CORRUPTION

Draft Legislation

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The Queen's Speech 2002 announced that the Government would publish a Draft Bill to reform the laws on corruption. "The focus of the Bill", the Home Office press notice said, "is on raising standards in both public and private life and sending out a clear message across all sections of society that corrupt practices will not be tolerated."

The Joint Committee of both Houses that considered the Draft Bill produced its report on 17 July 2003 (HL Paper 157; HC 705). The Report was critical of the complex language of the Bill and of the failure to define corrupt conduct sufficiently clearly. It also concluded that the Draft Bill's clause on the waiving of parliamentary privilege required reworking.

The Committee produced an alternative approach which challenged the description of corruption at the heart of the Draft Bill, and invited 'the Home Office to bring forward a revised Bill'. In view of this recommendation it seems unlikely that new Corruption legislation will be presented in the Government's programme for 2003-04. This Note considers the main issues and criticisms of the Bill raised by the Committee.

Contents

A. Introduction

The existing legislation on corruption and related areas can be found in a variety of Acts, of which those relevant to current reform proposals are:

Public Bodies Corrupt Practices Act 1889
Prevention of Corruption Act 1906
Prevention of Corruption Act 1916
Representation of the People Act 1948
Criminal Justice Act 1988
Security Service Act 1989
Intelligence Services Act 1994
London Local Authorities Act 1995

There is also the common law offence of bribery, comprising many overlapping offences, broadly described by the general statement:

> Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity[1]

Although the number of prosecutions for corruption in the past ten years has been very small the conclusion of the Law Commission that the present law was in an unsatisfactory state has been generally accepted. The Law Commission produced its report for the government (*Legislating the Criminal Code*: *Corruption*[2]*)* in January 1998. It contained detailed proposals which concluded that the present arrangements were 'obscure, complex, inconsistent and insufficiently comprehensive'. It proposed repeal of all or parts of the existing relevant Acts from 1889 to 1995 and their replacement by a modern statute and incorporation of the common law offences of bribery. The new offences, drawn from these existing statutes and common law, apply to both the public and the private sector; it has been widely recognised that it is no longer useful or practicable to distinguish between the agents involved in public authorities and those in the private sector, given privatisation, the contracting out of government services and the general blurring of the boundaries.

The Government responded to the Law Commission in a White Paper[3] in 2000 and it was announced in the Queen's Speech 2002 that a *Draft* Corruption Bill would form part of the government's programme 2002-03.

The Joint Committee on the Draft Corruption Bill under the chairmanship of Lord Slynn of Hadley was appointed on 24 March 2003; the greater use of pre-legislative scrutiny of bills

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1 *Russell on Crime*, 12th edn 1964, p381
2 Law Commission, *Legislating the Criminal Code: Corruption*, Report No. 48 (also HC524 1997-98)
3 Home Office, *Raising Standards and Upholding Integrity* Cm 4759, June 2000

was one of the Modernisation Committee's recommendations in its first report .[4] and the Joint Committee considering the Draft Corruption Bill was the first to be staffed and supported by the newly established Scrutiny Unit. The members of the Committee were: Lord Slynn of Hadley (chairman), Lord Bernstein of Craigweil, Lord Campbell-Savours, Lord Carlisle of Bucklow, Baroness Scott of Needham Market, Lord Waddington, Baroness Whitaker; Vera Baird MP, Edward Garnier MP, John MacDougall MP, Mark Oaten MP, Richard Shepherd MP, Paul Stinchcombe MP, Desmond Turner MP. The Committee appointed a specialist legal adviser, Pete Alldridge

The Draft Corruption Bill incorporated many of the proposals of the Law Commission's report. According to the press release from the Home Office,[5] the intention of the Bill was to:

- Clarify and codify the law on corruption in line with developments both in this country and internationally.
- Unite the various overlapping offences of corruption in a single statute to make the law easier to apply and more effective.
- Ensure that the law is comprehensive and applicable to all.
- Ensure that the UK is in line with international obligations on corruption.

The Law Commission had **not** dealt with the issue of MPs and corruption since this was at that time under consideration by the Joint Committee on Parliamentary Privilege of 1998-99.[6]

That Committee accepted that Members of Parliament should be brought within the criminal law, and concluded:

> While recognising its disadvantages, we recommend the second option… as the best way forward. Members of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that evidence relating to an offence committed or alleged to be committed… shall be admissible notwithstanding article 9. This would be fair, workable and acceptable to the public.

The Draft Bill incorporated one clause (Clause 12) relating to the issue.

The Draft Bill did not contain any provision for an offence of trading in influence, although there had been some prior indications that it would. Nor did it include a new offence of misuse of public office which would have consolidated the existing civil law tort of misfeasance in public office, and the common law offence of misconduct in public office. The Nolan Committee on Standards in Public Life had proposed a new statutory offence of misuse of public office in 1997.[7]

The Draft-Corruption Bill relates to the law in England and Wales. The criminal law in Scotland is devolved and is now the responsibility of the Scottish Executive. The

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4 HC224-I 2001-02
5 Home Office Press Notice, 13 November 2002
6 HC 214-I 1998-99
7 Committee on Standards in Public Life, 'Misuse of Public Office' Consultation paper, July 1997

Draft Bill also covers Northern Ireland, as confirmed by the then Home Secretary in April 2001. [8]

B. Framework of the Bill

The Committee considered the question central to a Draft Bill on corruption: What is the conduct which the offence of corruption is seeking to deter or to punish? The Draft Bill's definition of corruption is predicated upon the *agent-principal* relationship; and it is the betrayal of the duty of loyalty owed by the agent to his principal which is the essence of the offence.

The central clause of the Bill is:

> 5. Conferring an advantage: meaning of corruptly
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> 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.

The CBI, the OECD, Transparency International (UK), the President of the Institution of Structural Engineers and the former Director of the Serious Fraud Office were critical of the

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[8] HC Deb 10 April 2001 c550W

language used to define corruption and the complexity of the concept of corruption, despite the assurances to the Committee of Lord Falconer, the Home Office minister then responsible for the Bill, that 'we have gone for a middle course which we think embraces both simplicity but also clarity and codification.'[9]

The Report of the Joint Committee on the Draft Corruption Billcomments that '…much of the concern of our witnesses has centre 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.'[10] Reliance on the agent-principal relationship therefore affects other clauses of the Bill including the defence offered to a charge of corruption in the private sector – the consent of the principal - which would mean that consent of an employer to a corrupt act by his agent is acceptable in law. The Draft Bill also allows corruption between principals.

The Committee also considered at length the absence from the Draft Bill of any concept of immoral or improper behaviour, although it rejected the addition of the word 'dishonestly' or 'dishonesty' in the offence because of the problems of definition in court.

The conclusion of the Committee in respect of the central relationship was 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**
>
> We believe that…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.

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9 Lord Falconer, Oral evidence, Wednesday 4 June (Q446)

10 p 31 (para 85)

C. International Obligations

The need for reform and rationalisation of the UK's corruption law has been in large part driven by the International obligations incurred in agreements with the OECD, the European Union, the Council of Europe, and the United Nations which have attempted to develop common standards for anti-corruption measures internationally.

- **OECD Convention on combating bribery of foreign public officials in international business transactions** Legally binding agreement on the UK, currently implemented 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** Legally binding agreement on the UK

- **Council of Europe Criminal Law convention on Corruption** Agreement in force but not legally binding on the UK as the UK currently has no offence of 'trading in influence'.

- **Council of Europe Civil Law Convention on Corruption** Agreement not in force and not ratified; not legally binding on the UK

- **European Union Convention on the fight against corruption involving officials of the European communities or officials of member states of the EU** UK has ratified but agreement not in force until last member state of EU has 'notified completion of its internal procedures'

- **United Nations Convention on Corruption** Draft agreement**,** not currently legally binding on the UK

The Committee said of the international dimension:

> 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 .

The problem of corruption affecting developing economies had been addressed by the International Development Select Committee in April 2001[11] and by pressure groups such as Transparency International and Inside Fraud.[12]

The Committee heard evidence from witnesses representing Transparency International (UK), from Professor Mark Pieth of the OECD Expert Group on Bribery in International Business Transactions, and written evidence from Drago Kos, chairman of GRECO (the Council of Europe's Group of States Against Corruption) and from the Corner House, an NGO, like Transparency International, with a development and human rights perspective.

The 'OECD Convention' is perhaps the most significant of the agreements entered into by the UK (signed in December 1997, ratified in December 1998). Following the events of 11 September, the *Anti-Terrorism, Crime and Security Act 2001* was passed which attempted among its many provisions to satisfy the OECD Convention by including Part 12 extending the current offences of bribery and corruption outside the United Kingdom.

The Convention 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

However neither Part 12 of the 2001 Act nor Clause 13 (Corruption outside the UK) of the new draft legislation specifically refers to *foreign public officials*. The Committee heard from Professor Pieth, who was Chair of the OECD Expert Group on Bribery in International Business Transactions, that the failure of the existing and proposed legislation to capture *active bribery of a foreign public official* was a weakness in the eyes of the OECD.

> We would say, why do you not use the convention that says very clearly, in five lines, what is to be forbidden. 34 countries in the world representing all your competitors in the international terrain have simply done that. …You could save a lot of the situation if you inserted one clause making it very clear the foreign, public officials are covered.

Transparency International, a ten year old NGO lobbying on corruption issues worldwide, believed that the extra-territorial provisions of the *Anti-Terrorism Crime and Security Act* were not effective for a number of reasons to do with difficulties of investigation, resources, international cooperation. But TI expressed greater doubts about the efficacy of the proposed Clause 13 of the new legislation.

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[11] _*Corruption* HC 39 2000-01

[12] _www.transparency.org/index.html and www.insidefraud.com/pdf/pressreleasefinal.pdf

> **Graham Rodmell ((Director of Corporate and Regulatory Affairs, TI (UK))**: We have a concern about the comparison of this Bill with 2001 Act Part 12. That came in following September 11 and had to be done with what was available … common law and the quaint old statutory offences of 1889, 1906 and 1916…At least those offences, for what they were, read over into the new international situation. When you come to look at this Bill, for some of the reasons I have already illustrated, I think it would be virtually impossible to prosecute for the foreign element… It comes in like a side-wind. ..Why should there not be a specific inclusion of the offence wherever it takes place?[13]

The omission of a 'trading in influence' offence was also considered by Transparency International and other witnesses to be a weakness in the Bill, since the Council of Europe Criminal Law Convention appeared to require signatories to it to adopt such an offence in order for the Convention to be legally binding. TI noted the omission though it did not press for it to be included specifically in the Bill. The Corner House expressed surprise that the offence was not included since it would enable the UK Government to ratify the Council of Europe Criminal Law Convention (above).[14]

On the issue of UK subsidiaries abroad there were strong differences of view from witnesses. Not surprisingly the NGOs with international development and human rights concerns (the Corner House and Transparency International (UK)) argued strongly for the Bill to include specific provision to make parent UK companies responsible for corrupt acts of their subsidiaries. It was said Corner House 'a serious loophole...evidence shows that it is through agents and subsidiaries that the vast majority of bribes are paid.'[15] Transparency International argued that prosecutors should be able to prosecute companies which are responsible for the actions of their subsidiaries or joint ventures or intermediary agents. It suggested in a Memorandum to the Committee[16] that 'Clause 13 should be extended to include subsidiaries 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 suitable anti-corruption measures…'

However, written and oral evidence from PriceWaterhouseCoopers, the CBI and Professor Pieth of the OECD, suggested that Clause 13 of the Bill (Corruption committed outside the UK) would not and, some believed, should not cover foreign subsidiaries. The OECD Convention 'did not impose an international, binding standard of coverage' on foreign subsidiary responsibility although Professor Pieth remarked that the OECD was now in the process of discussing this issue.

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13 Oral evidence 13 May 2003
14 Written Evidence (DCB1)
15 Written evidence from The Corner House
16 para 4.3 DCB 18

> There I must admit that the OECD has a weakness built in its own instrument. We would like to see you covering your foreign subsidiaries. The problem is we did not manage to get our act together in 1997 when we drafted the Convention to make that an international biding standard.

The Committee was **not persuaded of the argument 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**.

D. The Issue of Privilege

Clause 12 of the Draft Bill is an attempt to allow parliamentary proceedings to be used in corruption prosecutions notwithstanding Article 9 of the Bill of Rights. The Clause says:

> **'Proceedings in Parliament**
>
> (1) No enactment or rule of law preventing proceedings n Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for a corruption offence.
>
> (2) These offences are corruption offences -
>
> (a) an offence under this Part;
> (b) an attempt, conspiracy or incitement to commit an offence under this Part;
> (c) aiding, abetting, counselling or procuring the commission of an offence under this part.'

The issue of privilege and the law relating to the bribery of, or the receipt of a bribe by, a Member of Parliament is a difficult and controversial one. Article IX of the Bill or Rights 1689 states:

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

The issue has been much discussed over the years, but particularly since the Salmon Report[17] and the parliamentary investigation into the Neil Hamilton case. During the debate on 17 November 1997 on the 7th and 8th reports of the Standards and Privileges Committee Nicholas Winterton said:

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[17] Royal Commission on Standards of Conduct in Public Life cm 6524 1976

> …is hard to see how Parliament can much longer avoid legislating on what constitutes unethical or illegal behaviour on the part of its Members. The status quo may simply yield more not proven verdicts of this type.[18]

And Tony Benn argued:

> A corrupt practice should be defined for a Member of Parliament. […] if someone were charged with a corrupt practice as a Member of Parliament, the matter could go to a court to determine. The person concerned would be able to present his case.

As a result of the uncertainty and concern over the position of MPs with regard to the common law offence of bribery of a public officer, and statutory law, a joint committee of both Houses had been set up and reported in March 1999.

> There is some uncertainty on whether the common law offence of bribery of a person holding a public office extends to members of Parliament. The 1975 Royal Commission on standards in public life, presided over by Lord Salmon, expressed the view that membership of Parliament did not constitute public office for the purposes of the common law. Doubt has been cast on this pronouncement by the prosecution of Mr Harry Greenway, a member of the House of Commons, for this offence in 1992 (he was subsequently acquitted).
>
> …if the common law offence of misuse of public office does apply to Members, a trial could encounter insuperable difficulty should either side wish to call evidence falling within article 9 of the Bill of Rights. Article 9 prevents evidence being given in court which questions proceedings in Parliament. In consequence the prosecution might lack evidence necessary for a successful prosecution, or the defendant might be unable to call evidence needed for his defence. Either way, if that were to happen, a proper trial of the Member might not be possible. For the same reason a person who offers a bribe may also be beyond the reach of the courts.[19]

The Joint Committee considered a range of 'middle way' options, but concluded that the principle of bringing members within the statute law on bribery should be accepted (paras 166-169):

> The problem of bribery exposes a conflict between two important public interests: the need for corrupt members of Parliament and those who corrupt them to be punished in the same way as everyone else, and the need to maintain the freedom of speech protected by article 9. There is no easy answer, and no answer is perfect.
> While recognising its disadvantages, we recommend the second option… as the best way forward. Members of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that *evidence relating to an offence committed or alleged to be committed under the relevant sections shall be admissible notwithstanding article 9*.
> ... We anticipate, further, that in only a small proportion of any prosecutions will it be necessary to question proceedings in Parliament. Thus, to allow evidence to be given

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[18] HC Deb 17 November 1997 c93 and 102

[19] HC 214-I 1998-99

> as we recommend will involve only a minimal encroachment upon the territory safeguarded by article 9.
> …Bribery can only be dealt with effectively using the police and the courts. There are too many disadvantages in any other solution. In particular, this option is the only credible remedy. It is also the only credible deterrent for any briber, as well as being the best means of retaining public confidence.

The Joint Committee was however concerned to provide safeguards against vexatious prosecutions, and therefore rejected the Law Commission proposal that the approval of the law officers should no longer be sought for the institution of proceedings in relation to its new offence.

The sixth report of the Neill Committee on Standards in Public Life, *Reinforcing Standards*, urged the Government in 2000 to 'introduce its proposed legislation on the criminal law of bribery as soon as possible in order to remove any uncertainty regarding the scope of the statutory offence of bribery and to make clear that Members of both Houses of Parliament, acting in their capacity as Members, and those who bribe a member of either House of Parliament fall within its scope'.

As the Committee's discussions developed a number of concerns were expressed that the intentions of the Joint Committee had been misinterpreted, and that Clause 12 as drafted would apply to all parliamentary proceedings, including the evidence of witnesses in select committees, and an MP's words about his own or another's conduct.

The Committee felt that the recommendations of the Joint Committee on Parliamentary Privilege in 1999 were not intended to expose witnesses before select committees to court proceedings as to what they had said in Parliament.

The Committee also considered arguments that Clause 12 was not necessary to the Bill. Prosecutions in Australia and the United States did not rely upon infringement of freedom of speech in parliament or reference to parliamentary proceedings, although the Clerk of the House of Commons accepted 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.'[20]

The Committee's Report also makes the point that the exclusion of MPs from statutory offences 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 Pubic Bodies Corrupt Practices Act 1889 and a Member of Parliament is not an agent for the purposes of the Prevention of Corruption Act 1906.'

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[20] , Memorandum by the Clerk of the House of Commons

The Joint Committee on Parliamentary Privilege had suggested a new Parliamentary Privileges Act to incorporate its recommendations on the issue of privilege and freedom of speech and this view was endorsed by the Joint Committee on the Draft Corruption Bill.

Taking into account the 'competing interests between convicting the corrupt and protecting freedom of speech in Parliament', the Committee concluded that of the Clause 12 be narrowed to apply to the words or actions of an MP or peer in a case where he is the defendant. 'In relation to witnesses and other Members, we conclude that the balance of public interest lies with protecting freedom of speech in Parliament.' The Committee therefore drafted a new Clause 12, subject to further drafting advice, that

> '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 –
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> (a) in proceedings for that offence against that person; or
> (b) in proceedings for a corruption offence which arises out of the same facts.'

E. 'Misuse of Public Office'

It had been thought that new legislation would include a new offence of misuse of public office. Responding to an enquiry from the chairman of the Joint Committee on Parliamentary Privilege about progress on this issue of misuse of public office on 18 November 1998 the Home Secretary replied:

> This is proving particularly tricky and no decision has yet been taken on which categories of public servant might be included. It may, as you say, prove necessary to examine the statutory duties of Members and Ministers in this context. We are conscious that we need to avoid unnecessary overlaps between any new offence and existing offences, civil remedies and disciplinary codes. Clearly, we do not wish to capture conduct which can be best left to disciplinary procedures or other effective mechanisms. Equally, however, there would be presentational difficulty in excluding certain categories of public servant from the scope of any new offence.[21]

The Committee on Standards in Public Life (the Nolan Committee) had recommended in a consultation paper *Misuse of Public Office: a New Offence?* in July 1997.

> The Committee believes that the responsibility of public office-holders should continue to have a special emphasis in statute law. We also consider that there should be a statutory regime for misconduct which does not entail bribery or corruption,

[21] Both letters are reproduced in Joint Committee on Parliamentary Privilege Report HC 214-III 1998-99

> otherwise the proposed changes may leave public office holders with less stringent legal obligations than company directors or trustees.
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> ...We recommend, therefore, the introduction of a new statutory offence of *misuse of public office.*[22]

Nolan recommended that the offence apply to ministers, civil servants, councillors, local government officers and Non-Departmental Public Bodies. As part of its report on local government, which was issued simultaneously, the Nolan committee recommended the abolition of surcharge of councillors and local government officers in favour of this new offence. The *Local Government Act 2000* did subsequently abolish surcharge.

Transparency International supported a separate offence, as 'a useful tool for upholding public integrity in cases where to mount a full prosecution case would present insuperable difficulties'.

The Committee did not support the inclusion of a new offence, nor did it consider the draft Bill the appropriate vehicle for giving a statutory definition of misconduct in public office.

F. Clauses on the Intelligence Services and the Director of Public Prosecution

Clause 15 exempts the Intelligence Services – ie the Security Service, the Secret Intelligence Service and GCHQ - from being charged with committing a corruption offence provided that they are operating under the authority given by the Secretary of State at the time of the apparent offence. Three conditions have to be met for that authorisation to be given.

This clause was considered to be highly contentious. Professor Pieth, who chairs the OECD Working Group on Bribery in International Business Transactions said that this clause was 'asking for trouble… That is going to trigger off huge debates internationally.' He added that:

> …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.[23]

Drago Kos, chairman of GRECO, wrote to the Committee that:

> No international treaty would allow an exemption from the general criminalisation of corruption like the one included . …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…There is hardly any reasonable legal explanation for the text …

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[22] Committee on Standards in Public Life, *Misuse of Public Office: a new Offence*? A consultation paper from the Nolan Committee

[23] Oral evidence, 2 June 2003 Q405

The Report argues that '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 does not conflict with the objectives' of the OECD Convention and the Council of Europe's Criminal Law Convention , which are summarised as being

- 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

The Committee was concerned with the possibility that the intelligence services would still be exempt from corruption charges even if the conditions in Clause 15 had *not* been met, and the authorisation should not have been given.

The functions of the Intelligence Services, as set out in the *Security Service Act 1989* , S 1,(3) and the *Intelligence Services Act 1994* S1(2)(b) include the 'economic wellbeing' of the United Kingdom' and the Committee expressed concern at the proposal in Clause 15 to exempt activities which would be made in the interests of or to safeguard the wellbeing of the UK, [24] and risk placing the UK in breach of its international obligations, in particular Article 5 of the OECD Convention and Council of Europe's criminal law convention. The Report invites the Government to give further consideration to the breadth of the Clause 15 exemption for the intelligence agencies, and consider amending the Clause to exclude 'economic wellbeing'.

The consent of the Attorney General to prosecutions for the new offence (Clause 17) was not included in the Law Commission's original report; but because of the protection of Members of Parliament and peers by parliamentary privilege, the Joint Committee on Parliamentary Privilege had felt it necessary to have the AG filter, in order to protect Members of Parliament and peers from frivolous vexatious actions if, as they recommended, Article IX of the Bill of Rights was waived. However, the involvement of the Attorney General, a Government appointment in the UK, was questioned by Drago Kos of GRECO in written evidence, who wrote that ' it is hard to understand why the Attorney General...needs to give consent to start the proceedings…the requirement of the AG's consent might give rise to serious misinterpretation and favour a perception of political interference..'[25]

It was suggested that the Serious Fraud Office might take over responsibility under the Bill for all corruption cases (currently their minimum threshold for taking on cases is when sums of one million pounds are involved).

Accepting the arguments that for the sake of the appearances ministerial involvement should be avoided the Report concluded that consent to prosecute should lie with the Director of Public Prosecutions or one nominated deputy.

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[24] the wording in the two Acts is slightly different.

[25] Memorandum from Drago Kos, Chairman, GRECO (DCB 12)

G. Alternative approach

The problems identified by the Committee with the Bill following the suggestions and criticisms put to it were

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

The Committee considered a number of ways of modifying the bill to deal with these problems: for example by introducing an element of moral turpitude into the offence; by replacing 'functions' in the Bill with 'duties'; adding specific offences such as trading in influence, and misconduct in public office. It rejected this marginal approach in favour of a more fundamental revision.

One alternative, put by the Committee's specialist legal adviser, Peter Alldridge, then of Cardiff University, was a 'market' based model which identifies corruption as

> conferring or receiving 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.[26]

The Committee considered that this model had a number of advantages over the Draft Bill: including that the principal-agent requirement becomes unnecessary, and therefore that the 'consent of the principal' is not relevant as a defence to corruption(Clause 7); the vice is clear, because 'corrupting' is used as a transitive verb; and the nature of the statute, to prevent corruption: (i) of government (ii) of markets, is clear.

In this model also Mr Alldridge considered that the adoption of the extra-territorial liability is, in principle, easier to justify because it transfers the emphasis to the proper operation of the organs of governments and markets, than with the loyalty of individual public servants; and covers the situation (absent from the Draft Bill) of one principal bribing another.

Although the Committee was attracted by this model, it concluded that *such* a radical departure, without having taken evidence to examine such a course, would not be possible. The Committee did however agree that the central problem was with the agent-principal model at the heart of the Bill, and therefore concluded that **the way to address the problems which are inherent in the Bill...is to move away from the definition of corruptly in Clause 5**.

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[26] See Annex 4 to the Joint Committee Report, *Note by Peter Alldridge, specialist adviser, on locating the harm in bribery and corruption – an alternative approach*

The new approach was to

> 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.

Looking at the definitions of corruption in other legal systems the Committee decided that the essence of corruption could be expressed in terms of duty or function thus:

> **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.**

This new definition would require a restructuring of the Bill because the subsequent clauses based upon the principal-agent concept would have to be removed, and with them the 'obscurity and complexity' of the Draft Bill. The definition would apply equally to the private and public sectors, corruption between principals would be covered, and it would be open for further specific offences to be created. The Committee also suggested that it would then be possible to consider including the text of Article 1 of the OECD Convention, appropriately modified, referring to the bribery of foreign public officials. **We believe**, the Committee concluded, **that a Bill centred on a simple definition such as our would be clearer and work better. We also believe it would be more likely to receive general approval**.

H. List of recommendations

The recommendations made by the Joint Committee on the Draft Bill are as follows**:**

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)

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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

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)