

# APPENDIX E

## PREVIOUS REFORM PROPOSALS

### INTRODUCTION

- E.1 This Appendix outlines the previous law reform proposals relating to misconduct in public office. It also refers, where relevant, to reform proposals for alternative and/or related offences which are identified in Appendix D.

### CHRONOLOGY OF PROPOSALS

Date	Source
Late 1960s	Criminal Law Revision Committee sub-committee
1974	Report of the Royal Commission on Local Government in England 1966-1969 ("The Redcliffe-Maud Commission")
1976	Report of the Royal Commission on Standards of Conduct in Public Life Cmnd 6524 ("The Salmon Commission")
May 1995	First Report of the Committee on Standards in Public Life Cm 2850-I (with minutes of proceedings and memoranda)
Dec 1996	Home Office, <i>Clarification of the law relating to the Bribery of Members of Parliament: A Discussion Paper</i>
Jan 1997	Legislating the Criminal Code: Corruption (1997) Law Commission Consultation Paper No 145
1997	Unpublished work by then Law Commissioner Stephen Silber QC
June 1997	Home Office, <i>The Prevention of Corruption: Consolidation and Amendment of the Prevention of Corruption Acts 1889-1906: A Government Statement</i>
July 1997	Third Report of the Committee on Standards in Public Life: Standards of Conduct of Local Government in England, Scotland and Wales Cm 3702-I
1997	Pamphlet "Misuse of public office: a consultation paper" accompanying the Third Report of the Committee on Standards in Public Life: Standards of Conduct of Local Government in England, Scotland and Wales Cm 3702-I
Mar 1998	Legislating the Criminal Code: Corruption (1998) Law Com No 248
April 1999	Joint Committee on Parliamentary Privilege Report (1998-99) HC 214-I/HL43-I
July 2002	Fraud: Report on a reference under s 3(1)(e) of the Law Commissions Act 1965 (2002) Law Com No 276
Mar 2003	Home Office, Draft Corruption Bill (Cm 5777)
July 2003	Joint Committee on the Draft Corruption Bill Report and evidence (2002-03) HL 157/ HC 705
Dec 2005	Home Office, <i>Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials</i>
Nov 2008	Reforming Bribery (2008) Law Com No 313
Mar 2010	Police Searches on the Parliamentary Estate, Report of the Parliamentary Committee on Issue of Privilege (2009-10) HC 62

## **CRIMINAL LAW REVISION COMMITTEE**

- E.2 The earliest reference we have found concerning attempts to reform the offence of misconduct in public office is:

A sub-committee of the Criminal Law Revision Committee considered [misconduct in public office]...in the late 1960s, though they were forced by pressure of other commitments to stop work on the subject before their report could be completed.<sup>1</sup>

This reference was contained in the Report of the Royal Commission on Standards in Public Life (“the Salmon Commission”), although it would seem that no report of this work was ever produced.

## **THE REDCLIFFE-MAUD COMMISSION**

- E.3 In 1974 the Royal Commission for Local Government in England (“the Redcliffe-Maud Commission”) reported on local government law and practice.<sup>2</sup> The Redcliffe-Maud Commission recommended that it should be a criminal offence to use information received through membership of, or employment in, a local authority for private gain. The Government appeared to welcome the recommendations<sup>3</sup> but did not legislate in response.

## **SALMON COMMISSION**

- E.4 The Salmon Commission was appointed to conduct an inquiry into allegations of corruption within local government. This followed the political scandal known as the “Poulson affair” which resulted in a number of prosecutions for corruption offences.<sup>4</sup>

- E.5 The terms of reference for the Salmon Commission were:

To inquire into standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body; and to make recommendations as to the further safeguards which may be required to ensure the highest standard of probity in public life.

- E.6 Chapter 10 of the Salmon Report specifically considers the common law offence of misconduct in public office and whether the offence should be placed on a statutory footing. The rest of the report looks at bribery, misuse of public information and corruption. The Salmon Commission’s conclusions on misconduct in public office were that:

<sup>1</sup> Royal Commission on Standards in Public Life (1974 – 1976) Cm 6524 at [197].

<sup>2</sup> Report of the Royal Commission on Local Government in England (1966-1969).

<sup>3</sup> See Written Answer, *Hansard* (HC) 23 May 1974, vol 874, cols 236-237.

<sup>4</sup> See A Doig, *Corruption and Misconduct in Contemporary British Politics* (1984), ch 5.

- (1) There were some philosophical attractions in attempting to define an all-embracing test against which official conduct might be judged but it was impracticable to do so as it would be too vague and broad.<sup>5</sup>
- (2) Misconduct in public office is a “breach of official trust” and embraces a wide variety of acts done with dishonest, oppressive or corrupt motive.<sup>6</sup>
- (3) “Public office” covers a wide field including judicial office.<sup>7</sup>
- (4) It was better to focus on refining specific offences such as bribery.<sup>8</sup>
- (5) The common law offence should not be discarded but should not be extended by statute.<sup>9</sup>
- (6) Retention of the common law offence was necessary because –
- (7) However carefully specific offences may be framed, there is likely to be a small residual area that they do not cover and which is currently embraced by the old common law offence.<sup>10</sup>
- (8) No attempt should be made to codify the offence because the Committee “doubt whether the task could be satisfactorily performed”.<sup>11</sup>

E.7 A further specific issue considered was whether the criminal law applied to Members of Parliament (“MPs”).<sup>12</sup> It was stated that membership of the House of Commons<sup>13</sup> does not, as such, constitute public office for the purposes of the common law and that Parliament could not be deemed to be a “public body” under the Public Bodies Corrupt Practices Act 1889.<sup>14</sup> These suggestions have been roundly criticised by at least one eminent academic and subject to challenge in the lower courts.<sup>15</sup> The Salmon Commission cited Parliamentary privilege as the basis for its conclusion. However, Parliamentary privilege concerns the immunity of MPs for actions done or statements made in the course

<sup>5</sup> The Salmon Commission [195].

<sup>6</sup> The report cites *Borron* (1820) 3 B & Ald 432, 106 ER 721.

<sup>7</sup> The report cites *Marshall* (1855) 4 El & BI 475, 119 ER 174.

<sup>8</sup> The Salmon Commission [195].

<sup>9</sup> The Salmon Commission [196].

<sup>10</sup> The Salmon Commission [196].

<sup>11</sup> The Salmon Commission [197].

<sup>12</sup> The Salmon Commission, ch 17.

<sup>13</sup> This did not refer to members of the House of Lords so there may have been a different view in respect of peers.

<sup>14</sup> The Salmon Commission [307].

<sup>15</sup> See G Zellick, “Bribery of Members of Parliament and the Criminal Law” [1979] *Public Law* 31. The conclusion was not accepted by the Central Criminal Court in *Greenway* [1992] unrep CCC (see para E.15 below) and was later challenged by the Committee for Standards in Public Life in their First Report (see para E.13 below).

of their legislative duties. It does not provide immunity from specific or certain types of criminal offence.<sup>16</sup> Although, the Salmon Commission also stated that:

A Minister of the Crown is a holder of public office and corruption in connection with his ministerial duties would be caught by the common law offence [of misconduct in public office].<sup>17</sup>

E.8 It was recommended that “Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his Parliamentary capacity within the ambit of the criminal law”.<sup>18</sup>

E.9 The final conclusion on misconduct in public office was that:

The common law offence has a useful, though small, part to play in the battery of criminal sanctions against malpractice in public life, and that it should be retained.<sup>19</sup>

E.10 The Commission’s substantive recommendations were that:

(1) Public bodies for the purpose of corruption offences should be defined as broadly as is compatible with certainty.<sup>20</sup> It was noted that “the boundaries of the public sector will, in the last resort, be arbitrary and there are bound to be some perplexing cases at the fringes.”<sup>21</sup>

(2) It should be an offence for:

(a) a Crown servant or member or employee of any public body corruptly to use for his own advantage any information obtained by virtue of his official position; or

(b) any other person corruptly to use such information passed to him by a Crown servant or member or employee of a public body for his own advantage; or

(c) a Crown servant or member or employee of a public body, or any other person, corruptly to disclose official information with the intention of conferring an advantage on the recipient or a third party.<sup>22</sup>

<sup>16</sup> *Chaytor* [2010] UKSC 52, [2011] 1 AC 684.

<sup>17</sup> Salmon Commission at [308].

<sup>18</sup> Salmon Commission at [311].

<sup>19</sup> Salmon Commission at [198].

<sup>20</sup> Salmon Commission at [88(iii)].

<sup>21</sup> Salmon Commission at [50].

<sup>22</sup> Salmon Commission at [193].

- E.11 This report was not discussed in the House of Commons and no government action was taken.<sup>23</sup> The report was fully debated in the House of Lords, with a mixed response.<sup>24</sup>

### **COMMITTEE ON STANDARDS IN PUBLIC LIFE**

- E.12 The Committee on Standards in Public Life (“the CSPL”)<sup>25</sup> was set up by Sir John Major MP, then Prime Minister, in October 1994 in the aftermath of the “cash for questions” Parliamentary affair. The CSPL’s terms of reference are:

To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.

For these purposes, public life should include Ministers, civil servants and advisers; Members of Parliament and UK Members of the European Parliament, members and senior officers of all non-departmental public bodies and of national health service bodies, non-ministerial officer holders, members and other senior officers of other bodies discharging publicly funded functions, and elected members and senior officers of local authorities.<sup>26</sup>

### **CSPL First Report – MPs, ministers and civil servants, quangos**

- E.13 The first report of the CSPL did not consider the offence of misconduct in public office specifically. However, it did consider the question, as raised by the Salmon Commission,<sup>27</sup> of whether common law offences of bribery apply to MPs. The CSPL concluded that the law was less clear than asserted by the Salmon Commission:

...it is quite likely that Members of Parliament who accept bribes in connection with their Parliamentary duties would be committing Common Law offences that could be tried by the Courts. Doubt exists as to whether the courts or Parliament have jurisdiction in such cases.<sup>28</sup>

- E.14 In light of this, the CSPL recommended that the law in relation to bribery should be clarified and considered that it might be an area of review suitable for the Law Commission.<sup>29</sup>

<sup>23</sup> Written Answer, *Hansard* (HC) 25 May 1978, vol 950, col 664.

<sup>24</sup> *Hansard* (HL) 8 December 1976, vol 378, cols 585-604 and 611-674.

<sup>25</sup> The CSPL is sometimes referred to as the “Nolan Committee” as Lord Nolan was chairman from 1994 to 1997.

<sup>26</sup> *Hansard* (HL) 25 October 1994, col 758.

<sup>27</sup> See para E.7 above.

<sup>28</sup> CSPL *First Report Volume 1: Report* (May 1995) Cm 2850-I, p 43 at [103].

<sup>29</sup> CSPL *First Report*, p 43 at [104]. See *Reforming Bribery* (2007) LCCP No 185; *Reforming Bribery* (2008) Law Com No 313.

E.15 This followed the 1992 case of *Greenway*<sup>30</sup> where a member of the House of Commons had been charged with misconduct in public office, though the member was acquitted. The judge in that case held that the alleged conduct of an MP would fall within the scope of the common law offence. The issue was not tested before the Court of Appeal.

E.16 The Select Committee on Standards in Public Life was set up to evaluate the first report of the CSPL and agreed with its recommendations:

The Government should ask the Law Commission to undertake an immediate review of the common and statute law relating to bribery, with specific reference to Members of Parliament. The review should concentrate in particular on the degree of doubt which exists about the effectiveness of the common law in dealing with bribery cases involving Members and the practical problems, if any, which arise from this.<sup>31</sup>

E.17 However, the Government subsequently concluded that this could not be considered by the Law Commission as it was not a strict question of law but also required consideration of Parliamentary privilege. Instead *Clarification of the Law relating to Bribery of Members of Parliament: A Discussion Paper* was produced by the Home Office in December 1996. The purpose of the paper was to set out possible options for the clarification of the law for consideration by the Select Committee on Standards and Privileges.

E.18 The discussion paper looked at options for clarifying the way in which bribery of an MP is dealt with. None of these included the application of common law bribery of a public official but it appears to have been accepted that an MP could be subject to the offence of misconduct in public office:

The Government has accepted that there is ambiguity in the present situation and that Members of Parliament - and indeed the public - are entitled to a greater degree of certainty as to the application of the criminal law, and of Parliamentary Privilege, in circumstances where corrupt acts are alleged to have been committed by a Member of Parliament. At present it seems likely that such acts – at least of Members of the House of Commons – constitute in England and Wales the common law offence of Misuse of Public Office, but, as discussed below at paragraph 11, some evidence which might be necessary to establish the guilt or innocence of a Member may not be available to the courts by virtue of article 9 of the Bill of Rights, 1688.<sup>32</sup>

E.19 Further activity on this issue was subsequently subsumed into the wider government review of the law on corruption.

<sup>30</sup> *Greenway* [1992] unreported. For discussion see A Bradley, "Parliamentary privilege and the common law of corruption" [1998] *Public Law* 356.

<sup>31</sup> See Home Office, *Clarification of the law relating to the Bribery of Members of Parliament: A Discussion Paper* (December 1996).

<sup>32</sup> Home Office Discussion Paper at [8].

### **CSPL Third Report - Standards in local government**

E.20 In July 1997, the CSPL published its third report, “Standards of Conduct in Local Government” (“Third Report”).<sup>33</sup>

E.21 The Third Report recommended the abolition of surcharge of local councillors and officers – a financial penalty for accounting failures.<sup>34</sup> In considering whether a statutory offence of misuse of public office should be created the Report went on to say:

There is an English common law offence of misconduct in a public office under which prosecutions are occasionally taken. We believe that a new statutory offence of misuse of public office should be developed from that common law offence. The key advantage of creating such a statutory offence would be that a clearer indication could be given in the statute of the circumstances in which an offence might occur...

...We therefore believe that any new offence of misuse of public office should apply to all those in public service and not just to those in local government.

The whole of the law of corruption (including the legal position of bribery of Members of parliament) is presently being considered by the Home Office. We believe that work on the offence of misuse of public office should go forward in parallel with those reviews. We are therefore publishing today in parallel with this report, a consultation paper which sets out in more detail our thinking on the new offence, its scope, and to whom it might apply.<sup>35</sup>

E.22 The CSPL made the following formal recommendation in the Third Report:

Subject to further consultation, there should be a new statutory offence of misuse of public office, which would apply to all holders of public office.<sup>36</sup>

### **CSPL Misuse of public office: a consultation paper July 1997**

E.23 Alongside the Third Report, the CSPL also announced a review of misconduct in public office:

The committee believes the offence should be framed so as to apply widely to all public sector office-holders. The Consultation Paper sets out some examples of the way the offence might be framed and the people to whom it should apply. The Committee has passed its

<sup>33</sup> CSPL *Third Report – Standards of Conduct in Local Government – Volume 1* (July 1997) Cm 3702-I.

<sup>34</sup> CSPL *Third Report* at [223]. Surcharge of Local Councillors was abolished by Local Government Act 2000, s 90.

<sup>35</sup> CSPL *Third Report* at [228] to [230].

<sup>36</sup> CSPL *Third Report*, Recommendation 28.

preliminary views to the Home Office so that they may be taken into account in developing work on bribery and corruption.<sup>37</sup>

- E.24 Accordingly, the CSPL published a consultation paper, entitled “Misuse of Public Office”, with the Third Report. The consultation paper reiterated the problems with the surcharge penalty and then went on to discuss the offence of misconduct in public office:

Discussing the common law offence in its consultation paper on corruption, the Law Commission described it as ‘wide-ranging and ill-defined’...

There are few prosecutions, suggesting that action is taken only when misconduct is particularly gross. The advantage of creating a statutory offence of misuse of public office would be that some clearer indication could be given in the statute of the circumstances in which an offence might occur. The limits should not have to be drawn by the jury unguided...

We have considered whether consent should be required before prosecution can be commenced. We do not believe that the public interest demands the ability to prosecute privately and there could be a significant problem with vexatious prosecutions or prosecutions stimulated by political motives. Our preliminary conclusion is that consent should be required and that authority to give it should be vested in the Director of Public Prosecutions.

It should be a defence to criminal proceedings that the office holder has acted in good faith – that is, reasonably and honestly. But there is a question of whether it should be for the prosecution to demonstrate lack of good faith as an element of the offence. There will be many situations where an office-holder has acted carelessly or unreasonably, but not so carelessly as to have been wilful or reckless. In some such cases, a question of civil liability for the tort of misfeasance in public office may arise under existing law...<sup>38</sup>

- E.25 The consultation paper specifically asked consultees about the boundaries of the definition of public office:

We envisage that the new offence should apply to those carrying out public functions. We have no doubt that it should apply to office holders such as Ministers and Civil Servants; councillors and local government officers; the police, magistrates and the judiciary; and to non-departmental public bodies. It is a matter of consultation how much wider the boundaries should be drawn. To what extent should they include office-holders of organisations outside the public service? For example, should the offence apply to those bodies we considered in our second report (further and higher education institutions, grant maintained schools, training and enterprise councils

<sup>37</sup> Press release 8 July 1997.

<sup>38</sup> CSPL *Misuse of Public Office Consultation Paper* at [16] to [21].

and housing associations)? Would it be inappropriate for it apply to fully privatised companies such as the utilities?<sup>39</sup>

- E.26 Following publication of the Third Report and accompanying Consultation Paper, Lord Nolan gave a lecture in which he said:

Third, we called for the creation of a new offence, called ‘misuse of public office’, which would replace the surcharge on local government councillors and officials, and cover everything from culpable waste of public money to abusing office for party political advantage and would apply to all public offices, local or national.<sup>40</sup>

### **JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE**

- E.27 In 1999 the Joint Committee on Parliamentary Privilege (“JCPP”) considered the CSPL’s proposals and heard evidence in respect of the misconduct consultation.<sup>41</sup>

- E.28 Jack Straw MP, then Home Secretary, stated:

There has been an almost universal welcome for the proposal to formulate a modern corruption offence and a widespread recognition that the dividing line between standards in the public and private sectors is outdated. The idea of creating a new statutory offence of a Misuse of Public Office put forward by the Nolan Committee report last July received overwhelming support in the responses in the public consultation exercise.<sup>42</sup>

- E.29 He went on to say that the thinking of the Government was that:

There should be an offence of Misuse of Public Office which should apply to ministers, should apply to councillors, to other members of public bodies and should also apply to Members of Parliament...

This new offence of misuse of public office should replace surcharging<sup>43</sup> and, indeed, expand the criminal law more generally. We are still considering that in the light of representations made to this document and to the Nolan Committee report, but if it appears that there is pretty substantial support for such a change, obviously we will take account of the extent of support for change if we are going to propose one.

- E.30 The evidence then turned to the question of who is in public office, particularly whether members of both Houses of Parliament would be. Christine Stewart

<sup>39</sup> CSPL *Misuse of Public Office* at [22].

<sup>40</sup> Richard Dimpleby Lecture, “Public life, public confidence” (November 1997). Lord Nolan also referred to the confusion that existed over bribery of Members of Parliament following the Salmon Commission’s conclusion.

<sup>41</sup> JCPP Volume 1, Report and Proceedings of the Committee (30 March 1999) HC 214-I; HL Paper 43-I; Volume 2 – Oral Evidence (30 March 1999) HL Paper 43-II; HC 214-II.

<sup>42</sup> JCPP Volume 2 – Oral Evidence (30 March 1999) HL Paper 43-II; HC 214-II, p 41.

(then Head of Sentencing and Offences Unit) answered on the Home Secretary's behalf, but did not reach a conclusion:

There is a question of whether it should apply more generally, for example to education authorities, as well as the question of how it should apply to Members of the House. The Nolan Committee in its paper drew specific attention to ministers and I think implied that ministers clearly would be covered but raised a more general question about whether it should go further.<sup>44</sup>

E.31 In a letter sent to the Chairman of the JCPP on 18 November 1998 the Home Secretary later stated:

As you know, we have set up two inter-departmental groups to examine (i) the Law Commission's Report No 248 on Corruption and (ii) the possibility of a new statutory offence of misuse of public office. Although these groups are making good progress with their examination of these issues, they have not yet completed their work.

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.<sup>45</sup>

E.32 The JCPP published a final report in which it declined to make recommendations on the position of Members of Parliament, and in particular whether they conflicted with Parliamentary privilege, until the ingredients of any proposed new offence were clearer.

#### **LAW COMMISSION WORK ON MISCONDUCT IN PUBLIC OFFICE**

E.33 The Law Commission has never previously published on misconduct in public office. However, as indicated above by the Salmon Commission, a review of the law relating to corruption was undertaken from 1996 onwards and this did involve some consideration of the common law offence.

E.34 In evidence to the Joint Committee on the Draft Corruption Bill in 1999 Stephen Silber QC, then Law Commissioner for criminal law, stated that:

[The Law Commission] in fact started doing corruption with a lot of support from Lord Nolan and his Committee and then we also looked

<sup>43</sup> Surcharge of local councillors was abolished by Local Government Act 2000, s 90.

<sup>44</sup> JCPP Volume 3 – Written Evidence (30 March 1999) HL Paper 43-II; HC 214-II, p 52.

<sup>45</sup> JCPP Volume 3 – Written Evidence (30 March 1999) HL Paper 43-II; HC 214-II, p 155.

separately at misuse of public office which looked into all those areas. I did that for a number of reasons in my sole capacity but that really was put on ice when Dame Shirley Porter's case was going through the courts.<sup>46</sup>

- E.35 An inter-departmental Government working group on corruption had made the request that Stephen Silber QC consider how the CSPL's proposal of a statutory offence of misconduct in public office could be implemented.<sup>47</sup>
- E.36 Stephen Silber QC's work on the potential reform of misconduct in public office did not result in any published document. However, the Law Commission published a number of papers regarding its work on both corruption and bribery offences.

### **LAW COMMISSION: CORRUPTION**

- E.37 The Law Commission consultation paper on corruption focused on corruption offences such as bribery.<sup>48</sup> However the paper acknowledged the overlap with misconduct in public office, referring to it as "wide-ranging and ill-defined", and stating that it could "provide a residual offence" where a specific statutory offence did not apply.<sup>49</sup> The Consultation Paper concluded:

We make no proposals as to the common law offence of misconduct in a public office; it covers a range of conduct other than bribery and is therefore, in our view, outside the scope of this consultation paper.<sup>50</sup>

- E.38 On 2 March 1998 the Law Commission produced its final report on corruption offences.<sup>51</sup> It made no reference to the misconduct offence.

### **THE GOVERNMENT'S REVIEW OF THE LAW ON CORRUPTION**

- E.39 A Government review of the law of corruption began following publication of the Law Commission's consultation paper on corruption. In June 1997 a Government Statement was published considering the law on corruption.<sup>52</sup> In commenting on the extent of the existing corruption statutes the statement read:

The term "corruption" does not only apply to bribery. As has been stated the 1906 Act applies to offences involving false documentation. There may also be situations where persons use their position to obtain an unfair advantage for themselves or another, which may fall within the common law offence of Misconduct in Public

<sup>46</sup> Ev 106, Q 644. *Porter v Magill* (2001) [2001] UKHL 67, [2002] 2 AC 357.

<sup>47</sup> This request is referred to by the Home Secretary in his letter to the JCPP.

<sup>48</sup> Legislating the Criminal Code: Corruption (1997) Law Commission Consultation Paper No 145.

<sup>49</sup> LCCP No 145 at para 2.33.

<sup>50</sup> LCCP No 145 at para 4.19.

<sup>51</sup> Legislating the Criminal Code: Corruption (1998) Law Com No 248.

<sup>52</sup> Home Office, *Consolidation and Amendment of the prevention of Corruption Acts 1889-1916: A Government Statement* (June 1997).

Office. For example; if an officer of a committee of a local authority influenced or encourage a member to vote in a particular way, the acts would be corrupt but bribery would not necessarily be involved.

It is for discussion as to whether the existing statute or common law adequately covers these activities.<sup>53</sup>

E.40 Following the publication of the Law Commission's Corruption Report in 1998 the review concentrated on discussion of the Law Commission's proposals. In June 2000 the Government published proposals for the reform of corruption offences, accepting the recommendations contained in the Law Commission's Corruption report, in the most part.<sup>54</sup>

E.41 In March 2003 the Home Office produced a draft corruption bill based on, but different from, that produced by the Law Commission in 1998.<sup>55</sup>

#### **The Joint Committee on the Draft Corruption Bill**

E.42 The Joint Committee on the Draft Corruption Bill ("JCDCB") heard evidence from a wide range of organisations including the Law Commission.<sup>56</sup> The evidence included discussion of the issue of whether a separate offence of misconduct in public office should be retained.

E.43 Annexed to the report were the comments of Professor Peter Alldrige, a specialist adviser to the JCDCB. In specifically discussing reform of the law on bribery he referred to the common law offence of misconduct in public office.

If the offence of misconduct in public office is to be given a more significant role in the fight against public sector corruption (for example, by extending the definition of public office) then again this needs to be taken into account in the reform of bribery. If any acceptance by a public sector worker of a bribe is misconduct then there is less need for specific bribery offences. Coherence of criminal law requires that it generate appropriate labels and consistent sentences, and that like cases should be treated alike. Proliferation of offences each dealing with the same wrong cannot be avoided entirely, but areas of overlap should be carefully considered.

E.44 Transparency UK felt that a separate offence of misconduct could be useful where a corruption prosecution would "present insuperable difficulties eg the corruptor is beyond the jurisdiction".<sup>57</sup>

<sup>53</sup> [3.8] and [3.9].

<sup>54</sup> Home Office, *Raising standards and upholding integrity: the prevention of corruption. The Government's proposals for the reform of the criminal law of corruption in England and Wales* (June 2000) Cm 4759.

<sup>55</sup> The draft Corruption Bill (March 2003) Cm 5777.

<sup>56</sup> JCDCB Report and evidence (2002-03) HL 157/ HC 705

<sup>57</sup> JCDCB Report and evidence (2002-03) HL 157/ HC 705, Ev 3 DCB 18 at [3.13]. In oral evidence they supported the definition included in an Australian law proposal referred to in a Law Commission consultation paper. This is a reference to Appendix C in LCCP No 145.

- E.45 The Criminal Bar Association was supportive of the inclusion of a misconduct offence in the Corruption Bill:

The essential elements of the tort are clear, but those of the crime are not [...] This Bill may represent an opportunity to correct the defect by statute.<sup>58</sup>

- E.46 Sir David Calvert-Smith, then Director of Public Prosecutions (“DPP”), was asked whether it would be helpful to include in the Corruption Bill a workable statutory offence of misconduct in public office. He stated that:

I think it might very well be very helpful. I would have thought it would not be impossible. It would not have all the difficulties and complications surrounding the agent/principal relationship, which I think makes this Bill so hard ... For simplicity, I can see great advantage for public servants in having a misconduct offence which was statutory rather than dredged up from the Middle Ages.<sup>59</sup>

- E.47 On being questioned about the CPS written evidence stating that further consultation on misconduct in public office was necessary<sup>60</sup> Sir David Calvert-Smith stated:

The common law offence of misconduct in public office has made a come-back in recent years. Having really not been prosecuted for many, many, years, it is now quite common, and its exact scope is still the subject of debate and has not been pronounced upon recently, for instance by the House of Lords [...] Many jurisdictions, as I understand it, do have a specific offence of that kind in statute...there is a proposal for something that looks very much like statutory misconduct in the proposed fraud legislation, which the Law Commission have come up with on the subject of fraud [...] it would take out of the corruption ambit those cases...where perhaps dishonesty is not exactly the right word to describe it but it is somebody who has actually abused their function as a public servant.

Primarily, in CPS terms, it has been limited to behaviour by police officers, which is so far below the standard of what police officers should do in respect of caring for someone that it amounts to misconduct.

- E.48 Stephen Silber QC also gave evidence to the JCDCB. When asked about the relationship between corruption and misconduct in public office, and stated:

Misfeasance in public office is an extremely vague offence; that was the feature of it that upset Lord Nolan. He thought that the offence was so uncertain that nobody knew what it was. The big difference between that and corruption is that in corruption there is a benefit being offered or conferred. In misfeasance in public office it can be

<sup>58</sup> JCDCB (31 July 2003) HL Paper 157 HC 705, Ev 155.

<sup>59</sup> JCDCB, Q 126.

<sup>60</sup> JCDCB, Ev 18.

someone just doing something out of stubbornness, because of omission or laziness or for different purposes. It is the concept of benefit and advantage which is the hallmark of corruption which is really very different from what is construed as misfeasance in public office. You might well get a case where people are caught on both.<sup>61</sup>

### **The Report of the Joint Committee on the Draft Corruption Bill**

E.49 The JCDCB's Report was published on 31 July 2003. Under the specific heading of "misuse of public office" the report states:

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

E.50 In making recommendations the JCDCB noted:

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

- making explicit the liability of UK companies for the actions of foreign subsidiaries and agents
- creating a separate offence of trading in influence
- making misconduct in public office a statutory offence (with a wider definition of public office).<sup>63</sup>

It concluded that:

The draft Bill does not seem to us the appropriate vehicle for giving a statutory definition of misconduct in public office.<sup>64</sup>

### **OTHER RELEVANT LAW COMMISSION WORK**

#### **Fraud**

E.51 In 2002 the Law Commission published its report on Fraud. This included a recommendation to create an offence of fraud by abuse of position.

<sup>61</sup> JCDCB, Ev 107.

<sup>62</sup> JCDCB at [44].

<sup>63</sup> JCDCB at [77].

<sup>64</sup> JCDCB at [80].

Any person who, with intent to make a gain or to cause loss or to expose another to the risk of loss, dishonestly ... abuses a position in which he or she is expected to safeguard, or not to act against, the financial interests of another person, and does so without the knowledge of that person or of anyone acting on that person's behalf, ... should be guilty of an offence of fraud.<sup>65</sup>

- E.52 It was this recommendation that was discussed in evidence to the Joint Committee on the Draft Corruption Bill in 2003 as similar to misconduct in public office. Section 4 of the Fraud Act 2006 implemented the recommendation.

### **Bribery**

- E.53 The draft Corruption Bill was never enacted and law reform focus shifted to creating new offences of bribery. The Law Commission published a consultation paper on Bribery in December 2007<sup>66</sup> and a final report in 2008.<sup>67</sup>
- E.54 The Joint Committee on the Draft Bribery Bill<sup>68</sup> identified misconduct in public office as an offence that would potentially overlap with offences included in the Bill. Evidence from the then DPP showed that it was difficult to ascertain the exact number of bribery investigations conducted as misconduct, money laundering or other offences may be charged instead.<sup>69</sup>
- E.55 The recommendations of the Law Commission were implemented in the Bribery Act 2010. The bribery offences are applicable to MPs.<sup>70</sup>

### **PARLIAMENTARY DISCUSSION OF MISCONDUCT IN PUBLIC OFFICE FOLLOWING THE ARREST OF CHRISTOPHER GALLEY AND DAMIAN GREEN MP**

- E.56 In November 2008, civil servant Christopher Galley and Damian Green MP were arrested for misconduct in public office. Following this the offence was the subject of debate in the House of Commons<sup>71</sup> and scrutiny by the Parliamentary Committee on Issue of Privilege.
- E.57 As we note in Chapter 1,<sup>72</sup> the Committee on Issue of Privilege recommended that:

<sup>65</sup> Fraud (2002) Law Com No 276, p 87.

<sup>66</sup> Reforming Bribery (2007) LCCP No 185.

<sup>67</sup> Reforming Bribery (2008) Law Com No 313.

<sup>68</sup> Joint Committee on the Draft Bribery Bill, Volume 1 (2008-09) HL Paper 115-I; HC 430-I.

<sup>69</sup> Joint Committee on the Draft Corruption Bill (31 July 2003) HL Paper 157 HC 705, Ev 271.

<sup>70</sup> Subject to Parliamentary privilege where actions done or statements made in the course of legislative duties. The Bribery Act sought in part to align UK law with the Organisation for Economic Co-operation and Development's *Convention on Combating Bribery of Foreign Public Officials* (1997), which includes elected persons within the definition of "foreign public official".

<sup>71</sup> *Hansard* (HC) 15 December 2008, col 796.

<sup>72</sup> Para 1.8.

The Law Commission re-visit its 1997 proposal that misconduct in public office be made a statutory offence, in light of the developments of the past dozen years;<sup>73</sup>

because:

The current law on misconduct in public office remains unsatisfactory, not least because it is punishable with up to a life sentence.<sup>74</sup>

<sup>73</sup> As explained above, the 1997 proposal referred to was not in fact a formal Law Commission proposal, but was a provisional proposal made in the consultation paper published by The Nolan Committee on standards in public life, appended to their third report. *CSPL Misuse of Public Office: a Consultation Paper*.

<sup>74</sup> Parliamentary Committee on the issue of privilege, *Police searches on the Parliamentary Estate*: First report, 15 March 2010 [57]. The report is silent on the issue of whether a Member of Parliament is a public office holder.