done through an intermediary. Sometimes that would be a subsidiary. Sometimes it would be an intermediary agent working closely with that subsidiary. Even more often, it would be a joint venture which is rather more difficult to catch, but nonetheless highly relevant …. There is a suggestion that intermediaries will still be left out. If the Bill is really going to tackle the mischief, most people who understand the way in which international business is conducted are aware of the role of intermediaries….. We are not tackling that problem".[67]

> "Clause 13 (Corruption outside the UK) should extend to include subsidiary companies of those incorporated in the UK if under actual control (according to an appropriate definition); in the case of other subsidiaries, associated companies and joint ventures, there should be an offence by the UK incorporated company if it fails to take adequate measures to satisfy itself that the foreign registered company or joint venture is implementing suitable anti-corruption policies in the conduct of its business".[68]

> "Unincorporated associations and partnerships (according to English and Scottish definitions) should be included as bodies capable of committing corruption offences".[69]

49. This approach is similar to that of the Exports Credit Guarantee Department which requires applicants for support to warrant that neither they nor anyone acting on their behalf have engaged or will engage in any corrupt activity in connection with the supply contract.[70] The CBI told us that the draft Bill should not apply to overseas subsidiaries because they were subject to the law of the other country.[71]

50. We asked Professor Pieth, whether the draft Bill would cover foreign subsidiaries of British companies. He told us that the OECD Convention did not impose an international, binding standard on coverage of foreign subsidiaries. He said:

> "We are in the process of discussing whether we should go further in the OECD to pick up also foreign subsidiaries. Under certain circumstances, foreign subsidiaries would be covered also in this framework because if it were proven that in the UK somebody was

66 Ev 50 DCB 16 para 40

67 Q27 (Mr Cockcroft and Mr Carver)

68 Ev 4 DCB 18 para 4.3

69 Ev 4 DCB 18 para 4.2

70 Ev 141 DCB 10 para 9

71 Q715

aware -- that is where the intent issue comes back again -- not corruptly and not with some malicious intent but if they had knowledge that the UK company or its agent was involved in bribing somewhere, then we would have a case to be run in the UK under the territorial jurisdiction. You are covering some cases of foreign subsidiary and agent behaviour but you are not tackling it head on…" [72]

Facilitation payments

51. Many witnesses have raised the issue whether the draft Bill is intended to make 'facilitation' payments criminal. As PricewaterhouseCoopers put it "it is not unknown in some countries for public officials to abuse their position by demanding payments from the unwary (or unlucky) for the granting of basic rights".[73] We understand this phrase to mean a small bribe necessary to obtain a service to which the payer is already entitled – the lorry driver who has to pay the customs officer to cross a road border, the businessman who has to include a donation to get his travel documents passed by the immigration officer. In most cases it is assumed that the service required would not be obtained without the additional payment, so there is an element of extortion.

52. Several witnesses have called for such payments to be treated as corruption and outlawed:

> "The Corner House believes that the UK government and law enforcement agencies should operate a zero tolerance for facilitation payments, except in exceptional circumstances in which the life of an employee may be at risk if a payment is not made. The Corner House believes that if it does not do so, facilitation payments could become a serious loophole, which could be used by companies as a defence in court".[74]

> "What is 'small'? A payment of 1% may be considered to be small, but it certainly is not small if it is 1% of a project worth £5,000,000. What is 'normal practice' and who will define 'normal'? Facilitation payments must be outlawed".[75] (Bob McKittrick)

> "Common law and UK legislation have never distinguished 'facilitation payments' from other bribes … TI(UK) supports the Government's position that it is unacceptable to apply different standards abroad to those that apply within the UK. Petty corruption remains unacceptable within the UK and the draft Bill rightly makes no express distinction". [76]

53. On the other hand we were told:

> "Intuitively, payments made in such circumstances might be felt not to offend against justice or the public interest, which the Bill (like any other law) aims to serve. In practice,

72 Q376

73 Ev 149 DCB 16 para 37

74 Ev 129 DCB 1 para 8.3

75 Ev 31 DCB 4 para 4.2

76 Ev 3 DCB 18 para 3.10

in spite of the potential defences under the Bill suggested above, it appears that the maker of such payments could be caught under the Bill".[77] (PricewaterhouseCoopers)

"From the point of view of international competitiveness and achieving a level playing field for UK companies with other companies, CBI members would welcome a specific exemption or defence for small facilitation payments, along the lines of that provided in the US Foreign Corrupt Practices Act [1978] for US companies. This is especially important following the assumption of nationality jurisdiction by the United Kingdom for corruption overseas in the 2001 Act".[78] (CBI)

54. There appear to be uncertainties about the aim of the draft Bill in respect of facilitation payments:

"Under Frequently Asked Questions No 5 on the Trade Partners UK website the following is quoted:…we do not think it appropriate to make an exemption for 'facilitation payments'. However, we do not envisage any circumstances in which the making of a small 'facilitation payment', extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK".[79] (Bob McKittrick)

"The definition of 'corruptly' in Clause 5 and the need to prove 'belief' that an act was done or an omission made 'primarily' in return for the advantage, raises uncertainties as to whether some small facilitation payments may now be decriminalised".[80] (Transparency International (UK))

"The key distinction is that facilitation payments are made to a person who is already under a duty to do something and a facilitation payment is one which is designed to make him either do that duty or do it more quickly or more efficiently and this distinction, by the way, is taken in the Foreign Corrupt Practices Act of the United States".[81] (CBI)

55. Ministers and prosecutors have made plain that prosecutorial discretion will govern the operation of the law:

"The proper use of prosecutorial discretion is one important way of ensuring that the line is correctly drawn between morally questionable behaviour and criminal conduct".[82] (Serious Fraud Office)

77 Ev 149 DCB 16 para 37 (PricewaterhouseCoopers)

78 Ev 113 DCB 17 para 2(b)

79 Ev 31 DCB 4 para 4.2

80 Ev 3 DCB 18 para 3.10

81 Q690 (Mr Berkeley)

82 Ev 16 DCB 13 (Serious Fraud Office)

"It is hard to envisage circumstances where the CPS would prosecute a case involving a small payment made as a result of extortion".[83] (Crown Prosecution Service)

"When the 2001 Anti-Terrorism Crime and Security Bill was going through, which has the extra-territorial bits of this Bill, we in effect gave an indication that small facilitation payments extracted by foreign officials in countries where this is normal practice would not of themselves give rise to a prosecution in the United Kingdom and we would be happy, when this Bill, in whatever form it comes, was going through Parliament again, to give a similar assurance".[84] (Lord Falconer)

Hospitality

56. Some concern has been expressed that hospitality could fall within the definition of corruption in the draft Bill. Several witnesses urged that there should be a specific exemption or minimum threshold for the offences so that reasonable corporate hospitality and promotional expenditure would not be covered.[85] PricewaterhouseCoopers addressed this point thus:

"Arguably, the lack of a *de minimis* exemption is mitigated by the definition of the term 'corruptly' in the Bill, which requires that for any of the corruption offences to have been committed, the person who acts as agent for another must do so 'primarily' in return for (or in anticipation of) an advantage. This means that, regardless of the value of the advantage conferred, obtained or anticipated, the test of whether an offence of corruption has been committed involves determining whether the person receiving, or expecting to receive, the advantage acts or acted primarily in return for that advantage. If such is not the case, then even a substantial payment, gift or other advantage is, on the face of it, neither corruptly conferred nor so received".[86]

57. The Minister told us:

"People give various sorts of hospitality in the course of business. What is their intention in doing it? Obviously, it is to get a good relationship with their potential clients but not necessarily to make them make their decisions primarily based upon lunch at Wimbledon rather than the merits of a particular deal".[87]

Financial services commissions

58. Several witnesses have queried whether standard commission payments in the financial services industry would fall within the definition of corruption in the draft Bill.[88] The Home

83 Ev 17 DCB 15 para 1.6

84 Q526 (Lord Falconer)

85 Ev 113 para 2 (d) DCB 17 (CBI) Ev 138 DCB 8 (Newspaper Society)

86 Ev 149 DCB 16 para 32

87 Q516 (Lord Falconer)

88 Ev 144 DCB 14, Ev 152 DCB 19

Office told us that this might fall within the Bill if the agent gave advice not in the best interests of the client (principal) because of the commission received from a third party.[89] We understand that if the client consents to the payment of the commission there would be no offence.

Public interest defence

59. The Newspaper Society were concerned that "newsgathering practices could effectively be criminalized, thereby potentially inhibiting investigative journalism".[90] They suggested that such conduct could be excluded from the definition of corruption or that there should be a public interest defence.

60. The Crown Prosecution Service did not favour such a defence "because it would open the door to all sorts of spurious defences".[91] Transparency International (UK) pointed out that the public interest was one of the factors taken into account when a decision to prosecute was made.[92]

Prosecution of corruption offences

61. Although the Bill does not cover the administration of prosecutions for corruption, we have received some evidence that these offences could be prosecuted more effectively if this responsibility was given to the Serious Fraud Office.[93] The Serious Fraud Office have dealt with 10 corruption cases since 1988, but have among their criteria for investigation a minimum threshold for the sum involved of £1 million.[94] The Audit Commission told us that the average sum involved in the cases reported to it is just over one quarter of that amount.[95] When asked if the SFO should take responsibility for all corruption cases, the Attorney General told us:

> "The Serious Fraud Office is a very important and skilled organisation dealing with complex and serious fraud which often does involve corruption, these two things do quite frequently go together, but I would have some questions about whether or not the office should be involved, for example, in the sort of …..pedestrian corruption which does take place, somebody slipping a backhander to the buying manager of a small company in order to sell particular goods to that company. I am not sure I would want the Serious Fraud Office to be taken up dealing with that, that is a question of resources".[96]

89 Q477 (Lord Falconer)

90 Ev 138 DCB 8

91 Ev 18 DCB15 para 1.7

92 Ev 3 DCB18 para 3.11

93 Ev 4DCB 18 para 4.4

94 Ev 16 DCB 13 Annex 1

95 Ev 159 DCB28 para 6

96 Q574 (Lord Goldsmith)

Missing evidence

62. The Corner House has drawn our attention to the brevity of the Home Office's statement on the financial and manpower effects of the Bill and the absence of the normal Regulatory Impact Assessment.[97] The expenditure effects, manpower consequences and regulatory impact are all said to be 'negligible'. It is clear from other evidence that companies and professionals will be affected to some extent by the Bill.[98] The CBI made plain the burden on business:

> "Our principal concern is that even sophisticated companies with suitable resources are struggling with what this Bill means, but the lay business community will not have confidence that they can train and brief their staff that certain actions will not cause them to fall foul of offence".[99]

Comment on evidence received

63. We have not so far commented on the evidence received. In the following sections of the report we turn to our conclusions. We are surprised, however, that legislation which has been so long in preparation and the essential elements of which have been the subject of extensive consultation by the Law Commission and the Home Office, should attract such a range of negative comment from a variety of sources at this late stage.

3 The Bill - the options

64. In the light of all the many criticisms and suggestions that have been made, we have to consider whether the best way forward is to retain the present structure of the Bill based on the Law Commission Report with some amendments or look for a different approach which avoids the criticisms which have been made of the present draft.

65. The central problems with the present Bill appear to be:

- the agent/principal relationship
- the meaning and scope of corruption for the purposes of the criminal law
- whether there should be specific or broad offences
- whether producing offences which cover both the public and private sectors has created artificial definitions which meet neither situation

97 Ev 130 DCB 1

98 Ev 30 DCB 4 (Bob McKittrick) Ev 144 DCB16 (PricewaterhouseCoopers) Ev111 DCB 17 (CBI), Ev 2 DCB 18 (Transparency International (UK)

99 Q694 (Mr Cridland)

66. The first question is to analyse what the law is trying to do. What is the conduct which the offence of corruption is seeking to deter or to punish? Is it the *betrayal* of the duty of loyalty which is owed by the agent to his principal or by the employee to his employer? Is corruption to cover only that or does it go wider? Is it the undermining of the efficiency of and trust in public administration and, in the private sector, an attack on fair dealing and proper behaviour? These two approaches are not necessarily mutually exclusive. The proponents of the Bill have proceeded on the basis that it is disloyalty which is the essence of the offence and that that alone should be covered.

67. The draft Bill contains this definition of corruption:

> Conferring an advantage: meaning of corruptly
>
> 1) A person (C) who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if –
>
> a) He intends a person (A) to do an act or make an omission in performing functions as an agent of another person (B) or as an agent or the public;
>
> b) He believes that if A did the act or made the omission it would be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it;
>
> c) The exception provided by section 6 does not apply;
>
> d) The exception provided by section 7 does not apply.
>
> 2) A person (C) who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if –
>
> a) He knows or believes that a person (A) has done an act or made an omission in performing functions as an agent of another person (B) or as an agent for the public;
>
> b) He knows or believes that A has done the act or made the omission primarily in order to secure that a person confers an advantage (whoever obtains it);
>
> c) He intends A to regard the advantage (or the advantage when conferred) as conferred primarily in return for the act or omission;
>
> d) The exception provided by section 6 does not apply;
>
> e) The exception provided by section 7 does not apply.
>
> 3) For the purposes of subsection (1) the nature of the intended act or omission, and the time it is intended to be done or made, need not be known when the advantage is conferred or the offer or agreement is made.

68. The Committee proceeded to consider whether the problems with the Bill and the definition of corruption could be solved by minor modification; whether a different analysis

was needed; or whether a whole new structure for the Bill was necessary. These three options are examined below.

Option 1: Modifying the Bill

69. The Committee considered whether the Bill would be improved by the addition of 'dishonesty' or 'dishonestly' in the offence. If, however, the offence is based on a breach of loyalty there are arguments against using these words. 'Dishonesty' may not be the same as corruption. The courts have avoided giving a precise definition of 'dishonesty' saying that ordinary men and women know what it means. Yet the Committee believe that the offence does need to express some element of immoral or improper behaviour. Nothing can convey this as well as 'dishonest' but we accept the difficulties of relying on the word. We note that the Law Commission has undertaken a review of the law of fraud.[100] Introduction of a bribery offence of which dishonesty is an element will involve a very considerable overlap with the common law offence of conspiracy to defraud and should perhaps best be considered alongside other offences of dishonesty.

70. Another suggestion made is that the word 'undue' should be added. This word appears to have a technical meaning in civil law, but to introduce the phrase 'undue advantage' may raise more questions than it answers. We believe that juries would better understand the concept if the word 'improper' appears before 'advantage'. On the other hand we consider that an 'advantage to which a person is not entitled' would be an alternative formulation to 'improper advantage'.

71. We do not believe that the use of the word 'primarily' adequately meets the concerns about the unqualified use of the word 'advantage'. It does not clearly express the concept of improper or immoral even if it puts emphasis on the necessary intention. While we accept that many other countries have included the OECD wording of 'bribery of a foreign public official' we think there is some force in the Home Office view that the draft Bill adequately covers this point.[101]

72. While accepting the advantages for prosecutors of having broadly-based offences, we do not believe this excludes having in addition some specific offences. It would be up to the prosecutors to choose which offence would be most appropriate for the circumstances. People involved in corruption may currently be pursued for a variety of offences. Although this might add to the complexity of the law, specific offences will also be more readily understood.

73. At first glance the blurring of the distinction between the public and private sectors in economic life would support the combining of the old statutory offence into new ones which apply across all sectors. This is the approach the Law Commission took in 1998. This leads however to the awkwardness of using the agent/principal relationship in the public sector and the defence of consent of the principal applying only in the private sector. Another approach

100 Law Commission Report no 276

101 Ev 75 para 14

would have been to produce offences some of which might apply in both the public and private sectors and others which were specific to only one sector.

74. The Crown Prosecution Service drew our attention to doubts about the meaning of 'functions' in the Bill.[102] The Home Office has told us that this word is widely used across the statute book and recently in the Human Rights Act 1998. Mr Justice Silber set out the case for replacing the word 'functions' with 'duties'.[103] This would be a return to the wording originally proposed by the Law Commission in 1997 but changed in their 1998 draft Bill. We also note the willingness of the Attorney General to express the offence in terms of breach of duty.[104]

75. We considered whether the Bill could be made clearer by re-casting its various Clauses and provisions and Mr Justice Silber in his latest submission sets out a way in which this could be done by including the relevant words of Clause 5 in the earlier Clauses.[105] But the Home Office states that such a change would have to be reflected throughout the early part of the Bill and would substantially lengthen it. And in our view we would after all these changes still be left with a Bill lacking in clarity. This kind of redraft is not therefore the way forward.

76. Is it however right or sufficient to look only at the loyalty of the agent to the principal? We are persuaded that this approach is too narrow. There could well be cases where the giving of a secret or underhand advantage to the prejudice of competitors or members of the public is corrupt in the eyes of the ordinary public. The head of a company who bribes another not to bid for a contract would be guilty of an offence even though no agent were involved. Lord Falconer and the representatives of the CBI[106] took the view that these cases were already covered by appropriate parts of anti-competition law, and that this was sufficient regulation. The Enterprise Act 2002, which came into force on 20 June 2003, introduces criminal penalties for individuals who dishonestly engage in the worst types of cartels such as horizontal price fixing, limiting supply or production, market sharing or bid-rigging. We are not satisfied that this is sufficient and we consider that there should be legislation dealing with this type of corruption.

77. We have also considered adding separate specific offences to the Bill such as:

- making explicit the liability of UK companies for the actions of foreign subsidiaries and agents
- creating a separate offence of trading in influence
- making misconduct in public office a statutory offence (with a wider definition of public office).

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102 Ev 17 DCB 15 para 1.1

103 Ev 170 DCB 33

104 Q578

105 Ev 170

106 Q487 (Lord Falconer) and Q752 (Mr Berkeley)

78. **We are not persuaded that UK companies should be made explicitly liable for the actions of non-resident foreign subsidiaries and agents because the individuals – in many cases nationals of the countries concerned – will be subject to national law in that jurisdiction.**

79. **The case for a separate offence of trading in influence is not, in our view, convincing.**

80. **The draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office.**

81. **Our overall conclusion, however, is that by adopting only the agent/principal approach the Bill does not proceed on the right basis and that corrupt acts outside that relationship ought to be included in the Bill.**

Option 2: An alternative analysis of the harm in corruption

82. As we have said, the essence of the offence in the draft Bill is the breach of loyalty owed by an agent to his principal. Another approach is to look at the harm corruption does to public administration or the efficient operation of the economy. Taking such a different approach could solve many of the problems which have been identified in the evidence we have received. A full explanation of this alternative is set out in the opinion given by our specialist adviser, Peter Alldridge.[107] In the introduction to the draft Bill, Lord Falconer wrote:

> "Corruption is potentially devastating. If it is not kept in check, it has the potential to cause serious damage to government and business – indeed to every aspect of economic and social life. We need to be constantly on our guard against corruption – it is a complex crime, by its nature very insidious and its effects stretch across international borders. Corruption world-wide weakens democracy, harms economies, impedes sustainable development and can undermine respect for human rights by supporting corrupt governments, with widespread destabilising consequences".

83. The alternative approach identifies serious consequential harm in bribery as having greater significance than disloyalty. A Bill based on the harm done to the system would make it an offence to confer or receive a benefit with the intention of corrupting or frustrating the proper functioning of government and public services or with the intention of corrupting or frustrating the proper functioning of a regulated market. An offence along these lines was contemplated by Mr Justice Silber.[108] As against the draft Bill the advantages of this model are:

- it is no longer necessary that the consent of the principal be a defence (Clause 7);
- the vice is clear, because now "corrupting" is used as a transitive verb. The reader knows that the statute is intended to prevent corruption: (i) of government (ii) of

107 Annex 4

108 Q657 Ev 171

markets. Clearer identification of the vice will enable judges to sentence more rationally and consistently;

- the adoption of extra-territorial liability is in principle easier to justify. The criminal law of England and Wales has far greater cause to be concerned with proper operation of the organs of government and markets than with the loyalty of individual public servants.

84. This is an interesting way of looking at corruption in terms of its legal and economic impact. It makes a stimulating contrast to the more conventional approaches to the criminal law. Yet we have received no evidence from those who would be affected by the new law which would support such a radical departure at this stage. We therefore have used this analysis as a means of comparison with the approach in the Bill and as an indication that a wider approach should be adopted.

Option 3: An alternative structure to the Bill

85. As has been seen, much of the concern of our witnesses has centred around the decision to draft the Bill on the agent/principal model. Experienced lawyers and professionals in the anti-corruption field expressed doubt as to whether the new legislation would be intelligible to juries – or indeed to companies and individuals who wanted to be clear that they were acting within the law. The definition of 'corruptly' given in Clause 5 caused particular concern, and we too found it to be opaque.

86. The defences in Clauses 6 and 7 are not clear. Their inclusion is a consequence of the reliance on the agent/principal relationship. If the Bill is based on a breach of loyalty, then the consent of the principal must be a defence. But we still believe that these two Clauses are very complex and hard to understand. It seems to the Committee that in a private sector case, even if the employer consents to his purchasing agent accepting bribes from contractors, this is dishonest, immoral and done to get an unfair advantage at the expense of competitors and /or the public, and there is a strong argument for saying it should be categorised as criminal. We note that there is a case for specifying that the belief in the principal's consent should be genuine or reasonable but this was not accepted by the Home Office (see paragraph 31).

87. Finally, as we have indicated, the agent/principal model fails to cover corruption which takes place between two principals. It is as corrupt for one owner of a firm to give money to an owner of another firm to persuade him not to tender for a particular contract, as it is to give money to the buyer to recommend a particular seller to his principal. The former example would fall outside the offences created by the draft Bill since the two firm owners are not necessarily agents. Moreover, as Lord Falconer pointed out, where the enterprise is incorporated, the owner of the company may be its agent.[109]

88. These problems with the agent/principal model go to the heart of the Bill. The culpable mental state in Clause 5 is directed against the breach of the agent/principal relationship. But

109 Q524

the agent/principal relationship is defined so widely in Clause 11 that almost any legal relationship giving rise to duties and functions will be an agent/principal relationship. Where there is a civil law duty, there will be a principal-agent relationship. It is better to rely on the element of duty rather than the principal-agent relationship.

89. **The Committee has therefore concluded that the only way to address the problems which are inherent in the Bill (which arise from agent/principal model) is to move away from the definition of 'corruptly' in Clause 5.**

International experience

90. For this purpose it is valuable to see how corruption is defined in different legal systems across the world. Some of the legal provisions relate specifically to the bribery of a foreign public official but it may be that a similar definition would apply equally to domestic public sector corruption.

OECD

> "It is a criminal offence …. 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 …. 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".[110]

South Africa

> "Corruptly" means in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to:
>
> a) any employment relationship;
>
> b) any sporting event;
>
> c) any agreement; or
>
> d) the performance of any function in whatever capacity.[111]

Australia

> A person is guilty of an offence if the person:
>
> a) provides a benefit to another person; or

110 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) Article 1

111 Prevention of Corruption Bill 2002 Clause 1 (iv)

b) causes a benefit to be provided to another person; or

c) offers to provide or promises to provide a benefit to another person; or

d) causes the offer of a provision of a benefit, or the promise of the provision of a benefit, to be made to another person; and

e) The benefit is not legitimately due to the other person; and

f) The first-mentioned person does so with the intention of influencing [a foreign] public official (who may be the other person) in the exercise of the official's duties as [a foreign] public official in order to:

i. obtain or retain business; or

ii. obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).[112]

Canada

"Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to [a foreign] public official or to any person for the benefit of [a foreign] public official as a consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions." [113]

Switzerland

"Anyone who offers, promises or grants an undue advantage to a person acting for [a foreign] state or an international organisation, as a member of a judicial or other authority, a civil servant, expert, translator, or interpreter employed by an authority, or an arbitrator or military person, for that person or for another, for him to act or not to act in his official capacity, contrary to his duties, or using his discretionary powers, will be punished by five years of imprisonment."

Council of Europe

"For the purpose of this Convention, 'corruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect

112 Chapter 4, Division 70 of the Criminal Code

113 Title 19, Article 322 of the Penal Code

thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".[114]

"When committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions".[115]

"When committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions".[116]

"The promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties".[117]

Kenya

" 'Corruption' means –

an offence under any of the provisions of sections 39 to 44, 46 and 47;

39.(1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent –

a) doing or not doing something in relation to the affairs or business of the agent's principal; or

b) showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent's principal

40.(2) A person is guilty of an offence if the person –

a) receives or solicits, or agrees to receive or solicit, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised; or

b) gives or offers, or agrees to give or offer, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised

c) bribery;

114 Council of Europe Civil Law Convention (1999) Article 2

115 Council of Europe Criminal Law Convention (1999) Article 2

116 Council of Europe Criminal Law Convention Article 3

117 Council of Europe Criminal Law Convention Article 7

d) fraud;

e) embezzlement or misappropriation of public funds;

f) abuse of office;

g) breach of trust;

h) an offence involving dishonesty - in connection with any tax, rate or impost levied under any Act; or under any written law relating to the elections of persons to public office".[118]

91. The World Bank refers to the classic definition of corruption as " the exercise of public power for private gain".[119] The Asian Development Bank uses the phrase "the abuse of public or private office for personal gain".[120]

92. The diversity of these definitions illustrates how difficult it is to arrive at an agreed definition of corruption. Some definitions rely on a single, general, overarching offence: others rely on a number of specific offences**. Having examined all these different models, we consider that (leaving aside related offences) the essence of corruption could be expressed in the following terms:**

> **A person acts corruptly if he gives, offers or agrees to give an improper advantage with the intention of influencing the recipient in the performance of his duties or functions;**
>
> **A person acts corruptly if he receives, asks for or agrees to receive an improper advantage with the intention that it will influence him in the performance of his duties or functions.**

93. **As we have already indicated, it could be possible to substitute for 'improper advantage' the words 'advantage to which a person is not legally entitled'.**

94. It might be helpful to give some examples of how our definition might work in practice. To take a simple example from the private sector, it is corrupt to give a bribe to a buyer to persuade him to buy his supplies from one company rather than from another: and in the public sector it is corrupt to give a bribe to someone involved in a local planning authority so as to obtain planning permission which the giver would otherwise be unlikely to obtain. From the receiver's point of view it is corrupt to receive the bribe knowing of the giver's intention and acting accordingly.

95. The advantages of having a clear and simple definition of corruption such as this are as follows:

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118 Anti-Corruption and Economic Crimes Act 2003 Section 2

119 World Development Report 2002 p 101

120 Cited in 'Turning a Blind Eye – Corruption and the UK Exports Credit Guarantee Department' June 2003 p 17

- There is no need for the agent/principal relationship and the obscurity and complexity it brings;
- The definition applies equally to the public and private sectors;
- Corruption between principals is covered;
- It leaves open the question of whether further, specific offences could be created, or whether a single, general offence of corruption would suffice.

How would the Bill be restructured if the new definition were adopted?

96. If a definition such as the one proposed above were used instead of the definition given at Clause 5 of the current Bill, it follows that all references in the draft Bill to agents and principals would fall from the Bill. Thus the first two Clauses would remain broadly as they are and Clause 3 would no longer be necessary as a separate offence. Clause 5 would be replaced with a new Clause containing the new definition. These three Clauses would form the heart of the new Bill and Clauses 6, 7 and 10 would be omitted.

97. In addition, it would be possible to implement some of the suggestions given in paragraphs 69 to 81 above (under "Modifying the Bill"). In particular, it would be right to consider whether to add the text of Article 1 of the OECD convention, appropriately modified, for 'bribery of foreign public official', and whether to replace 'functions' with 'functions and duties' throughout.

Conclusion

98. **In the light of the criticisms which have been made of it, we do not consider that the draft Bill should be left as it stands on the essential issue.** The choice is between modifying the Bill by trying to improve it marginally (by, for instance, making clear that the offences created include an element of moral turpitude) and restructuring the Bill on a new definition of corruption. **We conclude that the Bill would still be obscure and unsatisfactory if the offences remain based on the concept of agency.** On the other hand we can adopt a completely different approach which concentrates not on breach of the duty of loyalty which an agent owes to his principal but on the giving or receipt of an improper advantage in secret and underhand dealing to the prejudice of the interests of competitors or the public. This alternative course is, we believe, the right one.

99. **We believe that a Bill centred on a simple definition such as ours would be clearer and would work better. We also believe it would be more likely to receive general approval.**

100. We consider that this approach would equally apply to the bribery of a foreign public official. The Home Office may wish to consider whether one broad offence is in itself sufficient or, as in many other jurisdictions, it should be supported by certain specific offences such as bribing a foreign public official.

4 Clause 12: parliamentary privilege

Prosecuting MPs and peers for corruption

101. The draft Bill intends that Members of Parliament and peers should be subject to the same corruption law as everyone else. We support this objective. No witness argued that MPs and peers should be immune from the corruption laws. The Standards and Privileges Committee of the House of Commons, the Constitution Committee of the House of Lords and the (Wicks) Committee on Standards in Public life support the proposal. [121]

102. Corruption in Parliament has not wholly escaped punishment in the past. Indeed Members have been punished by expulsion for accepting bribes since at least 1667.[122] The leading authority on parliamentary procedure, *Erskine May,* says:

> "The acceptance by a Member of either House of a bribe to influence him in his conduct as a Member, or of any fee, compensation or reward in connection with the promotion of or opposition to any Bill, resolution, matter or thing submitted or intended to be submitted to the House or to a committee is a contempt. Any person who is found to have offered such a corrupt consideration is also in contempt".[123]

103. We understand that the exclusion of MPs from the *statutory* offences of corruption is a result of historical accident rather than deliberate policy. This is because the statutory offences have been interpreted to mean that neither House is a public body for the purposes of the Public Bodies Corrupt Practices Act 1889 and a Member of Parliament is not an agent for the purposes of the Prevention of Corruption Act 1906.

104. In 1992 one Member of Parliament was prosecuted for the *common law* offence of bribery. The judge ruled that MPs were subject to the common law offence.[124] In that case it was alleged that the MP accepted bribes from a company in his constituency "to show such favour as might be within his power as a member of Parliament" to the company and its directors in relation to their business and contracts with British Rail. The case never came to a full trial because in a separate trial of the company executives the judge ruled that there was no case to answer and the Crown later offered no evidence against the MP.

105. The Committee has received little evidence that any MPs and peers have avoided prosecution for corruption either because of their status or because parliamentary proceedings cannot be questioned in court.[125] As the Joint Committee on Parliamentary Privilege noted in

121 Ev 172 DCB 35; Ev 158 DCB 24; Ev 157 DCB 23 para 8

122 For a recent account of the history see Oliver & Drewry in *Conduct Unbecoming* Ch 6 Parliament and the Law relating to Parliamentary Standards

123 *Erskine May*, 22nd edn., Butterworths, 1997, p. 112

124 R V Greenway. See Public Law April 1998.

125 Q233 (Sir William McKay)

1999, "there are very few instances of corruption involving Members of Parliament".[126] The Attorney General could not identify any occasions in which MPs or peers have escaped prosecution because of the provisions of Article IX of the Bill of Rights 1689.[127] We have been told there have been very few cases in other comparable jurisdictions.[128]

106. The draft Bill does not explicitly mention MPs and peers but its intention and effect are clearly to include them within the new corruption offences. This is the case irrespective of whether Clause 12 is in the Bill.

107. The purpose of Clause 12 is to remove any evidential difficulty in prosecuting MPs and peers. We understand that in many situations MPs and peers could be prosecuted for corruption without any evidence of proceedings in Parliament being adduced in court. Nonetheless there may be circumstances in which a conviction could not be obtained without such evidence. The 1999 Joint Committee on Parliamentary Privilege expected that there would be few prosecutions of Members for corruption and that in only a small proportion *of such cases* would it be necessary to question proceedings in Parliament.[129] The Attorney General and Director of Public Prosecutions, respectively, told us:

> "I think there would be cases where without Clause 12 it would not be possible to bring a prosecution because evidence of a key ingredient of the offence would not otherwise be available" [130]

> "I can imagine that it would be very important in order to secure a conviction of a corrupt elected Member to be able to adduce in evidence things that he or she had said, either in a Committee like this or in the House itself, as evidence of whatever the bribe had been intended to achieve".[131]

108. On the issue whether Clause 12 is necessary, we refer below to Australian and American cases. The Clerk of the House of Commons told us:

> "It can .... be argued that the fundamental requirement for the successful prosecution of the proposed new criminal offence of corruption will be clear evidence of the existence of a corrupt bargain and that Clause 12 will not materially assist the prosecution in meeting that requirement…..[but] I accept that some hypothetical cases of corruption by Members of Parliament would be, at least, extremely difficult to prosecute as criminal offences without encroaching on the Bill of Rights".[132]

126 para 140

127 Q547 (Lord Goldsmith)

128 Q260 (Sir William McKay)

129 para 168

130 Q562 (Lord Goldsmith)

131 Q101 (Sir David Calvert-Smith)

132 Ev 134 DCB 5 para 10

109. There is experience of legislators being prosecuted in other countries without impinging on freedom of speech in Parliament. We were told that in Australia, evidence of parliamentary proceedings could be cited in court as long as the participants in those proceedings were not exposed to criminal liability.[133] In several instances Members have been prosecuted for corruption-type offences without reference to parliamentary proceedings and without it being thought that the prosecution was hampered thereby.[134] In the United States of America, convictions of legislators for corruption have been obtained by concentrating on the improper agreement to do something rather than on the act which was done as part of proceedings in Congress.[135] In both countries the development in the law has resulted from the decisions of courts in actual cases; in Australia this has led to Parliament enacting a statutory definition of parliamentary proceedings.

110. The leading American case on this point was described to us in these terms:

> "In *US v Brewster* a U S Senator was charged with accepting a bribe to be influenced in his performance of official acts in respect to his action, vote and decision on legislation. The Supreme Court decided that while a prosecution might not inquire into legislative acts or their motivation, taking or agreeing to take money to act in a certain way when participating in a legislative act cannot itself be a legislative act. Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as part of or even incidental to the role of a legislator. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution … It is the taking of the bribe, and not the performance of any illicit compact that is the criminal act under the statute. The speech or debate Clause interposes no obstacle to this type of prosecution. The guilty act is the acceptance of the bribe, and that is complete without performance".[136]

Other matters on Parliamentary Privilege

111. In bringing forward this measure, the Home Office has relied on the recommendations of the Joint Committee on Parliamentary Privilege in 1999. It has sought, in the explanatory notes, to portray Clause 12 as the inevitable consequence of that Joint Committee's recommendation. The Lords Constitution Committee, responding to our invitation to submit evidence, said "We endorse the conclusions of that Joint Committee, which form the basis of Clause 12 of the draft Bill, that Article IX of the 1689 Bill of Rights should be disapplied in respect of allegations of corruption against members of Parliament".[137] We do not read these recommendations as showing that it was the intention of that Joint Committee to allow witnesses before select committees to be questioned in court on what they had said in Parliament.

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133 Q239 (Sir William McKay)

134 Ev 132 lines 49 and 50 DCB 2 (Harry Evans)

135 Q248 (Sir William McKay)

136 Ev 45 DCB 11 para 26

137 Ev 158 DCB 24

112. No reference is made in the Home Office documents to the other recommendations of that report. One key recommendation was that parliamentary privilege should be put on a statutory basis on the lines of the Australian Parliamentary Privileges Act. As the Clerk of the House put it:

> "I would find it somewhat easier to accept the inclusion in the Bill of a provision derogating from the principle of freedom of speech in the case of alleged corruption by a Member of Parliament if it were being presented in the context of a wider statutory restatement of parliamentary immunities and the scope of parliamentary freedom of speech".[138]

113. We note that the Joint Committee itself contemplated the Government adopting a selective approach to implementation of its recommendations and said:

> "The recommendations of the Joint Committee requiring enactment by legislation should be included in a new Parliamentary Privileges Act**.** These recommendations will stand enactment by themselves, but if so enacted the results will be an uncomfortable mixture of modern statute and ancient learning".[139]

114. **We consider it would be better if the Joint Committee recommendations were followed and a Parliamentary Privilege Bill dealing with all these matters were brought forward.**

Freedom of speech in Parliament

115. The aim of parliamentary privilege has never been to protect Members from the consequences of their own wrong-doing. Article IX of the Bill of Rights protects freedom of speech so that Parliament can debate all matters fully without the participants being in fear of adverse consequences. The most obvious examples include:

- A witness before a select committee who might be deterred from explaining the full details of a matter
- An MP asking a question about a sensitive constituency matter
- A Minister replying to a debate about how a particular matter had been handled.

116. We understand that Clause 12 as drafted would apply to all parliamentary proceedings including:

a) an MP's words about his own conduct

b) an MP's words about another MP's conduct

138 Ev 134 DCB 5 para 7 (Clerk of the House)

139 HL Paper 43-1 (1998-99), HC 214-1 (1998-99) page 3

c) an MP's words about a non-Member's conduct

d) a witness' words about his own conduct, the conduct of an MP or someone else.

117. In all these instances there is a public interest in ensuring that the fullest facts are disclosed in Parliament and that no one – witness, Member or minister – should feel inhibited by the prospect of what he or she says being subsequently questioned in court. The importance of such freedom of speech in Parliament was recognised recently when the European Court of Human Rights rejected an action against the UK in respect of what an MP had said in debate.[140] That case concerned an MP who in 1996 initiated a debate on municipal housing policy. He referred to anti-social behaviour and cited the name and address of a constituent. As a consequence the constituent received adverse press coverage. Her application to the European Court of Human Rights alleged that the absolute parliamentary immunity which prevented her from taking legal action in respect of statements made about her in Parliament violated her right of access to court under Article 6 and her right to privacy under Article 8 of the Convention. In another case the Court had stated that while freedom of expression was important for everyone, it was especially so for an elected representative of the people, who represented the electorate, drew attention to their preoccupations and defended their interests.[141] In the case of *A v. UK* the Court noted that most if not all signatory states to the Convention had in place some form of immunity for members of their national legislatures and that the immunity afforded to MPs in the UK was in several respects narrower than in certain other countries. The Court stated: "The absolute immunity enjoyed by MPs is moreover designed to protect the interests of Parliament as a whole as opposed to those of individual MPs".

Resolving the dilemma

118. There are thus competing interests between convicting the corrupt and protecting freedom of speech in Parliament. There is a high public interest in protecting the frankness of witnesses giving information to parliamentary committees. On the other hand there is also a high public interest in preventing parliamentary proceedings from being corrupted in ways which are immune from censure in the courts or in Parliament itself. Parliament should be aware of the implications of legislating in ways which make it appear as though the only place where one could lawfully act in corrupt ways is in the Houses of Parliament.

119. There may be different ways of resolving these competing interests in respect of, on the one hand, witnesses before select committees and, on the other, Members and peers. The Liaison Committee of select committee chairmen has expressed concern about the effect of Clause 12 on witnesses.[142] Witnesses are usually unfamiliar with Parliament, they are expected to answer questions put to them and they only appear before select committees. We are

140 A v UK application no 35373/97 – judgment of 17 December 2002.

141 Jerusalem v Austria 40 ECHR, 2001-II

142 Ev 175 DCB 36

inclined to accept the argument that they are more likely to be inhibited in their evidence by the prospect of it being questioned in court.

120. We have therefore considered the following possibilities:

- Accepting Clause 12 as drafted
- Rejecting Clause 12 completely
- Excluding witnesses from Clause 12
- Confining Clause 12 to essential cases.

Accepting Clause 12 as drafted

121. The Explanatory Notes on the draft Bill state that Clause 12 implements a recommendation of the Joint Committee on Parliamentary Privilege in 1999. In weighing up four options for dealing with bribery of MPs – proposed by the Home Office in its 1996 consultation paper – that Committee accepted both that MPs and peers should be brought within new statutory corruption offences and that there should be a derogation from Article IX to secure convictions in rare cases where there was insufficient evidence from other sources. The Committee appear to have accepted that the first objective could not be secured without the second. Our evidence on that point is more mixed (see paragraphs 107 to 110 above). But the Joint Committee's consideration of the waiver of Article IX is expressed entirely within the context of bribery of MPs – it did not contemplate withdrawing the protection of Article IX from witnesses before select committees.

122. The case for Clause 12 as drafted – allowing any proceedings in Parliament to be cited in court in a corruption case – was put by the Attorney General:

> "Clause 12 does go further than simply dealing with a Member, I agree. It would cover a case where somebody comes before a committee such as this or another committee, who perhaps comes forward as an expert to come and tell the Committee that there is not a problem from a particular scientific process, or something of that sort, and has in fact been bribed to say the opposite of the truth. What would happen at the moment would be that the evidence that had been given to the select committee could not be brought into court to prove that this person had been corrupted into giving that false evidence. I would add that it is obviously a policy matter but I think you can argue very strongly that freedom of speech is actually enhanced by having a limited exception so that you can be satisfied that people who are speaking are speaking from the heart, honestly and genuinely, and not speaking because they have been paid secretly by some interested party to do so".[143]

143 Q551 (Lord Goldsmith)

Rejecting Clause 12 completely

123. The principal arguments put against Clause 12 were that:

- Clause 12 is not essential -- the aim of prosecuting MPs and peers for corruption could be achieved by other means and
- any erosion of privilege will inhibit freedom of speech in the chamber or other parliamentary proceedings.

124. Ways in which the purpose could be achieved by other means are described in paragraph 109 above and whether Clause 12 is essential is dealt with in paragraphs 107 and 108 above. On the dangers of eroding freedom of speech, the case for rejecting Clause 12 completely was put largely by Mr Harry Evans, the Clerk of the Australian Senate, and Sir William McKay, the recently-retired Clerk of the House of Commons:

> "Any dilution of Article IX in the United Kingdom would weaken its status as a statement of major constitutional principle".[144]
>
> "It would still allow one side or the other in court to ask a Member what he meant by what he said. I think that is too high a price to pay for the remedying of a very, very serious but very rare mischief".[145]
>
> "If the protection of Article IX is broken into, your position is very much weaker than if you have untouched protection".[146]
>
> "If the words or actions in proceedings of a member or a witness could be used to prosecute the member or witness or some other person, proceedings in Parliament would no longer be free from all external interference. Members and witnesses would be aware that what they say and do in the course of proceedings could be turned against them or other persons in some future criminal investigations, and therefore would not speak freely".[147]
>
> "[If you ask me: Would Members be less willing to speak freely in Parliament?] I think they would. The Member who has the floor does not need to be within a million miles of corruption he just needs to be talking about it or an instant case or a case that comes on next year, a constituency problem which at the time the Member speaks he has no conception will fetch up in the courts".[148]

144 Ev 131 DCB 2 lines 10 and 11

145 Q266 (Sir William McKay)

146 Q273 (Sir William McKay)

147 Ev 13 DCB 2 (Harry Evans)

148 Q268 (Sir William McKay)

Excluding witnesses from Clause 12

125. One way of narrowing the effect of Clause 12 would be to exclude from it anyone other than MPs and peers – bearing in mind the overt rationale for the Clause is to overcome difficulties in prosecuting MPs and peers. The Liaison Committee have suggested that the balance of public interest between securing convictions for corruption and protecting freedom of speech in Parliament lies differently with outsiders giving evidence to committees than it does with MPs and peers.[149] We note that while witnesses are the main category of non-Member who would be caught by Clause 12, it also includes outsiders submitting petitions concerning private Bills and parliamentary staff directly engaged in proceedings.

126. The case against excluding one category of people was set out by Sir William McKay:

> "My objection to this method of approach is not lessened by the narrowing, because all you have done is you have highlighted those who should be protected and who are not going to be protected. MPs and Peers were protected, and now they are not".[150]

127. The Attorney General told us that there would be advantages for prosecutors if witnesses before select committees could be prosecuted for corruption offences on the basis of their evidence to committees. He also said it would be helpful if Clause 12 could be extended not just to corruption cases but also to fraud cases.[151]

Confining Clause 12 to essential cases

128. We have also considered confining Clause 12 to the immediate situation the Bill was originally designed to overcome: the prosecution of MPs and peers for corruption. Leaving aside for the moment the issue of witnesses before committees, the Clause as drafted would enable MPs and peers to be questioned in court about what they had said in Parliament in respect of at least three scenarios where it was alleged that the person involved in corruption was:

- the individual MP or peer whose words were in question
- another MP or peer
- another person who was not an MP or peer.

129. We have already referred, in paragraphs 107 and 108 above, to the question whether it would be necessary in order to secure a conviction of an MP to cite in court what they themselves had said or done in parliamentary proceedings. We have also heard conflicting evidence about whether a court would admit evidence as to what an MP or peer had said about another person whether or not an MP or peer. The Director of Public Prosecutions told us:

149 Ev 175 DCB 36

150 Q287 Ev 52 (Sir William McKay)

151 Q569 Ev 93 (Lord Goldsmith)

> "I cannot see how that would ever be admissible in a criminal trial. Saying things about people is not evidence. Facts are evidence. I think that particular bit actually over-states the difficulty. If a Member of Parliament had commented in a debate on an individual, that is highly unlikely to be evidence relevant to the commission of a criminal offence".[152]

130. In arguing against Clause 12, however, Sir William McKay gave an example of how this might apply in practice:

> "The consequences of partial withdrawing of the protection of Article IX would very, very rarely fall on the corrupt Member of either House. They would be much more likely to fall … on the Member who has got a corruption case going on in his constituency, nothing to do whatever with Parliament, and that Member makes a contribution to debate and either by accident or design says something about the case … I would imagine any defence counsel would be anxious to throw a little smoke around and ask for the Member's attendance to discuss what it was he said, how he knew it and what his motives were. This is, it seems to me, exactly what the Bill of Rights is intended to prevent happening. The Member himself is not corrupt but having lost the protection of Article IX he or she is asked to explain themselves before the courts".[153]

131. We have heard there is some uncertainty and that it would be up to the judge in particular cases to decide (on the basis of the relevance of evidence) whether a Member should be called to be questioned on what he had said. This uncertainty goes to the heart of the issue of freedom of speech: would a witness before a committee or a Member raising a constituency case in debate be inhibited from doing so by the *possibility* that they might be questioned in court on why they had said it? A very recent example of what can happen in practice was drawn to our attention by the Clerk of the Australian Senate: in that country, during the trial of a Member of Parliament for corruption, he was questioned about statements he had made in Parliament – while the appeal court held that the questioning had been in breach of the Australian Parliamentary Privileges Act, this had not resulted in a miscarriage of justice.[154]

132. The DPP told us that Clause 12 could be amended:

> "It certainly could be drafted more narrowly. It could, for instance, be limited to cases where the defendant is the elected representative, because here this could be evidence in a quite different case against somebody who is not elected, and that would be one limitation that could be placed on it. Obviously it could be limited more than it currently is. It is quite a wide provision at the moment".[155]

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152 Q112 (Sir David Calvert-Smith)

153 Q234 (Sir William MacKay)

154 R v Theophanous [2003] VSCA 78 (20 June 2003)

155 Q105 (Sir David Calvert-Smith)

Conclusion on Clause 12

133. The choice is between accepting Clause 12 as drafted and adopting a modified form of protecting parliamentary proceedings from consideration in the courts. There are arguments in favour of either course, but we do not consider that the law should be left as it is now in Article IX. We have already set out the opinion of the Director of Public Prosecutions that it is almost impossible to conceive of situations when comments made by MPs or peers in Parliament about third parties could be admissible in evidence in any event. However, given that some people express uncertainty on this, and given also that the DPP has told us this Clause could be narrowed, there are some advantages in following that course. The weight of evidence we have heard is against the inclusion of Clause 12 as drafted. We are persuaded that some changes in the exclusion of parliamentary proceedings from consideration by the courts has to be accepted if the prosecution of an MP or peer for corruption is to be achieved.

134. **We therefore recommend that Clause 12 be narrowed. This would apply only to the words or actions of an MP or peer in a case where he is the defendant.** This is in line with the recommendations of the 1999 Joint Committee on Parliamentary Privilege. **We also recommend that, to the extent that the words or actions of an MP or peer are admissible for or against him, they should also be admissible for or against all co-defendants in respect of corruption offences based on the same facts.** So the words of an MP could be used for or against a non-Member who was a defendant in the same trial.

135. In relation to witnesses and other Members, however, we conclude that the balance of public interest lies with protecting freedom of speech in Parliament. **We recommend that Clause 12 be redrafted on the lines set out below** *(with new words in italics),* subject to further drafting advice:

> "No enactment or rule of law preventing proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence *of words spoken, or acts performed, by a person alleged to have committed a corruption offence as a Member of either House of Parliament,* being admissible –
>
> a) *in proceedings for that offence against that person; or*
>
> *b)* in proceedings for a corruption offence *which arises out of the same facts.*

5 Clause 17: Attorney General's consent

136. Clause 17 of the draft Bill provides that prosecutions for the new offences can only proceed with the consent of the Attorney General. The original Law Commission report in 1998 did not include such a requirement. The Joint Committee on Parliamentary Privilege, when agreeing to the waiver of freedom of speech in Parliament to secure the conviction of MPs and peers, did recommend a requirement of Attorney General's consent. Generally,

however, the trend has been to reduce the number of offences for which the Attorney's consent is required.[156]

137. We have been told that MPs and peers, among other public figures, are vulnerable to frivolous or vexatious private prosecutions for corruption. These could, if raised during an election or other sensitive time, distort the political process. We therefore accept the need for some filter before prosecutions are launched.

138. Where some consent to prosecution is required for other offences, the decision-maker is usually the Director of Public Prosecutions. This responsibility is normally exercised through delegated powers by Chief Crown Prosecutors. We understand that there is little practical advantage in requiring the consent of the Attorney as opposed to the DPP. Furthermore, involving a member of the Government in the decision to prosecute may be counter to our international obligations.[157] Without doubting the independence of the Attorney General and his predecessors, we accept that the appearance of ministerial involvement in the prosecution decision would best be avoided.

139. Ideally the consent to prosecute would be vested in the Director of Public Prosecutions and exercised either by him personally or in his absence by one nominated deputy. In cases involving MPs it would be open to the DPP to consult the Parliamentary Commissioner for Standards on the interpretation of the Code of Conduct. **We recommend that Clause 17 be replaced by a requirement for the consent to be given by Director of Public Prosecutions or one nominated deputy.**

6 Clause 15: Intelligence services

140. Clauses 15 and 16 apply to the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (GCHQ)—referred to collectively as "the intelligence agencies". Clause 15 effectively exempts the intelligence agencies from being charged with committing a corruption offence, provided that they are operating under the authority of an authorisation given by the Secretary of State at the time of the apparent offence. The Secretary of State may authorise the intelligence agencies to carry out an act which would otherwise constitute a corruption offence only if he or she is satisfied that the three conditions set out in sub-Clauses (4) to (6) of Clause 15 have first been met. However, even if the intelligence agencies were to act in accordance with an authorisation which the Secretary of State should not have given—because one or more of the three conditions had not, as a matter of fact, been met—it would appear that the agencies would still be exempt from being charged with a corruption offence.

141. We have heard a range of evidence as to the desirability of the current broad scope of the Clause 15 exemption. The chairpersons of the bodies responsible for monitoring the implementation of the OECD convention and the Council of Europe's criminal law

156 Law Commission Report no. 255 (1998)

157 Ev126 DCB1 (Corner House) para 4.2, Ev 143 DCB 12 (GRECO)

convention separately told us that Clause 15 is not in compliance with the UK's obligations under either convention.[158] Professor Pieth, the chairman of the OECD Working Group on Bribery in International Business Transactions stated in oral evidence that:

> "Clause 15 is being explicit and just asking for trouble. There you will be in massive trouble with the intelligence agencies. That is going to trigger off huge debates internationally …"[159]

142. Mr Drago Kos, the chairman of GRECO, the body responsible for monitoring the implementation of the Council of Europe convention, told us that:

> "No international treaty would allow an exemption from the general criminalisation of corruption like the one included in [Clause 15]. Even admitting the "special" or "unusual" nature of the activities of the intelligence services and the strict conditions laid down in [Clauses 15 and 16], there is no doubt that the text of the draft is not in compliance with the Council of Europe's Criminal Law Convention on Corruption or with the OECD Convention … [Clauses 15 and 16 are] in direct opposition to international legal instruments in the field of corruption and might attract heavy and undeserved criticism towards the whole draft [Bill]. There is hardly any reasonable legal explanation for the text of [Clauses 15 and 16]".[160]

143. On the other hand, we have also heard evidence supporting the inclusion of Clause 15 in the Bill in its present form. The Intelligence and Security Committee has stated that Clauses 15 and 16 are necessary to ensure that, when the intelligence agencies conduct activities that would otherwise be illegal in the UK, they do so with the authorisation of the responsible Secretary of State.[161] The Attorney General told us that the intelligence agencies:

> "… are required from time to time to act in a way which would contravene what the law is in order to protect national security and to protect the people of the country. I think it is much more desirable that that should be within a framework within which Parliament has authorised with checks and balances and set out clearly rather than leaving it to the discretion of the prosecutor at the end of the day simply to say whether it was appropriate or not".[162]

144. We consider further below the question of whether the scope of the Clause 15 exemption is such that Clause 15 is not in compliance with the UK's obligations under either convention.

158 The UK has not yet ratified the Council of Europe's criminal law convention, although we understand it intends to do so shortly; see Annex 2

159 Q373

160 Ev 143 DCB 12 (GRECO)

161 Ev 169 DCB 32

162 Q 593

Functions of the intelligence agencies

145. In order to understand the application of Clause 15, it is necessary to consider the statutory functions of the intelligence agencies, and the purposes for which those functions may be exercised. This is because Clause 15(4) requires that the act or omission that is authorised (or the operation in the course of which such acts or omissions will be done or made) must be necessary for the proper discharge of a function of the intelligence agencies.

146. The statutory functions of these agencies are set out in detail in Annex 3. In summary, on the basis of the relevant legislative provisions, it would appear that all three intelligence agencies are empowered to carry out their respective functions only:

- in the interests of national security, or
- in order to prevent or detect serious crime, or
- (in the case of the Security Service) "to safeguard" the economic well-being of the UK; or (in the case of the Intelligence Service and the GCHQ) "in the interests of" the economic well-being of the UK.

Compliance with international obligations

147. Neither the OECD convention nor the Council of Europe's criminal law convention expressly provide for intelligence agencies to be exempted from the corruption offences that parties to the conventions are required to establish. On the face of it, therefore, the intelligence agencies are required to be subject to the provisions of the conventions, unless there is some basis for arguing that there is an implied exception.

148. In establishing whether there is such a basis, it is necessary to consider what the objectives of each convention are. While we do not propose here to undertake an extensive examination of the objectives of each convention, we have commented briefly on each.

149. The preamble to each convention is helpful in establishing each convention's objectives. The preamble to the OECD convention indicates that it is directed against bribery because bribery "raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions". The preamble to the Council of Europe's criminal law convention indicates that it is directed against corruption because "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society".

150. This suggests that the objectives of both conventions are essentially threefold:

- to safeguard fundamental features of democratic societies, such as the rule of law and human rights, and the stability of democratic institutions
- to promote economic development and international competition

- to address the "immorality" of corruption.

151. Any exception implied in the conventions must be compatible with these objectives. Consequently, in order to answer the concerns raised by Mr Kos and Professor Pieth, the Government must be able to demonstrate that the exemption given to the intelligence agencies under Clause 15 does not conflict with these objectives. Professor Pieth acknowledged that all international conventions arguably contain an implicit exemption in respect of actions safeguarding national security.[163] However, he questioned whether Clause 15 could not be limited to providing an exemption for "defence and public security in a very narrow sense"—a sense that would "exclude economic considerations".[164] He suggested that, if Clause 15 did not exclude such "economic considerations", it would risk non-compliance with the OECD convention". He told us:

> "My uneasiness is [that] we are here talking in an economic context and we all know that secret services have been heavily involved in economic espionage. It would certainly be against the Convention to allow a secret service agency, for the purpose of furthering business, to use such an exemption. That is where we would really be very concerned".[165]

Conclusion about Clause 15

152. We have serious concerns that the breadth of the Clause 15 exemption for intelligence agencies is such that Clause 15 risks non-compliance with the UK's obligations under the OECD convention and the Council of Europe's criminal law convention. It seems to us that the Clause 15 exemption is compatible with international law in so far as it promotes two of the three purposes for which the intelligence agencies may exercise their functions, national security and the prevention and detection of serious crime. We are concerned, however, about the proposal to extend the Clause 15 exemption to functions exercised for the third purpose: acts or omissions of the Security Service intended to safeguard the economic well-being of the UK and, even more broadly, to acts or omissions of the Intelligence Service or the GCHQ done or made in the interests of the economic well-being of the UK. For the following reasons, we consider that drawing the Clause 15 exemption so broadly as to include these cases would appear to risk placing the UK in breach of its international obligations:

> a) Article 5 of the OECD convention provides that the investigation and prosecution of offences under the convention "shall not be influenced by considerations of national economic interest … or the identity of the natural or legal persons involved." As presently drafted, Clause 15 would appear to be in direct contravention of article 5.
>
> b) Giving the intelligence agencies licence to commit corruption offences in the interests of the economic well-being of the UK would appear to undermine the

163 Q 401 (Professor Pieth)

164 Q 413 (Professor Pieth)

165 Q405

> objectives of the OECD convention and the Council of Europe's criminal law convention. A very wide range of corrupt activities could fall under the umbrella of safeguarding or promoting the UK's economic well-being; such activities, of their nature, risk undermining other democratic societies or compromising economic development and international competition. Likewise, such activities would risk appearing immoral in the eyes of the international community. Very few, if any, of these activities would be sufficiently vital to justify that risk.

153. **For these reasons, we recommend that the Government gives further consideration to the question of whether the Clause 15 exemption for intelligence agencies is so wide that Clause 15 risks non-compliance with the UK's international obligations.**

154. **We also recommend that the Government considers whether Clause 15 should be amended so that the exemption for activities of the intelligence agencies applies only to acts or omissions done or made in the interests of national security or of preventing or detecting serious crime.**

7 Other Matters

Guidance notes or Code of Practice

155. Since the criminal law of corruption derives its normative standards (its requirements as to how people should and should not behave) from pre-existing civil law obligations, the Committee does not regard the criminal law of corruption as being principally a mechanism for laying down minimum standards of conduct, whether in public life, in business, in local government or elsewhere. Rather, the Committee regards the criminal law of corruption as a means of punishing some of the grosser breaches of standards that should be laid down elsewhere. In many areas in which corruption is possible there is already relevant guidance available. The major area in which a Code of Practice is required as a matter of urgency is to give guidance to businesses attempting to procure contracts overseas. Lord Falconer told us that an Approved Code of Conduct might be helpful.[166] As the CBI told us:

> "There will be a need for very clear guidance on these points and I can see the case that some of the fairly specific and technical issues we referred to could lend themselves very well to guidance".[167]

156. Consideration could be given to the possibility of including in the Bill powers to make or approve Codes of Practice. This would enable the Government to put any Guidance before Parliament for approval as a Code of Practice. Whilst such a Code would not be legally binding, it would have persuasive force in encouraging companies to introduce procedures

166 Q537

167 Q704 (Mr Cridland)

which ensured compliance. The overriding consideration is that the Bill should - on its face – clearly establish what is and what is not corrupt.

The Relationship of corruption law to the Proceeds of Crime Act 2002

157. The relationship between the Bill and the Proceeds of Crime Act has been raised in some of the evidence.[168] There are the issues of reporting requirements and whether confiscation should apply to the net or gross sum involved in corruption.

158. On reporting requirements, an offence under the Bill would be a predicate offence for the purposes of the Proceeds of Crime Act 2002, generating a reporting obligation on accountants and auditors within the regulated sector to report any instance of corruption by or against a UK client. Concern was raised as to the weight of this obligation in the absence of an exception as *de minimis* or for facilitation payments.[169]

159. Confiscation orders and civil recovery proceedings are both computed gross.[170] No deductions are allowed for expenditure incurred by the criminal in the commission of crime. This makes a certain sense when applied to a drug dealer's expenses (though even the drug dealer is allowed to deduct from his liability to tax expenses which are not themselves unlawful).[171] This has significant consequences in the case of corruption. It means that in the case of a corruptly acquired contract all the benefit income of the job is vulnerable either to a confiscation order or to civil recovery proceedings. This will create significantly greater uncertainty and risk in commercial transactions.

160. For example, by bribing some of the directors of A Plc, B Plc is able to take over A Plc. The entire company (A Plc) and/or all its property is liable to a confiscation order or to civil recovery proceedings under the Proceeds of Crime Act 2002. Anyone who has extended unsecured credit to A Plc will lose.

161. Although this is not explicitly covered by the Bill, the Committee considers that both Houses may wish to debate whether this is wrong in principle and whether it would be a violation of the First Protocol to the ECHR.

168 Ev 145-148 para 3(c) and 12 and 13 Part 4 (18-22) PricewaterhouseCoopers DCB 16.

169 Ev 147 DCB 16.

170 Ev 147 para 21 Proceeds of Crime Act 2002 ss. 76(4) & (7), Proceeds of Crime Act 2002 s.242 respectively.

171 Ev 149

8 Conclusion

162. At the start of this report we listed the key questions we have addressed in this inquiry. Our answers to those questions are now as follows:

Is the existing law on corruption so deficient that it is necessary now to legislate?

Yes.

If so, does the Draft Bill criminalise all conduct which is corrupt without criminalising any conduct which is not?

It fails to cover some corrupt conduct such as when the head of one company bribes the head of another company (neither being agents) or when the principal consents to the bribery of his agent (so it is not an offence).

Further, does the Draft Bill state clearly what types of conduct are punishable as corrupt in language which can readily understood by the police, by prosecutors, by jurors and by the public, including – especially – the business and public sector communities, and their advisors, both here and abroad?

No.

What is the essence of corrupt conduct? How might it be defined? What distinguishes corrupt conduct from lawful conduct? Does this Bill draw that line in the correct place? In particular, is the definition in the Bill – which confined corruptness exclusively to a principal/agent relationship - both complete and robust, and is it clear so that it can readily be understood by all relevant parties?

We believe that (leaving aside related offences) the essence of corruption would be better expressed as in the following terms:

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

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

Should parliamentary privilege be waived in corruption cases?

Yes – but in a narrower form than proposed in the draft Bill.

Should the Attorney General's consent for prosecution for corruption offences be required?

No – the consent of the Director of Public Prosecutions or one nominated deputy would be sufficient.

Should the Intelligence Services be exempt from prosecution for corruption offences?

The compatibility of this provision with international law needs to be re-considered.

The Committee invites the Home Office to bring forward a revised Bill taking account of these points.

Conclusions and recommendations

1. We are not persuaded that UK companies should be made explicitly liable for the actions of non-resident foreign subsidiaries and agents because the individuals – in many cases nationals of the countries concerned – will be subject to national law in that jurisdiction. (Paragraph 78)

2. The case for a separate offence of trading in influence is not, in our view, convincing. (Paragraph 79)

3. The draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office. (Paragraph 80)

4. Our overall conclusion, however, is that by adopting only the agent/principal approach the Bill does not proceed on the right basis and that corrupt acts outside that relationship ought to be included in the Bill (Paragraph 81)

5. The Committee has therefore concluded that the only way to address the problems which are inherent in the Bill (which arise from agent/principal model) is to move away from the definition of 'corruptly' in Clause 5. (Paragraph 89)

6. Having examined all these different models, we consider that (leaving aside related offences) the essence of corruption could be expressed in the following terms:

> A person acts corruptly if he gives, offers or agrees to give an improper advantage with the intention of influencing the recipient in the performance of his duties or functions;
>
> A person acts corruptly if he receives, asks for or agrees to receive an improper advantage with the intention that it will influence him in the performance of his duties or functions. (Paragraph 92)

7. As we have already indicated, it could be possible to substitute for 'improper advantage' the words 'advantage to which a person is not legally entitled'. (Paragraph 93)

8. In the light of the criticisms which have been made of it, we do not consider that the draft Bill should be left as it stands on the essential issue. …We conclude that the Bill would still be obscure and unsatisfactory if the offences remain based on the concept of agency. (Paragraph 98)

9. We believe that a Bill centred on a simple definition such as ours would be clearer and would work better. We also believe it would be more likely to receive general approval. (Paragraph 99)

10. We consider it would be better if the Joint Committee recommendations were followed and a Parliamentary Privilege Bill dealing with all these matters were brought forward. (Paragraph 114)

11. We therefore recommend that Clause 12 be narrowed. This would apply only to the words or actions of an MP or peer in a case where he is the defendant. …. We also recommend that, to the extent that the words or actions of an MP or peer are admissible for or against him, they should also be admissible for or against all co-defendants in respect of corruption offences based on the same facts. (Paragraph 134)

12. We recommend that Clause 12 be redrafted on the lines set out in paragraph 135 (Paragraph 135)

13. We recommend that Clause 17 be replaced by a requirement for the consent to be given by Director of Public Prosecutions or one nominated deputy. (Paragraph 139)

14. For these reasons, we recommend that the Government gives further consideration to the question of whether the Clause 15 exemption for intelligence agencies is so wide that Clause 15 risks non-compliance with the UK's international obligations. (Paragraph 153)

15. We also recommend that the Government considers whether Clause 15 should be amended so that the exemption for activities of the intelligence agencies applies only to acts or omissions done or made in the interests of national security or of preventing or detecting serious crime. (Paragraph 154)

ANNEX 1:SCHEDULE OF DETAILED POINTS ON THE DRAFT BILL

Clause	Original text	Change/comment	Source	Comments by Home Office
1	**A person commits an offence if**	Clarify the word "person". In Part 1, the word "person" is used, but in clause 13 the provision applies to any "*national* of the United Kingdom or a body incorporated in any part of the United Kingdom". It might be argued that the avoidance of the word "person" in clause 13, and the use of the word "person" in Part 1 mean that "person" should not be interpreted to include a legal person (as it would be presumed to mean in accordance with Section 5 of the Interpretation Act 1978).	Khawar Qureshi DCB 7, para 13	The reason the general word "person" is not used in clause 13 is because it is necessary to identify which persons incur extra-territorial liability. The answer is persons who are either UK nationals or bodies incorporated in the UK.
		Clarify how widely this clause is intended and the problems of proof in non-pecuniary advantage (also applicable to clause 2). The current definition is very broad.	CPS, DCB 15, para 1	We think that the Bill is very clear on the width of meaning of "advantage". Although a non-pecuniary advantage may be more difficult to prove than an exhibitable bribe, removing the possibility of non-pecuniary bribes would significantly weaken the existing law.
		Insert the operative words in clause 5 into clause 1. The definition of corruption will therefore be captured in one clause and make the bill easier to understand.	Sir Stephen Silber, oral evidence, 9 June 2003	It would not just be clause 5 that would need to be incorporated, but also clauses 4, 6 and 7. Clause 2 would then need to have incorporated clauses 4, 5, 6, 7, 8 and 9. Clause 3 would need to have incorporated clauses 4, 5, 6, 7 and 10. This would make clauses 1, 2 and 3 very long and repetitive.
1 (b)	"he corruptly offers or agrees to confer an advantage"	The arguments in favour of 'dishonesty' as the basis for the criminalisation of this sort of conduct are well described in the joint BC and CBA response of 1997. The potential advantages of a scheme based on 'dishonesty' have plainly been rejected completely by the draftsman, but will need to be reconsidered by the Joint Committee.	CBA Working Party, DCB 20, para 5(a)	We agree that where there is corruption, there is often also dishonesty, for example, fraud. But we do not think that corruption necessarily involves dishonesty, and this is in line with existing law. The Court of Appeal has held (*R vs Harvey 1999)* that dishonesty is not a necessary element in the existing offences. Instead, the word "corruptly" was to be construed as meaning deliberately offering money or other favours, with the intention that it should operate on the mind of the person to whom it was made so as to encourage him to enter into a corrupt bargain. Introducing a requirement of 'dishonesty' would therefore constitute a weakening of the law. Including an element of dishonesty might suggest that the offence must involve damaging the interests of the principal or the public. Whilst this will no doubt usually occur where there is corruption, it does not seem to us to be a necessary element of the offence. For example, where two companies put in identical tenders, but one offers an advantage on top, we would want that to count as corruption (unless there was principal's consent to the advantage). But if an element of dishonesty were required, arguably there would be no corruption because there would

				be no damage to the interests of the principal since the tenders are identical. Please also see Lord Falconer's answer to Q506 and Lord Goldsmith's answer to Q576.
3	**Performing functions corruptly**	Define the meaning of "function".	CPS, DCB 15, para 1	'Functions' is a term which gives the necessary breadth in our view - it covers both what a person is required to do and what he is permitted to do as part of his job - and it is used without definition across the statute book (eg section 6(3) of the Human Rights Act 1998).
		Is this offence necessary or appropriate? Is it clear what the criminal act actually is or is intended to be?	CBI, DCB 17, para 4 (& response to HO para 17)	We do not envisage that the third offence, ("acting corruptly"), will be prosecuted very frequently. However, in some cases it will be necessary, in order to ensure that corrupt behaviour can be punished (e.g. if an agent acts in a certain way because he believes that he would get an advantage – other agents may have got advantages in the past – and finally is not given an advantage).
4	**A person confers an advantage if**	The definition of "conferring an advantage" would catch a wide range of business activities which are normal business practice and universally viewed as wholly unexceptionable. There are currently a number of concerns over potential grey areas (free meals/ holidays provided to journalists for review purposes).	The Newspaper Society DCB 8, para 3	Whilst it is true that clause 4 is wide, it has to be read with clause 5. Concerning the coverage of clause 5, please see comments below.
		Clauses 4 and 5 only refer to "an advantage", rather than the Council of Europe's Criminal Law Convention on Corruption (CoE), which repeatedly refers to an "*undue* advantage". The draft Bill therefore widens the scope of the offence, which would cover more ground than required by the CoE and other international standards.	Drago Kos, GRECO, DCB 12, para 6	The word "undue" is unclear. The Oxford English Dictionary has three meanings, including "not owing or payable" (rare), "improper" and "excessive or disproportionate". We do not think the inclusion of a term which would not be uniformly understood would lend clarity to the Bill. The international conventions do not require parties to use specific terms in their law. We do not think that the current Bill substantially widens the scope of the law.
4 (1)(a)	"A person confers an advantage if – (a) he does something (for example makes a payment) or he omits to do something that he has a right or duty to do"	Clause 4(1)(a) gives an example of doing something which confers an advantage but does not give an example of omitting to do something. An example here would help to clarify this clause.	Bob McKittrick, Institution of Structural Engineers DCB 4, para 3.3	We avoid examples in primary legislation unless necessary to avoid the provision being misunderstood. Where examples are useful by way of explanation, they can be placed in explanatory notes. It was felt necessary to give an example of "doing something" so that it was clear that clause 4 was dealing with the bribe rather than what was done in return. This point is now clear so there is no need for a further example, and we do not think that "omitting to do something" is in itself a difficult concept to understand.
		The language of this clause is ambiguous. It needs to be made clear, by punctuation or otherwise, that the subordinate clause "which he has a right or duty to do" applies only to an omission and not to an act.	Secretariat to the OECD's Bribery Working Group, DCB 26, para 2b	We see no ambiguity in view of the repetition of the pronoun 'he'.
		Clause 4(1) as presently drafted gives rise to one potential ambiguity as to the definition of "advantage".	Secretariat to the OECD's Bribery Working Group,	This seems to be the same point addressed above.

			DCB 26, para 2b	
		Replace ";" ["semi-colon"] with ", and" ["comma and"] at end of 4(1)(a), 5(1)(a), (b) and (c), 5(2)(a), (b), (c) and (d), 6(2)(a), 6(3)(a), 6(4)(a), 7(1)(a), 8(1)(a), 10(1)(a), 10(2)(a), 13(1)(a), 13(2)(b) and 16(3)(b). This would reflect consistency with the correctly punctuated clauses in the rest of the draft Bill.	CBA Working Party, DCB 20, para 16a	We think it is clear from the context that in each case these are cumulative conditions and therefore "and" adds nothing of substance. However, we will be checking the consistency of the Bill's punctuation before it is introduced into Parliament.
4 (2)	"An act or omission may be done or made in consequence of a person's request even if the nature of the act or omission, and the time it is intended to be done or made, are not known at the time of request."	Clause 4(2) is too vague and unclear. It needs the example (or similar) that is given in the explanatory notes.	Bob McKittrick, Institution of Structural Engineers DCB 4, para 3.3	As explained above, the practice is to avoid examples in primary legislation unless necessary to avoid misunderstanding. We do not consider that misunderstanding will arise here.
5	**Conferring an advantage: meaning of corruptly**	A majority of the Working Party favours adding "dishonestly" as an additional element in all new offences.	CBA Working Party, DCB 20, paras 9-13	Please see response on 1b.
		The offences in the draft Bill are framed according to whether advantages have been conferred or obtained and do not require a specific element of dishonesty or even a breach of the agent's duties to his principal. Exceptions would be very difficult to establish.	Financial Services and Markets Legislation City Liaison Group, DCB 14, para 3	Please see response on 1b. The Law Commission rejected the idea of breach of duty (paras 5.5-5.10 of their report). However we will reconsider in view of the concerns expressed.
		Replace "an advantage" with "an improper advantage". Emphasis should not just rely on "primarily" and primary purpose, but should also apply a concept of conferring or receiving an improper advantage (in line with OECD Convention Outlawing Bribery of Foreign Public Officials). Using the word 'improper' would considerably strengthen the bill and make it easier to understand. Detailed guidance should be provided once the scope of the new offences is decided, so that companies can review and update their codes of conduct and practice for employees. Exclude small facilitation payments, 'offset' contracts, insurance and other commissions paid in the financial services industry. Exemptions or specific defences should be made for corporate entertainment, bona fide promotional expenditure, payments made or conferred under duress and small facilitation payments as recognised in commentaries to 1997 OECD Convention.	CBI, DCB 17, para 4 and CBI oral evidence, 11 June 2003 Para 17	In Article 1 of the OECD Convention, the terms 'undue' and 'improper' are both used: the first qualifies the advantage given by the briber and the second the advantage given in return by the official. But we do not believe that either term (or both if we follow the OECD precedent) would add clarity to the Bill. Jurors, in particular, would not necessarily have the same understanding of what is or is not improper ("not in accordance with accepted standards of behaviour" (OED)). We are considering guidance (see Lord Falconer's answer to Q537). <u>Facilitation Payments</u> We do not think it desirable for UK law to apply differently overseas to the way it applies in the UK. That admits a double standard. The realities of life in less developed countries may well be very different, but we see no formal way of distinguishing those countries from the others, and there is an international effort to raise standards so that the number of countries where such payments are normal should be reducing over time. Blanket exemptions are always liable to misuse, and we do not think it appropriate to make an exemption for

				'facilitation payments'. However, in considering whether or not to prosecute individual cases, prosecutors must decide whether it would be in the public interest to do so. They may then take into account how the payment is viewed locally. Lord Falconer dealt with this in answer to Q 526. As concerns corruption cases, there is the additional safeguard of Attorney General's consent: the Attorney General must give his agreement to any prosecution. <u>Offset payments</u> We do not believe that the draft Bill would ordinarily capture offset contracts. Offset is, in essence, a commitment from a contractor to provide an extra service (e.g. buy local components, build a local hospital) in addition to the main terms of the contract for which he is bidding. As such, it can be seen as one of the specifications of bidding, whether mandatory or not. We do not see it being treated any differently under the Corruption Bill than any other contractual term. See Lord Falconer's answer to Q468. <u>Promotional expenditure/corporate hospitality</u> An act of corporate hospitality would not be corrupt unless the "advantage" (for example a corporate lunch, a gift, or a sum of money) was given or received on the understanding that it is *primarily* the advantage, or promise of an advantage, that would make an agent act in a certain way – for example award a contract. Thus corporate hospitality is not corrupt unless it is on such a scale as to be the prime motivation for an act by an agent. It would also not be corrupt if the agent receiving it has his principal's consent and the agent is not performing functions for the public.
		Definition of corruption could also encompass non 'transactional' corruption, including: - misuse of position by officials (as defined by Asia Development Bank) - improper use of information and property (Article X1, Inter-American Convention Against Corruption).	Khawar Qureshi, DCB 7, para 7	This Bill is designed to repeal and replace the common law of bribery and the statutory offences of corruption in the Prevention of Corruption Acts 1889-1916. While other forms of behaviour may be characterised loosely as 'corruption' they are distinct issues, and are not for this Bill.
		New legislation should incorporate a comprehensive set of specific corruption offences, including 'trading in influence', (as specified in the Council of Europe Criminal Law Convention). The offences should be defined so as not to require proof of dishonest intent, but on the basis of payment or other gratification without reasonable explanation (an inference of corrupt behaviour compatible with the ECHR).	Transparency International (UK), DCB 18, para 3.12, 4.1.2 and 3.13	A/ A list is less likely to be comprehensive – it would be problematic to ensure that all corrupt behaviour is covered. The multiplicity of existing offences has not proved helpful in practice either in the case of corruption or fraud. UK law already contains sufficient offences to meet the requirements of the Council of Europe Convention, with the exception of 'trading in influence.' Trading in influence is a complicated concept. It is

		Misuse or abuse of public office as a separate offence committed by a public official or servant could be a useful tool for upholding public integrity in cases where to mount a full corruption prosecution would present insuperable difficulties.		difficult to ensure that the offence only covers dishonest behaviour, and does not cover legitimate actions such as lobbying and advice giving. (It is possible to make a reservation on the Council of Europe provision on trading in influence – many countries including the US and Sweden have done so or intend to do so). Where an agency relationship exists, trading in influence is included in the corruption offences. It can be argued that if a person taking advice does not establish some kind of agency relationship with the one who gives him advice, he has only himself to blame if he gets biased advice. B/Payment or other gratification without reasonable explanation appears to create a reverse burden of proof that goes to the heart of the offence. It is difficult to imagine how any reverse burden provision of this nature would not have potential problems of compatibility with ECHR. C/ Misuse of Public Office is a very complex area of the law and its reform, while it may be desirable, is not urgent when compared with some other issues in the criminal justice arena. Cases can be prosecuted under the common law, though there have been a number of recent court cases on misfeasance where issues (such as the exact definition of recklessness in this context) have arisen. It may be that one or more of these cases will yet come before the Appeal Court, and the outcome would be relevant to the content of any future statutory offence of misuse of office.
		Language needs to be clarified to counter uncertainties as to whether some small facilitation payments may now be decriminalised. This is suggested by the definition of 'corruptly' in clause 5 and the need to prove 'belief' that an act was done, or omission made, 'primarily' in return for the advantage.	Transparency International (UK), DCB 18, para 3.10	Some facilitation payments may not be 'corruptly' given under existing law. It depends on the circumstances. The 'primarily' test in our view does not decriminalise any particular type of payment that might be criminal now.
		The Bill should include a general exemption for the financial services industry, as various forms of commissions and fees are standard commercial practice throughout the financial services industry, not least between manufacturers and distributors.	Investment Management Association, DCB 3, para 4	For a commission to be corrupt, it would be necessary to establish that the commission was the primary motivator for the agent to act or forbear to act in relation to his functions as an agent of another person, and that the agent's principal had not consented, or would not have consented if he had known all the facts. As concerns the recipient of the commission: in order for him to be considered guilty, it would be necessary to establish that he knew or believed that the person conferring the commission conferred it corruptly. (See Lord Falconer's answer to question 477).
		Standard newsgathering practices, including inducements or reward, could effectively be criminalised, thereby potentially inhibiting investigative journalism. Journalists may have a defence under sections 6 and 7 of the Bill, but this could be obviated by excluding such conduct altogether from the definition of 'corrupt' behaviour.	The Newspaper Society, DCB 8, para 2	See answer under 4 "public interest defence".

		Alternatively, an additional public interest defence could be introduced into the Bill. This could follow the definition in the Code of Practice administered by the Press Complaints Commission.		
		The concept of A, B and C is particularly difficult to understand, as it focuses on the relationship between the agent and principal, rather than the briber and bribee (which is how most people conceive of it). Corruption can be fundamentally defined by 'secrecy'.	DPP and SFO, oral evidence session, 14th May 2003	The essence of corruption, according to the Law Commission, is the suborning of an agent against his principal. By being bribed, an agent is going against the bond of duty and trust he owes to his principal and is acting in the interests of the briber. Corruption must involve three persons or entities. If there is no principal, then there is no reason to criminalise acting primarily because of an advantage. To do so would run counter to principles of freedom of contract. See Lord Falconer's answers to questions 460, and 483 – 486.
		A serious effort should be made to devise a more easily understandable definition of "corruptly" than the present one. Ideally, this key definition should be worded in affirmative terms and might be based, for example, on existing common law or statutory language and include the word "undue" as used in the Convention.	Secretariat to the OECD's Bribery Working Group, DCB 26, para 3	See answer under clause 4
5 (1)	"A person (C) who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if …"	Give examples to illustrate what is meant by this clause. A threshold should be given, as a way of delineating what is acceptable. This should not be a percentage, but could be based, for instance, on the tax threshold for entertaining staff per annum.	Bob McKittrick, oral evidence session, 20th May 2003	A/ See answer under clause 4 above. B/ There are strong practical difficulties in establishing minima. What would hold good for one sector of society (for example the extractive industries) would not hold good for another (for example a parking attendant). In addition, if "corruptly" is defined in terms of an intention to induce an agent to act in a certain way, the fact that a gift was of small value will be evidence that it could not have been intended to act as an inducement.
5 (1) (a) 5 (1) (b)	"he intends a person (A) to do an act or make an omission in performing functions as an agent of another person (B) or as an agent for the public;" "he believes that if A did the act or made the omission it would be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it"	The UK authorities should consider substituting "in performing functions" with "in relation to the performance of functions" in order not to restrict the scope of the offence as required by Article 1.1 of the OECD Convention. The language should not exclude, for example, acts done outside the public agent's "authorised competence". *Any* conferring of an advantage done with the intent in (a) and the belief in (b) will be corrupt according to this definition, unless it falls within one of the exceptions. As a definition of the core *mens rea* element of the offence, this is obscure, circular and unsatisfactory. It would be preferable to devise an affirmative definition of "corrupt" or "corruptly" using language drawn from existing common law, cases and statutes, or by using the word "undue" as it is used in the OECD Convention.	Secretariat to the OECD's Bribery Working Group, DCB 26, para 3 and 2b	We think that the language does not exclude acts done outside the scope of the public agent's "authorised competence". If a public agent does something outside of his job description because of a bribe (for example an official who does not normally give out passports gives out a passport because of a bribe), then he is still performing functions as an agent for the public, albeit functions he does not normally perform. Please see Lord Falconer's Memo paras 7-9. On "undue" please see above.
5 (1)(b)	"it would be primarily in return for the conferring of an advantage"	The use of the word "primarily" is not in line with the requirements of international conventions and could cause difficulties in implementation, by making it more difficult to prove the genuine	Drago Kos, GRECO, DCB 12, para 8	The term 'undue' is not defined in the Conventions, and is left to the interpretation of Parties. The 'primarily' test is our interpretation of the term.

5 (2)(b)	"he knows or believes that A has done the act or made the omission primarily in order to secure that a person confers an advantage"	intention of the perpetrator.		
5 (3)	"For the purposes of subsection (1) the nature of the intended act or omission, and the time it is intended to be done or made, need not be known when the advantage is conferred or the offer or agreement is made."	Clause 5(3) is too vague and unclear	Bob McKittrick, Institution of Structural Engineers, DCB 4, para 3.4	For issues of general clarity, please see Lord Falconer's Memo paras 7-9.
6	**Acting on behalf of principal or public: no corruption**	This is unclear and is likely to be ignored.	Bob McKittrick, Institution of Structural Engineers, DCB 4, para 3.5	Clause 6 is needed so that, for example, where an agent's salary is paid by a third party on behalf of his principal, no corruption offences are committed. It seems very unlikely that a case revolving around clause 6 would come to court, but it is still a very important aspect of the definition of "corruptly". We do not agree that clause 6 is unclear.
		Exceptions would be needed in clause 6 and 7, to describe situations where the advantage cannot be described as an 'undue' one. Additional language to explain the reasons for clause 6 might be useful to avoid misinterpretation.	Drago Kos, GRECO, DCB 12, para 6	We are not attracted by the term 'undue', as already mentioned. The point however may be met by our reconsideration of 'breach of duty' referred to above (on Clause 5).
6 (3)	"The second condition is that – (a) The functions concerned are performed only for the public and not for a principal; (b) C is acting on behalf of the public"	If a definition by reference to exceptions is to be retained, a clearer explanation is needed of exactly what it is intended to exclude from the scope of the offence, so that this is more easily understandable to the enforcement authorities. It should be stated which party bears the burden of proving an exception.		We think that the layout of the Bill is clear but, as explained above, it seems unlikely that the enforcement authorities will frequently be concerned with a case where clause 6 is relevant. The burden of proving that the exception does not apply is on the prosecution.
6 (3)(b)	"C is acting on behalf of the public"	Insert "on behalf of the public as remuneration or reimbursement in respect of the performance of the function" (as in original draft Bill produced by Law Commission). Even with this inclusion, it is still questionable whether it is appropriate to define corruption offences in such a way as to require no element of lack of integrity, or breach of duty.	George Staple, Clifford Chance, DCB 19, para 5	The point may be met by our reconsideration of 'breach of duty' referred to above (on Clause 5).
6 (4)(b)	"each element of the advantage is conferred"	Insert "improper" before "advantage" to make the meaning and ambit of this exemption more clear.	CBI, DCB 17, para 5 and 17	For issues of general clarity, please see Lord Falconer's Memo paras 7-9.
6 (6)	"References to the public are not confined to the public of the United Kingdom or any part of it."	There should be a specific and explicit inclusion of the crime wherever it takes place in the world (rather than the current provision, which suggests it is an addendum).	Transparency International (UK) from oral evidence, 13th May 2003	That this is the effect of the Bill is quite clear from Clause 13 .

7	**Principal's consent: no corruption**	This is unclear and is likely to be ignored.	Bob McKittrick, Institution of Structural Engineers, DCB 4, para 3.5	No comment.
7 (1)(a)	"the functions concerned are performed only for a principal and not for the public"	Provide a more detailed definition of functions "performed for the public". Do privatised bodies perform functions "for the public" or for its shareholders or both? In addition, in its dealings with its employees, does a local authority perform functions for the public or for the benefit of its employees or both?	Sir Stephen Silber, DCB 22, para 5	The draft Bill draws a distinction between public and private which is based on the nature of the functions concerned. Choosing this approach, rather than, for example, listing which bodies are to be considered public bodies, affords greater flexibility in dealing with a changing political and economic environment. The draft Bill follows the example of the Human Rights Act 1998. In determining whether a body is performing functions of a public nature for the purposes of section 6 of the 1998 Act, the courts have said that the issue must be looked at in the round, taking into account all the circumstances of the particular case. But the following factors have been picked out as having general application: ▪ Whether the act is done pursuant to a statutory power or duty ▪ The extent of control over the body's functions exercised by another body which is a public authority ▪ The more closely the act concerned is enmeshed in the activities of a public body, the more likely it is to be a function of a public nature. ▪ The degree of public funding the body receives in relation to the act The Joint Committee on Human Rights is currently conducting a short inquiry into the issue, and is expected to report on it before the summer recess. We will consider whether it is possible to achieve greater clarity on this issue without losing anything from the Bill.
		Problems could arise where the public/private functions are blurred. For instance, a private principal can consent to something which would otherwise be corrupt, but where functions are of a public nature the principal's consent cannot exonerate.	CPS, DCB 15, para 1.1	See above
		Should a distinction between public and private acts be drawn, as this goes against the Government's general stated intention?	CBI, DCB 17, para 13	The Law Commission identified practical difficulties in consent on behalf of the public. However, if it is possible to eliminate the one public/private distinction made in the Bill we would be glad to do so.
7 (2)	"A person is to be treated as if he were aware of all the material circumstances and consented to the conferring of the advantage or the making of the offer or	The defence should only apply where the belief is 'reasonable' or 'genuine'. Without this qualification, the exception is too wide in where it will apply.	Public Concern at Work, DCB 9, para 6	We do not think it is necessary to require the belief to be genuine. If the belief were not genuine, it would not be a belief and clause 7(2) would not apply. We do not want to require the belief to be "reasonable". The defendant should be able to rely on clause 7(2) if he had a genuine belief in consent even if his belief was not necessarily reasonable i.e. one that the reasonable man would have

	agreement…"			come to.
		Insert "improper" before "advantage" to make more clear the meaning and ambit of this exemption.	CBI, DCB 17, para 17	See above on "improper".
8 (1)(a)	"another does something (for examples, makes a payment) or he omits to do something which he has a right or duty to do"	Delete "he" before "omits".	CBA Working Party, DCB 20, para 14a	On reflection, we agree that "he" is ambiguous and we will clarify its meaning before the Bill is introduced into Parliament.
8(1)(a)		Insert "and" after " ; " General drafting point: there is inconsistency in whether "and" is used in the cases of cumulatively required conditions - e.g. 6(4) 7(1) 8(1) 10(1) 10(2) (no "and") 9(1), 9(3) ("and")	Peter Alldridge, University of Cardiff	We think it is clear from the context that in each case these are cumulative conditions and therefore "and" adds nothing of substance. However, we will be checking the consistency of the Bill's punctuation before it is introduced into Parliament.
8 (2)	"an act or omission may be done or made in consequence of a person's request…"	Replace with: "the act or omission of that other person is done or made in consequence of his request (express or implied) or with the result (direct or indirect) that he benefits".	CBA Working Party, DCB 20, para 14b	Clause 8(2) applies only where an act or omission is done or made in consequence of a person's request. It is only in this situation (as opposed to the situation where the act or omission benefits the person) that the nature of the act or omission and the time that it is intended to be done may not be known. The suggested wording which includes reference to the act or omission benefiting the person is therefore incorrect.
9	**Obtaining an advantage: meaning of corruptly**	The wording is unclear. The Bill makes certain acts illegal but the authorities (Trade Partners UK) have suggested that some behaviour within this definition (eg. facilitation payments) will be overlooked in a discretionary manner.	Bob McKittrick, oral evidence session, 20th May 2003	See answer on 'facilitation payments' in Clause 5).
9 (1)(b)	"he gives his express or implied consent to obtaining it (in a case where he does not have to request it)"	Replace with: "he either requests it or gives his express or implied consent in obtaining it, or both".	CBA Working Party, DCB 20, para 14c	There is no need for a request to be covered in clause 9(1)(b) since it is already covered by clause 8(1)(b).
9 (2)	"A person who agrees to obtain an advantage agrees to obtain it corruptly if he knows or believes that the person agreeing to confer it agrees corruptly".	Replace the last "agrees" with "does so" (thus mirroring clause 5 (1)).	CBA Working Party, DCB 20, para 14d	This is not an issue of substance but we will consider it as regards consistency.
10 (1)(a) 10 (2)(b)	"he does an act or makes an omission primarily in order to secure that a person confers an advantage" "he regards the act or omission as done or made primarily in return for the conferring of the advantage"	The use of the word "primarily" is not in line with the requirements of international conventions and could cause difficulties in implementation, by making it more difficult to prove the genuine intention of the perpetrator.	Drago Kos, GRECO, DCB 12, para 8	See above, under Clause 5 (1) (b).

10 (1)(a)	"he does an act or makes an omission primarily in order to secure that a person confers an advantage"	Replace with: "he does an act or makes an omission primarily in order that a person should confer an advantage (whoever may obtain it)".	CBA Working Party, DCB 20, para 14e	There is no change of substance here and we think the existing wording is clear.
10 (2)	"A person who performs his functions as an agent performs them corruptly if – (a) he does an act or makes an omission when he knows or believes that a person has corruptly conferred an advantage (whoever obtained it); (b) he regards the act or omission as done or made primarily in return for the conferring of the advantage."	Replace with: "(a) he knows or believes that a person has corruptly conferred an advantage (whoever obtained it) (b) he does an act or makes an omission primarily in return for the conferring of that advantage".	CBA Working Party, DCB 20, para 14f	We will consider this.
11	**Meaning of agent and principal**	Requires greater detail about what would happen if the briber (ie. person C from clause 5) was not a UK national (as only the agent and the principal are mentioned here) and the corruption offence takes place in the UK.	Drago Kos, GRECO, DCB 12, para 9	We do not think that this issue is unclear. If any person (no matter what his nationality), who is not protected by immunity, 'bribes' someone in the UK, he would be liable for prosecution in the UK under clause 1.
		The concept of agency, though well developed in common law, has been stretched unreasonably in this Bill. The concept of actors in the offence being agents for, or performing functions for 'the public' is particularly difficult.	Transparency International (UK), DCB 18, para 3.4	In this respect the Bill, like the Law Commission's scheme, builds on the precedent of section 1 (3) of the 1906 Act, which is currently in use.
11 (1)(a)	"… to perform the functions for the second;"	Replace ";" ["semi-colon"] with ", or" ["comma or"] at end of 11(1)(a) and (b), 11(2)(a), 15(7)(b), 16(4)(a) and 18(a). This would reflect consistency with the correctly punctuated clauses in the rest of the draft Bill.	CBA Working Party, DCB 20, para 16b	We do not think there is any ambiguity in these provisions. However, we will be checking the consistency of the Bill's punctuation before it is introduced into Parliament.
11 (1)(a)	"the first and the second are partners in the same partnerships"	This clause creates unreasonable difficulties for partnerships. To ensure that there is no corruption, under clause 7(1)(b) the consent of all partners is required and this creates real practical and inappropriate difficulties.	George Staple, Clifford Chance, DCB 19, para 9	We think that it is appropriate, in the event that one partner is receiving advantages as the prime motivator for certain acts or omissions performed as part of his functions for the partnership, that the other partners should consent (or that their consent would be given if they knew all the circumstances).
11 (3)	"A person is an agent performing functions for the public if the functions he performs are of a public nature."	In the absence of an autonomous definition of "foreign public official" in clause 11, the UK authorities are requested to give an assurance, as was done by the Attorney General in the context of the Anti-Terrorism, Crime and Security Act 2001, that this Bill is intended to cover "all the categories of public official that the OECD Convention requires to be covered".	Secretariat to the OECD's Bribery Working Group, DCB 26, para 2b	We believe that all categories of public official that the OECD Convention requires to be covered are covered by Clause 11 (3) and (4). We would be happy to give such assurance.
12	**Proceedings in Parliament**	Remove clause 12 – if the words or actions in proceedings of a member or a witness could be used to prosecute the member or witness or some other person, proceedings in Parliament would no longer be free from	Harry Evans, Clerk of the Senate (Australia), DCB 2,	Clause 12 is intended to ensure that speeches in Parliament are free of external interference, because it aims to ensure that what is said is not subject to the influence of a corrupt

		all external interference.	para 10	advantage. (See the Attorney General's reply to question 551). Also, in corruption cases, action can only be taken with the consent of the Attorney-General – a protection on the importance of which the Joint Committee on Parliamentary Privilege insisted.
		Consider whether clause 12 needs to be drafted more narrowly and whether the drafting is proportionate to the perceived problem. Additionally, consider whether the clause should proceed at all, in the absence of a commitment from the Government to the introduction of a Parliamentary Privileges Bill.	Roger Sands, Clerk of the House of the Commons, DCB 5, para 14	We do not agree that clause 12 should be drafted more narrowly (see the Attorney General's answer to Q549). In particular it does need to cover others as well as MPs (see the Attorney General's answer to Q 565). It is possible that primarily in return for a corrupt reward a person who is not a Member might say or do something in Parliament. For example, having been paid by the owners of a factory, a representative of an NGO with an interest in ecology might give evidence to a committee scrutinising a Bill on noxious gases to the effect that the fumes from this factory do not harm the environment in any way. In addition, for example, a person charged with conferring an advantage on an MP would not currently be able to use evidence of parliamentary proceedings in his defence. Without clause 12, what was said or done in Parliament could not be made available as evidence in court and notwithstanding the fact that a record may be available within Hansard, or the action in question may have been televised, no inference can be made. On the question of a Privileges Bill, see the Attorney General's answer to Q 546.
		Parliamentary privilege could better be maintained by the implementation of the fifth recommendation of the Joint Committee on Parliamentary Privilege (replacement of section 13 of the Defamation Act 1996).	Michael Davies, Clerk of Parliaments, DCB 6, para 3	The 5th recommendation would not solve the problem of the potential usefulness of evidence of proceedings in Parliament in securing convictions for corruption.
		Consider the United States model as an alternative to this clause – the Supreme Court has explicitly drawn between the improper compact and the performance; the first within the cognisance of the courts, the second not.	Sir William McKay, DCB 11, para 35	Please refer to question 556 and 570 of the Attorney General's evidence.
		Having sanctions against MPs who might speak for corrupt purposes would enhance freedom of speech in the Parliament. It might also be useful to extend this clause to include fraud, but this would be a policy issue.	Attorney General Lord Goldsmith, oral evidence session, 4th June 2003	There is an argument that corruption is a special case in that it has the potential to be detrimental to the freedom of speech in itself: that is, a corrupt bargain could motivate what was said or done in Parliament. Clearly, parliamentary privilege has the potential to be an impediment to the prosecution of other offences, but this is not an issue for this Bill. Extending clause 12 to fraud would be outside the scope of the Bill.
12 (2)	"These offences are corruption offences"	Remove this clause and put its content in a separate clause within Part I (along with 13(3), 15(9) and 17(4)). Stating the definition of corruption offences more than once is not necessary.	CBA Working Party, DCB 20, para 15	We will consider this. The same applies to clause 12(2).
13	**Corruption committed outside the UK**	There is a lack of clarity about the locus of prosecutions for such offences. According to the Brussels Convention and UK common law,	Corner House, DCB 1, para 9.2	The clause enables UK nationals and incorporated bodies to be tried in the UK. The locus of prosecutions is a matter

		it is wrong for the Government to suggest (as it did in its response for consultations) that the locus of prosecution should be in the countries where payments have been made.		for consideration on a case by case basis, not for the Bill. For practical reasons (availability of witnesses and evidence) the jurisdiction where the acts took place is usually best placed to try the offence.
		Greater detail needed to explain what would happen if a foreign national committed a corruption offence abroad and was arrested in the UK. Could he/she be prosecuted in the UK?	Drago Kos, GRECO, DCB 12, para 11	The UK does not have universal jurisdiction, thus a foreign national who committed a corruption offence abroad would not be triable by UK courts. He could be extradited to face trial in his own country, or in the jurisdiction where the acts took place.
		Clause 13 should extend to include subsidiary companies of those incorporated in the UK if under actual control. In the case of other subsidiaries, associated companies and joint ventures, there should be an offence by the UK incorporated company if it fails to take adequate measures to satisfy itself that the foreign registered company or joint venture is implementing sustainable anti-corruption policies in the conduct of its business.	Transparency International (UK), DCB 18, para 4.3	The UK already has jurisdiction over acts committed by any company, foreign or UK, which commits acts of bribery wholly or partly in its territory and this form of jurisdiction will be confirmed and extended by clause 14. In addition, under the Criminal Law Act 1977, the courts of England and Wales have jurisdiction over persons who conspire to commit any act in another country which is an offence against the law of that country, provided that the act would have constituted an offence if committed here, and provided there is some connection to England and Wales, for example, where an act (or omission) which contributes to the formation or furtherance of the conspiracy takes place here. Therefore a UK parent company that conspired in the UK with its foreign subsidiary to pay a bribe abroad could be prosecuted. We do not think it appropriate to go further and to take jurisdiction over a foreign company for actions which take place entirely in a foreign country. The position of overseas subsidiaries (which are clearly foreign if they are registered abroad) is an international problem, which needs to be tackled on an international basis. The OECD is examining the issue and the Government has said (in its response to the all-party Commons International Development Committee report on corruption) that it will consider its policy in relation to the coverage of foreign subsidiaries in the light of the OECD examination, its existing policy on extra-territoriality and its obligations as a member of the World Trade Organisation.
		This would inevitably include countries where actions would not be illegal or even morally disapproved. Is it right to 'export' criminal law for a crime with a proposed maximum sentence of only seven years and would it 'unfairly' disadvantage citizens/companies who were British/ incorporated in the UK? Additionally, there are obvious practical problems involved in trying such a crime.	CBA Working Party, DCB 20, para 3 and 4	We consider it of the utmost importance that UK citizens do not contribute to corruption either at home or abroad. The vast majority of OECD countries have extra territorial jurisdiction over their nationals, thus we do not see any unfair disadvantage for UK interests. We do not know of any country in which bribery is not considered a crime. Although we agree that there could be practical problems in trying a corruption crime which took place abroad, we do not consider it impossible – the USA prosecutes a handful of such cases each year. In any case extra-

				territorial jurisdiction has substantial preventative force.
		A clause should be inserted which explicitly states that bribery of foreign public officials is covered.	Mark Pieth, Professor of Criminology, oral evidence session, 2 June 2003	We think that the inclusion of such a clause would raise more questions than it would resolve. It is clear that the bribery of foreign public officials is covered in the Bill. The requirement under the Convention is that Parties should criminalise the bribery of foreign public officials. The means by which parties achieve that aim remain open to them. Indeed the commentaries on the Convention, adopted by the Negotiating Conference in 1997 state: "a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case could both comply.
13 (1)(a)	"This section applies if – A national of the United Kingdom or a body incorporated under law in any part of the United Kingdom does or omits to do anything"	Unincorporated associations and partnerships should be included as bodies capable of committing corruption offences.	Transparency International (UK), DCB 18, para 4.2	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 extra-territorial 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.
13 (2)(a)	"the act or omission constitutes the offence concerned;"	Replace ";" ["semi-colon"] with "," ["comma"] at end of 13(2)(a), 15(7)(a) and 16(3)(a). This would reflect consistency with the correctly punctuated clauses in the rest of the draft Bill.	CBA Working Party, DCB 20, para 16c	We do not think there is any ambiguity in these provisions. However, we will be checking the consistency of the Bill's punctuation before it is introduced into Parliament.
13 (3)(c)	"These offences are corruption offences – aiding, abetting, counselling or procuring the commission of an offence under this Part"	Change to: "complicity in, including aiding, abetting, implicitly authorising, counselling or procuring the commission of an offence."	Corner House, DCB 1, para 7.5	Clause 13(3)(c) reflects section 8 of the Accessories and Abettors Act 1861 which makes it an offence to aid, abet, counsel or procure the commission of any indictable offence.
15	**Authorisations for intelligence agencies**	The Criminal Convention does not contain any express provision which provides clear justification for clause 15. The legal basis for this clause may need further clarification.	Khawar Qureshi, DCB 7, para 15	There is no specific provision on security service issues in the Council of Europe Convention. As we have not ratified the Council of Europe Convention, there is no legal impediment to our enacting clauses 15 and 16. They are closely based on section 7 of the Intelligence Services Act 1994. That allows the Secretary of State to grant authorisations to the SIS which have the effect of negating any liability that might otherwise arise under UK law in relation to acts carried out outside the British Islands. This would apply to the making of 'corrupt' payments. We do not see that there is a problem with the OECD Convention as it relates to international business

				transactions only. As concerns the Council of Europe, we do recognise that the remit of the Convention is wider and we will consider the issue in the ratification process. However, we do not consider that the question is unique to the UK.
15 and 16	**Authorisations: supplementary**	No international treaty would allow an exemption from the general criminalisation of corruption as stated in clauses 15 and 16. It is not in compliance with the Council of Europe's Criminal Law Convention on Corruption or the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.	Drago Kos, GRECO, DCB 12, para 12	See above and the Attorney General's point below.
		Clauses 15 and 16 are inappropriate in a new corruption law and, if needed at all, should be included in a more general Intelligence Services Act.	Transparency International (UK), DCB 18, para 3.11	We recognise the point about the desirability of a wider provision but there is no current vehicle for a wider change.
		This clause is "asking for trouble" in relation to the OECD Convention.	Mark Pieth, Professor of Criminology, oral evidence session, 2 June 2003	The Convention is limited to bribery in international business transactions and the clauses are modelled on extant provisions (see above).
		The Attorney General regards it as highly desirable to have these provisions. It is better to have these activities subscribed to by parliament but subject to checks and balances.	Attorney General Lord Goldsmith, oral evidence session, 4th June 2003	We agree with the Attorney General.
17	**Consent to prosecution**	The Attorney or Solicitor General's consent for prosecution should be removed from the bill to allow for private prosecutions (this also represents a potential breach of Article 5 of OECD Convention on Combating Bribery in International Business Transactions).	Corner House, DCB 1, para 4	The requirement for the Law Officers' consent to statutory corruption prosecutions is part of the existing law and it does not lead to problems. The Government made a statement on its position on the consent requirement in corruption cases on 10 April 2001. They noted that the Law Commission had recommended in October 1998 that consent should be required for "offences which create a high risk that the right of private prosecutions will be abused and the institution of proceedings will cause the defendant irreparable harm". The Government said it believed that this category is relevant to the offence of corruption. It also noted that the Joint Committee on Parliamentary Privilege recommended that prosecution under the new legislation, whether of a member or non-member, should require the consent of a law officer. They said that 'all those who are in the public eye are particularly vulnerable to mistaken or malicious allegations. For these people, and no doubt others, the new offence will create a high risk that the unrestricted right of private prosecution will be abused'. CBI has underlined that Attorney General's Consent is a very useful safeguard. The Attorney General's consent is in the current law. The OECD stated in its 2003 report that "the Working Group

				is of the opinion that the U.K. law now addresses the requirements set forth in the Convention." The issue of private prosecutions is not dealt with in the OECD Convention.
		In relation to allegations against Members, consent to prosecution should be given by Director of Public Prosecutions after consultation with the Parliamentary Commissioner for Standards. Proposals that discretion over the prosecution of elected MPs should be exercised by a Government Minister run contrary to both history and principle.	Roger Sands, Clerk of the House of Commons, DCB 5, para 12	Please see responses 571, 580 and 585 of the Attorney General's evidence.
		No explanation is given as to why the consent of the Attorney General or Director of Public Prosecutions for NI is needed to start proceedings. This is a highly unusual clause and might lead to a perception of political interference in prosecutorial functions. At the very least, additional explanatory language is needed.	Drago Kos, GRECO, DCB 12, para 14	See above
		The CPS does not believe that the Attorney General's consent is necessary. The consent of the DPP could act as a necessary check against private prosecutions which are not in the public interest. In practice, this would mean an individual prosecutor taking the decision under the Director's delegated authority	CPS, DCB 15, para 3.1	In the case of Attorney General's consent, the consent can only be delegated to the Solicitor General. However in the case of the Director of Public Prosecutions, such consent can be delegated to individual prosecutors, which may not satisfy all concerned that the protection given would be of a high enough level. The Nicholls Report suggested that "the Director of Public Prosecutions does not appear to be appropriate because he does not have parliamentary experience."
		Politicisation of prosecutions would be retrograde and there should be no requirement for the Attorney General's consent to prosecution of offences.	Transparency International (UK), DCB 18, para 3.15	See above. There is no question of politicisation of prosecutions – see Attorney General's answer to Q 585.
		Considerable care has been taken to distance the Attorney-General from daily decisions of the prosecuting authorities (setting up CPS and SFO) and there seems to be no reason why the principles behind this should not be equally valid in respect of prosecutions for corruption. It would also be inappropriate for the DPP to sanction a prosecution brought by the SFO.	George Staple, Clifford Chance, DCB 19, para 14 and 15	See above
		This clause could be limited to cases where the defendant is an elected representative. The DPP considers that consultation/ communication with the Parliamentary Commissioner would be mandatory before taking a case forward. Even if it were not included in the draft Bill, it would be done anyway.	DPP and SFO, oral evidence session, 14th May 2003	MPs are not the only people who could be damaged by a malicious prosecution. The CBI and others consider that the risk of malicious prosecutions in the field of business and the devastating effect these could have on victims merits the retention of Attorney General's consent. We understand the Attorney General is to write on this matter.
		The OECD would have difficulties with this clause and sees no reason for a political officer to give consent to all corruption cases. However, the OECD would not object to the consent of the Attorney General being attached to cases involving MPs.	Mark Pieth, Professor of Criminology, oral evidence session, 2 June 2003	The OECD's BWG has already determined that the UK's existing law, and New Zealand's law (which has a similarly broad consent requirement), address the requirements of the Convention.
		The Attorney General would be able to bring parliamentary knowledge and experience to the role. However, the Attorney General is "quite relaxed" about who the consent should come from (either himself or the	Attorney General Lord Goldsmith, oral evidence session, 4th	The Government prefers to retain the Attorney General consent mechanism.

		DPP), as long as the reason for not giving it to the Attorney General was because they could not be trusted. He and his predecessors have been committed to making impartial decisions.	June 2003	
17 (1)	"No proceedings for a corruption offence may be started in England and Wales except with the consent of the Attorney General"	The Attorney General might have or be perceived as having a conflict of interest if he has to decide if a corruption offence can be brought against a politician. It might be better for clause 17(1) to require the consent of the Attorney General or the Director of Public Prosecutions, provided that he can only delegate this duty to certain specified senior officials.	Sir Stephen Silber, DCB 22, para 4	See previous comments.
19	"Abolition of existing offences etc"	Further clarification is needed regarding the repeal of Section 2 of the Prevention of Corruption Act 1916. In particular, the Bill contains no provision dealing with 'illicit enrichment' which is defined in Article 25 of the UN Draft Convention on Corruption.	Khawar Qureshi, DCB 7, paras 19-22	Section 2 of the Prevention of Corruption Act 1916 in effect places the onus on the public servant to prove his innocence and is to be repealed as it could potentially conflict with ECHR. We think that the offence of "illicit enrichment" as defined in the draft UN Convention is also potentially in conflict with ECHR. We have agreed to an EU Common Position binding us not to support a mandatory provision. The Government has no intention to introduce any such offence.
22	"Postponement of limitation periods"	There is no provision for compensation claims, as provided for in Article 5 of the Civil Convention. Normal civil proceedings could be considered, but further clarification is required regarding whether proceedings against the Crown could be undertaken in this manner.	Khawar Qureshi, DCB 7, para 10	(Answer from Department of Constitutional Affairs). We believe that the usual principles on which the Crown is liable will apply in the same way to corruption as they do elsewhere. Generally the Crown Proceedings Act 1947 provides for the Crown to be liable in tort and contract in the same way as a private person. We do not consider that the subject of corruption raises any new issues in respect of Crown liability.

Annex 2 : TABLE OF INTERNATIONAL OBLIGATIONS

Agreement	Summary of agreement	Entry into force	UK signed	UK ratified	Other comments
Organisation for Economic Cooperation and Development Convention on combating bribery of foreign public officials in international business transactions **Agreement currently legally binding on the UK**	Requires member states to establish as a criminal offence intentionally offering, promising or giving an undue advantage to a foreign public official in return for that official acting or refraining from acting in the exercise of his or her functions, in order to obtain or retain business or other improper advantage in the conduct of international business. "Foreign public official" means: ü any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected ü any person exercising a public function for a foreign country, including for a public agency or public enterprise ü any official or agent of a public international organisation. Member states must ensure that this criminal offence extends to legal persons and to money laundering where it is connected to the corruption offence. Implementation of the Convention is monitored by the OECD Working Group on Bribery in International Business Transactions.	15 February 1999	17 December 1997	14 December 1998	Currently implemented in the UK by Part 12 of the Anti-Terrorism, Crime and Security Act 2001.
Protocol to the Convention on the protection of the European Communities' financial interests **Agreement currently legally binding on the UK**	Requires member states to ensure that the following conduct is made a criminal offence (where "official" means any European Community or national official): ⊄# an official who deliberately requests or accepts an undue advantage in return for acting or refraining from acting in the exercise of his or her functions in a way which is likely to damage the European Communities' financial interests ⊄# any person who deliberately promises or gives an undue advantage to an official in return for acting or refraining from acting in the exercise of his or her functions in a way which is likely to damage the European Communities' financial interests.	17 October 2002	27 September 1996	UK notified completion of its internal procedures on 11 October 1999	

Agreement	Summary of agreement	Entry into force	UK signed	UK ratified	Other comments
Council of Europe Criminal Law Convention on Corruption **Agreement in force but the UK has not yet ratified -- not currently legally binding on the UK**	Requires member states to establish as a criminal offence: ⊄# either intentionally promising, offering or giving an undue advantage to the following persons, or the following persons requesting, receiving or accepting an undue advantage, in return for acting or refraining from acting in the exercise of his or her functions: ü domestic or foreign public officials ü members of domestic and foreign public assemblies and international parliamentary assemblies ü directors or staff of private sector entities ü officials of international organisations and judges and officials of international courts ⊄# either intentionally promising, offering or giving an 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 of the following persons, or accepting such an undue advantage (known as "trading in influence"): ü domestic or foreign public officials ü members of domestic and foreign public assemblies and international parliamentary assemblies ü officials of international organisations ü judges and officials of international courts ⊄# any money laundering of proceeds arising from the corruption offences specified in this convention. Member states must ensure that the appropriate criminal offences extend to legal persons and to money laundering where it is connected to the corruption offences. Implementation of the convention is monitored by GRECO (the Group of States against Corruption).	1 July 2002	27 January 1999	Not yet ratified	The UK has not ratified the Convention because it has not been in a position to do so, as the UK currently has no offence of trading in influence. The UK could enter a reservation to the offence of trading in influence to enable it to ratify the convention: of the 20 member states that have ratified the convention to date, seven have entered a full or limited reservation to the offence of trading in influence.

Agreement	Summary of agreement	Entry into force	UK signed	UK ratified	Other comments
European Union Convention on the fight against corruption involving officials of the European Communities or officials of member states of the European Union **Agreement not yet in force but the UK has ratified -- not currently legally binding on the UK**	Based on the offences set out in the Protocol to the Convention on the protection of the European Communities' financial interests (set out above) but broadens these offences by omitting the words "in a way which is likely to damage the European Communities' financial interests". Consequently, requires member states to ensure that the following conduct is made a criminal offence (where "official" means any European Community or national official): ⊄# an official who deliberately requests or accepts an undue advantage in return for acting or refraining from acting in the exercise of his or her functions ⊄# any person who deliberately promises or gives an undue advantage to an official in return for acting or refraining from acting in the exercise of his or her functions ⊄# any head of business or person having power to take decisions or exercise control within a business who authorises a person under their authority to engage in active corruption.	Not yet in force	25 June 1997	UK notified completion of its internal procedures on 11 October 1999	Article 13(3) of the Convention provides that the Convention will enter into force 90 days after the last member state has notified completion of its internal procedures. Neither Germany nor Luxembourg has yet given notification.
Council of Europe Civil Law Convention on Corruption **Agreement not in force and the UK has not yet ratified – not currently legally binding on the UK**	Requires member states to provide that: ⊄# persons who have suffered damage as a result of corruption shall have the right to initiate an action in order to obtain full compensation for this damage. This includes actions against the state in the case of corruption by public officials. Compensation sought may cover material damage, loss of profits and non-pecuniary loss. ⊄# any clause of a contract providing for corruption shall be null and void ⊄# an employee who has reasonable grounds to suspect corruption and who reports in good faith his or her suspicions to the appropriate authorities shall be protected against any unjustified sanction. Implementation of the Convention is monitored by GRECO.	Not yet in force	8 June 2000	Not yet ratified	Requires 14 ratifications before it can enter into force; currently has only 10 ratifications.

Draft Agreement	Summary of agreement	Entry into force	UK signed	UK ratified	Other comments
United Nations Convention on Corruption **Draft agreement – not currently legally binding on the UK**	This appears to be intended to be a comprehensive convention of broad application; it adopts a wide-ranging approach to corruption and matters associated with it, and is currently 85 clauses in length. In summary, the draft convention would: ∉# apply to the prevention, investigation and prosecution of corruption and criminal acts related specifically to corruption ∉# apply also to the recovery and return of assets and proceeds derived from corruption ∉# require member states to criminalise acts of corruption irrespective of whether they involve the public or the private sector ∉# seek to address the links between corruption and other forms of crime, particularly organised crime and economic crime, including money-laundering.	Not applicable	Not applicable	Not applicable	Currently, will require either 20 or 40 countries (the number is not yet decided) to ratify it before it can come into force.

Annex 3: Statutory functions of the intelligence agencies

Security Service

The Security Service's functions are set out in section 1 of the Security Service Act 1989, as amended by the Security Service Act 1996, the Police Act 1997 and the Regulation of Investigatory Powers Act 2000.

The Security Service

(1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.

(2) The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

[(4) It shall also be the function of the Service to act in support of the activities of police forces[, the National Criminal Intelligence Service, the National Crime Squad] and other law enforcement agencies in the prevention and detection of serious crime.]

[(5) Section 81(5) of the Regulation of Investigatory Powers Act 2000 (meaning of "prevention" and "detection"), so far as it relates to serious crime, shall apply for the purposes of this Act as it applies for the purposes of the provisions of that Act not contained in Chapter I of Part I.]

Intelligence service

The Intelligence Service's functions are set out in section 1 of the Intelligence Services Act 1994.

1 The Secret Intelligence Service

(1) There shall continue to be a Secret Intelligence Service (in this Act referred to as "the Intelligence Service") under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—

(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

(b) to perform other tasks relating to the actions or intentions of such persons.

(2) The functions of the Intelligence Service shall be exercisable only—

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime.

Government Communications Headquarters

The GCHQ's functions are set out in section 3 of the Intelligence Services Act 1994.

The Government Communications Headquarters

(1) There shall continue to be a Government Communications Headquarters under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—

(a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and

(b) to provide advice and assistance about—

(i) languages, including terminology used for technical matters, and

(ii) cryptography and other matters relating to the protection of information and other material, to the armed forces of the Crown, to Her Majesty's Government in the United Kingdom or to a Northern Ireland Department or to any other organisation which is determined for the purposes of this section in such manner as may be specified by the Prime Minister.

(2) The functions referred to in subsection (1)(a) above shall be exercisable only—

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or

(c) in support of the prevention or detection of serious crime.

(3) In this Act the expression "GCHQ" refers to the Government Communications Headquarters and to any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

Annex 4: Note by Peter Alldridge, specialist adviser, on locating the harm in bribery and corruption – an alternative approach

What is wrong with bribery?

Differing definitions of the crime bribery flow from differing accounts of what is wrong with the phenomenon. There are at least four possible accounts of the harm(s) in bribery. Bribery might be said to be harmful because:
(i) it involves an inducement to breach of a civil law duty. This is the basis of the position taken in the Draft Corruption Bill with its insistence upon a principal-agent relationship and inducement towards its breach.
(ii) the creation of a market in goods or services whose being sold degrades them, or otherwise prevents the proper operation of government. This was the rationale for the earliest corruption statutes – against bribery of judges and magistrates and the sale of offices and commissions, but it would only cover a small area of public sector corruption.
(iii) it is an impediment to fair competition in liberalised global markets and consequently a detriment to consumers, producers and economic growth. Much of the evidence about corruption, particularly international corruption, dealt with these cases, often in public sector procurement.[172]
(iv) it involves abuse of public position for private gain. This kind of definition, adopted, for example, by the World Bank, does not distinguish public sector bribery from other misconduct and excludes some private sector bribery.
A coherent law of bribery will identify the harm and generate definitions directed against its prevention.

A second major issue requiring resolution at the outset is the place of bribery law relative to other areas of criminal law. In particular, the point at which bribery of an official ends and extortion[173] by that official begins is notoriously unclear, as is the apparent area of overlap between bribery and conspiracy to defraud, and the criminal offences[174] dealing with various market abuses. If the offence of misconduct in public office is to be given a more significant role in the fight against public sector corruption (for example, by extending the definition of public office) then again this needs to be taken into account in the reform of bribery. If any acceptance by a public sector worker of a bribe is misconduct then there is less need for specific bribery offences. Coherence of criminal law requires that it generate appropriate labels and consistent sentences, and that like cases should be treated alike. Proliferation of offences each dealing with the same wrong cannot be avoided entirely, but areas of overlap should be carefully considered.

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172 E.g. Supplementary document from the Corner House: Susan Hawley, Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department (Sturminster Newton, Dorset: The Corner House 2003).

173 Which since 1968 could be charged as blackmail (Theft Act 1968 s.21) or under clauses 2or 3 of the Draft Bill.

174 Particularly that under Section 188 of the Enterprise Act 2002.

The Law Commission's view of the harm in bribery

The Law Commission took as its starting point, both in the Consultation Paper[175] and its Report,[176] that the betrayal of a principal-agent relationship should form the basis of the crime of corruption.[177] The Commission relied on the Oxford English Dictionary for this account.[178] A number of things follow from the choice of disloyalty as the foundation stone for the definition of the offence:

1. A law of corruption based around disloyalty must identify the relationship within which the disloyalty takes place. This is done in the principal-agent relationship, which has been widely criticised.
2. The element of moral turpitude must be directed against that relationship: hence the definition of "corruptly" in clause 5.
3. There must be a defence of consent by the principal (clause 7). In general, except for the most exceptional cases the consent of the victim is a complete defence to a criminal charge. If the principal is the "victim" it is his/her consent which is relevant. However, if the "victims" are others (competitors or end-users) then the consent of the principal should be irrelevant.
4. If the offence has its root in disloyalty there is no reason in principle[179] why extra-territorial jurisdiction should be imposed in the case of disloyalty induced overseas, when it is not imposed, for example, for paying the agent overseas to hit the principal.

Much of the evidence before the Committee has emphasised the damage to *others than the principal* (competitors and end-users) which is consequential upon the bribe.[180] Sentencing has not hitherto emphasised the degree of disloyalty. The growth in global interest in corruption from the time of the enactment of the US Foreign Corrupt Practices Act 1978 till the present, including Lord Falconer's emphasis upon markets and democratic value[181] has

175.Law Commission, Consultation Paper No 145, *Legislating the Criminal Code: Corruption* (1997) CP Ch 7, following Phil Fennell and P.A. Thomas, 'Corruption in England and Wales: An Historical Analysis', (1981) 11 *International Journal of Sociology of Law* 167, themselves citing Lord Ellenborough C.J.'s judgment in *Thompson v Havelock* (1808) 1 Camp 527; 170 ER 1045. The case, however, turned upon its particular facts and is not authority, for any wide proposition, nor for any proposition in criminal law.

176 Law Commission Report No 248, *Legislating the Criminal Code: Corruption* (1998) 5.4 *et seq.*

177 The "fundamental mischief" Law Commission, Consultation Paper No 145, *Legislating the Criminal Code: Corruption* (1997) Para 1.15.

178 Sir Stephen Silber, memorandum of 23rd June 2003.

179 Other than the fulfilment of international obligations, the significance of which is not underestimated.

180 E.g. Transparency International written evidence paras 2.2-2.3: Corner House Susan Hawley, Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department (Sturminster Newton, Dorset: The Corner House 2003) quantifies the damage done by corruption it describes to the *taxpayers* of the countries concerned, who are not always the principals.

181 Corruption Draft legislation Cm 5777 (2003) Foreword, page 5.

not been driven by concern about loyalty of agents.[182] It has been driven by concern about the operation of (increasingly globalised) markets.

This suggests the possibility of a different model of the harm in corruption, one which better responds to the complaints which have placed bribery high on the agenda of the internationalisation of criminal law. It relates the crime (and its gravity) not to loyalty and the principal-agent relationship, but to the relationship between the actor and the market of which s/he forms part. On this account, bribery is not the corruption of a *relationship* but of a *market*. Bribery occurs in two overlapping but distinct sets of cases:

> attempts to operate a market where it is not an appropriate allocative mechanism – attempts to pay for goods and services which ought not to be for sale at all. These cases are attempts to buy or sell the proper functioning of government (widely considered, to include policing, votes, administration of justice, local government and other public services). The precise limits beyond which there can be no market are set, usually by statute in individual jurisdictions;
>
> there is a market whose existence is desirable or at least legitimate, having rules as to how allocation is to take place (how competition is to work), and proper functioning of that market is undermined by the bribe. The benefits of competition to the end-user are denied by bribes, and competitors may also be damaged.

Instead of there being one broad offence based upon an indistinct wrong related to loyalty there are two wrongs upon which offences could be built. This enables more effective labelling and sentencing. An offer of a small bribe to, for example a traffic warden, strikes directly at the rule of law, is a different type of wrong and should command a heavier sentence than a small bribe to secure a small contract. A definition of corruption on these bifurcated lines would make it an offence (a) to confer or receive a benefit: with the intention of corrupting the proper functioning of government and public services: or (b) with the intention of corrupting the proper functioning of a regulated market.[183]
The reason that the criminal law of corruption is so difficult is that it is not free-standing, but operates by reference to a series of existing legal duties. The approach taken in the Bill is to incorporate the duties owed by agents to principal, in its extended definition. These duties arise under public law and the civil law of employment, agency, fiduciaries, trusts, contracts and even marriage.[184] The alternative approach finds the duties upon which the criminal law of corruption is to be built in the law relating to the relationship between an individual and the market in which s/he operates. A system for allocating goods services, jobs, contracts and other benefits - by competition – posits a set of rules for its proper functioning. These rules – the rules of markets - are limitations upon freedom of contract.

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182 Susan Rose-Ackerman 'Corruption and the Global Corporation: Ethical Obligations and Workable Strategies' in Michael Likosky ed. Transnational Law and Legal Process: Globalisation and Power Disparities (London: Butterworths, 2002) 148-171

183 An offence along these lines was suggested by Dr Desmond Turner to Sir Stephen Silber. (Q.657) Appropriate definitions would, of course, be required..

184 Which would be a principal-agent relationship under clause 11(1)(a).

They do not compel participants in a market to make the best bargain possible, but they do lay down minimum standards. They may or may not be incorporated in individual contracts between principal and agent. The rules may be laid down by European law,[185] in statutes,[186] in statutory instruments,[187] by prerogative powers,[188] under powers conferred by one of the former,[189] by self-regulation (which generally gives rise to contractual obligations),[190] or by rules from a combination of these sources. The "market" model of bribery holds that corruption is to be identified by reference to those rules. The object of corruption is to gain the benefits of acting according to those rules, whilst not actually doing so. This, and not disloyalty to the principal, is the "fundamental mischief" in corruption. The criminal law of corruption does not itself place limitations upon freedom of contract,[191] but rather punishes attempts to avoid existing restrictions upon freedom of contract.[192]

As against the "loyalty" model the advantages of the "market" model are:

(i) the principal/agent requirement becomes unnecessary;

(ii) "corruptly" is no longer an element in the offence and consequently the problems around defining it, and "primarily" are avoided. The mental state of "intention to corrupt" is easily comprehensible and sits well with the codification project;

(iii) it is no longer necessary that the consent of the principal be a defence (clause 7);

(iv) the vice in bribery would be is clear from the offences. The reader knows that the statute is intended to prevent corruption: (i) of government (ii) of markets. Clearer identification of the vice will enable judges to sentence more rationally and consistently. Other things being equal, corruption of government, striking directly at the rule of law, should be regarded more seriously than corruption of markets;

(v) the adoption of extra-territorial liability is in principle[193] far easier to justify. The criminal law of England and Wales has far greater cause to be concerned with

185 As, for example, in much competition law.

186 As in the Financial Services and Markets Act 2000, the Enterprise Act 2002 or the legislation on discrimination on the basis of race. sex or disability.

187 For example, some of the Statutory Instruments made under Financial Services and Markets Act 2000.

188 For example, the rules relating to the making of appointments or contracts by Universities.

189 The rules for the allocation of contracts or jobs in local government.

190 For example, the Stock Exchange Rules.

191 Pace Lord Falconer Oral Evidence Q 483, Q.583.

192 It would be possible if desired to except discrimination law. Somebody pays a bribe to the personnel manager of a large enterprise acting with the approval of his/her principal, to induce them not to employ persons of a particular race or sex, or persons with disabilities. This is not covered by the Draft Bill: on the market model it would be an attempt to pervert the operation of a market in jobs (because the rules about discrimination in employment form part of the rules of the market in jobs). It is, of course actionable discrimination but is not otherwise criminal (except, perhaps, as a conspiracy to defraud). Whether it should be criminal bribery is an open question.

193 i.e. again leaving aside again the question of the relevant international obligations.

proper operation of the organs of government and markets the than with the loyalty of individual public servants;

(vi) The *lacuna* in the case of a principal-principal bribe not covered by the Bill, is now covered.[194]

Peter Alldridge
14 July 2003

194 Q487 & 488 (Lord Falconer) Note: the conduct may also amount to a conspiracy to defraud, and an offence under Enterprise Act 2002.

Formal minutes

Extract from House of Lords Minute of 12 February 2003

Corruption—It was moved by the Lord Privy Seal (Lord Williams of Mostyn) that it is expedient that a Joint Committee of Lords and Commons be appointed to consider and report on any draft Corruption Bill presented to both Houses by a Minister of the Crown, and that the Committee should report not later than four months after any such bill has been presented to both Houses; the motion was agreed to and a message was ordered to be sent to the Commons to seek their agreement thereto.

Extract from Votes and Proceedings of the House of Commons 10 March 2003

Draft Corruption Bill (Joint Committee),-*Ordered*, That the Lords Message of 12th February relating to a Joint Committee of both Houses to consider and report on any draft Corruption Bill presented to both Houses by a Minister of the Crown be now considered.

That this House concurs with the Lords in their Resolution relating to the said Joint Committee.
That a Select Committee of seven Members be appointed to join with the Committee appointed by the Lords to consider any such draft Corruption Bill.
That the Committee shall have power-

(i) to send for persons, papers and records;
(ii) to sit notwithstanding any adjournment of the House;
(iii) to report from time to time;
(iv) to appoint specialist advisers;
(v) to adjourn from place to place within the United Kingdom; and

That Vera Baird, Mr Edward Garnier, Mr John MacDougall, Mr Mark Oaten, Mr Richard Shepherd, Mr Paul Stinchcombe and Dr Desmond Turner be members of the Committee.-(*Derek Twigg.*)

Extract from House of Lords Minute of 24 March 2003

Corruption—It was moved by the Chairman of Committees that the Commons message of 11th March be now considered, and that a Committee of seven Lords be appointed to join with the Committee appointed by the Commons, to consider and report on any draft Corruption Bill presented to both Houses by a Minister of the Crown;

That, as proposed by the Committee of Selection, the Lords following be named of the Committee:

L. Bernstein of Craigweil
L. Campbell-Savours
L. Carlisle of Bucklow
B. Scott of Needham Market
L. Slynn of Hadley
L. Waddington
B. Whitaker;

That the Committee have power to agree with the Commons in the appointment of a Chairman;
That the Committee have leave to report from time to time;
That the Committee have power to appoint specialist advisers;
That the Committee have power to adjourn from place to place within the United Kingdom;
That the reports of the Committee from time to time shall be printed, notwithstanding any adjournment of the House;
That the Committee do report no later than four months after the presentation of any such draft bill;
And that the Committee do meet with the Committee appointed by the Commons today at half past four o'clock in Committee Room 3A;

the motion was agreed to; and a message was ordered to be sent to the Commons to acquaint them therewith.

Proceedings of the Joint Committee

MONDAY 24 MARCH 2003

Members present:

Vera Baird
Lord Bernstein of Craigweil
Lord Campbell-Savours
Lord Carlisle of Bucklow
Mr John MacDougall
Mr Mark Oaten
Baroness Scott of Needham Market
Lord Slynn of Hadley
Mr Paul Stinchcombe
Dr Desmond Turner
Lord Waddington
Baroness Whitaker

Members disclosed their interests relating to the draft Bill, pursuant to the resolutions of the House of Commons 13th July 1992 and the House of Lords 2nd July 2001:

Lord Bernstein of Craigweil declared an interest as a Director of Waddington Galleries Limited; Trustee, Jerusalem Foundation (UK); and Trustee, Trusthouse Charitable Foundation.

Lord Carlisle of Bucklow declared an interest as a retired barrister-at-law; former Chairman, Society of Conservative Lawyers; and member, Justice.

Baroness Scott of Needham Market declared an interest as a non-executive director, Entrust (landfill tax credit scheme regulator); non-executive director, Anglia Television (28 October 2002); elected member, Suffolk County Council; member, Commission for Integrated Transport; Vice Chair, Local Government Association; First Great Eastern Stakeholder Advisory Commission (2 December 2002); President, Association of Value Management; and Chair, Local Government Association Transport Executive.

Lord Slynn of Hadley declared an interest as retired a Lord of Appeal.

Lord Waddington declared an interest as Trustee of the estate of J.C. Waddington which owns farmland in Read, Lancashire; Trustee, Natural Justice; Vice Chairman, Bermuda Society; and as a member of the Joint Committee on Parliamentary Privilege 1998-99.

Baroness Whitaker declared employment (remunerated) on a consultant basis, as a member of the Friends Ivory Sime Committee of Reference for ethnical and socially responsible investment, and as part-time Deputy Chair of the Independent Television Commission. She also declared an interest as member of the Advisory Council of Transparency International (UK); Amnesty International; Justice; Liberty; Opportunity International; and Society of Labour Lawyers. She also declared an interest as a non-serving magistrate; and consultant in ethical investment, ISIS Asset Management (Friends Provident).

Vera Baird declared an interest as Queen's Counsel remunerated by the Legal Services Commission. She also declared an interest as Chair, Society of Labour Lawyers; Chair, Fawcett Society Commission on Women and Criminal Justice; member, Council of Justice; and member, Fabian Society.

Edward Garnier declared as an interest his private practice at the Bar.

Mark Oaten declared an interest as Associate Editor, House Magazine.

Richard Shepherd declared an interest as non-executive founder Chairman of Partridges of Sloane Street Ltd (food retailing), and Shepherd Foods (London) Ltd. He also declared an interest as a former member of Lloyd's -- resigned with effect from 31 December 1994 (categories of business underwritten in open and run-off years: all, except life); member of the Court of Governors, London School of Economics; and member of the Board of the

Bologna Centre of the John Hopkins University, Paul Nitze School of Advanced International Relations.

Paul Stinchcombe declared an interest as a practising barrister.

Lord Slynn of Hadley was called to the Chair by acclamation.

The Committee deliberated.

Ordered, That the public be admitted during the examination of witnesses unless the Committee otherwise orders.—(*The Chairman.*)

Ordered, That the uncorrected transcripts of oral evidence given, unless the Committee otherwise orders, be published on the Internet.—(*The Chairman.*)

The Committee further deliberated.

[Adjourned till Wednesday 7 May at a quarter past Four o'clock

WEDNESDAY 7 MAY 2003

Members present:

Lord Slynn of Hadley, in the Chair

Lord Bernstein of Craigweil	Baroness Scott of Needham Market
Lord Campbell-Savours	Mr Richard Shepherd
Lord Carlisle of Bucklow	Mr Paul Stinchcombe
Mr Edward Garnier	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Mr Mark Oaten	

The Committee deliberated.

[Adjourned till Tuesday 13 May at quarter-past Four o'clock.

TUESDAY 13 MAY 2003

Members present:

Lord Slynn of Hadley, in the Chair

Vera Baird	Mr Richard Shepherd
Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Mr Edward Garnier	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Mr Mark Oaten	

The Committee deliberated.

Ordered, That Peter Alldridge be appointed a Specialist Adviser to assist the Committee in its inquiry into the draft Corruption Bill.—(*The Chairman.*)

The Committee further deliberated.

Draft Corruption Bill: Mr Laurence Cockcroft, Chairman, Transparency International (UK), Mr Jeremy Carver CBE, Head of International Law, Clifford Chance LLP, and Mr Graham Rodmell, Director of Corporate and Regulatory Affairs, Transparency International (UK), were examined.

[Adjourned till tomorrow at Two o'clock.

WEDNESDAY 14 MAY 2003

Members present:

Lord Slynn of Hadley, in the Chair

Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Mr Edward Garnier	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Mr Richard Shepherd	

The Committee deliberated.

Draft Corruption Bill: Mr Robert Wardle, Director, Serious Fraud Office, and Sir David Calvert-Smith QC, Director of Public Prosecutions, were examined.

[Adjourned till Tuesday 20 May at Five o'clock.

TUESDAY 20 MAY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Campbell-Savours	Baroness Scott of Needham Market
Lord Carlisle of Bucklow	Mr Richard Shepherd
Mr Edward Garnier	Dr Desmond Turner
Mr John MacDougall	Lord Waddington
Mr Mark Oaten	Baroness Whitaker

The Committee deliberated.

Draft Corruption Bill: Mr Bob McKittrick, President, Institution of Structural Engineers, was examined.

[Adjourned till tomorrow at quarter past Four o'clock.

WEDNESDAY 21 MAY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Vera Baird	Mr Richard Shepherd
Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Carlisle of Bucklow	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Baroness Scott of Needham Market	

The Committee deliberated.

Draft Corruption Bill: Professor Sir William McKay KCB, was examined.

[Adjourned till Monday 2 June at quarter past Four o'clock.

MONDAY 2 JUNE 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Vera Baird	Baroness Scott of Needham Market
Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Lord Carlisle of Bucklow	Lord Waddington
Mr Edward Garnier	Baroness Whitaker

The Committee deliberated.

Draft Corruption Bill: Professor Mark Pieth, Chairman of the OECD Working Group on Bribery in International Business Transactions, was examined.

[Adjourned till Wednesday 4 June at quarter past Four o'clock.

WEDNESDAY 4 JUNE 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Vera Baird	Baroness Scott of Needham Market
Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Lord Carlisle of Bucklow	Lord Waddington
Mr John MacDougall	Baroness Whitaker

The Committee deliberated.

Draft Corruption Bill: Lord Falconer of Thoroton QC, Minister of State for Criminal Justice, Sentencing and Law Reform, Mr Paul Stephenson, Bill Team Leader, and Ms Michelle Dyson, Solicitor, Home Office, were examined.

Lord Goldsmith QC, Attorney General, was examined.

[Adjourned till Tuesday 10 June at quarter past Four o'clock.

TUESDAY 10 JUNE 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Campbell-Savours	Mr Paul Stinchcombe
Lord Carlisle of Bucklow	Dr Desmond Turner
Mr Mark Oaten	Lord Waddington
Mr Richard Shepherd	Baroness Whitaker

The Committee deliberated.

Draft Corruption Bill: Mr Justice Stephen Silber, was examined.

The Committee further deliberated.

[Adjourned till tomorrow at quarter past Four o'clock.

WEDNESDAY 11 JUNE 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Vera Baird	Mr Richard Shepherd
Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Lord Carlisle of Bucklow	Lord Waddington
Baroness Scott of Needham Market	Baroness Whitaker

The Committee deliberated.

Draft Corruption Bill: Mr John Cridland, Deputy Director General, Mr Gary Campkin, Head of International Group, and Mr Andrew Berkeley, Barrister and Arbitrator, Confederation of British Industry, were examined.

The Committee further deliberated.

[Adjourned till Wednesday 18 June at quarter past Four o'clock.

WEDNESDAY 18 JUNE 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Vera Baird	Mr Paul Stinchcombe
Lord Bernstein of Craigweil	Dr Desmond Turner
Lord Campbell-Savours	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Lord Carlisle of Bucklow	

The Committee deliberated.

[Adjourned till Tuesday 1 July at quarter past Four o'clock.

TUESDAY 1 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Bernstein of Craigweil	Baroness Scott of Needham Market
Lord Campbell-Savours	Mr Richard Shepherd
Lord Carlisle of Bucklow	Mr Paul Stinchcombe
Mr Edward Garnier	Lord Waddington
Mr Mark Oaten	Baroness Whitaker

The Committee deliberated.

[Adjourned till tomorrow at quarter past Four o'clock.

WEDNESDAY 2 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Bernstein of Craigweil	Mr Richard Shepherd
Lord Campbell-Savours	Mr Paul Stinchcombe
Lord Carlisle of Bucklow	Dr Desmond Turner
Mr John MacDougall	Lord Waddington
Baroness Scott of Needham Market	Baroness Whitaker

The Committee deliberated.

[Adjourned till Tuesday 8 July at quarter past Four o'clock.

TUESDAY 8 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Bernstein of Craigweil	Baroness Scott of Needham Market
Lord Campbell-Savours	Mr Richard Shepherd
Lord Carlisle of Bucklow	Mr Paul Stinchcombe
Mr Edward Garnier	Lord Waddington
Dr Desmond Turner	Baroness Whitaker

The Committee deliberated.

[Adjourned till tomorrow at quarter past Four o'clock.

WEDNESDAY 9 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Campbell-Savours	Mr Richard Shepherd
Lord Carlisle of Bucklow	Dr Desmond Turner
Mr Edward Garnier	Lord Waddington
Mr John MacDougall	Baroness Whitaker

The Committee deliberated.

[Adjourned till Tuesday 15 July at quarter past Four o'clock.

TUESDAY 15 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Bernstein of Craigweil	Baroness Scott of Needham Market
Lord Campbell-Savours	Mr Richard Shepherd
Lord Carlisle of Bucklow	Mr Paul Stinchcombe
Mr Edward Garnier	Lord Waddington
Mr John MacDougall	Baroness Whitaker

The Committee deliberated.

[Adjourned till tomorrow at Two o'clock.

WEDNESDAY 16 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Campbell-Savours	Mr Paul Stinchcombe
Lord Carlisle of Bucklow	Dr Desmond Turner
Mr John MacDougall	Lord Waddington
Mr Richard Shepherd	Baroness Whitaker

The Committee deliberated.

[Adjourned till tomorrow at Ten o'clock.

THURSDAY 17 JULY 2003

Members present:

Lord Slynn of Hadley, in the Chair.

Lord Bernstein of Craigweil	Mr Paul Stinchcombe
Lord Campbell-Savours	Dr Desmond Turner
Lord Carlisle of Bucklow	Lord Waddington
Mr John MacDougall	Baroness Whitaker
Mr Richard Shepherd	

The Committee considered the draft report.

Paragraphs 1 to 162 were read and agreed to.

Resolved, That the draft Report be the Report of the Committee to both Houses.

Ordered, That the following papers be annexed to the Report:

1 Schedule of detailed points made about the draft Bill by witnesses, together with comments from the Home Office

2 Table of international obligations

3 Statutory provisions on the powers of the intelligence services

4 Note by Peter Alldridge, specialist adviser, on an alternative approach to locating the harm in bribery and corruption

Ordered, That the memoranda received by the Joint Committee be appended to the Minutes of Evidence.

Ordered, That The Chairman make the Report to the House of Lords and Mr Richard Shepherd make the Report to the House of Commons.

Witnesses

List of written evidence

List of unprinted written evidence

Additional papers have been received from the following and considered by the Committee. Since they were responses to the Home Office rather than the Committee, they have not been printed with the evidence.

Investment Management Association (DCB 3)

Association of British Insurers (DCB 25)