OBSERVATIONS OF THE COUNCIL OF HM CIRCUIT JUDGES

REFORMING BRIBERY

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1 We agree that there is a need to consider the consolidation and reform of the law relating to Bribery. In general terms we agree with the analysis of the problems currently faced as set out in 1.5 to 1.10 of the Consultation. We believe that the object of legislation in the field of criminal law should be to produce a clear and comprehensible statement of the law that is readily appreciated and easily understood. There have been too many instances of over complication in recent legislation. We preface our remarks by emphasising that this unsatisfactory trend is to be avoided if the law is to be effective in dealing with the mischief at which it is aimed.

2 We have commented on consultations in the past when the particular consultation has been drawn to our attention or when we have been asked to comment. We did not, however, have the opportunity to comment upon all those previous consultation processes described in paragraph 1.1 thus our views have not been canvassed on some aspects of the previous proposals made by the Commission.

3 The first matter raised in this consultation exercise is whether the law should continue to distinguish between offences in the public and private sectors. We recognise the force in the argument that certainty in law requires consistency in approach. We also recognise that in recent times fiscal policies have resulted in a greater amount of activity that was once dealt with in the public sector being contracted out to the private sector introducing an extended risk of corruption. There are, however, different approaches to ethical problems in each of these sectors Further there are quite different views as to what might be acceptable and what might not. In another consultation on corruption recently[1] we pointed out that we were conscious of the fact that the giving and receiving of advantage, whether a seat at Wimbledon or Christmas dinner at the Savoy, is a long-established aspect of customer/client care in the private sector. It is regarded as an important aspect of customer/client relationships and as such may be generally beneficial rather than harmful. Defining the elements of an offence that reflects the importance of preventing corruption in the public sector and the strict standards that apply in the sector but which relate to those who are not within that grouping might prove to be a difficult exercise producing an unsatisfactory result.

4 We believe that the standards of conduct rightly expected of those engaged in public service and remunerated from public funds demand a high degree of integrity In the public sector corruption

[1] Consultation on the proposed Corruption Bill in February 2006.

involves a very serious breach of the obligations that arise from holding a position in public service. It is fundamental to the proper regulation of society that those with such public responsibilities adhere to the exacting standards expected. Whilst we accept that the loss of employment might be an additional sanction such loss would also arise in the case of those not engaged in public service. It does not, in our view, adequately reflect the damage that the corruption of a public servant causes. We considered whether the one offence might be possible if the fact that the defendant was a public servant could be adequately reflected as an aggravating feature on sentence. We do not believe that it could.

5 It is our view that whilst the basic elements of the offence might be the same the correct approach would be to have a basic offence of Bribery and an offence of Aggravated Bribery committed where, at the time of committing the offence, the offender was a member, officer or servant of a public body[2].

6 Having made that important point we agree that the ingredients of the basic offence should be the conferring or seeking/receiving of an advantage in order to facilitate an improper act or omission, or to induce another to perform an improper act or omission, intending that the advantage should be the primary reason for the improper act or omission.

PART 4

7 In simple terms the object must be to punish those who intend to secure the performance of an improper act or omission by the conveying of an advantage together with those who intend to obtain such an advantage by performing an improper act or omission. The essence is seeking to criminalise the "purchase" of something that would not otherwise be achieved from a person willing to effect the "sale" and vice versa. Whilst the line between the two concepts is difficult to draw we agree that it is the intention to "purchase" or "sell" the improper act or omission rather than dishonesty that governs the mental element.

8 Having considered the contents of Part 4 of the consultation paper with care we agree that the conduct element of bribery should exist where an advantage is conferred, promised, received or solicited in connection with an improper act performed or promised by or solicited from the recipient. Thus we agree with the proposal at 4.143. We agree that the pure improper conduct model most closely reflects the object we have set out above.

[2] We would extend the definition of "public body" beyond that contained in the Prevention of Corruption Acts 1889 to 1916, which are now outdated, so as to include all public and local authorities including government departments.

PART 5

9 We are bound to point out that we have favoured an approach that does not involve a legal definition of a phrase or term that is in common use and understood by those who are tasked with determining whether an element defined by that phrase or term is made out. The addition of legal definitions in such situations often has the effect of complicating what was otherwise a concept that was easily understood. A classic example of this is the term "dishonesty" which is easily understood by jurors[3] who apply "the current standards of ordinary decent people". We made this same point when we commented upon on the proposed Corruption Bill in February 2006. We did not see a need for a legislative definition of the term "corruptly" which we considered to be a term in common use that was readily understood[4]. As practitioners with daily experience of juries we respectfully disagree with the consultations conclusion at 5.12 that "lack of definition was one of the most important defects of the present law. As we indicate at paragraph 1 above there have been too many instances of over complication in recent legislation and the addition of a definition which might be compared to seeking to describe an elephant when everyone knows what an elephant looks like is a classic example of over complication. Further once what should be a simple concept becomes, as a result of definition, partly a question of law for the Judge and partly a question of fact for the jury the situation is complicated still further – if the Judge decides the elephant is capable of being gray the jury then decides whether it is.

10 Thus we question whether there is, in reality, a need to define the term "improper". In some ways the point made in 5.8 identifies not only the dangers of not defining but also the dangers of seeking to set out a definition that does not encourage a torrent of litigation when the common sense of the fact finding tribunal might be relied upon to interpret what is, by the current standards of ordinary decent people, improper. We venture to suggest that in practice the potential horrors will not materialise. We cannot imagine that, in practice, cases will be pursued where the scenarios postulated in 5.13 exist nor can we accept that Bribery would be charged where the reality is that a more serious offence was committed as identified in 5.30. Paragraphs 5.34 to 36 identify the real difficulty of seeking comprehensive definition. They identify more problems than solutions.

11 The reader of this response will note that we have identified below some situations where there is a very clear advantage in not seeking to define the term "*improper*"

[3] Brutus v Cozens [1973] AC 854, R v Ghosh [1982] QB 1053
[4] See R v Wellburn [1979] 69 Cr App R 254, R v Harvey [1999] Crim LR 70 CR

12 Paragraph 5.52 seeks the answer to the question "*As a way of narrowing the scope of "improper conduct" is the limitation to cases involving a breach of a relation of trust, a breach of duty of impartiality or a breach of duty to act in the best interests of another the best that can be devised or can it be simplified?*" If a definition is to be sought, and we counsel against that, it should be as simple. We would favour "*a breach of duty to another*".

13 We agree that the improper conduct must be the result of the actual or anticipated conferring of an advantage by the party seeking to induce the improper conduct.

14 Whilst we do not consider that there is need to further define the improper conduct induced we agree that there is a need to identify what is meant by an "*advantage*". The Public Bodies Corrupt Practices Act 1889 refers to "*any gift, loan, fee, reward or advantage*". As it stated in the consultation this is a wide definition. The term "*advantage*" is construed by reference to the other words used in that section.

15 We identified a problem in paragraph 3 above in relation to what might be termed customary business entertaining. The practice is widespread and it is well known, for example, that seats at many sporting events are taken by those engaged in corporate entertaining. The provision of entertainment would be an "advantage" within the proposed definition and thus a common business practice might be construed as a criminal act. Whilst the consultation argues that there is no necessity to include the term "*undue*" in relation to the advantage there may be a case for some qualification. The use of a general requirement for "*improper*" conduct on behalf of the recipient coupled with the requirement that the donor must act "*with the intention to influence the recipient to act improperly*" should alleviate the potential difficulty but it is sensible to be alert to the position.

16 We have considered the proposal in paragraph 5.60. The adoption of a definition such as this would identify a wide range of advantages that might be bestowed to include those matters dealt with in The Public Bodies Corrupt Practices Act 1889 and omissions by the donor that would result in advantage to the recipient in return for his improper conduct. We agree with that proposal.

17 The consultation identifies the potential difficulty that might arise where there is "trading in influence". In such situations the donor seeks to induce a third party to influence the commission of the improper conduct without directly conferring any advantage upon the recipient. The answer postulated in the consultation is to include the third party's act and the recipient's consequent improper act as criminal acts where the third party agrees to induce another to act improperly. We agree that such a course might be adopted although we would be inclined to deal with the situation as

an offence in its own right and separate from the basic offence of bribery. Such would appear to us to conform to Article 12 of the Council of Europe's Criminal Law Convention on Corruption.

18 The essence of bribery is the offer by the donor to confer an advantage on the recipient in return for the recipient's willingness to perform an improper act or omission. Whilst in many cases the advantage may be conferred and the improper act or omission have taken place we do not regard the completion of those acts as essential to the conduct element. We agree that the offence might be committed by the actual conferring of an advantage and the performance of the improper act or omission but equally by the expression of a willingness to do so.

19 We agree that it should be immaterial to the recipient's liability whether the advantage is conferred on the recipient or a third party. Thus we believe that the use of a phrase such as "*for himself or another*" should be used in relation to the advantage received or contemplated by the recipient.

PART 6

20 In simple terms the basic mental element on the part of both the donor and the recipient must be the intention that the other acts or will act by conferring the advantage or performing the improper act or omission. We do not consider that "*dishonesty*" is a necessary ingredient although it is likely to be present in many cases. We are a little concerned to note that paragraphs 6.83 and 6.101 appear to suggest that the metal element on the part of the donor might be a form of recklessness "*foreseeing a serious risk that the advantage will create the primary reason for the recipient to perform the improper act [or omission]*". We would not support that. It does not appear to us that an offence of bribery, which should require deliberate action and intent, could be committed by a form of recklessness.

21 An interesting question raised by the consultation in relation to both the donor and the recipient is whether there is a need to establish that the act or omission intended was known to be improper. We have pointed out above that we do not believe a definition of the term "*improper*" is necessary or desirable. When considering this aspect that becomes the more relevant. Paragraphs 6.28 to 6.30 consider this in relation to the recipient concluding that his knowledge that his act or omission is or would be "*improper*" need not be established. That might be, in part, explained by the way that this is dealt with in paragraph 6.30 where there is reference to the sort of definition we consider to be inappropriate. Frankly if it had to be proved that the recipient knew of these duties and the breach of them in every case there would be few convictions whereas the simple recognition that what was done or intended was "*improper*" could be established by commonly

understood standards. Similarly with the donor who may not be proved to have knowledge of these duties but could nevertheless recognise that what was proposed was "*improper*" by ordinary standards.

PART 7

22 There is a case for a discrete offence of bribing a foreign public official subject to the recognition of two important matters. First that standards of conduct in the United Kingdom ad European Union are not universally recognised as the standards to be applied elsewhere. There are other jurisdictions where the conferring of an advantage is a universal practice. Second before such an offence was enacted it would be necessary to ensure recognition and, more importantly, enforcement of similar principles internationally. There could be serious political implications in seeking to impose criminal sanctions upon those in the United Kingdom seeking to do business in other jurisdictions where competitors are not subject to the same constraints. It may also be that lessons should be learned from the problems that were experienced in relation to the BAE/Saudi Arabia affair in January 2007. We appreciate that Organisation of Economic and Cultural Development Convention has been ratified but this is an area that still requires careful consideration.

23 In principle and subject to the very real concerns raised above. and the concerns we have expressed about a pseudo recklessness test, we have no comment to make concerning the proposal set out in paragraph 7.36.

24 We are asked the question "*whether our provisionally proposed offence of bribing a foreign public official should be extended to inculpate the foreign public official who accepts a bribe?*". That might be countered by the question "For what purpose?" Where the foreign official is resident in the United Kingdom or in a European Union state and that state has recognised the Convention of the Organisation of Economic and Cultural Development there may be a reasonable prospect of extradition and enforcement. Otherwise there would be problems with enforcement particularly where the activity of the foreign national is not considered to be improper in his or her country of residence. Further there may be difficulty in establishing the metal element of knowledge that the act or omission was "*improper*" even by our less rigid and defined standard.

PART 8

25 We would be concerned at the introduction of a number of statutory defences. Such should be restricted to few exceptional situations. The approach to the use of the term "*improper*" that we have advocated above will remove some of the problems identified in the

consultation. For example that emergency situation identified in paragraph 8.11. We do not believe there would be any prospect of securing a conviction in such circumstances particularly if the reference to pseudo recklessness is removed as we recommend.

26 We agree that a reasonable belief in the lawfulness of conferring an advantage, whether because of a legal requirement or because to do so was legally permissible, should be a defence. We comment that neither of the examples in paragraph 8.20 would result in conviction if our proposed use of the term "*improper*" was adopted and reference to pseudo recklessness was excluded since in neither case would the donor be proved to know that what he or she was doing was "*improper*" by generally accepted standards.

27 We do not see the need for Consent to Prosecution although we can understand that there may be a political need for the insertion of some appropriate provision in relation to the bribery of foreign officials. We assume that paragraph 8.81 should have been framed in the negative.

PART 9

28 We agree this should be seen as part of a much larger review of corporate liability for criminal offences. The topic is potentially difficult and the consequences far reaching. Much of what has been discussed in the consultation and in our response above concerns the liability of individuals for their criminal conduct. Thus we agree that consideration of the law relating to the direct liability of legal persons (incorporated and unincorporated bodies) should be deferred until the Law Commission's wider review of his area. If invited we will comment upon proposals for wider principles in due course. We would prefer to comment in detail upon the applications of wider principles to offences of bribery once those wider principles are identified.

PART 10

29 We have recently considered proposals in relation to Conspiracy and Attempts set out in the Commission's consultation No 183. We responded with our views and comments on 14th February 2008. In general we supported proposals in relation to offences of conspiracy but we expressed our reservations on certain of the proposals in relation to attempts. Whilst that consultation was directed to the law in concerning inchoate offences in general the views we expressed are relevant when considering both inchoate and secondary offences in relation to bribery. There is no necessity to set those views out again herein.

PART 11

30 We preface our remarks in relation to offences contrary to the law of England and Wales committed abroad by again drawing attention to the points we made in relation to Part 7 above. There are some offences which are, by their very nature, criminal acts wherever they occur even if not subject to criminal sanctions in the jurisdiction where he act takes place. In such cases extra territorial jurisdiction does not offend general principles of equity ad fairness. There may, however, be a difficulty in relation of offences of bribery simpliciter since there are places where payment or giving advantage is an accepted fact of life. Whilst we would not seek to condone that we would be concerned if the law in England and Wales results in the prosecution of a defendant in England and Wales for an offence arising from activities in a foreign jurisdiction where those activities were not criminal acts in that jurisdiction but were acts that were accepted as a normal feature of life or business in that jurisdiction. First an obvious unfairness would result. An example of the sort of problem that might be encountered is that of the parent with the sick child in paragraph 8.11. If the payment of some "reward" for provision of treatment was accepted within the jurisdiction concerned there could be no reasonable basis for treating the actions of the parent as a crime in English law. Second there is a need to recognise the realities of business activities in some other jurisdictions. As we indicated above lessons have to be learned from the BAE/Saudi Arabia affair. Further placing those citizens or residents in England and Wales doing business in those jurisdictions at risk of later prosecution in England and Wales would be to place them in a position of real disadvantage when compared with businessmen or women from other countries who were not liable to prosecution in their own jurisdictions. There are, therefore, real practical implications to bear in mind.

31 We have noted the provisions of section 109 of the Anti Terrorism, Crime and Security Act 2001, to which there is reference in the consultation, which provides that an act of corruption abroad by a national or body corporate in England and Wales may be prosecuted as an offence of corruption in England and Wales even though the act itself is not an offence in the jurisdiction where it is omitted. The Act defines the "common law offence of bribery" as an offence of "corruption" which has the potential for causing the very problems referred to above and renders the decisions in the BAE/Saudi Arabia affair the more difficult to understand jurisprudentially. It may be, of course, that the potential effects of the provision, inserted in a Statute that appears to have been advanced as "*An Act to amend the Terrorism Act 2000; to make further provision about terrorism and security; to provide for the freezing of assets; to make provision about immigration and asylum; to amend or extend the criminal law and powers for preventing crime and enforcing that law; to make provision about the control of pathogens and toxins; to provide for the retention of communications data; to provide for implementation of Title VI of the Treaty on European Union; and for connected purposes*" were

not sufficiently thought through. Certainly we do not recall any consultation on the provisions. If bribery was to become a statutory offence, as this consultation envisages, that aspect of the Anti Terrorism, Crime and Security Act 2001 would have to be reconsidered.

32 We appreciate that the observations above are matters for political and practical consideration rather than matters for those engaged in the enforcement of the law but it would be remiss of us not draw attention to these concerns.

33 As indicated above we recently commented upon inchoate offences in a general consultation on the subject and do not intend to repeat what we set out then.

34 The consultation draws attention to three possible scenarios. We agree that the inchoate offence might be committed in cases (1) and (2) in which there are direct links with England and Wales. Case (3), however, would potentially criminalise an act which was not a criminal offence in the jurisdiction were it occurred with the objections to which we have already referred. Thus we have concerns about the proposals contained in paragraph 11.64, 11.77 and 11.78 insofar as offences of bribery are concerned. We accept that there are other offences where such approaches might be appropriate; for example offences of homicide. Thus whilst we accept that the more general recommendations in the recent consultation on inchoate offences have general relevance to criminal activities we do not agree that it is necessarily appropriate to include all offences in the general approach adopted therein.

HH Judge David Swift
Chairman
Criminal Sub Committee
Council of HM Circuit Judges
4th April 2008