



THE GOVERNMENT REPLY TO THE REPORT FROM THE
JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL
SESSION 2002-2003 HL PAPER 157, HC 705

Draft Corruption Bill

**Presented to Parliament by the Secretary of State
for the Home Department
by Command of Her Majesty
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Introduction

The Draft Corruption Bill was published for pre-legislative scrutiny on 24 March 2003, and the Joint Committee's report on it was published on 31 July. The Joint Committee concurred with the Government that existing legislation is in an unsatisfactory state and reform is needed. However they did put forward a number of recommendations.

The Government is indebted to the Committee for the thoroughness of its work, the high level of commitment it has shown in preparing the report and for examining evidence from such a wide variety of stakeholders within such a demanding time-scale. It appreciates the depth and quality of the debate that arose from pre-legislative scrutiny and is grateful for the recommendations put forward and the opportunities for clarification.

We have considered at length all of the Committee's conclusions, in which there are four specific recommendations for change. In two cases we are able to take the recommendations on board exactly as the Committee has wished. We would like to consider a third further in discussion with the two Houses as it particularly concerns Parliament itself. However, as regards the central issue of the definition of corruption, we do have reservations on the proposal of the Joint Committee. Although we have made modifications to the definition to meet some of the issues of clarity and precision brought forward by the Committee itself or in evidence, we have not abandoned the agent/principal approach proposed by the Law Commission for reasons which we detail below.

We take the opportunity to express our thanks to Lord Slynn, the members of the Joint Committee and all those who submitted evidence to them. We are confident that the process of pre-legislative scrutiny has enabled significant improvements to the Bill to be made.

The next step is to continue the revision of the draft Bill with a view to introducing it in Parliament in due course.

The conclusions and recommendations of the Joint Committee and the Government response to them

- 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.**
- 2 **The case for a separate offence of trading in influence is not, in our view, convincing.**
- 3 **The draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office.**
- (1) We are grateful for the Committee’s conclusions on the above three points. We fully agree with them.
- 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.**
- 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.**
- 6 **Having examined all these different models, we consider that (leaving aside related offences) the essence of corruption could 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.
- 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”.**
- 8 **In the light of 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 satisfactory if the offences remain based on the concept of agency.**
- 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.**

- (2) We have carefully considered the views of the Joint Committee as concerns the central issue of the definition of corruption. Their criticisms on the definition of corruption are broadly two-fold. They relate to the clarity of the offence and the possibility that by adhering to the agent/principal construct, some corrupt acts will fall outside of the ambit of the offence. Although we share the Committee's concerns that the offence should be as far as possible clear and simple, we believe that clarity can only be achieved by setting out within the Bill the elements which make a transaction corrupt. We do not agree with the assessment that abandoning the agent/principal approach would make the offence clearer or easier to use, nor do we accept that the reliance on agent/principal makes the offence too narrow. Lastly, we submit that in some aspects the adoption of the Joint Committee's proposal would lead to an unacceptable narrowing of the law.

The definition of corruption in the draft Bill

- (3) The definition of corruption is based upon the agent/principal construct which has existed in corruption law since 1906 and is expressed in two instances of case law as: in the case of *Lindley* (1957) a dishonest intention to "weaken the loyalty of the servants to their master and to transfer that loyalty from the master to the giver", and in *Calland* (1967) "dishonestly trying to wheedle an agent away from his loyalty to his employer".
- (4) The agent/principal relationship is not a concept unique to the UK. Ireland, Canada and Australia have a similar structure to some of their offences of corruption and several countries, including Germany and Austria, have a concept of private sector corruption based around breach of duty, which is conceptually close to the agent/principal approach although not quite as broad. The breach of duty approach is present within all international instruments which address private sector corruption i.e. the Council of Europe Criminal Law Convention, the EU Joint Action and Framework Decision on Private Sector Corruption and the UN Convention on Corruption.
- (5) The enormous difficulty in defining corruption is how to differentiate an offence of corruption from all kinds of legitimate giving and receiving of advantages that make up ordinary transactions of business and social life. It seems to us that there are broadly two ways of doing this. One is by qualifying the payment as "improper" or "undue" or, as under current law, qualifying the act by the adverb "corruptly" and leaving it to the jury to determine what that means. If we were to take this approach it would have to be on the basis that we are satisfied that a uniform understanding exists as to what constitutes a corrupt act. The other approach, which we are proposing, is to list the constituent parts of what makes an act corrupt by a series of tests.

- (6) Whilst the approach which we have adopted does lead to a statute which is visually fairly complex and which may well not be immediately understood by a layman, it will lead to more uniform conclusions as to whether a given action is corrupt. The underlying principles are logical, straightforward and easily understood. We think that we have got the balance right in proposing a wide coverage of behaviour, but excluding acceptable levels of corporate hospitality, legitimate advertising, and receiving gifts in the private sector where the principal gives consent. We also believe that it will be possible for courts to give jurors clear instructions to steer them through the corruption tests within the Bill leading to consistency of conviction. Examples of such instructions were included in the Memorandum by Lord Falconer submitted to the Joint Committee.
- (7) We would argue strongly that there is no consistent understanding throughout society of what constitutes a corrupt act. In common parlance the word “bribe” is used to describe almost any kind of advantage with an aim to influence a person. A person might say to another: “if I bribe you by taking you to dinner, would you help me make these deliveries?”, or “a bicycle for your birthday is a bribe to make you work for your exams.” In the world of business it is difficult to know what constitutes a bribe: is it corrupt for an employee to accept a fishing trip from a supplier who wants to build up a relationship between the two firms, to go to a product launch in an expensive hotel or to accept a gift of thanks after a contract has been awarded? Without guidance as to what makes a transaction corrupt, we cannot expect uniformity of conviction or even prosecution. An ambiguous offence could lead to unfairness, only the very obvious cases being prosecuted and continuing uncertainty particularly in the business community as to what is or is not bribery.
- (8) Within the Bill there are two main elements of the offence which help to clarify what constitutes corrupt behaviour. These are the requirement that the advantage is intended as the *primary* motivator, and the provision that, in the private sector, principal’s consent exempts the conferring of an advantage from the criminal law of corruption.
- (9) The concept of “primarily” is straightforward and should be easily understood by juries. For example (taking the example given by the Joint Committee at paragraph 94), a person C gives an advantage to A hoping that in doing so he might influence A to buy supplies from his (C’s) company. Let us say that the advantage is a “free gift” of minimal value, such as an item of promotional stationery. The only reason for C to give A promotional stationery is to influence him in the performance of his functions – the stationery has advertising slogans on it and C hopes the slogans will stick in A’s mind when he is making the decision as to which company to buy from. A, of course, understands this when he accepts the stationery. However, C does not believe that it will be *primarily* the stationery that will influence A to buy a product from him. It is the concept *primarily*

that stops this everyday transaction from being corrupt. However, if the advantage is a large sum of money conferred secretly into A's bank account, then the *primarily* test would render the action corrupt. In Lord Falconer's Memorandum to the Joint Committee, he noted that a similar concept is used in NHS guidelines: hospitality should be *secondary* to the purposes of a meeting.

- (10) Likewise the concept of the defence of principal's consent (which exists in the private sector only) is an important restriction on the definition of what is considered corrupt behaviour. Giving a waiter an extra large tip in the hope that he would be influenced to give more attentive service next time the tipper patronised the restaurant would be saved from being corrupt in the draft Bill by concept of principal's consent.
- (11) To take another example to illustrate the above two concepts, we could consider a person who works in the financial services industry. Such a person is frequently given advantages in the form of commission by third parties in order to influence him to advise clients to buy certain financial products. So how would it be possible to differentiate a corrupt payment from a non-corrupt one? If the duty that the financial advisor has towards his principal (his client) is not subverted, then he will advise his client to buy a product because it suits the client's needs, not primarily because of the commission that he receives. Secondly, the commission would not be corrupt if the client is aware of all that it is reasonable for him to be aware and the client consents, since the bond of loyalty has not been broken.

Widening the approach beyond agent/principal

- (12) The Joint Committee suggests that by abandoning the agent/principal concept, it would be possible to encompass a much greater field of activities within the private sector, including corruption by heads of business and receiving of bribes sanctioned by the agent's principal, and that it would make the definition of corruption less complex. All references to the agent/principal concept would be removed from the Bill and the Bill would apply equally to the private and public sectors.
- (13) Attractive though the simplicity of their proposal might be, we do not think that it would be wise to abandon the agent/principal construct and the basic premise that corruption is subversion of loyalty to a principal. The vast majority of those who submitted evidence to the Committee, to the Home Office in response to the White Paper or to the Law Commission in response to its consultation document did not propose such a radical rethink. As Lord Falconer put it (Q460) "it is difficult to think of occasions when the essence of corruption is not cheating on the person who you should be looking after".

- (14) We have seen no evidence of activities of bribery outside of the agent/principal relationship which are morally reprehensible enough to be criminalised but which do not fall in the ambit of other statutes. We believe that the case mentioned by the Joint Committee at paragraph 87 of their report, in which the owner of one firm gives money to the owner of another firm in order to induce him not to tender for a particular contract, would be covered where done dishonestly by the criminal offence of bid rigging under the Enterprise Act 2002. As for the Joint Committee's suggestion that "bribery" which is sanctioned by a principal should be a criminal offence, we do not agree. If an employer in the private sector agrees that his employee can receive a payment or other advantage, then there is no reason for making the conferring of that payment a criminal offence. The purpose of the law on corruption in such situations is to protect the employer, but where he agrees to the "corruption", he does not need protection. As the Law Commission notes, it is difficult to argue how a commercial agent who accepts a gift with the knowledge and consent of his principal should be liable to sanction by the criminal law. The principal is not being cheated on. As concerns public functions, as explained above, principal's consent is not a defence.
- (15) By going beyond agent/principal, the Joint Committee definition would cover a variety of innocent situations such as small scale corporate hospitality designed to influence the recipient, advantages given or received in social life, even activities such as tipping a waiter, subject to the caveat "improper". As the Law Commission said of "corruptly": "for a term that is not statutorily defined to be included in the definition of an offence, we must be confident that its generally understood meaning is unequivocal and that that unequivocal meaning is the meaning we would like imported into the offence". No workable definition of "improper", which has meanings ranging from "incorrect" to "unsuitable" or "unbecoming" has, however, been mooted. It is not entirely clear what the definition proposed by the Joint Committee: "advantage to which a person is not legally entitled" means. But if it means that as long as there is some legal basis for the advantage, including any form of agreement between the parties, there is no corruption, then it is a charter for corruption. As we argued above, we believe that there would not be consistency amongst jurors as to whether anything but the most blatant cases of corruption are "improper". In effect in the draft Bill we define "corruptly" or "improper" through tests of whether the advantage is the primary motivator and whether there is principal's consent. Consider once more the examples in paragraphs 9 and 10 above. In the absence of any definition of "improper" could we really be sure that juries would come to the same conclusion?

The narrowing of the law that would follow adoption of the Joint Committee definition

- (16) Much of the complexity of the Bill derives from the need to cover a variety of complex situations. In some areas, adopting the offence proposed by the Joint Committee would entail a narrowing of the law - as follows:
- The proposed offence does not cover the situation where a bribe is offered not to the person whose behaviour it is intended to influence but a third party. For example if a person gives a bribe through an intermediary in order to influence someone to do something (for example giving a bribe to the wife of a public official in order to influence the latter to give a contract), it would neither be possible to prosecute the wife who is the recipient of the bribe, nor the official who has kept his side of the bargain and given a contract.
 - The Joint Committee’s definition does not address the behaviour in the Bill’s clause 3 offence: performing functions corruptly. If a person, for example, gives a contract to a company primarily because he has heard that the company gives corrupt rewards in return for the awarding of contracts, such behaviour is covered by the draft Corruption Bill but not the Joint Committee definition.
 - If the Joint Committee’s proposal were adopted, it would be necessary to prove that the recipient receives (asks for or agrees to receive) the advantage *with the intention* that it would influence him in the performance of his duties or functions. Thus a recipient of a bribe could claim that he received the bribe but that he did not intend it to influence him in any way and thus is not guilty of an offence, for example he took the bribe but did not intend to carry out his side of the bargain. It would clearly be undesirable if the law did not condemn, for example, an official who accepts a bribe having promised to give a passport in return, even if he never intends to carry out his side of the bargain.

Whilst some redrafting of the Joint Committee definition could iron out these lacunae, doing so would inevitably make the definition lengthier and more complex.

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.

- (17) We have noted the views of the Joint Committee. Discussions are taking place between officials in the Cabinet Office and the House authorities about the case for a Parliamentary Privilege Bill and what it might contain.

- 11** We therefore recommend that Clause 12 be narrowed. This would apply only to the words or actions of an MP or peer in the case were 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.
- 12** We recommend that Clause 12 be redrafted on the lines set out in paragraph 135.
- (18) We have carefully considered the views of the Joint Committee as concerns the scope of clause 12. This is a delicate and complex constitutional issue. A balance must be found between the desirability of lessening any evidential bar to prosecution which might lead to a guilty person going unpunished, and the need to ensure that there is no impediment to the freedom of speech in Parliament. In looking at this, we submit that the two do not always run at odds with each other. In the particular case of corruption, the ability to use parliamentary proceedings in evidence might be a factor which enhances the freedom of speech, by making sure that a person does not speak in Parliament as a result of a corrupt bargain. As concerns the specific question of removing witnesses from the scope of the derogation from privilege, whilst we take the Joint Committee's point that witnesses may lack parliamentary experience, it is also true that whereas a disciplinary system exists for MPs who receive corrupt advantages for speaking before Parliament, in practice there is no way of dealing with a witness who speaks to a Committee as a result of a corrupt bargain if, as may well be the case, his words are essential to the prosecution.
- (20) However we appreciate the force of the Joint Committee's concerns on this. As this is a matter which directly affects the working practices of Parliament, we would like to take the opportunity to listen further to the two Houses on this point before coming to a firm conclusion. We would particularly welcome the chance to look at the concerns raised by the Joint Committee in more detail.
- 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.
- (21) We are pleased to concur with the Joint Committee and are exploring the options as to how to make necessary provision in the Bill.
- 14** 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.

(22) We thank the Joint Committee for this recommendation. Having acted upon recommendation 15, we consider that we have met the Committee's concerns in this regard.

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 preventing or detecting serious crime.

(23) We are grateful for this recommendation and have made the necessary change in the Bill.



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