

London Criminal Courts Solicitors' Association

Response to the Home Office Paper

**BRIBERY – Reform of the Prevention of Corruption Acts and SFO
Powers in Cases of Bribery of Foreign Officials, A Consultation Paper,
December 2005**

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1984, it now has over 1000 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

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All members of the sub-committee participated as individual members of the LCCSA and the views expressed do not necessarily reflect those of any of their firms.

INTRODUCTION

Following proposals by the Law Commission in 1997 to modernise the law governing bribery and corruption offences, the Government undertook a period of consultation and published a draft Corruption Bill in 2003. The Bill attracted severe criticism in the pre-legislative scrutiny phase and unfortunately the recommendations made by the Joint Committee failed to provide sufficient clarity as to a suitable way forward.

In an attempt to establish consensus as to how the law in this area should be developed, the Government has invited comments on its paper, *“Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials”*. The Government seeks the views of stakeholders on any aspect of this Paper, but in particular it asks for responses to the 8 questions set out in Annex A.

Please find herewith the response of the LCCSA to each of the questions set in the Paper. In summary:

- We do not think there are any real advantages to altering the proposed definition of giving and receiving illicit advantages;
- We consider that a proper definition of the term ‘corruptly’ will lead to greater overall simplicity and a better understanding by both ordinary citizens and foreign law enforcement;

- We reject the inclusion of dishonesty as an element of the offence, concluding that the definition proposed by the Joint Committee offers the correct solution;
- We do not consider that the Bill should be redrafted so as to separate out offences applicable in the public sector from those which apply in the private sector, agreeing with the conclusions reached by the Law Commission in 1998. We believe the principal-agent relationship is satisfactory to deal with the myriad of different relationships in the private and public spheres. We consider the question of the principal's consent providing a defence to private sphere corruption to be unjustified;
- Subject to incorporating the comments made herein, the Bill should be implemented as it stands;
- We agree there should be a qualitative test to target truly criminal behaviour which could be set as low as substantially to ensure that the onus should be on a business to clean up its act;
- We agree that new operational powers are needed to tackle bribery of foreign officials either in the UK or abroad. We agree that the law should be changed to allow section 2 powers to be used at the vetting stage. We agree that individuals who have information on corruption cases prefer to be compelled by section 2 to avoid the risk of being sued or losing their jobs. We agree that the extension of powers should not be confined to cases where the bribery takes place overseas but should equally apply where foreign officials have been bribed in the UK by UK or foreign nationals and companies;

- This legislation will bring about an increase in the volume of work for defence solicitors and as such there will be increased costs.

Q.1 Do you think there are any real advantages in describing the crimes of giving and receiving illicit advantages as ‘bribery’ instead of ‘corruption’?

RESPONSE

We do not think there are any real advantages in altering the proposed definition. To ensure consistency and width of statutory application, the focus of the statute should be on addressing corrupt behaviour, rather than seeking to focus solely on bribery.

In terms of clarity of terminology, the Corruption Bill is designed to introduce consistency across what has hitherto been a disjointed and fragmented area of domestic law. The Bill seeks to replace the common law offence of bribery; the two offences in S.1 of the Public Bodies Corrupt Practices Act 1889; and the first two offences in s.1(1) of the Prevention of Corruption Act 1906 (no significant changes are made to the application of the law overseas). Through such consolidation of common law and statute law in this draft, the Bill seeks to address corrupt behaviour across public and private life of which bribery is but one part. Therefore, the advantage seems to remain with retaining the term ‘corruption’ in order that legislative terminology is applied and understood in a consistent manner.

Whilst we accept that in both national and international law the term ‘bribery’ is used to describe offences which cover non-pecuniary advantages and

apply to both the giver and receiver, we would argue that use of the term 'bribery' in this context would confer no significant benefit, only detriment. The term 'corruption' is already in place in both domestic and international law and therefore this Bill would not create confusion, merely confirm the nature of offending with which it is concerned. By focusing on corruption, the Bill makes it clear at the outset that this is an attempt to address the broad spectrum of offending which makes up corrupt behaviour as a whole. To use the term 'bribery' would, in our view, be misleading.

It should be remembered that one can have a culture of corruption with or without bribery, but bribery is, of itself, an act of corruption. Or to put it another way, bribery is one example of the actus reus of offending, corruption the resultant impact. Other examples of corrupt behaviour which can involve the giving or receiving of illicit advantages are fraud, extortion, intimidation, entrapment, cronyism and facilitation payments. In addition, acts which are not of themselves corrupt such as hospitality and client entertaining can be used in order to corrupt. Therefore, it is the abuse of power by those in positions of influence which the legislation should be seeking to target and to confine such abuse to bribery would, in our view, be short-sighted.

To restrict and narrow the definition of offending in this area to bribery could be useful if there were specific agency relationships, sectors or transactions against which the legislation were to be used. However, such narrow legal definitions will, of necessity, exclude other areas which can prove central to the wider problem in which the offending takes place. Therefore, it seems

sensible to retain a wider definition which focuses on the corruption itself in order that the legislation is applicable in as broad a sense as possible.

Q.2 Do you consider that the Bill should be radically simplified by leaving the central concept (whether ‘corruptly’, ‘undue’, or ‘improper’) undefined?

RESPONSE

We agree with the Joint Committee’s concerns that the Bill should not be so complex as to lead to a lack of accessibility to the ordinary citizen and/or foreign law enforcers who may be considering the Bill in translation. However, we do not accept either that “the main complexity of the Bill derives from defining the term ‘corruptly’...”, or that a reform of the law on corruption would benefit from a Bill that left ‘corruptly’ (or any other central concept) undefined.

We consider that a proper definition of ‘corruptly’ within the Bill will lead to greater overall simplicity and a better understanding by both the ordinary citizen and the foreign law enforcer.

Annex C provides an interesting and helpful overview of the courts’ attempts to define ‘corruptly’. It highlights not only the difficulties that have been encountered but also the differing strands of judicial interpretation that have evolved. Indeed, many have argued that it is this very confusion within the existing caselaw that primarily gives rise to the need for new legislation. Many of the existing authorities define ‘corruptly’ in a self justifying, circular

manner. Hence, the Court of Appeal in Wellburn [(1979) 69 Cr App R 254] stated that :

“‘corruptly’ is a simple English adverb..... and it means purposefully doing an act which the law forbids as tending to corrupt.”

Similarly, in the case of Harvey [(1999) Crim L R 70 CA], the Court of Appeal approved the trial judge’s direction that:

“‘corruptly’means purposely, deliberately doing an act..... which the law forbids as tending to corrupt.”

We do not consider such guidance to be helpful to the ordinary citizen. Yet, if the new Bill fails to define the central concept (be it ‘corruptly’ or any other term) it would leave those concerned to fall back on the existing caselaw, which would no doubt continue to evolve with differing and confusing strands.

On a strictly limited view, we accept that a Bill that left “corruptly” (or any other such concept) undefined would be more simple than a Bill that carried a definition. However, and more importantly, this would not simplify the law but, rather, leave it in its present confused state.

We consider that a Bill without a proper definition of its central concept would be of little value. We consider it essential that the Bill include a definition of its central concept; whether this is “corruptly”, “undue”, or “improper”.

Q.3 Have you any suggestion for a simple definition of the central harm?

RESPONSE

It is tempting for the criminal lawyer to seek a well known, tried and tested formula to resolve the problems that have arisen over the years with the definition of corruption. The common solution suggested over the years has been to introduce the concept of dishonesty into the definition of corruption. This initially attractive solution which accords with the evidence of the Criminal Bar Association to the Joint Committee and reflects the evidence of the Director of the Serious Fraud Office who said that most, if not all offences of corruption prosecuted by the SFO involved dishonest conduct, is not appropriate for an offence which can cover such a wide range of conduct by persons in public and private office. The DPP said in his evidence to the Joint Committee that a definition based on dishonesty would risk unduly limiting the scope of the offence, especially when it applied to offences by public servants.

In our view, most offences of corruption do involve evidence of dishonest conduct and there will be no difficulty prosecuting such offences fairly without dishonesty being included in the definition of the offence. Most people will continue to regard corrupt conduct as dishonest and they will be correct. Nevertheless, to insert dishonesty as an essential element of the offence of corruption would risk causing more difficulties than it would solve. The particular character of corrupt conduct and the need for a robust law against it

demand that there ought to be more latitude for prosecutors in order that the law can be applied to the range of conduct which ought to be prosecuted in the public interest.

It is also important, in our view, to consider carefully the international context of the fight against corruption and the work done in recent years to produce the Council of Europe and United Nations Conventions on Corruption. The law in the UK ought not to be made more complex to interpret than necessary; especially given the long history of domestic problems with the current law. If the concept of dishonesty was specifically included in the definition of the offence there would be a risk that UK law would end up being inconsistently applied compared to other international partners in the fight against corruption.

Having rejected the inclusion of dishonesty as an element of the offence, we conclude that the definition proposed by the Joint Committee is the right solution. It means that the restriction of the agent/principal definition in the draft Bill ought to be abandoned in favour of the definition proposed 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.

(Joint Parliamentary Committee on the Draft Corruption Bill
HL Paper 157
HC705
Published 31 July 2003)

Q.4 Do you consider that the Bill should be redrafted so as to separate out offences applicable in the public sector from those which apply in the private sector?

If so, should it provide:

- (i) that any giving or receipt of an advantage by a person exercising a public function would be criminal unless it was specifically authorised by the law or both of small value and in accordance with the official's terms and conditions of employment; if so, is there any further qualification needed to this (eg an additional requirement of declaration)?**
- (ii) That any giving or receipt of an advantage by an agent in the private sector should be criminal in the circumstances set out in the draft Bill?**

RESPONSE

We do not consider that the Bill should be redrafted so as to separate out offences applicable in the public sector from those which apply in the private sector.

We have considered all the reasons put forward in the Law Commission's Report, "Legislating the Criminal Code: Corruption" (1998).

We have considered in particular the view that “the distinction between public and private can no longer be regarded as a simple dichotomy: rather it is a spectrum. At one extreme there are quintessentially public bodies, the privatisation of which is scarcely conceivable; at the other, firms which exist to make profits for their owners and for no other purpose. In between, there is a grey area. The bodies in this area may or may not earn profits for shareholders, but their functions are such that it is a matter of public concern that they should be properly run.”

We consider that in view of this expanding “grey area” it is no longer appropriate to differentiate between the public and private spheres when legislating in an important area such as corruption. In 1998 the Home Office, among others, considered the distinction arbitrary. We agree. Such a distinction would inevitably lead to arbitrary distinctions between different bodies delivering the same function. Why should there be a different test for corruption in a publicly run prison than for corruption in a privately run prison? In the context of a market economy where private sector providers are increasingly used to deliver public services, a distinction between the public and the private sectors is increasingly hard to justify.

We agree with the conclusions reached by the Law Commission in 1998 namely:

- a. Although it might be said that corruption on the part of a public servant was, all other things being equal, more serious than corruption on the

part of a private agent, the seriousness of the offence is more appropriately dealt with at the sentencing stage;

- b. The question as to whether the public is more in need of protection than the private sector is irrelevant given that it has been the view of Parliament since 1906 that the private sector also needs the protection of the criminal law;
- c. The question as to whether higher standards of conduct are required in the public sector is again a matter that can more appropriately be dealt with at sentencing stage.

The current Consultation Paper “Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials” suggests an approach in direct contrast to the Bill previously proposed. This is despite the fact that, as the Law Commission commented in its 1998 Report, two thirds of those who responded on this point were in favour of abandoning the distinction between public and private bodies.

We believe the proposed split between public and private sector offences in the Consultation Paper would represent no significant improvement on the current state of the law. It was the view of the Law Commission in 1998 and many others that the law of corruption was complex, ill-defined and fragmented and should be restated in a modern statute.

To separate out the offences between the public and private sectors would produce similar inconsistencies and uncertainties and would lead to arbitrary distinctions and differences in application of the law.

A comprehensive definition of the law should be able to encompass the functions of a public 'agent' and private 'agent' alike. We see no reason why the concept of the principal-agent relationship should not be able to encompass functions performed on behalf of the public as well as those in the private sphere.

However, one aspect of this relationship that we do not accept is necessary and which we consider leads to confusion in the formulation of the law, is the defence of the principal's consent.

The Law Commission, in its Consultation Paper 145, initially took the view that "although the acceptance of a bribe with the principal's consent cannot amount to a fraud on the principal, it can contribute to a climate in which bribery is common." By 1998 the Law Commission had decided that this argument was unconvincing bearing in mind their abandonment of the second limb of the provisional definition of corruptly conferring an advantage. However, we do not see that the abandonment of the second limb of the provisional definition (we agree that this should be abandoned for the reasons given by the Law Commission at 5.70-5.73) renders the viewpoint concerning the principal's consent unconvincing.

The Consultation Paper suggests that “[t]he right context for deciding in which circumstances payments between principals should be illegal is in commercial law, including competition law.” We consider that simply because it may be more appropriate to prosecute a given set of circumstances using commercial law does not mean that those circumstances should not be capable of being examined from a corruption law perspective.

Furthermore, there may be cases in which the principal consents to the agent’s obtaining of an advantage - in particular in circumstances where the principal does so for his or her own ends or advantage - which may not be caught under commercial law and it may be something which is most appropriately dealt with as an offence of bribery. To take one example:

Employer A requests that Employee B interviews candidates for a highly paid prestigious position in her company. Candidates C-G apply. Candidate C pays Employee B £5000 to ensure that he is offered the position. If this is without the Employer’s consent it is corrupt. But even if it is with the Employer’s consent (the Employer believing, for example, that she will receive 50% of the bribe), surely that it also corrupt and should be subject to the sanction of the law?

In its paper “Raising Standards and Upholding Integrity” the Government agreed that where the conferment or acceptance of an advantage has been properly authorised, there is no breach of trust by the agent and

therefore no offence of corruption arises. The example to illustrate this was if it is the practice within a company to offer better, or faster service to any client who will pay extra for this, the employee accepting the extra payment in these circumstances will not be guilty of corruption.

In the example given, it would be unlikely in any event that a prosecution for corruption would follow given the likely transparency of any such arrangement and the fact that such arrangements are not uncommon. Furthermore, the practice described could be dealt with through an expanded clause 6 in that any additional payment received in these circumstances could be described as an additional but legitimate part of the remuneration of the agent.

Clause 7(3) seeks to deal with the situation where the principal's consent is given on a principal's behalf by an agent rendering that consent invalid if it is corruptly given. That deals with one aspect of the problem raised here but does not deal with the situation where the principal does not delegate the giving of the consent and him or herself does so corruptly.

In summary, we believe that there should be no separation between the public and private sectors in relation to the law of corruption, and there should be one statute governing corruption as originally intended. We believe the principal-agent relationship is satisfactory to deal with the myriad of different relationships in the private and public spheres.

However, we consider that the question of the principal's consent providing a defence to private sphere corruption to be unjustified.

Q.5 Do you consider that the best course is to introduce the Bill as it stands subject to the changes agreed in the light of the Pre-Legislative Scrutiny?

RESPONSE

We agree that, subject to the comments made in this Paper, and subject to the changes agreed in Pre-Legislative Scrutiny, the Bill should be introduced as it stands.

Q.6 Do you think that in defining corruptly we should replace “primarily” with “substantially”?

RESPONSE

We agree that there should be a qualitative test to target truly criminal behaviour. This could be set as low as substantially to ensure that the onus should be on a business to clean up its act. The definition needs to be kept relatively broad to identify corrupt systems rather than to show case major prosecutions.

Following high-profile corporate governance reports in the 1990s, many companies re-evaluated their values and ethics, and clarified their position with regard to gifts within this context. The Audit Commission has recommended, for example, that local government should incorporate the Committee on Standards in Public Life's 'seven principles of public life' into codes of conduct, which should include guidance on what gifts and hospitality may be accepted by employees. Organisations should produce a clear, concise, written code to protect the company against fraud, bad practice and abuse. It is of course accepted that most commercial enterprises are driven by a need to bring in new business and this involves influencing agents of other firms.

The Financial Times reported this week that City investment banks in London, flushed with record earnings are snapping up most of the corporate hospitality packages available to British companies for this summer's World Cup in Germany. The London banks have already secured about 20,000 tickets, more than 70 per cent of the corporate packages being sold in the UK.

The FT says that Champagne and fine-dining packages range from €900 (£618) for a single match to as much as €300,000 for a luxury corporate box holding 10 people. The problem only arises when these are proffered with the expectation of a future payback. It would be hard not to feel in debt to such a host. As the value of what is given increases, so an unspoken quid pro quo begins to creep in. Eventually the employee and

his or her employer may become unacceptably compromised. Policies are introduced to protect both employees and employers against relationships leading to bribery and corruption. The law should be developed to increase corporate responsibility for transparent systems rather than be designed to bring about more prosecutions of individuals caught operating inappropriately with little or no corporate governance.

Q.7 Do you agree that the law should provide that where in the view of the Director of the SFO there are reasonable grounds for suspecting that a case involves the corruption (bribery) of a foreign public official, then powers under section 2 of the Criminal Justice Act 1987 (to compel the production of documents and explanation of them) will also be available for the purposes of determining whether an investigation should be undertaken?

RESPONSE

We agree that new operational powers are needed to tackle bribery of foreign officials either in the UK or abroad. The SFO have experienced difficulty in obtaining assistance from foreign jurisdictions. We agree that the law should be changed to allow section 2 powers to be used at the vetting stage to shorten their enquiries and overcome problems substantiating or refuting allegations at an early stage. We agree that in practice, despite the apparent protections of the Public Interest Disclosure Act 1998, individuals who have information on corruption cases prefer to

be compelled by section 2 to avoid the risk of being sued or losing their jobs, particularly where what they are alleging does not seem to them to amount to serious or complex fraud.

We agree that the extension of powers should not be confined to cases where the bribery takes place overseas but should equally apply where foreign officials have been bribed in the UK by UK or foreign nationals and companies.

This extension would still require the Director of the SFO to suspect that the case involved corruption (bribery) of a foreign public official rather than actually to involve a relevant offence therefore these extended powers would resemble those enacted under section 62 of the Serious Organised Crime and Police Act 2005. The extended powers would be subject to checks and balances and be subject to judicial review to avoid excessive or inappropriate use.

Q.8 Will your organisation/authority face any extra costs under any of the proposals mentioned in this paper?

RESPONSE

Any increase in the use by the Serious Fraud Office in their section 2 powers, and any increase in the number of prosecutions will of course involve a greater amount of work for defence solicitors. In turn this will

mean increased costs for the client (if paying privately) or the Treasury (if the client is relying on public funds).

2nd March 2006