

UNITED KINGDOM

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

PHASE I BIS REPORT

A. INTRODUCTION

a) Background

The United Kingdom signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the OECD Convention”) on December 17, 1997, and deposited its instrument of ratification on December 14, 1998. At that time, Parliament concluded, in a review of the existing legislative and common law provisions on corruption, which was completed on November 16, 1998, that the law already in place was sufficient to implement the Convention.

The U.K.’s legislative and common law provisions were reviewed under a process of monitoring carried out by the OECD Working Group on Bribery in International Business (“the Working Group”) on 14-15 December 1999 with a view to assessing whether they complied with the Convention requirements. The conclusion was that “On the basis of the ample information provided, the Working Group is ... not in a position to determine that the U.K. laws are in compliance with the standards under the Convention.” It urged the United Kingdom “to enact appropriate legislation and to do so as a matter of priority, taking into account the observations of the Working Group”, and stated its intention “to re-examine the U.K. in Phase 1 as soon as this legislation is enacted.”

In response to the concerns expressed in the U.K.’s Phase 1 Evaluation, the United Kingdom stated its intention to carry out a general reform of corruption law as soon as parliamentary time permitted. Legislative priorities in the U.K. were however impacted by the need to respond to the events of 11 September 2001. As a result, the approach adopted by the U.K. authorities was to include new U.K. legislation on bribery and corruption in the Anti-Terrorism, Crime and Security Act 2001, which received the Royal Assent on 14 December 2001. As such, Part 12 of the Act, which came into force on 14 February 2002, amends the scope of the U.K. law as it relates to bribery, bringing in provisions to strengthen the law on international corruption. One of the features of the new Act is a requirement for the review of its provisions¹.

The changes, which extend the scope of the existing anti-corruption legislation (the Prevention of Corruption Acts 1889 to 1916) and of the common law without altering the main elements of the offences, cover two main areas. The first (Section 108 of the 2001 Act) extends the relevant U.K. law to the bribing

1. Section 122 of the Act provides that the Home Secretary (Interior Minister) must appoint a review committee to report by 13 December 2003 on the Act. Section 122 applies to the whole Act, including both parts 3 and 12. Part 12 of the Act was subject to all-Party agreement. According to the UK authorities, the provisions of parts 3 and 12 are unlikely to be amended significantly as a result of the review process.

of persons and bodies in a country or territory outside or having no connection with the United Kingdom. The second (Section 109) establishes nationality jurisdiction in respect of corruption offences committed 'in a country or territory outside the United Kingdom'. In addition, under Part 3 of the Act, which deals with disclosure of information held by revenue departments, Section 19 contains provisions that are also relevant to the obligations under the Convention. The present Phase 1 bis review is intended to take account of the changes brought about by the new legislation.

b) *Methodology and Structure of the Report*

Since the purpose of Phase 1 bis of the monitoring process is to review progress in complying with the recommendations of the Working Group and thereby to assess the implementation of the Convention, the Phase 1 bis Report is intended to supplement, not to replace, the Phase 1 Report. It should be read in conjunction with the Phase 1 Report as, taken together, they provide an overall evaluation of the U.K. legal framework in place for combating corruption of foreign public officials. To the extent that the findings and conclusions of Phase 1, both in the evaluation and in the body of the report, are not specifically modified by the present report, they remain valid and continue to represent the views of the Working Group.

The Phase 1 bis Report adopts the following structure: the introduction, Part A, explains the background and context with regard to the new legislation. Part B recalls the main provisions of pre-existing U.K. bribery law and the main concerns identified by the Working Group in the course of the Phase 1 examination. Part C examines the new provisions, focusing on Part 12 of the Anti-Terrorism, Crime and Security Act 2001, showing how they impact on the existing anti-bribery framework. Part D summarises the extent to which the new provisions address the Working Group's concerns as expressed in Phase 1. Part E sets forth the specific recommendations of the Working Group, based on its conclusions as to compliance with the standards of the Convention. It also identifies those matters which the Working Group considers should be followed up as part of the continuing monitoring effort.

B. THE PRE-EXISTING U.K. BRIBERY LAW

As a background for an analysis of the effect of the new legislation, it is important to briefly present the anti-bribery laws of the United Kingdom as they existed prior to the enactment of the Anti-Terrorism, Crime and Security Act 2001. The Phase 1 Report and Evaluation by the Working Group contains a detailed analysis of the pre-existing U.K. bribery law. The summary that follows is therefore limited to the main provisions of the law; it is not intended to supersede the previous Report.

a) *The Pre-existing Bribery Offences*

The pre-existing offences of bribery in the United Kingdom are based on both common law and statute. Common law is developed through judicial decisions, each of which forms a precedent binding on courts of the same or a lower level. The statutory provisions on corruption are contained in three different criminal statutes, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (collectively called the Prevention of Corruption Acts 1889 to 1916). These were enacted before Scottish devolution, and apply to the entire United Kingdom, i.e. England, Wales, Northern Ireland and Scotland. Under sections 93A (3)(b) and 93A(4) (c) of the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993), there is no limitation period with respect to the prosecution of corruption offences.

At common law, according to the traditional formula taken from *Russell on Crime*, 12th. ed., 1964, "bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in

order to influence his behaviour in office, and to incline him to act contrary to the known rules of honesty and integrity”.²

The statutory offences use different definitions, concepts and terminology, and are overlapping in scope. The Prevention of Corruption Acts 1889 to 1916 cover both active and passive bribery by any person and include definitions of corrupt behaviour which would encompass, variously, bribery of persons in an agent-principal relationship, inducement to officials of public bodies, and different types of gift or valuable consideration. Under the Interpretation Act 1978 the term “person” includes any corporate or unincorporated body or person. The offences under the Prevention of Corruption Acts are triable either summarily (by magistrates with no jury) or on indictment (before a judge and jury). Sanctions depend on the type of court in which the offender is convicted: on summary conviction by a magistrates’ (lower) court, the maximum penalty is six months imprisonment or a fine not exceeding the statutory maximum, or both. Conviction on indictment (i.e., after trial in the Crown Court, usual in the case of more serious offences) can result in imprisonment for seven years or an unlimited fine, or both. Loss of voting rights and eligibility for public office may also apply in the case of the 1889 Act offence. Prosecutions under the 1889 and 1906 Acts require the consent of one of the government’s chief Law Officers, the Attorney-General or the Solicitor-General.

The Public Bodies Corrupt Practices Act 1889 made both active and passive bribery of a member, officer or servant of a public body a criminal offence. It is an offence to “corruptly give, promise or offer any gift, loan, fee, reward or advantage whatsoever” as an inducement or reward for doing or forbearing to do anything in respect of any matter or transaction in which the public body is concerned. The courts have interpreted ‘corruptly’ as meaning purposely doing any act which the law forbids as tending to corrupt, the rationale being to prevent agents and public servants being exposed to temptation. The broadly worded 1889 Act covers cases involving third parties and intermediaries. However, the language originally used to define a ‘public body’ was domestic in scope, and apparently confined to then-existing categories of local government entity. Its application in the context of foreign bribery would have presented obvious problems of interpretation. In any event, the United Kingdom authorities placed no reliance on the 1889 Act during the Phase 1 Review.

The offences under the Prevention of Corruption Act 1906 apply to both private and public bribery and are based on the relationship of principal and agent. According to section 1(2), the term ‘agent’ “includes any person employed by or acting for another”. Under that Act, it is an offence for any person to give or agree to give any consideration to any agent as an inducement or reward for doing or forbearing to do any act, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business. It is also an offence to offer such a gift to an agent.

The Prevention of Corruption Act 1916 broadened the definition of ‘public body’ in the 1889 Act to include, in addition to the other categories listed, ‘local and public authorities of all descriptions’. It also introduced the so-called ‘presumption of corruption’, whereby mere proof of payment of money, a gift or other consideration to an employee of a public body by anyone holding or seeking to obtain a contract from such body, raises a presumption that such payment was corruptly made. This presumption applies in proceedings under the 1889 and 1906 Acts against employees of public bodies who receive payments or gifts. The effect is to reverse the normal burden of proof, so that in such a case it is for the defendant to prove, on the balance of probabilities, that the payment was not corrupt.

2. In Scotland, which has its own common law, it is an offence at common law for a public official, defined as a person entrusted with an official situation of trust, wilfully to neglect his or her duty. Gordon, *The Criminal Law of Scotland* (2nd ed. 1978), para. 44-01.

The above state of affairs was described by the Attorney-General as “something of a patchwork”, when the draft of Part 12 of the 2001 Act was debated in Parliament in December 2001. The Law Commission for England and Wales, an independent body set up by Parliament in 1965 to keep the law of England and Wales under review and to recommend reform when it is needed, found the law on corruption “uncertain and inconsistent” and proposed in a Consultation Paper issued in 1997 that it be comprehensively restated and updated by the enactment of a new statutory bribery offence (*Legislating the Criminal Code: Corruption*).

b) Main findings of the Working Group in Phase 1

The Phase 1 review of U.K. law conducted by the OECD Working Group to assess compliance of the law with the requirements of the Convention also identified several deficiencies in the legislative and common law provisions on corruption, as they applied at the time.

First, when reviewing the compatibility of the law of the United Kingdom with the Convention, the Working Group voiced concerns about the uncertain applicability of U.K. law to the bribery of foreign public officials. The Group noted that the United Kingdom relied on a common law offence as well as statutory offences for implementing the obligation under the Convention to criminalise the bribery of foreign public officials and that neither offence expressly applied to the category of foreign bribery. The Group further noted that the common law offence did not appear in practice ever to have been applied to the bribery of a foreign public official, and there was only one reported case (the *Raud* case, 1989) where the statutory offences had been cited in relation to foreign bribery (the charge in that case was one of conspiracy to commit an offence under the 1906 Act). Moreover, the 1906 Act contained express language including within the definition of an ‘agent’ certain categories of domestic public official (“a person serving under the Crown,” etc) but was silent on the question of foreign public officials. Thus, as noted by the Working Group, the application of that Act to the bribery of a foreign public official depended entirely on future judicial interpretation. The Group voiced additional doubts with regard to the applicability of U.K. law to members of a foreign parliament and members of a foreign judiciary. It also expressed concerns that, if there was no clear offence of bribing a foreign public official under U.K. law, the United Kingdom would not be able to implement some of the other obligations under the Convention, in particular with regard to the provision of mutual legal assistance, the application of money laundering legislation and the disallowance of tax deductibility – all dependent upon the existence of a criminal offence under U.K. law.

The views of the U.K. authorities differed and still differ from the Working Group’s analysis as set out in paragraph 16 above. According to the U.K., the existence of a single case where a foreign public official was held to be the agent of a foreign government in terms of the 1906 Act was sufficient in U.K. law to create the presumption that this view will be upheld by the courts in any future case. In another case (*Van der Horst*), an agent (in the private sector) was convicted under the 1906 Act despite the fact that he worked for a foreign principal, and that the corrupt activity was mainly carried out overseas. As regards the common law, while acknowledging that there is no case law on its application to the bribery of foreign judges and foreign MPs, the U.K. authorities pointed out that there is no limitation on the scope of the offence which would lead the courts to conclude that it did not so apply: for this reason, in their view, the common law applies to the bribery of anyone ‘in a public office’. The U.K. also took note of the statement in paragraph 3 of the Commentaries to the Convention, according to which “a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with [Article 1 of the Convention]”.

In its review of implementation of the Convention by the U.K., the Working Group also drew attention to various other respects in which U.K. law might result in uncertainty in the implementation of the

Convention. These concerned some of the elements of the offence as defined in Article 1 of the Convention, including the manner of committing the bribery offence (“offer, promise or give”), the nature of the benefit, and the position with regard to third parties. The concerns expressed by the Working Group in Phase 1 derived largely from the lack of clarity, which is due to the coexistence of common law definitions alongside one or more statutory definitions framed in different language.

The Working Group further noted that under the existing law, the courts did not have jurisdiction to try a bribery offence unless some part of the corrupt transaction took place in the United Kingdom. The Working Group recommended that the U.K. government consider the extension of the scope of the bribery offences beyond its territorial jurisdiction in order to cover acts occurring entirely outside the territory of the United Kingdom.

Turning to enforcement, the Working Group voiced three specific concerns. The Working Group first noted that, under existing law, prosecution of bribery offences was carried out on the basis of the recognised discretionary power to initiate a prosecution, using a set of criteria known as the “evidential and public interest test”. It voiced its expectation that, in the exercise of prosecutorial discretion, the U.K. fully respect Article 5 of the Convention, which prohibits consideration of the national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, when deciding what is in the public interest. The Working Group also noted that prosecution of a bribery offence under the Prevention of Corruption Acts could not be instituted without a Law Officer’s consent (Attorney-General or Solicitor-General). It considered that there did not appear to be clear reasons why decisions made by professional prosecutors pursuant to established standards (evidence and public interest factors) needed to be reviewed by Law Officers, who are senior members of the Executive. The Working Group therefore recommended that the U.K. reconsider the requirement for the Law Officer’s consent. In addition, the Group viewed the duty of confidentiality that bound U.K. tax authorities as a significant obstacle to the detection of bribery and therefore recommended that the Government consider taking steps to allow the exchange of information between the tax and prosecuting authorities in cases of foreign bribery.

C. THE NEW STATUTE

The Anti-Terrorism, Crime and Security Act 2001 was enacted in response to the events of 11 September 2001. As a result, it contains a variety of measures designed mainly to cut off terrorist funding, ensure information sharing between government departments, enhance the security of vulnerable industries, and increase powers of enforcement. Included in the 2001 Act is new legislation on bribery and corruption.

a) *The Applicability of the New Statute*

England and Wales, Northern Ireland and Scotland

Three criminal law jurisdictions –England and Wales, Northern Ireland and Scotland—have co-existed in the United Kingdom since it took its present form in 1921. In 1998 a process (“devolution”) was set in motion for the transfer of some of the powers held by the central executive and parliamentary institutions in London to executive and legislative bodies that were set up in Wales, Northern Ireland and Scotland. As a result of “devolution”, the Scottish Parliament now has wide-ranging powers over policing and criminal law. In Wales and Northern Ireland, these responsibilities have not been devolved and continue to fall within the competence of the Westminster Parliament and central government. Part 12 of the Anti-Terrorism, Crime and Security Act 2001 applies everywhere in the United Kingdom with the exception of Scotland, as this Part deals with matters which, under the Scotland Act 1998, now fall within the

competence of the Scottish Parliament. As the Scottish Parliament has not yet passed any provisions equivalent to Part 12 of the 2001 Act, only the Prevention of Corruption Acts 1889 to 1916 and Scottish common law apply to Scotland. Equivalent Scottish provisions to Part 12 of the 2001 Act are contained in Part 9 of the Criminal Justice (Scotland) Bill, currently before the Scots Parliament. The Bill is expected to become law by early 2003. Part 3 of the 2001 Act deals with matters which are reserved to the Westminster Parliament, which legislates for the whole of the United Kingdom, and it therefore applies in Scotland.

U.K. Crown Dependencies and Overseas Territories

The applicability of U.K. law to U.K. Crown Dependencies and Overseas Territories is governed by different principles. They have constitutional links with the U.K. based on their allegiance to the British Crown, not to the state itself. Because they are self-governing dependencies of the British Crown and enact their own legislation, U.K. Acts of Parliament and the ratification of international conventions and treaties normally do not apply to them unless specifically agreed with the Insular Authorities. There are three Crown Dependencies: the Isle of Man, Guernsey and Jersey. The Convention was extended to the Isle of Man in June 2001; the Isle of Man has drafted legislation containing provisions equivalent to Parts 3 and 12 of the 2001 Act, which is currently before its Parliament and is expected to become law by the end of 2002. Negotiations are still under way to bring the two Channel Islands within the scope of the Convention. To achieve this, Guernsey and Jersey need to enact new legislation to ensure their domestic laws match the provisions of the Convention. Both are currently preparing new legislation to comply with the Convention, with Bills expected to come before their Parliaments around the end of 2002. The process to bring the U.K.'s Overseas Territories under the scope of the Convention has also begun. This involves a bilateral consultative process with each Territory. As extending the Convention to all fourteen Overseas Territories is not practicable, the nine most significant Overseas Territories will be encouraged to make changes. These are: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, and the Turks and Caicos Islands³. To date, Gibraltar is in the process of drafting new legislation, and the Cayman Islands' legislature is considering amendments to its Penal Code. The U.K. will keep the Working Group informed of progress towards the extension of the applicability of the Convention to Overseas Territories.

b) *The New Provisions*

Part 12 of the Anti-Terrorism, Crime and Security Act 2001 extends the scope of the U.K. law on bribery to 'foreign' bribery. It does this by providing that the existing bribery offences are also offences if they are committed outside the United Kingdom, or if they involve either foreign agents or principals having no connection to the United Kingdom, or holders of a foreign public office, or officials of foreign bodies or authorities which are the equivalent in the country concerned of those covered by the domestic offence. In other respects the elements of the offences remain unchanged; the Act makes it clear however that the existing presumption of corruption in respect of the statutory offences is not correspondingly extended. Part 12 of the Act also provides for jurisdiction over U.K. nationals or bodies incorporated in the U.K. who commit one of the offences as now redefined, no matter where outside the U.K. the offence is committed. In addition, Part 3 of the 2001 Act, on Disclosure of Information, lifts restrictions on the sharing of information between agencies for the purpose of making more effective the detection and investigation of crimes, including bribery.

Section 108: the offence of bribery of foreign public officials

A first important feature of the new U.K. law on corruption as amended by Section 108 of the Anti-Terrorism, Crime and Security Act 2001 is that it clarifies that the existing offences of bribery extend to bribery of persons outside, and with no connection to, the United Kingdom. It does so by explicitly importing a 'foreign' element into the offences of bribery under the existing anti-bribery legislation (the Prevention of Corruption Acts 1889 to 1916) and the common law. In doing so, the new legislation refers back to the definition of a public official contained in the existing anti-bribery statutes and the common law.

i) 'Foreign' bribery

Section 108 of the Anti-Terrorism, Crime and Security Act 2001 clarifies that the common law offence of bribery extends to persons holding public office outside the UK and that the statutory offences apply outside the UK in the same circumstances as they apply within the UK. In order to achieve this, it makes four specific changes to the law with respect to both the common law offence of bribery and the statutory offences under the Prevention of Corruption Acts 1889 to 1916.

With respect to the common law offence of bribery, Section 108 (1) provides that "For the purposes of any common law offence of bribery, it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom."

With respect to the Prevention of Corruption Acts (1889 – 1916), there are amendments to each statute.

Section 108 (3) amends the definition of 'public body' in Section 7 of the Public Bodies Corrupt Practices Act 1889 to read as follows : "The expression 'public body' means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above."

Section 108 (2) amends Section 1 of the Prevention of Corruption Act 1906, which deals with agents and principals, to add the following subsection 4: "For the purposes of this Act it is immaterial if (a) the principal's affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom ; (b) the agent's functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom."

Section 108 (4) amends the definition of 'public body' in Section 4 (2) of the Prevention of Corruption Act 1916 to read as follows : "In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression "public body" includes, in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions (including authorities existing in a country or territory outside the United Kingdom)."

ii) The definition of 'public officials'

While Section 108 of the new Act imports the 'foreign' element, it does so without providing an autonomous definition of what constitutes a 'foreign public official' *per se*. In essence, the definitions of 'agent', 'principal', 'public office', 'public body' and 'public authorities' from which the concept of 'public official' must be derived, are simply transposed by territorial extension so that they must now

respectively be interpreted in a 'foreign' context in the light of the expanded scope of the offence. The statutory definition of 'public body' already includes 'local and public authorities of all descriptions'.

Article 1(4) of the Convention defines a foreign public official as: "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation". As is recognised in the Commentary to that Article, there is no requirement that Parties "utilise its precise terms" in defining the offence under their domestic laws. Other language could comply with the Article. "For example," the Commentary states, "a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article". The test is whether a conviction would require "proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph".

In its Phase 1 Evaluation of the United Kingdom, the Working Group voiced specific concerns as to whether members of a foreign judiciary or legislature would be within the scope of the existing language. It recommended that "in the context of the Government's review of the law of corruption, the U.K. ensure that any new law that is proposed is clearly applicable to foreign Members of Parliament and foreign judges". The view of the U.K. authorities is that the bribing of members of foreign parliaments and members of foreign judiciaries is covered by the common law -- in which the accepted statement of the offence covers "any person, whatsoever, in a public office" -- and that its application to holders of foreign office is made explicit by section 108 (1) of the new Act.

As to judges, there are no recent decided cases involving domestic judicial bribery in the U.K -- the 1887 *Gurney* case involved a magistrate. However the Law Commission cited the *Gurney* case when it concluded in its 1998 Report that 'it is an offence at common law to give a judge, magistrate, or other judicial officer any gift or reward intended to influence his or her behaviour' (U.K. Law Commission, "Legislating the Criminal Code: Corruption", Report Law Com No 248, 3 March 1998, paragraph 2.27). U.K. courts may also rely on the definition of who is to be regarded as a 'public officer' for the purposes of common law bribery provided in the 1914 *Whitaker* case (10 Cr.App.R245 [1914] 3 KB 1283)³. Thus it is expected that the courts will hold, pursuant to Section 108(1) of the 2001 Act, that the offence under the common law of England, Wales and Northern Ireland also applies to foreign judges.

As to bribery of members of parliament, there has been some uncertainty over whether the common law offence of bribery of a person holding a public office extends to members of the Westminster Parliament. The 1975 Royal Commission on Standards in Public Life expressed the view that membership of Parliament did not constitute public office for the purposes of the common law. However, a member of the House of Commons was prosecuted in 1992 for corruptly receiving benefits from a company in exchange for using his influence as an MP on its behalf (he was subsequently acquitted). The trial judge in that case ruled that MPs were subject to the common law offence. The situation is further complicated by the fact that, because of parliamentary privilege, Westminster MPs may not be made the subject of criminal or civil proceedings in respect of statements made in either House, nor may such statements be used as evidence in court. The Nolan Committee, whose function is to investigate concerns about the standard of conduct of holders of public office in the U.K., in its First Report of the Committee on Standards in Public Life (at p.43), recommended in 1995 that the Government take steps to clarify the law relating to the bribery or the receipt of a bribe by a Member of the Westminster Parliament. The U.K. Home Office, in the course of the Phase 1bis review, has confirmed the Government's intention that the Corruption law reform Bill should address the issue of Westminster parliamentary privilege in relation to corruption prosecutions. Following

4. In this case, the Court of Appeal defined a public officer as an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.

the 1992 case and the implementation of the 2001 Act, there seems to be no reason to doubt that the bribery of members of foreign parliaments falls within the scope of the common law offence.

Questions were also raised in the Phase 1 Report about the position with regard to officials of public enterprises or public international organisations. The new language introduced by section 108 (4) -- expanding the statutory definition of 'public bodies' whose members, officers or servants might be the objects of bribery -- and by section 108 (1) -- expanding the common law definition of "public office" -- now encompasses "local and public authorities of all descriptions" outside the United Kingdom and "persons [in a public office] with no connection with the United Kingdom and carrying out their functions in a country or territory outside the United Kingdom". The category of persons covered is now geographically broader since the new Act came into force and the broad language used in the Prevention of Corruption Acts 1889 to 1916 and the common law, as amended, would probably be held to cover these two categories of foreign public officials. Furthermore, in considering what is a public office or a public body, the courts would be likely to take account of recent practice, including the *Bowden* case on the common law offence of misfeasance ([1996] 1 Cr. App.R. 104, CA), where the court looked at the nature of the official's duties, and held that the offence applied "generally to every person who is appointed to discharge a public duty and is remunerated for doing so whether ... by the Crown or otherwise". In addition, an agent within the terms of section 1(2) of the 1906 Act may be someone either in the public sector or the private sector.

The UK uses a wide concept in deciding which functions, or offices, are to be regarded as public. This approach has been endorsed by the Law Commission in the context of the reform of corruption law.⁴ The U.K. authorities have indicated that this view will be reflected in the terms of the forthcoming legislation.

Section 109: Jurisdiction

A second important feature of the new U.K. law on corruption as amended by the 2001 Act is that it establishes jurisdiction over corruption offences committed abroad by 'U.K. nationals' and by bodies incorporated under the law of any part of the U.K. (Section 109 of the 2001 Act). This means that a U.K. national or a company or other entity incorporated under U.K. law can now be prosecuted in the courts of England, Wales and Northern Ireland for bribery even if no part of the offence took place in the U.K. Previously, some part of the corrupt transaction needed to take place within the U.K. (e.g. the agreement, the transaction, or the arrangements) for U.K. law to apply.

Section 109(4) defines a national of the United Kingdom as not only a British citizen or a person who, under the British Nationality Act 1981, is a British subject or a British protected person within the meaning of that Act, but also 'a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen'. The majority of those who live in the Crown Dependencies and Overseas Territories (there are exceptions: migrant workers and expatriates of other countries) belong to one of these categories and they can therefore be tried in courts in England, Wales and Northern Ireland for acts of bribery committed outside the U.K. It should also be noted that the British Overseas Territories Act 2002 renamed 'British Dependent Territories citizens' as British Overseas Territories citizens' (section 2) with effect from February 2002 and made all British Overseas Territories citizens' --except for those whose

5. "We are therefore inclined to the view that the concept of 'public function' should not be defined, other than in the general terms used in our recommendation. We note this approach was adopted in the Human rights bill introduced in the House of Lords late last year -- giving effect to the European Convention on Human Rights by requiring public authorities to exercise their powers in a manner compatible with the Convention -- where 'public authority' is not exhaustively defined and is said to include 'any person certain of whose functions are functions of a public nature'." (page 60 of the 1998 Report, para. 5.27).

citizenship derived solely from a connection with the U.K. sovereign base areas in Cyprus—British citizens with effect from 21 May 2002. Furthermore, since section 109 of the 2001 Act applies to all British citizens, the fact that Scotland has not yet adopted a similar provision does not prevent courts in other parts of the U.K. (England, Wales and Northern Ireland) from trying any U.K. nationals, including Scots, for corruption offences committed abroad, although relevant offences committed with a connection to Scotland will be tried under Scottish legislation once it is in force in 2003

Under section 109 of the new Act, nationality jurisdiction is applicable, in addition to natural persons, to bodies incorporated under U.K. law, such as registered limited and unlimited companies and incorporated foundations and associations. This means that there is a population of unincorporated enterprises such as most types of partnerships⁵, unincorporated foundations and associations⁶, and many trusts, which do not have legal personality and fall outside the ambit of the nationality jurisdiction of the U.K. anti-corruption law. This does not mean however that they escape the newly established jurisdiction, as the individual natural persons (including, for example, trustees) who make up those unincorporated bodies may still be prosecuted and held jointly and severally liable. It should also be noted that, since section 109 of the 2001 Act applies to bodies “incorporated under the law of any part of the United Kingdom”, companies registered in Scotland can still be tried in courts in other parts of the U.K. (England, Wales and Northern Ireland), although once the Scottish legislation is in force such companies would be tried in Scottish courts.

Section 110: Proving corruption

Section 110 makes it clear that the presumption of corruption introduced by the 1916 Act is not to apply any more widely as the result of sections 108 and 109 of the Anti-Terrorism, Crime and Security Act 2001. The practical effect of this is that, in cases of bribes paid within the U.K. to employees or agents of *public bodies* that have no connection with the U.K., and of bribes paid overseas by U.K. nationals and companies to employees or agents of *public bodies*, in connection with a particular contract or transaction, there is no presumption that the payment is made corruptly. The burden of proof remains with the prosecution. The resulting procedural distinction between ‘domestic’ and ‘foreign’ bribery of public officials should, however, be short-lived. The United Kingdom has confirmed that, following the recommendation of the Law Commission, it is intended to abolish the presumption altogether in the longer term as part of the wider reform of corruption law.

Section 19: Disclosure of Information

The U.K. law, since the 2001 Act, now allows the exchange of information between the Inland Revenue and the prosecuting authorities in cases of criminal investigations and proceedings, including foreign bribery. Tax authorities in the United Kingdom are bound by a duty of confidentiality and therefore could not, until then, volunteer to share tax information on bribes with the enforcement authorities. In its Phase 1 evaluation, the Working Group considered this to be a significant obstacle to the detection of bribery in the

6. By contrast, Part 9 of the Criminal Justice (Scotland) Bill covers Scottish partnerships. Under the laws of England, Wales and Northern Ireland, most types of partnerships do not have legal personality and therefore the partnership cannot be prosecuted, though the partners are jointly and severally liable. There is one type of partnership – limited liability partnership – which has legal personality: these are incorporated bodies, and can therefore be prosecuted. In Scotland all partnerships have legal personality.

7. Under U.K. law, an “unincorporated association” is an organisation where a number of people join together for a common purpose (not a business purpose), whose relationship is governed by rules arising under a contract made between each member. Clubs and societies will generally have the status of an unincorporated association unless specific steps are taken to set up a company or a trust.

U.K. Therefore, it recommended that, in the context of the review of the U.K. law on corruption, the Government consider taking appropriate steps to allow the exchange of information.

Section 19 of Part 3 of the 2001 Act lifts, in specified circumstances, the restrictions on disclosure imposed by law. It does not go so far as to make disclosure mandatory. It does, however, provide that no obligation of secrecy (except in the very limited circumstances required by the Data Protection Act 1998), now prevents the Commissioners of the Inland Revenue and Customs and Excise Departments from disclosing information on their own initiative in order to assist any criminal investigation or criminal proceedings being carried out in the U.K. or abroad or to facilitate whether or not such investigations or proceedings should begin or end. Restrictions on disclosure to the intelligence services in support of their functions, which include the prevention and detection of serious crime, are also lifted. Memoranda of Understanding will be drawn up containing guidelines for the making of such disclosures between the agencies concerned. Furthermore, the Inland Revenue has issued internal guidelines asking staff to report any evidence of criminal activity to the Inland Revenue's Special Compliance Office.

Impact of the new statute on other aspects of the implementation of the Convention

The new provisions specifically clarifying the application of the existing corruption offences to the bribery of persons outside, and/or with no connection to, the United Kingdom has consequences for other aspects of implementation of the Convention. Although the U.K. Government regards both the 1906 Act and the common law as applying to the bribery of foreign public officials, even before the amendments made by the 2001 Act, the Working Group, in its Phase 1 Evaluation, expressed concerns that if there were no explicit offence of bribing a foreign public official under U.K. law, the United Kingdom would not be able to implement some of its obligations under the Convention. These obligations include the provisions of mutual legal assistance, the application of money laundering legislation and the disallowance of tax deductibility. The U.K. laws governing the money laundering offences, mutual legal assistance in the form of search and seizure and extradition and disallowance of tax deductibility are indeed all linked to, and predicated upon, the existence of a criminal offence under U.K. law.

i) Money laundering

The clarification brought about by the 2001 Act reinforces the ability of the U.K. to apply the provisions on money laundering in the Convention. These provisions require that where a Party has made bribery of a domestic official a predicate offence for the application of money laundering legislation, it must do so on the same terms also for bribery of foreign public officials. In the course of the Phase 1 Evaluation, the U.K. authorities explained that bribes, both as money offered and accepted, are to be considered as "proceeds of criminal conduct" within the meaning of the U.K. money-laundering legislation. At that time, it was unclear to the Working Group whether bribery of foreign officials could be considered a predicate offence. The new legislation, by clarifying the application of the corruption offences to 'foreign' bribery, puts it beyond doubt that the bribery of foreign officials is a predicate offence for money laundering on the same conditions as domestic bribery.

ii) Mutual legal assistance

The new statute also strengthens the provision of mutual legal assistance. The Convention mandates the Parties to co-operate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Under Article 9.2, the Convention also states that, where dual criminality is necessary for a party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. The clarification that U.K. legislation covers cases of ‘foreign’ bribery, as defined under the new Statute, should allow the full implementation of these provisions. In particular, the new law meets the dual criminality principle, which, under U.K. law, is a prerequisite to mutual assistance in respect of requests for search and seizure. The new legislation has no impact on the implementation of Article 9.3 of the Convention, which requires that a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

iii) Extradition

The clarification brought about by the 2001 Act also reinforces the ability of the United Kingdom to extradite someone for bribing a foreign public official. Article 10.1 of the Convention obliges the Parties to include bribery of foreign public officials as an extraditable offence under their laws and the treaties between them. Article 10.4 states that, if demanded by national legislation, the requirement of dual criminality is met as long as the offence is within the scope of the Convention. Under U.K. law extradition is available provided: (i) the crime in question constitutes an “extradition crime” and (ii) there is a reciprocal extradition arrangement with the requesting state.

The new provision does not modify the application by the U.K. of Article 10.2, which states that where a Party cannot extradite without an extradition treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public officials”. The provision on extradition of nationals (Art. 10.3), which includes the principle *aut dedere aut iudicare*, is fully implemented by the new legislation. The U.K. authorities will have the option to decide in each particular case whether to extradite or to prosecute the national.

iv) Tax deductibility of bribes

The clarification brought about by Section 108 of the 2001 Act as well the extension of jurisdiction to bribery offences committed wholly outside the United Kingdom under Section 109 also reinforce the ability of the U.K. to implement the prohibition of tax deductibility of bribes. Organised under Section 577A of the Income and Corporation Taxes Act (ICTA) 1988, the regime denies tax relief for any payment the making of which constitutes the commission of a criminal offence under U.K. law. The U.K. Government, including the Inland Revenue, has regarded both the 1906 Act and the common law as applying to the bribery of foreign public officials, even before the amendments made by the 2001 Act. However, the Working Group, in its Phase 1 Evaluation, expressed concerns that the absence of explicit reference to the bribery of foreign public officials in the existing U.K. criminal legislation could render illicit payments made to foreign public officials allowable for tax relief under Section 577A. As Section 577A refers to U.K. criminal law (i.e. tax relief is denied for payments related to anything which is defined as an offence for U.K. criminal law purposes), the 2001 Act, by importing a ‘foreign’ element into the offences of bribery under the existing anti-bribery legislation and the common law, now makes it clear that Section 577A denies relief for payment made to persons outside, and with no connection to, the United Kingdom.

Furthermore, previously, some part of the corruption transaction needed to take place within the U.K. for Section 577A to apply. In other words, if the activity in question occurred wholly outside the United Kingdom, as it was not considered as an offence under U.K. criminal law, the non-deductibility did not bite and therefore the bribe was still as deductible as any other business expense, unless it was considered a gift or hospitality⁷. The Finance Act 2002, which received the Royal Assent in July 2002, has further clarified the applicability of Section 577A to payments that take place wholly outside the United Kingdom. The new legislation provides that there is no right to deductibility in respect of any payment made outside the United Kingdom “where the making of a corresponding payment in any part of the United Kingdom would constitute a criminal offence there” (Section 68 on Expenditure Involving Crime in Part 3, Chapter 2 of the Finance Act 2002). This section applies in relation to expenditure incurred on or after 1st April 2002.

D. COVERAGE OF THE NEW CORRUPTION PROVISIONS

As a result of the Anti-Terrorism, Crime and Security Act 2001, the laws in the United Kingdom against ‘foreign’ bribery are now strengthened. The concerns of the Working Group in the Phase 1 Report and Evaluation have been substantially addressed. The application of the common law and statute law to ‘foreign’ bribery is clarified. The introduction of nationality jurisdiction, as well as the lifting of restrictions on disclosure of information in support of investigations and prosecution, are important steps forward. Furthermore, the existence of a new provision regarding the application of the existing corruption offences to the bribery of foreign agents, holders of a foreign public office, etc., has a potentially significant impact on the ability of the U.K. to provide mutual legal assistance and extradition, on the application of the money laundering legislation and on the U.K. regime to prevent the tax deductibility of bribes.

In its self-assessment of the new law, submitted in the course of the Phase 1 bis review, the U.K. has stated that, in its view, the offence, as now defined, “fully meets the requirements of the Convention and the specific concerns of the Group”. Because it consists of amendments to the pre-existing law, the 2001 Act however leaves unchanged – apart from the ‘foreign’ component – some essential elements of the offence whose interpretation, given the varied terminology employed in the definition of the offence, remains a matter for prosecutors, judges and juries. To the extent that the Working Group drew attention to these questions in the Phase 1 Report and that they appear to remain unsolved, they are briefly reviewed here. As acknowledged by the Home Office in a statement on the prevention of corruption (*Home Office Statement*, June 1997, page 6), much of the concern about the existing statutes “relates to the archaic language and formulations” in them. The amendments brought about by the 2001 Act are already substantial, and largely fulfil their stated objective, to achieve the most essential changes with the minimum of delay. The Working Group notes that, in the course of the Phase 1bis review, the United Kingdom authorities have confirmed their Government’s commitment to pursuing the wider reform of corruption law as soon as Parliamentary time permits and that Part 12 of the 2001 Act will be repealed and replaced as part of that wider reform.

Bribery of foreign public officials

As discussed above, the amendments to the law contained in Section 108 explicitly import a ‘foreign’ element into the existing offences of bribery under the Prevention of Corruption Acts 1889 to 1916 and the common law. However, the language defining the offence of foreign bribery under the law of the United

8. There is a general provision (Section 577 ICTA) which denies tax relief for any form of business entertainment, hospitality or gift—thus some payments which might be in a grey area could be denied relief on this basis without the need to show that they were corrupt payments.

Kingdom as it now stands still leaves room for some uncertainty as to exactly which categories of public official are covered by which particular offence. As to public international organisations, the question whether they will be regarded as 'public authorities' for the purposes of the statutory definition or whether their officials or agents will be considered to be occupying a 'public office' for the purpose of the common law definition remains a matter for judicial interpretation, though anyone employed by or acting for such an organisation would be an agent within the meaning of the 1906 Act. This may give rise to potential enforcement issues.

One factor to be taken into account is the existence of a clear statement of the intention of Parliament in enacting the new legislation. When the draft of section 108 of the Anti-Terrorism, Crime and Security Act 2001 was debated in the House of Lords on 4 December 2001, a proposal was tabled seeking to add to the definition of a 'public body' words which closely reflected those of Article 1 (4) of the Convention. The aim was "to make it certain that bribing a foreign public official is a crime in compliance with the OECD Convention". (*Hansard*, 4 December 2001, 211204-30). The amendment was withdrawn when the Attorney-General gave an assurance that in his view, the new statutory language, taken together with the common law, achieved this purpose. He said, "the Government is satisfied that the Bill as drafted covers all the categories of public official that the OECD convention requires to be covered."

That statement clarifies what Parliament intended the new legislation to mean. Since the judicial decision of the House of Lords, in *Pepper (Inspector of Taxes) v. Hart* (1993 A.C. 593), reference may be made to clear ministerial statements made in the course of the debate on a piece of legislation in cases where that legislation is ambiguous or obscure, in order to assist in interpretation. The Attorney-General's statement is authoritative, and provides valuable material for the prosecuting authorities to use. It remains to be seen whether prosecutors will be able to rely on it when arguing for a broad interpretation, consistent with the Convention, of the definition of "foreign public official".

Other elements of the offence

A first difficulty with the present legislation, as noted by the Working Group in its Phase 1 Report of the U.K., is that of ascertaining whether U.K. laws, in conformity with Article 1(1) of the Convention, fully cover the "giving", "offering" or "promising" of an advantage to a foreign public official. Under the 1889 Act a person may commit an offence by giving, offering or promising the advantage; under the 1906 Act, by giving, offering or agreeing to give it; and, under the common law, by offering any undue award. While there is certainly no major difference between promising an advantage and agreeing to give it, it can only be assumed, as noted in the Phase 1 Report, that the promising or the giving of a reward would be covered by the common law offence as the ordinary meaning of "offer" would cover both giving and agreeing to give a reward.

Another difficulty with the present legislation is that of ascertaining the nature of the benefit which constitutes a bribe. Under Article 1(1) of the Convention, the bribe is broadly defined in as "any undue pecuniary or other advantage". Under the laws of the United Kingdom, different definitions apply at common law and by statute. At common law, the benefit given or offered can be "any undue reward". Under the 1889 Act, it is "any gift, loan, fee, reward, or advantage whatsoever", though it must be connected to a particular "matter or transaction", and under the 1906 Act "any gift or consideration", consideration including "valuable consideration of any kind". Though all of these are wide in scope, the existence of a proliferation of definitions may give rise to uncertainties in interpretation.

The Convention also covers situations where a third party or intermediary, besides the public official, is involved. As to intermediaries, there is nothing in the 2001 Act that changes the existing law. Under the 1889 Act, the giving, etc., of bribes through intermediaries is caught by the broad drafting of the Act which

states that “every person who shall by himself or by or *in conjunction with any other person* corruptly give, promise, etc. shall be guilty of a misdemeanour”. In the 1906 Act, there is no express mention of bribery through intermediaries. However, based on general principles of criminal liability, provided the intermediary is acting in concert with the briber and not merely for his own purposes, the briber would be liable as the principal perpetrator⁸.

With regard to third parties, their coverage by U.K law is less clear. While the 1889 Act states that “every person who shall give, etc, any gift, etc., to any person, *whether for the benefit of that person or of another person* ... shall be guilty of a misdemeanour”, by contrast the definition of the offence of active bribery in the 1906 Act does not include any such language. A foreign official receiving a bribe with the intention of passing it to a third party might be held however to have received “valuable consideration” within the meaning of the 1906 Act, thus making the payer of the bribe liable for an offence.

Because of the continued proliferation of definitions and terminology, it is left to the prosecution, and ultimately to the judge or jury, to establish what the law actually means. It is expected that the U.K.’s proposed general reform of corruption law will provide further opportunity to build on the progress that has now been made and to eliminate ambiguities or inconsistencies in language.

Prosecution of the offence

One of the features of the U.K. anti-bribery law is the requirement that the Attorney General or the Solicitor General for England, Wales and Northern Ireland, who are senior members of the Executive, give his/her consent before any prosecution for the offences under the Prevention of Corruption Acts can be instituted⁹. Introduced during the Parliamentary proceedings on the Bill that became the Public Bodies Corrupt Practices Act 1889, the requirement for the Law Officer’s consent to corruption prosecutions has been retained since then and applies to the statutory offences of corruption as contained in the Prevention of Corruption Acts 1889 and 1906 (the common law bribery offence has no consent requirement).

Such a requirement is not unusual under U.K. law. The U.K. authorities have identified more than 230 other offences in English law which require a Law Officer’s consent. The consent requirement for corruption prosecutions has however been questioned by some, including the Council of Europe’s Group of States Against Corruption in its report published in September 2001¹⁰. The risks associated with the consent requirement were also raised at the time of the Phase 1 Review. When reviewing the compatibility of the U.K. law with the Convention, the Working Group invited the authorities to reconsider the requirement that the prosecution of those who bribe foreign public officials should not be instituted without the Attorney General’s permission.

The 2001 Act retains the requirement for a Law Officer’s consent to corruption prosecutions. The reasons for this were set out in the U.K. Government’s response to comments made on its 2000 White Paper (a consultation paper containing its proposals for the reform of the criminal law of corruption). In that response, which was submitted to the Working Group in April 2001, the U.K. Government explained that,

9. Archbold, 2002 edition, Chapter 8, “Principals and Secondary Parties”, at p. 1577.

10. The situation in Scotland is somewhat different: there, it is the Lord Advocate who is entrusted with the prosecution of crime. Although the Lord Advocate has a position broadly comparable to the Attorney General, as he or she is the sole prosecutor in Scotland, there is no requirement for specific consent in relation to corruption prosecutions.

11. The GRECO Evaluation Team noted that the consent requirement was “one of the occasions where the Attorney General can interfere with the autonomy of the Director of Public Prosecutions when making decisions to prosecute or not” and that “there does not seem to be any justification why decisions to prosecute made by professionals pursuant to established standards should be reviewed by the Law Officers (which might be interpreted as a form of political control) in corruption cases”.

under the United Kingdom Constitution, the Law Officers do not exercise their prosecution functions as members of the Government but act as impartial guardians of the public interest. When exercising their law enforcement functions the Law Officers act wholly independently of the executive and in a quasi-judicial manner. Therefore, when deciding to give consent to the commencement of criminal proceedings, the Law Officers apply the criteria set out in the Code for Crown Prosecutors and take into account the advice of the Crown Prosecution Service. It follows from this that the principal standard for prosecution applied by the Law Officers is, according to the U.K. authorities, the existence of sufficient evidence, and public interest is also taken into account. The Code for Crown Prosecutors provides the public interest factors that can be considered. These include the risk that a prosecution might result in the disclosure of information that could harm sources of information, international relations or national security. Article 5 of the Convention requires that investigation and prosecution “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

E. EVALUATION OF THE UNITED KINGDOM

In conclusion, based on the findings of the Working Group with respect to the United Kingdom’s application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to the United Kingdom. In addition, the Working Group recommends that certain issues be followed up.

a) *General Remarks*

The United Kingdom law implementing the Convention was reviewed by the Working Group in Phase 1 on 14-15 December 1999. At that time, the Working Group identified several deficiencies and urged the U.K. to enact appropriate legislation taking into account the observations of the Group. New law was enacted in December 2001, in the context of emergency anti-terrorism legislation, in the Anti-Terrorism, Crime and Security Act 2001. Part 12 of the new Act extends the scope of the law on corruption by importing a “foreign” element into the offences of bribery under the existing legislation (the Prevention of Corruption Acts 1889 to 1916) and the common law, and by establishing jurisdiction based on nationality. Part 3 of the Act contains a provision lifting existing restrictions on the sharing of information by tax and customs authorities in order to facilitate criminal investigations or proceedings. The Income and Corporation Taxes Act 1988, as amended by the Finance Act 2002, provides that payments made outside the U.K. which would have constituted a criminal offence if made within the U.K. will not be deductible for tax purposes.

The Working Group congratulates the U.K. on having taken very significant steps to address the concerns expressed in the Phase 1 Evaluation, notably by clarifying the application of the common law and statute law to “foreign” bribery, by introducing nationality jurisdiction, and by lifting restrictions on the sharing of information in support of the investigation and prosecution of bribery. While the Working Group notes that the 2001 Act does not go as far as to make disclosure mandatory, internal Inland Revenue guidelines ask staff to report any evidence of criminal activity to the Inland Revenue’s Special Compliance Office. The new legislation also reinforces the ability of the U.K. to provide mutual legal assistance and extradition, and to implement its money laundering legislation and the prohibition of tax deductibility of bribes, all of which are linked to, and predicated upon, the existence of a criminal offence under U.K. law.

The Working Group is of the opinion that the U.K. law now addresses the requirements set forth in the Convention. However, because the 2001 Act consists of amendments to the pre-existing law, it leaves unchanged some essential elements of the offence. Thus, some areas of uncertainty remain.

b) Recommendations

The Working Group takes note that the U.K. authorities have confirmed their government's commitment to pursuing the wider reform of corruption law, and that Part 12 of the 2001 Act will be repealed and replaced as part of that reform. The Working Group recommends that the U.K. proceed at the earliest opportunity to enact a comprehensive anti-corruption statute which will address the issues set out in paragraphs 69, 70 and 71 below.

The Issue of the Application of the Convention to Scotland

The Working Group notes that the clarifications effected by Part 12 of the 2001 Act apply in England, Wales and Northern Ireland, though the new nationality jurisdiction affects all U.K. nationals and all bodies incorporated in any part of the U.K. Equivalent Scottish provisions to Part 12 of the 2001 Act are contained in Part 9 of the Criminal Justice (Scotland) Bill which is expected to become law by early 2003. The Working Group invites the United Kingdom to report to the Group with respect to the coming into force of Part 9 of that Bill and reserves the right to review the Scottish legislation, once enacted, if it considers it necessary.

The Issue of the Application of the Convention to the U.K. Crown Dependencies and Overseas Territories

While the Crown Dependencies and Overseas Territories are not part of the United Kingdom, the U.K. is responsible for their international relations. With regard to the application of the Convention to the Crown Dependencies, the Working Group invites the U.K. to keep it regularly informed of the progress of implementing legislation which is or will be placed before the Parliaments of Jersey, Guernsey and the Isle of Man. With regard to the British Overseas Territories, the Working Group further invites the U.K. to proceed with, and keep the Group regularly informed of, the consultations necessary to ensure that appropriate implementing legislation is enacted as expeditiously as possible in these territories bearing in mind the relative risk factors associated with them.

Specific issues relating to the offence

The definition of foreign public official

Article 1(4) of the Convention gives an autonomous definition of foreign public officials to which national legislation should conform as closely as possible. In defining a foreign public official, the U.K.'s new legislation preserves the terminology employed in the domestic context. In essence, the definitions of "agent", "principal", "public office" and "public authorities" from which the concept of "public official" must be derived, are simply transposed by territorial extension so that they must now respectively be interpreted in a "foreign" context in the light of the expanded scope of the offence. The Working Group considers that such an approach may make a homogeneous application of the Convention among the Parties more difficult.

The Working Group has taken note of the explanations given and the cases cited by the U.K. authorities on the applicability of the definitions available under the existing law with respect to members of a foreign legislature, persons exercising a public function for a public enterprise, and officials or agents of a public international organisation. The Working Group will review this matter in Phase 2.

Other elements of the offence

Among the issues relating to the elements of the offence itself, identified during the Phase 1 Review, the Working Group is of the opinion that consideration should be given in the new anti-corruption statute to covering the notions of offering, promising or giving, and including a definition of the nature of the benefit conferred that reflects “any undue pecuniary or other advantage”. It should also be made clear under the new statute that the offence of foreign bribery may be committed for the benefit of a third party, as provided in Article 1(1) of the Convention.

Issues for follow-up by the Working Group

Enforcement

The 2001 Act retains the requirement whereby prosecution of a bribery offence under the Prevention of Corruption Acts 1889 to 1916 cannot be instituted without a Law Officer’s consent (either the Attorney General or Solicitor General, both of whom are senior members of the Executive). The U.K. authorities explained that, under the Constitution, the Law Officers, when deciding to give consent to the commencement of criminal proceedings, do not exercise their functions as members of the Government but act as impartial guardians of the public interest, in accordance with the code for Crown Prosecutors under the Prosecution of Offences Act 1985.

Article 5 of the Convention states that investigation and prosecution “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”. The Working Group encourages the U.K. to ensure that Article 5 is fully respected, both in the exercise by prosecutors of discretion based on public interest, and in the exercise by a Law Officer of the right to grant or withhold consent to prosecute. The Working Group proposes to examine, as part of the Phase 2 evaluation, whether the Law Officer’s consent requirement may be an obstacle to effective implementation of the Convention and whether the U.K. is in a position, within the exercise of prosecutorial discretion, to fully respect Article 5 of the Convention.
