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An Analysis of Irish Bribery Law

Submitted for the degree of Doctor of Philosophy
(2015)

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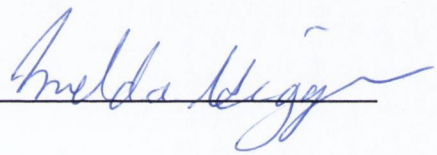
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An Analysis of Irish Bribery Law

Summary

The bribery offences are a much neglected area of law, both from an academic and from a practical perspective. Although the existing statutory offences can trace their origins to the dawn of the twentieth century, there has been no substantive academic attempt to analyse those offences in order to determine their precise contours and scope or to assess whether they meet the needs of a modern bribery law. This thesis remedies these lacunae, focusing on the bribery offences contained in the Prevention of Corruption Act 1906, as amended. In particular it considers whether the agent principal model underlying the 1906 Act is capable of meeting the needs of a modern bribery law and, to the extent that it is not, whether those needs could be more effectively met through reliance on the broader breach of duty model of bribery.

For the purposes of analysing the bribery offences and determining the requirements of a modern bribery law, this thesis relies on two primary sources. The first is the reports published by the Tribunals of Inquiry established, towards the end of the last century, to inquire into possible instances of political corruption. These reports run to thousands of pages in length and, in the absence of written case-law, comprise the only comprehensive existing source of information on the typologies of Irish bribery. Like the bribery offences themselves, the Tribunal's reports have been largely ignored by the academic community.

The second source consists of the various international anti-corruption and anti-bribery instruments to which the State is Party, and specifically: the Council of Europe Criminal Law Convention on Corruption; the EU Convention on the Protection of the European Communities' Financial Interests together with its three protocols; the EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; the EU's Framework Decision on Combating Corruption in the Private

Sector; the OECD's Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions; and the United Nations Convention against Corruption.

In order to analyse the bribery offences set out in the Prevention of Corruption Act 1906, this thesis takes a doctrinal approach. In particular it refers extensively to case-law and analysis on the UK Prevention of Corruption Act 1906 and the US federal bribery offences set out in 18 U.S.C. § 201, for the purposes of determining the contour and scope of those offences.

It is apparent from the analysis conducted in this thesis that the bribery offences contained in the Prevention of Corruption Act 1906 suffer from several deficiencies and that they do not, in their current form meet the needs of a modern bribery law. To some extent the deficiencies identified in the 1906 Act could be effectively remedied in the context of the agent-principal model of bribery which underlies that Act. However, several other deficiencies result from that model itself. Of these most, but not all, could be rectified through basing the bribery offences on the wider breach of duty model of bribery. This thesis also identifies a number of problems with the existing law of bribery which are unrelated to the model of bribery underlying that law.

While this thesis is primarily concerned with analysing the contours, scope and effectiveness of the bribery offences set out in the Prevention of Corruption Act 1906, it also sheds some interesting light on the international instruments which provide the second primary source for that analysis as well as on the evaluation processes associated with them.

In providing a detailed analysis of Irish bribery offences in the context of the findings of the PCTs and the provisions of relevant international instruments, this thesis seeks to contribute to the generation of greater academic interest in and scrutiny of bribery and corruption law generally. It reflects the law as it existed in August 2013.

Acknowledgements

I wish to thank my Dad, to whom this thesis is dedicated. He was a source of constant support, encouragement and love until his death. I miss him.

My sincerest gratitude to my thesis supervisor, Professor Ivana Bacik, Reid Professor of Criminal Law, Criminology and Penology. She has provided invaluable advice and guidance over the years, successfully balancing unfailing support with constructive criticism while remaining invariably cheerful and good humoured. The quality of this thesis owes much to her, the mistakes are exclusively mine.

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INTRODUCTION

This thesis focuses on the offence of bribery. Both historically and culturally bribes and bribery are ubiquitous and the idea that bribery is gross corruption "goes back, it seems, almost to the dawn of civilisation"[1]. From the fifteenth century B.C. on, there has been a concept that corresponds with that of the word "bribe", the "concept of a gift that perverts judgment".[2] While the precise amount of bribes paid each year is difficult to estimate, according to the World Bank it is more than $1 trillion.[3] Yet, despite this ubiquity, bribery is socially, morally, and frequently criminally condemned.[4] An Egyptian pharaoh, Horemheb (1342 – 1314 BC) issued the first recorded law of a secular penalty for bribe taking.[5] Over seven centuries ago, Dante placed bribers in the deepest circles of Hell, reflecting the medieval distaste for corrupt behaviour.[6] In England, the crime of bribery appeared in the mid-1500s although it may not have been routinely applied to administrative officials until the 1800s.[7] Shakespeare reflects popular anti-bribery

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[1] Lois Regent Driscoll, "The Illegality of Bribery: Its Roots, Essence, and Universality, (1984) 14 Cap. U.L. Rev 1, p 17.

[2] John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company, 1984), p 13. See also p 685 where he observes that "[w]herever one looks, whatever time or place or country exchanges with officeholders are found. From the mayors of Nippur and Nuzi in 1500 B.C. to the mayor of Lansing, Illinois, in 1976, payoffs have been made. From the Roman Curia under Innocent III to the Supreme Court of the United States under Earl Warren such exchanges have been arranged. In religious representations as ancient as The Book of the Dead and in secular reporting as recent as the Wall Street Journal such exchanges are commerated".

[3] See World Bank, *The Costs of Corruption,* (8 April, 2004).

[4] See David Hess and Thomas W. Dunfee, "Fighting Corruption: A Principled Approach: The C2 Principles (Combating Corruption)", (2000) 33 Cornell International Law .Journal 593 according to whom, at p 595, "[s]cholars studying the corruption phenomenon have noted a unique paradox: corruption is universally disapproved yet universally prevalent".

[5] Timothy A. Martin, "The Development of International Bribery Law", (1999) 14(2) Natural Resources & Environment 95.

[6] See John T. Noonan Jr, "Bribery", (1985) 2 Notre Dame J.L. Ethics & Pub. Pol'y 741

[7] James Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev. 1695 at 1696. According to Lindgren, prior to this, bribery-type behaviour by public officials was punished through the offence of extortion. As Lindgren explains, at p 1696, "extortion under colour of office is the seeking or receipt of a corrupt payment by a public official (or a pretended public official) because of his office or his ability to influence official action." Consequently, he observes at p 1697 that "[b]ribery and extortion substantially overlap and have for centuries. See also James Lindgren, "The Elusive Distinction between Bribery and Extortion: From the Common Law to the Hobbs Act", (1988) 35 UCLA L. Rev. 815.

sentiment in the *Merchant of Venice*, and more obviously in *Measure for Measure*. The American Constitution made bribery and treason the two explicitly mentioned crimes that could justify the impeachment of the US President.[8] In recent years, corruption, and more specifically bribery, has been the subject of considerable international attention and a number of international organisations have adopted anti-corruption/bribery instruments, including several to which the Irish State is party. Currently, there is:

> [n]ot a country in the world which does not treat bribery as criminal on its lawbooks....In no country do bribetakers speak publicly of their bribes, or bribegivers announce the bribes they pay. No newspaper lists them. (...) Not merely the criminal law – for the transaction could have happened long ago and prosecution be barred by time – but an innate fear of being considered disgusting restrains briber and bribee from parading their exchange.[9]

The traditional reason for criminalising bribery is founded on its immorality. Specifically, the very objective of bribery is to corrupt, and in the act of corrupting it undermines the equality of individuals before law; induces a betrayal of trust; and violates the paradigms of natural justice. More modern reasons focus on the economic harm caused by bribery and its potential to undermine democratic rule. While many of these harms are specifically connected with the bribery of public officials, some also relate to bribery in the private sector, for example the bribery of agents and/or employees.

Alongside the various reasons for criminalising bribery, there are also several models of criminalisation, depending on where the harm of bribery is considered to lie. These include: the acquisitiveness model; specific breach of duty models, such as a breach of a duty to act

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[8]Vito Tanzi, *Corruption around the World, Causes, Consequences, Scope, and Cures*, 45 IMF Staff papers, (December, 1988), No. 4.

[9] John T. Noonan, Jr., *Bribes*, (New York: Macmillan Publishing Company, 1984), p 702; see also Claire Moore Dickerson, "Political Corruption: Free-Flowing Opportunism", (1999) 14 Connecticut Journal of International Law 393; Andrea D. Bontrager Unzicker, Note, "From Corruption to Cooperation: Globalization Brings a Multilateral Agreement against Foreign Bribery", (2000) 7 Indiana Journal of Global Legal Studies 655.

impartially and a breach of a fiduciary-type duty of trust; the more generalised breach of duty model; and the market model. The choice of model used as a basis for the bribery offences may have significant implications for both the personal and material scope of those offences.

Public bribery has been unlawful in this jurisdiction at least since the Magna Carta Hiberniae in 1216. In their more recent incarnations, the Irish bribery offences have been heavily influenced by international developments. Specifically, over recent years the State has signed and/or ratified various international instruments which require the criminalisation of bribery, and which are the drivers behind several of the amendments to the existing offences. These instruments are: the OECD's Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"); the United Nations Convention against Corruption ("UNCAC"); the Council of Europe's Criminal Law Convention on Corruption (the "COE Convention"); the EU's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (the "EU Convention"); the EU's Convention on the Protection of the Union's Financial Interests, together with its protocols (the "PIF Convention and Protocols") and the EU's Framework Decision 2003/568/JHA on combating corruption in the private sector (the "Framework Decision"), (collectively, "the relevant international instruments").

While there are no fewer than 8 general bribery offences in Irish law, the main offences are set out in the Prevention of Corruption Act 1906, as amended (the "PCA 1906") . That Act contains two separate bribery offences which criminalise both the offer, promise or giving of a bribe, known as active bribery, as well as the solicitation or receipt of a bribe, frequently referred to as passive bribery. The PCA 1906 conceives the harm of bribery as lying in the breach of the specific duty of trust owed by an agent to his or her principal. While motivated by the desire to combat bribery in the mercantile community, the Act has a more general scope and criminalises bribery both in the private and public spheres.

Despite the fact that the PCA 1906 is over a century old and despite the increasing international focus on bribery, the bribery offences have rarely been used in practice and have been largely ignored academically. Recent amendments to the PCA 1906 have been exclusively driven by the need to comply with international obligations and, to date, there has been no substantial academic attempt to analyse the existing offences.

This is problematic for a number of reasons. Most basically, pursuant to the principle of legal certainty the criminal law must define offences in a strict and unambiguous way so that, at a minimum, those subject to that law may: determine what conduct falls within the scope of a particular offence, and as a corollary, what conduct does not; and foresee the type of sanctions which may be imposed if the offence is committed. The bribery offences have never been tested to see if they meet these minimum criteria.

More substantially, at least in Western democracies, there is widespread agreement that the use of a State's criminal powers is only justified in exceptional circumstances to respond to wrongs which are a matter of fundamental public concern. While there are a variety of principles used to justify state action, such as the harm principle, the morality principle, the offence principle and legal paternalism, and a lively divergence in views as to which principle, if any, is an appropriate basis for criminalisation, the fundamental need for justification is not in doubt.

Moreover, the agent-principal model of bribery upon which the PCA 1906 is based is itself the subject of a number of criticisms. Most fundamentally, doubts have been raised as to whether a bribery offence which rests on that model can adequately meet the needs of a modern bribery statute and whether it can adequately serve to implement the requirements of the relevant international instruments. Concerns regarding the adequacy of the agent-principal model are behind the recent reform of the UK Bribery law which culminated in the enactment of the UK Bribery Act 2010. That Act abandons the agent-principal model of bribery in favour of a more generalised breach of duty model,

which criminalises payments made as an inducement to perform a professional or occupational function in breach of a duty of good faith or impartiality or in breach of an expectation of trust.

This thesis seeks to remedy the existing academic neglect of the bribery offences. Its fundamental objective is to determine whether the agent-principal model of bribery underlying the PCA 1906 is an adequate model for the criminalisation of bribery, or whether the requirements of a modern bribery law can be more effectively met through the adoption of a breach of duty model along the lines of that contained in the UK Bribery Act 2010.

In determining the requirements of a modern bribery law, this thesis looks to two sources, one domestic and one foreign. The domestic source comprises the reports of several Tribunals of Inquiry established to inquire into various instances of political corruption, including bribery, over the past years. The foreign source comprises various international instruments to which the State is a party and which require the criminalisation of bribery.

Over the course of the 1990s and in response to serious disquiet regarding corruption in Irish public life, the Irish Government established four Tribunals of Inquiry which are usually referred to as the Hamilton Tribunal, the McCracken Tribunal, the Moriarty Tribunal and the Flood/Mahon Tribunal, after their chairperson or the person appointed as their sole member (collectively, the "PCTs" or "political corruption tribunals"). Following on from their inquiries, each of the PCTs published one or more reports summarising the evidence which it had heard and making findings based on that evidence. Collectively, those reports ran to over 5,000 pages and considered dozens of different payments. While not all of the payments inquired into by the PCTs were bribes, they all raised some level of public concern in one form or another.

This thesis analyses the payments inquired into by the PCTs to determine not only what is covered by the PCA 1906, but also what should be covered and what should not, including in particular the boundaries between criminal bribes and legitimate payments, including in particular political donations and gifts. To quote Marshall and Duff,

referencing John Wisdom's comment that 'at the bar of reason, always the final appeal is to cases."[10] and in the absence of case-law the typologies of payments inquired into by the PCTs provide a vital analytical tool for the purpose of analyzing and evaluating the bribery offences set out in the PCA 1906.

Regarding the international instruments sources, as mentioned, the PCA 1906 has been amended on a number of occasions for the purposes of implementing the relevant international instruments. These instruments comprise binding international commitments on the part of the State. Consequently, these instruments provide an important litmus test for the agent-principal model of corruption in so far as in order to be fit for purpose, the model underlying the bribery offences should be one which permits full compliance with Ireland's international obligations.

Ultimately this thesis concludes that the agent-principal focus of the PCA 1906 is too narrow to serve the needs of a modern bribery law and that the UK breach of duty model would provide a more suitable basis for an Irish bribery law, notwithstanding the fact that that model also suffers from a number of limitations. This thesis also identifies a number of other deficiencies in the PCA 1906 from the perspective of the relevant international instruments, which are independent of the model of bribery upon which the offences are founded and proposes measures to remedy them.

In fulfilling its objectives, this thesis uses a doctrinal research methodology. Specifically, it seeks to determine the scope and contours of the bribery offences contained in the PCA 1906 with reference to both domestic and foreign black-letter law, including cases and academic opinion, and the relevant international instruments. Clearly, a central difficulty in determining the substance of the law of bribery is the lack of case-law, written judgments, or other written materials dealing with this issue. This thesis addresses this lacuna through reference to case-law and analysis on the UK Prevention of Corruption Act 1906 and the US Federal Bribery Statute, 18 U.S.C. § 201. The UK 1906 Act shares the

[10] S.E. Marshall and R.A. Duff, "Criminalization and Sharing Wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence, 7, p. 22

same origins as the PCA 1906 and consequently cases and analysis dealing with that Act are of strong relevance to the domestic Act. For its part, the US Federal Bribery Statute uses some of the same or similar concepts to those contained in the 1906 Act and the way in which the US courts have interpreted those concepts is therefore relevant in interpreting that Act. As discussed above, this thesis also makes extensive reference to the bribery offences set out in the relevant international instruments, both for the purpose of determining the contours of the PCA 1906 and for addressing the fitness for purpose of the agent-principal model of corruption.

SCOPE AND STRUCTURE OF THIS THESIS

The second chapter of the thesis traces the development of the Irish law on bribery and in particular, the provisions of the PCA 1906. The next section then explores the issue of bribery and the PCTs, describing both the focus of their respective inquiries and some of their principal findings. The fourth section comprises an overview of the relevant international instruments considered for the purposes of this thesis and reviews the research on the compatibility of the PCA 1906 with those instruments.

The third chapter of this thesis provides a context for this research and positions it within the existing body of knowledge in this area. It begins with a general introduction to the reasons for criminalising certain types of behaviour before examining the various models used to underpin bribery offences, including in particular the agent-principal and breach of duty models. It also explains why from a theoretical perspective the generalised breach of duty model is the one that is best adapted to meet the harm / immorality of bribery and considers the evolution of the breach of duty model of bribery underlying the UK Bribery Act 2010. The final section of this chapter further develops key premises underlying this research.

The subsequent six chapters analyse respectively, the following components of the PCA 1906: the concept of a "bribe"; the personal

scope of the offences; the *actus reus* of bribery; the issue of *mens rea*; corporate bribery; and enforcement and sanctions. In each case the purpose of this analysis is to determine whether the agent-principal model of bribery can or could be used to effectively frame the relevant component of the offence, and if not whether the wider breach of duty model can resolve the deficiencies identified in the agent-principal model.

Each of these chapters follows the same structure, comprising five main sections. The first outlines some of the main issues and theoretical debates regarding the subject-matter of the chapter and relates these debates to the breach of duty models of bribery under consideration. The next briefly outlines the components of the PCA 1906 relevant to that subject-matter. The third section outlines the findings of the PCTs relating to those components and considers the extent to which they adequately address the issues arising from those findings. The fourth section reviews the requirements of the relevant international instruments and then considers the domestic component under consideration from the perspective of those requirements. The fifth section reviews the deficiencies identified in the PCA 1906 and considers the extent to which these deficiencies are attributable to: (1) the way the agent-principal model is articulated in the PCA 1906; or (2) the agent-principal model underlying that Act. In the event that those deficiencies are attributable to the model itself, it also considers whether they would be rectified through reliance on the more generalised breach of duty model.

It should be noted that in so far as the EU instruments are concerned, only the final two chapters consider the compatibility of the existing bribery laws with the EU Convention on the Protection of the EU's Financial Interests and its Protocols. As discussed, these instruments were implemented in Irish law pursuant to the Criminal Justice (Theft and Fraud Offences) Act 2001. However, that Act simply reflects the terms of those instruments, and there is therefore no basis for assessing its compatibility with those instruments, particularly in the absence of any case-law on this issue: for all intents and purposes the provisions of the Act and these instruments are precisely the same.

However, this is not true of the provisions relating to corporate liability or those dealing with enforcement and sanctions. Consequently, the compatibility of Irish law with those aspects of those instruments is considered in the relevant chapters.

A number of issues fall outside the scope of this thesis. Specifically, none of the relevant international instruments are uniquely concerned with the criminal offence of bribery and each of them deals at least to some extent with a number of other issues including, account offences, money laundering, whistle blowing, reporting offences and/or witness protection. While each of these issues plays a significant role in combating bribery additional to that played by the bribery offences, they are outside the scope of this thesis which focuses on the substantive elements of the bribery offences, together with the issues of corporate liability, jurisdiction, immunities, and sanctions.

There are many ways of criminalising bribery and a variety of reasons for doing so. The various components of the bribery offences are themselves surrounded by lively theoretical debates as to the issues which those offences should address and in particular as to where to draw the boundary between legitimate and illegitimate payments. Although these debates are outlined at the beginning of each chapter, many of the issues debated have been addressed in one way or another by the international instruments under consideration. It is not the purpose of this thesis, which is concerned with the Irish law on bribery, to criticise the choices made in drafting those instruments, nor to highlight their shortcomings.

In sum, this thesis provides a detailed analysis of the Irish bribery offences set out in the PCA 1906 for the purpose of determining the adequacy of the agency-principal model of bribery which frames those offences as against the wider beach of duty model of bribery. In doing so, it seeks to address the neglect of bribery law in Irish academic writing and to present a coherent and scholarly analysis of the findings of the PCTs and the requirements of the relevant international instruments.

This thesis breaks new ground in a number of respects. Specifically, it is the first piece of substantive academic work which analyses the contours and scope of the bribery offences set out in the PCA.

In addition, it is the first academic attempt to analyse the legal implications of the inquiries conducted by the PCTs for the law on bribery, despite the fact that, in many respects, the issue of bribery lay at the centre of their inquiries. The fact that the content of those reports has not attracted more academic attention is a clear lacuna in Irish legal analysis and one that this thesis seeks to fill.

While Ireland's compliance with the relevant international instruments has been the subject of reviews carried out by the OECD, the Council of Europe (COE), the EU and Transparency International, this is the first attempt to analyse the compliance of the PCA 1906 with those instruments following the amendments introduced by the PCA 2010 and the first to consider the over-all effectiveness of those reviews. More significantly, this thesis is the first piece of academic work which analyses in a holistic fashion the implications of the obligations assumed by the State under the relevant international instruments for the bribery offences. The obligations imposed by these instruments differ from each other in several respects and the challenge for the State is how to implement these differing obligations in a coherent fashion. This thesis makes proposals as to how the State should meet this challenge.

CHAPTER 2

A REVIEW OF DOMESTIC AND INTERNATIONAL BRIBERY LAW

This chapter gives a background to the domestic and international bribery laws which are the subject of analysis in the subsequent chapters. Specifically, it reviews the PCA 1906, the reports of the PCTs and the relevant international instruments, respectively and briefly surveys the existing materials relevant to these topics.

There is little written about the historical context of the criminal offence of bribery in this jurisdiction, although much about the occurrence of bribery in Irish history. It is however clear that by the time the Magna Charta Hiberniae was written, in 1216, the issue of bribery was sufficiently important to warrant specific mention in that Charter, which stipulates, "We will sell to no man, we will deny to no man, or delay, right or justice." Moreover, the common law has long disapproved of bribery. For example, in the UK, in 1621, a common-law parliament led by Edward Coke found Sir Francis Bacon guilty of accepting bribes and impeached him.

DOMESTIC BRIBERY LAW

In this jurisdiction, bribery is currently criminalised under both common law and statute. In this respect, there are no fewer than six general statutory bribery offences, contained in the Public Bodies Corrupt Practices Act 1889, as amended (the "PBCPA"), the PCA 1906 and the Criminal Justice (Theft and Fraud Offences) Act 2001 ("CJ(TFO)A 2001").[11]The common law and the statutory offences criminalise both the offer, promise or giving of a bribe, known as active bribery, as well as the solicitation or receipt of a bribe, frequently referred to as passive bribery.

[11]There are also other statutes which criminalise certain types of bribery. See e.g. the Local Elections Regulations 1995, s. 96.

COMMON-LAW BRIBERY

At common law it is an offence to bribe or to attempt to bribe a public officer to act otherwise than in accordance with his or her duty. As observed in *Rex v. Whitaker,*[12] by Lawrence J:

> When an officer has to discharge a public duty in which the public is interested, to bribe that officer to act contrary to his duty is a criminal act. To induce him to shew favour or abstain from shewing favour, is to induce him to act contrary to his duty: where this is done corruptly it is an indictable misdemeanour at common law which abhors corruption and fraud.[13]

It is not clear whether bribery at common law constitutes one offence applying to a range of different offices or functions or a number of separate offences.[14] However, Russell on Crime defines common law bribery as "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 incline him to act contrary to the known rules of honesty and integrity".[15]

THE PUBLIC BODIES CORRUPT PRACTICES ACT 1889

The PBCPA 1889 has its roots in revelations of malpractice before a Royal Commission appointed to inquire into the affairs of the Metropolitan Board of Works, the body exercising the powers of local government in London at that time.[16] According to Lord Randolph Churchill who introduced the Bill, that Commission had found "that persons had been guilty of corrupt practices for which they could not be got hold of in any way."[17]Since its enactment, the 1889 Act has been

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[12]*Rex v Whitaker* [1914] K.B. 1283.
[13]*Rex v. Whitaker* [1914] K.B. 1283, 1297.
[14] David Lanham, "Bribery and Corruption" in P. Smith (ed) *Criminal Law: Essays in Honour of JC Smith,* (Butterworths, 1987) at 92.
[15] Sir William Oldnall Russell, *Russell on Crime*, edited by JW Cecil Turner (London: Stevens, 12th edn, 1964) at 381. See further, Imelda Higgins, *Corruption Law*, (Roundhall, 2012) p 275-280.
[16] Phil Fennell and Philip A. Thomas, "Corruption in England and Wales; An Historical Analysis" (1983) 11 International Journal of the Sociology of Law 167, 172.
[17]As quoted in Robert Maynard Leonard and Edward Fry, *The War against Bribery*,

amended by, in particular, the Ethics Act 1995 and the Prevention of Corruption (Amendment) Act 2001.

The PBCPA is uniquely concerned with domestic public bribery. It applies to bribes given on account of an office holder; his or her special adviser; or a director of, or occupier of a position of employment in a public body doing or forbearing to do anything in connection with his or her public functions.[18] The term "office holder" includes: Ministers; Ministers of State; a member who holds the office of the Attorney General; the Chairman and Deputy Chairman of the Dáil and Seanad; the holder of a designated office of chairman of either House: and the holder of a designated office of chairman of a joint committee of both Houses.[19] "Special advisors" are persons whose function or principal function is to provide advice or other assistance to or for an office holder and who are appointed to that position, or awarded a contract for services by the office holder personally, otherwise than by means of a competitive procedure.[20] The term "Director of a Public Body" includes *inter alia*: local authority councillors, members of a health board and members and directors of some public, state controlled and/or state financed companies.[21] The term "occupier of a position of employment in, a public body" includes, inter alia, employees in the ombudsman's office; local government, the health board, and some public, state controlled and/or state financed companies.[22] The PBCPA does not apply to the bribery of Oireachtas Members, foreign public officials or private bribery.[23]

(Secret Commissions and Bribery Prevention League, London, 1913), p 3.

[18]Public Bodies Corrupt Practices Act 1889 as amended by the Ethics in Public Office Act 1995, s.38(a)(i).

[19]Public Bodies Corrupt Practices Act 1889, s.7 as substituted by the Ethics in Public Office Act, s.38(a)(iii). Despite a request by the Standards Commission, the Chairpersons of Oireachtas Committees have not, as yet been designated as office holders – see the Standards Commission's Annual Report, 2005 pg 5 and 2006, p 33.

[20]Public Bodies Corrupt Practices Act 1889, s.7 as substituted by the Ethics in Public Office Act, s.38(a)(iii).

[21] Public Bodies Corrupt Practices Act 1889, s.7 as substituted by the Ethics in Public Office Act, s.38(a)(iii).

[22] Public Bodies Corrupt Practices Act 1889, s.7 as substituted by the Ethics in Public Office Act, s.38(a)(iii).

[23]See generally, Imelda Higgins, *Corruption Law*, (Roundhall, 2012), p 280-314.

THE PREVENTION OF CORRUPTION ACT 1906

The PCA 1906 arose out of increasing public concern regarding the use of secret commissions within the mercantile community. At the time such commissions were considered to be a usual, albeit deplorable, accompaniment of business and to the extent that relief was available then the usual remedy was a civil action:

> Bribery was then so general that it was considered a trade custom, and when an agent was sued for the return of secret commission such a custom or practice was often alleged.[24]

These commissions were the subject of a report prepared by the London Chamber of Commerce in 1899 which concluded that:

> .. secret commissions in various forms are prevalent in almost all trades and professions to a great extent, and that in some trades the practice has increased, and is increasing, and they are of opinion that the practice is producing great evil, alike to the morals of the commercial community and to the profits of honest traders.[25]

The first Bill seeking to outlaw secret commissions was introduced in the House of Parliament in April 1899 and the issue was the subject of three further bills before the Prevention of Corruption Act 1906 was finally passed.

While the overall objective of the original 1906 Act was to outlaw secret commissions, the immorality or harm justifying their criminalisation does not appear to have been clearly articulated at the time of the enactment of that Act. Or, more precisely, there appears to have been several overlapping reasons for the criminalisation of such commissions. In general, secret commissions were viewed as dishonest and as having a tendency to "stifle confidence between man and man and to discourage honest trade and enterprise."[26] More specifically, as agents were

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[24]Albert Crew, *Bribes and Bribery in Business* (Johnson & Sons Ltd., 1916), p 1 - 2

[25]Report of the Special Committee of Secret Commissions of the London Chamber of Commerce, 1899, as quoted in Albert Crew, *The Law Relating to Secret Commission and Bribes, Christmas boxes, Gratuities, Tips etc* (Sir I. Pitman & Sons Ltd., 1913), p 62.

[26]Memorandum of the Secret Commissions Bill, 1889 as quoted in Albert Crew, *The Law Relating to Secret Commission and Bribes, Christmas boxes, Gratuities, Tips etc.,*

remunerated by the principal for their agency role, it was considered that they should not therefore be permitted to make secret profits over and above this agreed remuneration. On this view, any profit arising out of transactions conducted by an agent *qua* agent, "...belongs to the principal and the agent has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it."[27] In addition, the acceptance of a bribe by an agent was essentially viewed as a fraud on his or her principal, as:

> When a bribe is paid by a third party to an agent the object of the third party is to obtain an advantage at the expense of the principal, since it is out of the pocket of the principal that the bribe directly or indirectly comes. The principal either pays more for goods or services or gets inferior goods or services.[28]

Finally, secret commissions were also condemned for inducing a breach of the duty of trust owed by an agent to his or her principal:

> The agent who takes a bribe puts himself in a position in which he is tempted to commit a breach of the trust reposed in him, and in which his own interest and his duty to his principal come into conflict.[29]

Given these underlying objectives, it is hardly surprising that the PCA 1906 frames the wrong of bribery in terms of the agent-principal relationship. Moreover, by the time of its enactment, public bribery was already an offence under both common law and under the PBCPA.

(Sir I. Pitman & Sons Ltd., 1913), p 66.

[27]Albert Crew, *Bribes and Bribery in Business* (Johnson & Sons Ltd., 1916), p 18; see also *Parker v M'Kenna*, 1874, 10 Ch., 96.

[28]Albert Crew, *Bribes and Bribery in Business* (Johnson & Sons Ltd., 1916), p 17; see also the civil case of *Hovenden v Millhoff* 83 L.T. 43, in which Lord Justice A.L. Smith commented "If a vendor bribes a purchaser's agent, of course the purchase money is loaded by the amount of the bribe. It cannot be denied."

[29]Albert Crew, *Bribes and Bribery in Business* (Johnson & Sons Ltd., 1916), p 17; see also G. W. Wilton, "The Prevention of Corruption Act, 1906" (1906-1097) 18 The Juridical Review 370, who observes, at 373: "The first section of the Statute of 1906 is entitled 'Punishment of Corrupt Transactions with Agents.' It is plain from this heading that the mischief intended to be struck at is the payment of douceurs, in whatever shape, to persons pledged by their duty to serve the interests of their particular master or principal, in order that these persons may influence the contracts or business of their employer for the benefit of those from whom the douceurs are taken. It is against morality for one man to serve two masters without the knowledge of both masters that he is doing so."

Overview of the PCA 1906

In its original form, the PCA 1906 criminalised payments "corruptly" given to agents or received by them for the purposes of acting:

> as an inducement or reward for doing or for forbearing to do or for having..... done or forborne to do any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavor to any person in relation to his principal's affairs or business.[30]

In this jurisdiction, the PCA 1906 has been amended on several occasions, most significantly by the Ethics Act 1995, the Prevention of Corruption (Amendment) Act 2001 (the "PC(A)A 2001"), and the Prevention of Corruption (Amendment) Act 2010 (the "PC(A)A 2010"). As mentioned, several of these amendments were motivated by the need to comply with the relevant international instruments.

In particular, the PC(A)A 2001 substituted the two original offences of giving and receiving a bribe set out in the PCA 1906 making it an offence to "corruptly" offer or receive an advantage as:

> An inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business.[31]

The most significant difference between these substituted offences and the original offences is: (1) that the former cover advantages offered or received "on account of" the agent doing a relevant act or omission; and (2) under the 2001 Act, the relevant act or omission may relate either to the agent's own office or position or his or her principal's affairs or business. The PCA 2001 also further articulates the meaning of the term "agent", listing a number of domestic and foreign public offices which are included in the term.[32]

For its part, the PC(A)A 2010 amends the PCA 1906 in several respects. In particular, it extends the *actus reus* of the active bribery

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[30] Prevention of Corruption Act 1906, s. 1
[31] Prevention of Corruption (Amendment) Act 2001, s. 2(1) and (2)
[32] Prevention of Corruption (Amendment) Act 2001, s. 2(5).

offence[33] and further articulates the persons to be considered "agents" for its purposes.[34] It also defines the term "corruptly" as used in the PCA 1906[35] and amends the Act's jurisdictional scope to provide for more extensive nationality based jurisdiction.[36]

In 2012, the Government approved the general scheme for the Criminal Justice (Corruption) Bill 2012 which, if enacted in its current form will consolidate and reform the bribery offences set out in the Prevention of Corruption Acts 1889 – 2010.

IRISH BRIBERY AND THE PCTS

In the early years of the Irish Free State and the Republic, there was a widespread belief that bribery was not an issue in Irish politics. That view is well illustrated by Senator Connolly, who in the course of a 1934 Senate debate asserted:

> I think that there is a moral consciousness in this country that is not equalled anywhere. I have seen political bribery at its worst in other countries. I know it exists in many countries. (...) One thing that we can thank God for is that we have been singularly free from it.[37]

Whether this is an accurate reflection of the early years of the Irish Free State and the Irish Republic is open to question. The first government of the Irish Free State had to take resolute action against local councils across its jurisdiction to counter wide-spread nepotism, jobbery and dubious financial dealings.[38] In addition, the Seanad Elections of March 1938, August 1938, 1943 and 1944 were marred by allegations of vote buying.[39] In 1945, a former chairperson of Dublin County Council, John A. Corr was convicted in the District Court of "offering or promising money to voters to vote in a particular way" and sentenced to six

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[33]Prevention of Corruption (Amendment) Act 2010, s. 2(a).
[34]Prevention of Corruption (Amendment) Act 2010, s. 2(b)(i).
[35]Prevention of Corruption (Amendment) Act 2010, s. 3(b)(ii).
[36]Prevention of Corruption (Amendment) Act 2010, s. 3(b).
[37] Seanad Eireann, Volume 18 – 01 June, 1934, col 1434.
[38] Niall Collins and Mary O'Shea, "Political Corruption in Ireland", in Neil Collins and Terry Cradden (eds) *Irish Politics Today* 4th ed, (Manchester University Press, 2000).
[39]See e.g. Elaine Byrne, *Political Corruption in Ireland 1922 – 2010,* (Manchester University Press, 2012), Chapt 3.

months imprisonment.[40] Also in that year, Eamon de Valera admitted to the *Irish Independent*, that "some senators have been elected through corrupt practices, through bribery".[41] Two years later, in 1947, the Locke's Distillery Scandal erupted, focusing public attention on the relationships between certain politicians and businessmen.[42]

Whatever the reality of the situation, there is a popular perception that political corruption in Ireland increased significantly from the 1960s, largely as a result of the generational change in the political elite that occurred between 1957 and 1965.[43] From the 1960s through the 1970s and 1980s, rumours of corruption and bribery in Irish political life abounded. Garda investigations into alleged corruption occurred in 1973, 1974, 1980, 1989 and 1993.[44] In 1974, journalist Joe McAnthony exposed the corrupt activities of Ray Burke in the *Sunday Independent*.[45] In 1975, a Tribunal of Inquiry was set up to investigate allegations made by two members of the Dáil against the then Minister for Local Government.[46] In 1983, Des Crowley published details of Charles Haughey's debt to Allied Irish Bank.[47] Again in that year, the Joe Joyce and Peter Murtagh publication, *The Boss,* was published containing the transcripts of secretly taped conversations between two Ministers referring to Charles Haughey's involvement in rezoning land at Baldoyle.[48] Frank McDonald's book, *The Destruction of Dublin,*

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[40] Joe Lee, *Ireland 1912 - 1985: Politics and Society*, (Cambridge University Press, 1989), at 273.

[41] Irish Independent, October 12, 1945.

[42] Allegations of corruption were levelled at de Valera and other Fianna Fáil ministers in connection with the proposed sale of a distillery in Kilbeggan. See Paul Cullen, *With a little help from my Friends*, (Gill and Macmillan, 2002); see also Report of the Tribunal appointed by the Taoiseach on November 7 1947 (P No 8576) (sale of Locke's distillery).

[43] Tom Garvin, "Democratic politics in Independent Ireland', in John Coakley and Michael Gallagher (eds) *Politics in the Republic of Ireland*, 3rd ed, (Routledge, 1999), at 350.

[44] Tom Garvin, "Democratic politics in Independent Ireland', in John Coakley and Michael Gallagher (eds) *Politics in the Republic of Ireland*, 3rd ed, (Routledge, 1999), at 350.

[45] see Paul Cullen, *With a Little help from my Friends*, (Gill and Macmillan, 2002), at 15.

[46] Report of the Tribunal appointed by the Taoiseach on 4 July 1975 (Prl 4745) (allegations against Minister for Local Government);

[47]Evening Press January 28, 1983. AIB subsequently published a statement describing the claim as outlandishly inaccurate. See generally Simon Carswell, *Something Rotten; Irish Banking Scandals* (Gill and MacMillan Ltd, 2006). See also Irish Examiner, *Hairshirts and Charvet,* Thursday, December 21, 2006

[48]Peter Murtagh and Joe Joyce, *The Boss; Charles J. Haughey in Government*,

published in 1985, also highlighted abuse in planning law.[49] Throughout the early 1980s, Fianna Fáil was embroiled in a series of scandals, most of which involved abuses of power, such as unwarranted telephone tapping and interference with police administration. Moreover, from the mid 1980s into the 1990s, there were wide spread rumours surrounding the [corrupt] sources of the money which funded Charles Haughey's extravagant lifestyle.[50] Mr Haughey was Taoiseach for much of that period.

Towards the end of the 1980s, public disquiet regarding corruption focused on two key issues. First, a growing belief that certain prominent business people were profiting from their close connections with politicians and political parties, and vice versa. Secondly, a belief that at least some politicians were exercising their public functions to further their own private interests. In particular, during 1991, several incidents came to light which seemed to suggest the existence of a "golden circle" of business people and politicians with disproportionate levels of power and influence. The most significant of these concerned the relationship between Mr Larry Goodman, the Fianna Fáil party and certain prominent Fianna Fáil politicians and led to the establishment of the Hamilton Tribunal, the first of the PCTs.

THE HAMILTON TRIBUNAL

Towards the end of the 1980s, Mr Goodman's companies dominated the Irish beef-processing industry which accounted for 34% of the Republic's agricultural output.[51]Mr Goodman was also known to be close to various Fianna Fáil politicians and to give significant amounts by way of electoral donations. At that time, there were widespread rumours to the effect that his dominance in the beef processing industry was linked to those relationships and donations. However, the scandal did not erupt in earnest until 1991, when a British television

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(Poolbeg Press, Dublin, 1983).

[49]Frank McDonald, *The Destruction of Dublin*, (Gill and Macmillan, Dublin 1985).

[50] See e.g. T. Ryle Dwyer, *Fallen Idol: Haughey's Controversial Career*, (Mercier Press, 1997).

[51]Neill Collins, "Corruption in Ireland: a review of recent cases", Johnathan Moran, Rachel Flanery, and Robert Williams (eds) *The Politics of Corruption: Corruption in the Developed World No 3* (Elgar, 2000), p 181.

documentary, the World in Action, broadcast allegations of malpractice and fraud in the handling of beef exports which it claimed were known to and tolerated by the Irish government.[52] Shortly after that broadcast, the government was forced to set up a Tribunal of Inquiry to investigate the allegations or face the collapse of the government. The Tribunal was chaired by Mr Justice Liam Hamilton.[53]

While ultimately the Hamilton Tribunal found that there was no substance to the variety of allegations which it investigated, the proceedings of that Tribunal had a significant and detrimental impact on the public's view of political integrity. Specifically, those proceedings resulted in seemingly daily revelations of malpractice and systematic fraud in the handling of beef exports and bitter personal accusations made by senior politicians against each other.[54] In addition, they revealed in some detail the significant nature and extent of the donations made by Mr Goodman. Those revelations seriously damaged the standing of the political process,[55] as well as precipitating a general election.[56] The fact that the Tribunal did not ultimately make any findings of corruption was widely viewed as a whitewash and did little to allay public concern regarding political donations and relationships between politicians and big business.[57]As observed by Mr Pat Rabbitte, T.D., speaking in the Dáil:

> Mostly notably the matter of financial contributions to politicians and political parties is avoided in the report and, in fact, the figures admitted before the tribunal are not even recorded (...).

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[52]Niall Collins, "Corruption in Ireland: a review of recent cases" in Robert Williams, Jonathon Moran and Rachel Flanary (eds) *Corruption in the Developed World, (The Politics of Corruption 3)(No. 3)* (Edward Elgar Publishing, 2000), p 181.

[53]Each Tribunal is identified by the name of the judge who acted as its Sole Member or Chairperson, as the case maybe.

[54] Niall Collins and Colm O Raghallaigh, "Political Sleaze in the Republic of Ireland" 48(4) Parliamentary Affairs 697.

[55] Niall Collins, "Corruption in Ireland: a review of recent cases" in Robert Williams, Johnathon Moran and Rachel Flanary(eds)*Corruption in the Developed World, (The Politics of Corruption 3)(No. 3)* (Edward Elgar Publishing, 2000), p 184.

[56] Eunan O'Haplin, "Ah, they've given us a good bit of stuff..." tribunals and Irish political life at the turn of the century" (2000) 15(1) Irish Political Studies 183.

[57] Gary Murphy, "Payments for no political response? Political corruption and tribunals of inquiry in Ireland, 1991 – 2003", in John Garrard and James Newell (eds), *Scandals in Past and Contemporary politics*, (Manchester University Press, 2006); A poll published by the Irish Times on Saturday, 27th August 1991 showed that 70% of people surveyed thought that there was undue closeness between Mr Goodman and the 1987 - 1989 Government.

> With the judge's decision to leave aside consideration of the financial relationship between business and politics the report is not so much Hamlet without the prince as Macbeth with the dagger.[58]

THE MCCRACKEN TRIBUNAL

While the beef scandal was a matter of significant public concern in its own right, it was closely followed by another scandal leading to the establishment of another PCT. Specifically, in late November 1996, newspaper reports claimed that the Dunnes Stores Group had paid more than £200,000 for the renovation of the home of Mr Michael Lowry TD,[59] the then Minister for Transport, Energy and Communications. As a consequence of these reports, Mr Lowry resigned as Minister and announced that he would be making a personal statement to the Dáil. A few days after Mr Lowry's resignation, further media reports alleged that Mr Ben Dunne had paid more than £1 million to a retired politician and there was widespread speculation that that politician was the former Taoiseach, Mr Charles Haughey. The ensuing public outcry led to the establishment of a second Tribunal of Inquiry in February 1997, the Tribunal of Inquiry (Dunnes Payments), chaired by Judge McCracken and known as the McCracken Tribunal.[60]

The McCracken Tribunal inquired into Mr Lowry's relationship with Mr Dunne and his associated companies which largely stemmed from Mr Lowry's secondary employment as director of a company providing services exclusively for Dunnes Stores. In addition, it inquired into a number of gifts and political donations received by Mr Haughey from Mr Dunne and the companies which he controlled. While ultimately the McCracken Tribunal did not make any findings of corruption, it again raised the spectre of an unholy alliance between politicians and big business. Moreover, in so far as Mr Haughey is concerned, it emerged that he had been in receipt of significant sums of money while in public

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[58]Rabbitte, Pat, Vol 445 Dáil Debates 1 Sept 1994 col. 349.

[59] The first article was by Sam Smyth, "The minister, a tycoon, and the £200,000 house bill" Irish Independent, November 29, 1996.

[60]See Andrew M. Sherriff, Gary O'Brien, Eddie Punch and Matthew Cannon, "The Dunnes payments scandal, Charles Haughey and contemporary Irish Political culture" (1998) 30 Crime, Law & Social Change 43.

office which raised the question as to who was providing the relevant funds and why, or more to the point, for what.

THE MORIARTY TRIBUNAL

The Tribunal of Inquiry into Payments to Politicians and Related Matters, which was chaired by Judge Moriarty and became known as the Moriarty Tribunal, was primarily established in order to inquire into the suspect payments identified by the McCracken Tribunal in the course of its inquiries but which fell outside the scope of its terms of reference. While its reports primarily focus on the affairs of Mr Haughey and Mr Lowry, it is mandated to inquire into all payments to politicians. It has issued two reports and is currently dealing with cost applications. The first report focuses on Mr Haughey's affairs.[61] It identifies more than €9.3 million paid to Mr Haughey by various persons, some but not all of whom the Moriarty Tribunal succeeded in identifying. At the time the Report was published, in 2007, this figure was equivalent to €45 million.[62] The Tribunal found that these funds were primarily derived from: clandestine donations, described variously as loans, payments or gifts and from the misappropriation of: public funds; political donations; and money intended for the late Mr Brian Lenihan's medical expenses.[63] In addition, it identified instances where Mr Haughey used his office to confer benefits in return for specific payments. All in all, the report left little room for doubt regarding Mr Haughey's involvement in corruption.[64]

The Moriarty Tribunal's second report focused on the activities of Mr Michael Lowry and, specifically, the circumstances in which Mr Dennis O'Brien's Esat Digifone was awarded the first private mobile phone licence in 1996 for the sum of €18 million. It was subsequently sold to British Telecom in 1999 for €2.4 billion. Mr Lowry was the Minister for

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[61] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006).
[62] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 545.
[63] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 543.
[64] See e.g. The Irish Independent, "Moriarty Tribunal: Haughey Stole €45 million" 20 December 2006.

Communications in 1995 and 1996 who oversaw the award of the licence. In its Second Report, the Moriarty Tribunal found that Mr Michael Lowry had, while Minister for Communications, imparted substantive information to Mr Denis O'Brien at a time when Mr O'Brien's company was bidding for Ireland's second mobile phone licence. It found that the imparted information was of significant value and assistance to Mr O'Brien in securing the licence and that Mr Lowry received substantial payments from Mr O'Brien in the three years following the award of that licence.[65] The Moriarty Tribunal also made findings that Mr Lowry sought to procure unwarranted rent increases that would have improperly enriched Mr Ben Dunne, an individual with whom Mr Lowry had extensive professional dealings.[66] As mentioned, payments received by Mr Lowry from Mr Dunne were also investigated by the McCracken Tribunal. Other findings related to a "campaign of contributions" to Fine Gael from Mr O'Brien's companies totalling around £22,140 in the eight months preceding and subsequent to the award of the mobile phone licence. The Moriarty Tribunal also criticised Fine Gael for failing to disclose a clandestine £50,000 donation made to it by Mr O'Brien's company, Esat Digifone, via the Norwegian telecommunications company Telenor some two months after the mobile licence award.[67]

THE FLOOD/MAHON TRIBUNAL

The focus of the fourth and final PCT, the Flood/Mahon Tribunal, was on planning corruption.[68] In the late 1980s and early 1990s Dublin County Council rezoned thousands of acres of land. In doing so, it "repeatedly spurned the advice of the professional planners"[69] and, in many cases, the desires of local residents. There was a widespread

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[65]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, Vol 3, (2011), p 1051 and p 1058.

[66]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, Vol 1, (2011), p 417 – 419.

[67]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, Vol 1. (2011), p 67.

[68]From the time of its establishment in 1997 until 2002, Mr Justice Flood was the Sole Member of this Tribunal. He retired in 2002 and was replaced by Mr Justice Mahon, Ms Justice O'Flaherty and Mr Justice Keyes. Mr Justice Mahon was appointed Chairperson of the Tribunal.

[69] Frank McDonald and Mark Brennock, "The Rezoning Blitz", The Irish Times, Wednesday, July 14, 1993.

belief that many of these rezoning decisions had been "bought" by developers and that some local councillors at least, were for sale.[70] Mr Michael Smith T.D., the then Minister for the Environment, echoed the views of many when he announced that "rezoning has become a debased currency in the County Dublin area."[71] By the early 1990s, there were rampant rumours regarding bribery in relation to Dublin planning decisions. In 1995, Mr Colm Mac Eochaidh, a barrister, and another individual named Mr Michael Smith, who was the then chair of An Taisce, placed an anonymous advertisement in The Irish Times, through Donnelly, Neary and Donnelly solicitors in Newry, offering a reward of £10,000 for information on land rezoning corruption that would lead to a conviction. Among those who responded was Mr James Gogarty who claimed that former Minister, Mr Ray Burke, received £80,000 from Joesph Murphy Structural Engineers Ltd (JMSE) and a property company called Bovale Development, in return for securing planning permission for housing. Details of this allegation subsequently emerged in the newspapers[72] and Mr Burke was forced to resign from his ministerial post, two weeks after the formation of the new government. The resulting political damage was compounded by assurances given by the then Taoiseach, Mr Bertie Ahern, that when appointing Mr Burke "he had been up every tree in North Dublin to ensure that he had not been involved in illicit land deals."[73] The ensuing public outrage resulted in the establishment of a Tribunal of Inquiry, initially under the chairmanship of Judge Flood and subsequently under that of Judge Mahon.

That Tribunal's original remit was confined to investigating the JMSE payment and the planning history of the 726 acres of land in north country Dublin to which it allegedly related. However, during the course of its inquiry, in May 1998, it emerged that Mr Burke had received

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[70] see Mark Brennock and Frank Macdonald, "'Cash in brown paper bags' for Councillors", the Irish Times, Monday, July 12, 1993; see also Frank Macdonald and Mark Brennock, "Price of a vote: £2,500 in a white envelope" The Irish Times, Friday, July 16, 1993.

[71] Speech by Mr Michael Smith, T.D., Minister for the Environment at the Irish Planning Institute's Awards Ceremony on Tuesday, 11 May, 1993.

[72] The Sunday Tribune, in its edition of 27th July 1997, named Ray Burke as the politician referred to in an earlier article in the Sunday Business Post in March 1996 stating that a "senior Fianna Fail politician" had been implicated by statements made to Donnelly, Neary and Donnelly.

[73] Frank McDonald, *The Destruction of Dublin*, (Gandon Editions, 2000).

another substantial payment from Rennicks Manufacturing Ltd, a subsidiary of Fitzwilton, a holding company with a wide range of business interests. As a result, the Flood Tribunal's terms of reference were widened in June 1998 and it was empowered to investigate all improper payments made to politicians in connection with the planning process. Some years after the establishment of that Tribunal its proceedings resulted in the emergence of yet another scandal when a political lobbyist, Mr Frank Dunlop, gave evidence that 15 Dublin county councillors received payments totalling £112,000 in connection with the rezoning of a giant shopping centre in West Dublin. Subsequently, evidence which emerged in the course of that Tribunal's inquiries into Mr Bertie Ahern, the then Taoiseach, led to his resignation.[74]

The Flood/Mahon Tribunal has issued five reports, the second and third of which relate to its substantive inquiries as does its fifth and last report. In its second report, that Tribunal found that Mr Burke did receive corrupt payments and identified a number of public benefits conferred in return for those payments.[75] Its third report was principally concerned with the activities of Mr George Redmond, a retired Assistant City and County Manager for Dublin, in the context of his dealings with developers.[76] In that report, the Tribunal concluded that Mr Redmond had accepted corrupt cash payments made in order to influence him in the performance of his public duties. The Tribunal also found that Mr Redmond accepted payment in respect of advices given and that those payments amounted to an inducement to Mr Redmond to act unfaithfully and were detrimental to his public duties as Assistant City and County Manager. In its fifth and final Report, the Mahon Tribunal found that eleven local government councillors received corrupt payments from lobbyists and various developers. It also found that Mr Padraig Flynn had, while Minister for the Environment, corruptly sought a political donation from a developer for his political party and then subsequently used that donation for his personal purposes. In addition,

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[74]See e.g. Henry McDonald, "Irish Prime Minister resigns amid financial controversy" Guardian, April 2, 2008.

[75] The Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002).

[76] The Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002). Mr Redmond is currently challenging this report by way of judicial review.

it found that the then Taoiseach, Mr Albert Reynolds, together with the then Minister for Finance, Mr Bertie Ahern, abused political power and government authority in pressurising a developer for a party donation. Finally, it found that Mr Ahern had failed to give a truthful account regarding substantial cash deposits lodged in bank accounts connected with him in the early to mid 1990's.[77]

EXISTING RESEARCH ON THE PCTS

Despite their undisputed political, social and economic significance, and the fact that they have been the subject of intensive media analysis, the substantive findings of the PCTs have not been the subject of any significant legal analysis. Moreover, while the Tribunals themselves were empowered to make recommendations regarding legislative reform in the light of their inquiries, only the Flood/Mahon Tribunal considered the Prevention of Corruption Act 1906 from this perspective. Specifically, that PCT recommended the introduction of two new offences, the extension of the presumptions of corruption and improved sanctions. The two new offences are essentially aimed at permitting payments through intermediaries to be prosecuted on the basis of recklessness, and the introduction of a new corporate failure to supervise offence.

RELEVANT INTERNATIONAL INSTRUMENTS

Early international efforts at combating corruption have their roots in the Watergate scandal of the early 1970s.[78] Specifically, during the course of the ensuing inquiry there were a number of revelations of slush funds and corporate bribery. In particular a number of US corporations, including the Gulf Oil Corporation, admitted making illegal political corporate donations. These admissions attracted the attention of the Securities and Exchange Commission (the "SEC"), whose mission was

[77]See generally, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments Vol IV, (2012), Chapter 17

[78] see generally, John T. Noonan, Jr. *Bribes,*(Macmillan Publishing Company, 1984), chapter 20; A. Timothy Martin, "The Development of International Bribery Law", (1999) 14 Natural Resources & Environment 95; Christopher F. Corr & Judd Lawler, Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures" (1999) 32 Vanderbilt Journal of Transnational Law 1249.

to prevent fraud on investors in a company with stock registered under the Securities Exchange Act. As illegal corporate donations were almost inevitably linked to creative accounting practices, they also constituted a fraud under the securities laws. The SEC investigated Gulf Oil Corporation, and uncovered a number of illegal disbursements made both within the US and elsewhere. Shortly afterwards, the SEC turned its attentions to United Brands and then to Lockheed. Its investigation of Lockheed, in particular, uncovered that company's involvement in wholesale bribery, not only in developing countries but in Italy, the Netherlands and Japan. Subsequently, the SEC invited other corporations to voluntarily admit any unreported questionable payments they had made. Approximately 500 corporations came forward. Combined, these investigations and admissions had "severe adverse effects". Specifically:

> The "image of American democracy" had been "tarnished". Confidence in the financial integrity of American Corporations had been impaired. The efficient functioning of capital markets had been hampered.[79]

As a result of these revelations, the US became one of the first countries in the world to criminalise foreign bribery, via the Foreign Corrupt Practices Act 1977, (the FCPA). Prior to the adoption of this Act, bribery laws were primarily concerned with preserving the purity of domestic politics (and business). To the extent that foreign bribery was viewed as a problem, then it was a problem for the countries in which it occurred. For the most part, foreign bribery was simply ignored on the basis that "in paying off a foreigner one merely conforms to local custom".[80] In fact, the traditional view of foreign bribery was so benign that many countries treated bribes paid by companies operating in foreign jurisdictions as tax deductible expenses.

The FCPA made it illegal to use any means of interstate commerce for the purposes of making any payment, either directly or through an intermediary, to a foreign official, party or candidate for office in order to influence an official act. The sanction provided for an infringement was

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[79] John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company, 1984)at 677, note 54.
[80] John T. Noonan, Jr. *Bribes*, (Macmillan Publishing Company, 1984), at 653.

a possible one million dollar fine for the company and/or five years maximum imprisonment for company directors, officers or employees.

Having criminalised foreign corrupt practices in US domestic law, the US turned its attention to the international scene. This was largely because of domestic concerns regarding the impact of the FCPA on US competitiveness. Specifically, US companies claimed that the FCPA placed them at a disadvantage as compared to their foreign competitors and that their inability to pay bribes meant they lost overseas contracts to those competitors who did.[81] Rather than repeal the FCPA, the United States sought to level the playing field through the imposition of a global ban on bribery. In 1975, the US introduced a proposal to the United Nation's General Assembly calling for it to condemn both the offering and solicitation of bribes and for international cooperation to address this problem. Although the US subsequently withdrew this proposal, in that same year the General Assembly nevertheless adopted a resolution condemning all corrupt practices including bribery by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries.[82] This resolution was the first truly international acknowledgement of corruption in international business transactions. However, it lacked any real substance, and the US continued to pressurise its trading partners for a global ban on corruption.

For a number of years, the calls of the US Government fell on deaf ears. However, the changing geo-political circumstances of the early 1990s, led to increased international enthusiasm for a ban on foreign bribery. Moreover, the end of the cold-war improved the chances for successful collective approach,[83] while the "crashes" of financial and money markets heightened the awareness of many to the susceptibility

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[81]The US Commerce Department estimated that American firms lost about US$11b in foreign contracts between 1994 – 1996 because of the bar on bribes. Niall Collins "Corruption in Ireland: a review of recent cases" in Robert Williams, Johnathon Moran and Rachel Flanary(eds) *Corruption in the Developed World, (The Politics of Corruption 3)(No. 3)* (Edward Elgar Publishing, 2000), note 12.

[82]Resolution 3514 of 15 December 1974.

[83] Gemma Aiolfi and Mark Pieth, "How to Make a Convention Work: the Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law" in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement*, (Kluwer, 2002) at 350.

of developing countries to the "skewing" of their economies.[84] There was also a growing awareness that unilateral measures were inadequate in addressing international bribery.[85] Ultimately, US pressure together with changes in the international political environment, led to the adoption of the OECD Convention on Combating Bribery of Officials in International Business Transactions (the "OECD Convention"), which entered into force on 15 February 1999.

While the OECD Convention had its origins in US concerns, by the time it was adopted, corruption had moved from the periphery to the centre of the world stage. In this respect, the 1990s "saw corruption become one of the most important policy issues in the international economy".[86] As observed by the World Bank President, James Wolfensohn in September 1997, "[o]nly 18 months ago, the word corruption was never mentioned. Today, there is a publicly expressed revulsion, on moral, on social, and on economic grounds."[87] Since that time, the OECD, the UN, the Council of Europe, and the EU have each adopted several anti-corruption measures many of which extend beyond bribery, encompassing other criminal offences as well as preventative measures, asset recovery and enforcement. Some of these have taken the form of conventions, while others are contained in resolutions, recommendations, and, in the case of the EU, regulations, directives and decisions.

THE OECD CONVENTION

The OECD Convention is one of the key anti-corruption measures adopted by the OECD, although not the only one. In particular, in 2009, the OECD adopted the Recommendation of the Council for Further

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[84] John Hatchard, Colin Nicholls, Tim Daniel, Martin Polaine, *Corruption and Misuse of Public Office* (Oxford University Press, 2006), p 394.

[85] IMF Policy Development and Review Department, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (Sept 18, 2001); see Steven R. Salbu, "Battling Global Corruption in the New Millennium" (1999) 31 Law and Policy in International Business 47.

[86] David Hess, Thomas W. Dunfee, "Fighting Corruption: A Principled Approach: The C2 Principles (Combating Corruption)" (2000) 33 Cornell International law Journal 593.

[87] Diane Coyle, "West Targets Third World Corruption" Independent, Sept. 21, 1997 at 14.

Combating Bribery of Foreign Public Officials in International Business Transactions pursuant to which its members agreed to put in place new measures that will reinforce their efforts to prevent, detect and investigate foreign bribery.[88]

The object of the OECD is to promote trade relations on the basis of a level commercial playing field. Consistent with this objective, the primary aim of the OECD Convention is to eliminate bribery in international business transactions in order to prevent the distortion of international competitive conditions.[89] Essentially, therefore, the harm justifying the criminalisation of bribery in the case of the OECD Convention is its impact on international business transactions and associated derivative harms, namely the fact that this type of bribery "raises serious moral and political concerns, undermines good governance and economic development, and distorts competitive conditions."[90]

The OECD Convention seeks to combat the supply side of bribery by preventing companies from offering bribes. It criminalises the so called "active" corruption of public officials. In other words it focuses on the criminalisation of undue advantages paid directly or indirectly to a foreign public official:

> .. in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[91]

That Convention also requires State parties to ensure that legal persons may be held liable for the bribery of foreign public officials.[92] Those who

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[88]See also: Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009); Recommendation of the Council on Bribery and Officially Supported Export Credits (2006); Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement; OECD Guidelines for Multinational Enterprises (1996).

[89]Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A. Low, and Peter J. Cullen (eds) *The OECD Convention on Bribery A Commentary*, (Cambridge University Press, 2007) p 50.

[90]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Recital 1, p. 6.

[91]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 1.

[92]Convention on Combating Bribery of Foreign Public Officials in International

engage in bribery must be subject to "effective, proportionate and dissuasive criminal penalties", except in the case of corporate bribery where penalties need not necessarily be criminal.[93] The OECD Convention requires State parties to provide for jurisdiction based on the principle of territoriality as well as nationality-based jurisdiction in certain instances.[94] Other topics addressed by that Convention include: statutes of limitations,[95] money laundering,[96] accounting[97] and mutual legal assistance.[98]

The OECD does not criminalise the acceptance of bribes, as its drafters considered that this would raise unsolvable jurisdictional issues.[99] Nor does it criminalise facilitation payments, namely small payments made to induce public officials to perform non-discretionary functions. However, these payments are addressed in the OECD's 2009 Recommendation which calls on State parties to combat this phenomenon.[100]

Rather than requiring State Parties to adopt a uniform approach to the criminalisation of foreign bribery, the OECD Convention seeks to ensure "functional equivalence" between the ways in which each national system operates.[101] Under this approach, countries are not

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Business Transactions, Article 2.

[93]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 3.

[94]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 4.

[95]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 6.

[96]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 7.

[97]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 8.

[98]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 9.

[99] See Giorgio Sacerdoti, "To Bribe or not to Bribe?", in OECD (ed.,) *No Longer Business as Usual*, (OECD 2000). In this respect, the Convention follows the approach of the Foreign Corrupt Practices Act, where the legislature in the 1970s was somewhat reluctant to also include the possibility of prosecuting foreign ministers, members of parliament and other foreign and international public officials. Prosecuting foreign officials themselves would also raise very difficult jurisdictional issues and open State Parties to the Convention to the criticism that they are interfering with the sovereignty of non signatory states.

[100]Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009), Section VI.

[101]Official Commentaries to the OECD Convention on Combating Bribery of Officials

required to unify their laws but rather to ensure that certain defined goals are met. The Convention is supplemented by a series of Official Commentaries which were adopted along with the Convention.[102]Moreover, the 2009 Recommendation contains, in Annex I, a Good Practice Guide on Implementation of Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

In 1996, the UN adopted its Declaration against Corruption and Bribery in International Commercial Transactions.[103] Pursuant to that Declaration, state parties committed themselves, *inter alia*, to criminalising the bribery of foreign public officials in international commercial transactions. Subsequently, in 2000, the UN adopted its Convention against Transnational Organised Crime 2000.[104] While that Convention, known as the Palermo Convention, is primarily aimed at the fight against organised crime, it also promotes the concept of integrity of public officials and obliges State Parties to criminalise the bribery of public officials.

UNCAC was adopted by the UN's General Assembly in October 2003 and entered into force on 14 December 2005.[105] This Convention is much broader in scope than that of the OECD and is the first global and legally binding anti-corruption instrument. It represents an attempt to establish universal anti-corruption standards and has three main purposes: a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) to promote, facilitate, and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset

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in International Business Transactions (1997), Commentary 2.

[102]Opinion is divided as to the legal value of these commentaries, while some claim they should be regard as an authentic interpretation of the Convention, others consider that they merely provide guidance and are neither binding or conclusive. See e.g. Mark Pieth, "Introduction" in Mark Pieth, Lucinda A. Low, and Peter J. Cullen (eds) *The OECD Convention on Bribery A Commentary*, (Cambridge University Press, 2007).

[103] The Declaration was adopted by the UN General Assembly in its resolution 51/191 of 16 December 1996.

[104]United Nations Convention against Transnational Organised Crime (2000).

[105]United Nations Convention Against Corruption (2003).

recovery; and (c) to promote integrity, accountability and proper management of public affairs and public property. It is divided into four main chapters dealing with: Prevention; Criminalisation and Law Enforcement; International Cooperation; and Asset Recovery.

The bribery offences are set out in Chapter III of the Convention. There are six offences in all, dealing with the active and passive bribery of: national public officials;[106] foreign public officials and officials of public international organisations;[107] and any person who directs or works for a private sector entity.[108] The offences are couched in slightly different terms. Those dealing with the bribery of national public officials are concerned with undue advantages offered to or solicited by an official in "order that the official act or refrain from acting in the exercise of his official duties." The offence dealing with the solicitation of bribes by foreign public officials and officials of public international organisations is also expressed in these terms, however the introduction of such an offence is optional rather than mandatory. In contrast, while State Parties must criminalise the active bribery of foreign public officials and officials of public international organisations, as in the case of the OECD Convention, this is only to the extent that the undue advantage is offered or given "in order to obtain or retain business or other undue advantage in relation to the conduct of international business." For their part, the private bribery offences only apply to payments connected with a breach of duty on the part of those falling within their scope. As mentioned in the next chapter, while the harms underlying the bribery offences in UNCAC are not specifically couched in terms of a breach of duty, these offences can be effectively framed in terms of the more generalised model.

Like the OECD Convention, UNCAC also contains provisions dealing with: the liability of legal persons;[109] jurisdiction;[110] and sanctions.[111] However, in contrast to that Convention which subsumes trading in influence into the bribery offences, UNCAC has a specific provision

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[106]United Nations Convention Against Corruption (2003), Article 15(a) and (b).
[107]United Nations Convention Against Corruption (2003), Article 16(a) and (b)
[108]United Nations Convention Against Corruption (2003), Article 21(a) and (b).
[109]United Nations Convention Against Corruption (2003), Article 26.
[110]United Nations Convention Against Corruption (2003), Article 42.
[111]United Nations Convention Against Corruption (2003), Article 30.

which requires State parties to consider criminalising this type of behaviour.[112]

THE COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION

The Council of Europe established the fight against corruption as one of its priorities in 1994. The principal aim of its Criminal Law Convention on Corruption (the "COE Convention")[113] is the development of common standards concerning certain corruption offences.[114] However, in its preamble it specifically refers to the harm caused by corruption, namely the threat it poses to the rule of law, democracy and human rights, and that it undermines "good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society." The scope of the COE Convention was supplemented in 2003 by the adoption of the Additional Protocol to the Criminal Law Convention.[115]

The COE Convention obliges State Parties to criminalise, on the basis of a set of common elements, the active and passive bribery of a range of different persons, including: domestic public officials;[116] members of domestic public assemblies;[117] foreign public officials;[118] members of foreign public assemblies;[119] those who direct or work for private sector entities;[120] officials of international organisations;[121] members of

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[112]United Nations Convention Against Corruption (2003), Article 18.
[113]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999); See also Additional Protocol to the Criminal Law Convention (ETS 191, 15 May 2003).
[114] For an overview of the Convention, see Peter Csonka, "The Council of Europe's Anti-Corruption Treaties", a paper given at the 9th International Anti-Corruption Conference, Durban, 1999.
[115]Additional Protocol to the Criminal Law Convention on Corruption, (ETS 191, 15 May 2003).
[116] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Articles 2 and 3.
[117] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 4.
[118] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 5.
[119] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 6.
[120] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Articles 7 and 8.
[121] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 9.

international parliamentary assemblies;[122] judges and officials of international courts;[123] domestic and foreign arbitrators;[124] and jurors.[125]The offences dealing with officials apply to payments made directly or indirectly to a public official "for him to act or refrain from acting in the exercise of his or her functions." As in the case of the UN Convention, the private sector offences are only concerned with payments which are made in connection with acts or omissions which are in breach of the duties of a person who directs or works for a private sector entity. However, again like the OECD Convention, the public offences are also capable of being couched in these terms.

In keeping with the OECD and UN Conventions, the COE Convention also deals with: the liability of legal persons,[126] jurisdiction,[127] and sanctions.[128] Like the UN Convention it contains a specific offence of trading in influence.[129]

THE EU CONVENTIONS AND FRAMEWORK DECISION

The EU has adopted extensive measures against corruption:

> The fight against corruption at EU level has been deemed necessary to protect EU objectives and policies ranging from the protection of the EU budget and the internal market, to facilitating judicial cooperation in criminal matters and safeguarding the rule of law.[130]

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[122] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 10.
[123] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 11.
[124]Additional Protocol to the Criminal Law Convention on Corruption, (ETS 191, 15 May 2003) Articles 2 and 3.
[125]Additional Protocol to the Criminal Law Convention on Corruption, (ETS 191, 15 May 2003), Article 4.
[126] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 18.
[127] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 17.
[128] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 19.
[129] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 12.
[130]See generally, Valsamis Mitsilegas, "The aims and limits of European Union anti-corruption law" in Jeremy Horder and Peter Alldridge (eds) *Modern Bribery Law*

The EU has adopted two Conventions, which contain anti-bribery provisions namely the Convention on the Protection of the Union's financial interests 1995[131] (the "PIF Convention") together with its three protocols,[132] and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (the "EU Convention").[133]

The PIF Convention itself is aimed at protecting the European Communities' financial interests by criminalising fraudulent conduct injuring those interests. However two of its protocols are relevant to corruption. The 1996 Protocol to the Convention on the protection of the European Communities' financial interests (the "first PIF Protocol") is aimed primarily at acts of corruption involving national and Community officials that damage, or are likely to damage, the European Communities' financial interests. It covers passive and active corruption actually or potentially damaging those interests, as well as acts of participating or instigating such behaviour. That Protocol also contains provisions relating to jurisdiction. A second protocol adopted in 1997 (the "second PIF Protocol") is directed in particular at the liability of legal persons, the laundering and the confiscation of the proceeds of corruption and cooperation between the Member States and the Commission of the European Communities for the purpose of protecting the European Communities' financial interests and personal data related thereto. The PIF Convention and Protocols were implemented into Irish law by the Criminal Justice (Theft and Fraud Offences) Act 2001.

The Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union aims at criminalising all corrupt conduct involving officials of the

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(Cambridge University Press, 2013), 194.

[131]Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, (OJ C 316, 27 November 1995, p 49).

[132]Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313, 23 October 1996, p 1); Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (OJ C 221, 19 July 1997, p 12).

[133]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (OJ C 195 25 June 1997, p 1).

Community or its Member States. It sanctions both active and passive bribery of officials covering, in both cases, payments made to an official to "act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties."[134] While it does not deal with corporate liability as such, it does provide for the criminal liability of heads of business.[135] It also deals with the issues of jurisdiction[136] and penalties.[137]

While the EU Convention does not deal with corruption in the private sphere, this is addressed by the framework decision, adopted in July 2003, pursuant to which Member States are required to take the necessary measures to ensure that the international conduct of active or passive corruption, carried out in the course of business activities, constitutes a criminal offence.[138] In each case there must be a nexus between the advantage offered or received and a breach of duty on the recipient's part.[139] The framework decision also addresses issues pertaining to the liability of legal persons,[140] jurisdiction[141] and penalties.[142]

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[134]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (OJ C 195 25 June 1997, p 1), Articles 2 and 3.

[135]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (OJ C 195 25 June 1997, p 1), Article 6.

[136]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (OJ C 195 25 June 1997, p 1), Article 7.

[137]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (OJ C 195 25 June 1997, p 1), Article 5.

[138]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54).

[139]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 2.

[140]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 5.

[141]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 7.

[142]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Articles 4 and 6.

RESEARCH ON THE COMPATIBILITY OF IRISH LAW WITH THE RELEVANT INTERNATIONAL INSTRUMENTS

To-date, the main assessment of the strengths and weaknesses of the PCA 1906 from the perspective of the relevant international instruments has been under the evaluation processes relating to those instruments although Transparency International has also evaluated Ireland's compliance with the OECD Convention in the context of its annual progress report on OECD Convention enforcement.[143]

The OECD's WGB

Compliance with the OECD Convention is monitored by the "Working Group on Bribery in International Business Transactions" (the "WGB"). Essentially this takes place by evaluation by peer review, carried out by lead examiners from different countries and assisted by members of the OECD Secretariat. There are several phases to the monitoring process. Phase I is essentially an overview of the anti-corruption legislation of the State Party while Phase 2 is more indepth, focusing on implementation and enforcement and involving an on-site visit. Similarly Phase 3, which focuses on enforcement, also involves an on-site visit. In 2010, the OECD published a follow-up report on the implementation of the Phase 2 and Phase 2*bis* Recommendations.[144]

Phase 1

Ireland's Phase 1 evaluation was carried out in June 2002. In the context of the evaluation, the WGB considered, inter alia, the various components of the bribery offences contained in the PCA 1906, including their: personal scope; intention; the concept of a bribe; the act of bribery; defences; corporate liability; jurisdiction; and sanctions. Following that evaluation, the WGB concluded that overall the Irish implementing legislation conformed to the requirements of the OECD

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[143]See eg. Transparency International, Exporting Corruption Country Enforcement of the OECD Anti-Bribery Convention 2012 available at http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio, last accessed 22 August, 2013.

[144]OECD, Ireland: Phase 2 and 2*Bis* Follow-up Report on the Implementation of the Phase 2 and Phase 2*Bis* Recommendations (2010).

Convention. However, it also made a number of recommendations which needed to be followed up in Phase 2.[145]

Phase 2

The WGB's Phase 2 evaluation was the result of an on-site visit carried out in October 2006. In the context of that evaluation, the WGB again considered the component parts of the bribery offences, in addition to the issue of whistleblower protection and a number of other issues. There were serious failures in the organisation of that visit which hampered the ability of the WGB to carry out the evaluation. However, overall it was less complimentary than the previous Phase 1 evaluation with the WGB commenting, rather scathingly, that:

> The lead examiners are of the view that establishing an effective legislative framework for implementing the Convention was not a legislative priority in Ireland at the time the 2001 amendments were made.[146]

Again the WGB make a number of recommendations aimed at eliminating deficiencies identified in Irish bribery law.[147]

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[145]Specifically, it recommended: extending the concept of the term "agent" to cover all officials of international organisations and/or territorial units other than States which fall within the scope of the OECD Convention; amending the PCA 1906 so to ensure that the active bribery offence covered all advantages given as bribes, and not only those of pecuniary value; harmonising sanctions for convictions for bribery under the PCA and the CJ(TFO)A 2001; and establishing nationality based jurisdiction for offences under the PCA.

[146] OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 48.

[147]Specifically, it recommended: providing an offence of bribing a foreign public official which employs unambiguous terms; consolidating or harmonising the foreign bribery offences under the PCA 2001 and the CJ(TFO)A 2001; ensuring that the concept of a bribe covers not only pecuniary but also non-pecuniary advantages; codifying and clarifying the basis for imposing corporate liability for the bribery of foreign public officials; expressly providing for the prosecution of unincorporated legal persons for bribery; providing for effective, proportionate, and dissuasive sanctions for legal persons; providing for the imposition of additional civil or administrative sanctions for legal and natural persons convicted of foreign bribery; adopting comprehensive whistleblower protection mechanisms; and establishing nationality based jurisdiction for foreign bribery offences.

Phase 2 *bis*

Because of the inability of the WGB examiners to effectively assess the implementation of the OECD Convention during their visit in October 2006, a second visit took place in June 2008. This visit was more successful, and the examiners considered the level of co-operation and participation experienced in that visit to be very satisfactory. Moreover, by the time that visit took place, the Prevention of Corruption (Amendment) Bill 2008 (the "PC(A)B 2008") had been published. While the WGB recognised that Ireland had "taken important legislative steps in relatively little time to address some of the concerns of the Working Group concerning certain elements of the foreign bribery offence"[148], it nevertheless identified a number of remaining deficiencies and made a number of recommendations in respect of those deficiencies.[149]

Follow-Up Report

The Follow-Up Report considered Ireland's responses to the recommendations adopted by the WGB at the time of Ireland's Phase 2 and Phase 2*bis* examinations. It pre-dated the enactment of the PC(A)A 2010. In that follow-up report, the WGB professed itself to be:

> Concerned that a number of issues identified in Phase 2 and Phase 2*bis* relating to the foreign bribery offence, and to the consolidation and harmonisation of this offence, which currently exists in two different foreign bribery statutes, have still not been resolved by Ireland.[150]

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[148] OECD, Ireland: Phase 2*bis* Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2008), p 6.

[149] The OECD's recommendations included: harmonising the offences in the PCA 1906 and the CJ(TFO)A 2001; amending the PCA 1906 to removing ambiguities concerning the use of the terms "agent" and "corruptly"; adopting appropriate legislation to achieve effective corporate liability for foreign bribery; expressly providing for the liability of unincorporated bodies under the PCA and the CJ(TFO)A 2001; and harmonising the provisions relating to nationality jurisdiction under the PCA and the CJ(TFO)A 2001; and making certain amendments to the whistleblower protection provisions contained in the PC(A)B 2008.

[150] OECD, Ireland: Phase 2 and 2*Bis* Follow-Up Report on the Implementation of the Phase 2 and Phase 2*bis* Recommendations (2010), p 4.

It also expressed serious concern regarding Ireland's legal regime for liability of legal persons and observed that that regime posed major issues in terms of compliance with the OECD's Convention.[151] It also noted that the recommendations relating to whistleblower protection and liability of unincorporated persons for bribery had not yet been addressed.

Phase 3

In June 2013, the OECD WGB conducted an onsite visit to Dublin which focused on the enforcement of the foreign bribery offences. The report should be published by the end of the year.

Council of Europe - GRECO

Implementation of the COE Convention is monitored by the Group of States against Corruption (GRECO) of which Ireland is a member. So far there have been three rounds of evaluation which have considered Ireland's compliance with selected provisions from key Council of Europe legal texts, including the Criminal Law Convention on Corruption. The first evaluation focused on: the independence of investigation and prosecutorial bodies; limits on immunity from investigation and prosecution; and promoting the specialisation of persons or bodies in charge of corruption. The second evaluation dealt with: the confiscation of corruption proceeds; liability of legal persons; public administration; and tax measures to curb corruption and accounting offences relating to corruption. The third round of compliance evaluation focused on the transparency of party funding and the implementation of the criminal law provisions in the Criminal Law Convention on Corruption.[152] GRECO has also adopted a number of Compliance Reports on Ireland, as a follow up evaluation on the recommendations contained in its first three evaluation reports.[153] The fourth round of evaluation is on-going and focuses on corruption

[151]OECD, Ireland: Phase 2 and 2*bis* Follow-Up Report on the Implementation of the Phase 2 and Phase 2*bis* Recommendations (2010), p 4.
[152]Greco Eval 1 Rep (2001) 9E; Greco Eval II Rep (2005) 9E; Greco Eval III Rep (2009) 4E.
[153] Greco RC – 1 (2003) 14E; Greco RC – 1 (2003) 14E Addendum; Greco RC-II (2007) 11E; Greco RC-II (2007) Addendum; Greco RC-III (2011) 10E.

prevention in respect of members of Parliament, Judges and Prosecutors. Ireland has not yet been evaluated for the purposes of this round.

Overall, in its Third Evaluation Report, GRECO considered that

> the legislation of Ireland complies with the relevant public/private bribery provisions of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). In particular, the material components of the offence, i.e. corrupt acts performed, material and immaterial undue advantages, third party beneficiaries and commission through intermediaries are covered.[154]

Nevertheless, GRECO expressed concern about the lack of clarity regarding the law, observing that the small number of prosecutions and the paucity of legal decisions construing important statutory terms meant that neither observers nor Irish practitioners were able to identify with certainty the challenges which may emerge concerning the law's scope and reach.[155] It recommended:[156]

- continuing with efforts to revise existing criminal law in the field of corruption with a view to enhancing its consistency and clarity;
- establishing an autonomous offence of trading in influence in line with Article 12 of the Criminal Law Convention on Corruption;
- establishing jurisdiction over offences of bribery and trading in influence committed abroad by/or involving an Irish national, in accordance with Article 17, paragraph 1, subparagraph b, of the Criminal Law Convention on Corruption.

In its Compliance Report (2011) which assessed the measures taken by the authorities of Ireland to implement the recommendations contained in the Third Round Evaluation Report on Ireland, GRECO concluded that its first and third recommendations had been implemented

[154] Greco Eval III Rep (2009) p 14
[155] Greco Eval III Rep (2009) 4E.
[156] Greco Eval III Rep (2009) 4E, p 18.

satisfactorily but that the second recommendation had not been implemented.[157]

THE EU

The European Commission has published two reports on the implementation of the PIF Convention and its protocols and two reports on the implementation of the framework decision. From 2013 forward, the EU Commission is proposing publishing a bi-annual corruption report to monitor and assess the efforts of EU Member States in tackling corruption.

First Report on the Implementation of the PIF Convention

In this Report, the Commission suggested that Ireland did not appear to have introduced the concept of criminal liability of heads of business requiring "guilty knowledge".[158] It also considered it to be doubtful whether Ireland provides for liability where lack of supervision or control has made it possible for the offence to be committed or where the offence was committed by a subordinate person.[159]

Second Report on the Implementation of the PIF Convention

In its Second Report, the Commission commented on the lack of clarity regarding the scope and coverage of criminal liability for heads of business in Ireland.[160] It again commented on the failure to provide for the liability of legal persons in cases of lack of supervision.[161] It identified the failure of Ireland's jurisdiction rules on passive personality

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[157]Greco RC-III (2011) 10E, pp 2- 5.
[158]EU Commission, Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocol (COM(2004) 709 final, 25 October 2004, p 5).
[159]EU Commission, Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2004) 709 final, 25 October 2004, p 5), p 6.
[160]EU Commission, Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2008) 77 final, 14 February 2008, p 3).
[161]EU Commission, Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2008) 77 final, 14 February 2008, p 3), p 8.

to cover passive corruption as constituting a serious shortcoming.[162] Ireland is also listed as one of the States which failed to supply sufficient information regarding the transposition of the PIF instruments.[163]

First Report on the Council's Framework Decision

This report provides an analysis of the transposition commentaries and legislation provided by 20 Member States, including Ireland, on the transposition of the Framework Decision on Corruption.[164] In that report, the Commission identified a number of deficiencies in the Irish bribery offences from the perspective of that decision. These related to: the coverage of intangible benefits as bribes;[165] the extent to which a legal entity can be held responsible for bribery resulting from a lack of supervision on the part of that entity;[166] penalties for legal persons;[167] and jurisdiction.[168]

Second Report on the Council's Framework Decision

Like the first report, this report is again based on an analysis of the information sent by Member States regarding their transposition of the framework decision.[169] In this report, the Commission did not identify any deficiencies in Ireland's implementation of that decision.

CONCLUSION

Despite the longevity of the PCA 1906, it has been much ignored by both the academic communication and by practitioners. In particular,

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[162]EU Commission, Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2008) 77 final, 14 February 2008, p 3).
[163]EU Commission, Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2008) 77 final, 14 February 2008, p 3), p 7.
[164]EU Commission, Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (COM(2007) 328 final, 18 June 2007, p 5).
[165]Ibid., p 6.
[166]Ibid, p 8.
[167]Ibid.
[168]Ibid.
[169]EU Commission, Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (COM(2011) 309 final, 6 June 2011, p 1).

there is almost no domestic academic analysis of the 1906 Act and there are no written Irish judgments.

The domestic neglect of the 1906 act is paralleled by the neglect of the Tribunals reports: no substantive academic attempt has been made to consider the implications of the findings made in those reports for the substantive bribery offences (or indeed for any other offences).

While the compatibility of the 1906 Act with the relevant international instruments has been the subject of a number of evaluations, each of these suffers from a number of actual or potential inadequacies justifying additional analysis of this issue.

In remedying each of these deficiencies, this thesis makes a further important contribution to academic knowledge in this developing field of international law.

CHAPTER 3: BRIBERY

This chapter provides a context for this research and positions it within the existing body of knowledge in this area. The first section reviews and analyses the main rationales underpinning the criminalisation of bribery and the different models of bribery focusing in particular on the agent-principal model and the breach of duty model. The next section deals with the breach of duty model as articulated in the UK Bribery Act 2010. The final section of this chapter expands the central premises upon which this thesis is based.

WHY CRIMINALISE BRIBERY?

At least in Western democracies, there is widespread agreement that "the use of legal coercion (...) calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good."[170] There is however, considerable debate over what constitutes such a countervailing good. The main principles proposed as ways of identifying that good are: the harm principle; the offence principle; the immorality principle; and legal paternalism.

THE HARM PRINCIPLE

According to the harm principle, the only acceptable reason to criminalise criminal conduct is that it gives rise to some non-trivial harm. It was first articulated by John Stuart Mill in the opening pages of his essay *On Liberty*:

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[170]H.L.A. Autor Hart, *Law, Liberty and Morality* (Stanford University Press, 1963), p 20; see also Carl F. Cranor, "Legal Moralism Reconsidered" (1979) 89(2) Ethics 147; Dennis J Baker, *The Right not to be Criminalized*, (Ashgate, 2011) p 9, "[t]he right to not be criminalised is a basic human right that aims to protect individuals from unwarranted state interference of a penal nature. In particular the right is geared towards protecting individuals from being unjustly criminalized. The right is a basic moral right but it is also a fundamental legal right." See also S.E. Marshall and R.A. Duff, "Criminalization and Sharing Wrongs" (1998) 11Canadian Journal of Law and Jurisprudence 7, according to whom, at p 7, "the criminal law should deal with those kinds of wrong which are matters of public concern, and which therefore require a collective response from the whole community; wrongs, which are, by contrast, properly the concern only of the private or individual victim should be dealt with under the civil law. What is far less clear, however, is how we should characterise that distinction."

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individuals in the ways of compulsion and control. .... That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not sufficient warrant.[171]

While in this opening paragraph, Mill proposes an inquiry into harm generally, in his final statement of the harm principle he defines the concept of harm in terms of recognised or legal rights.[172] As is clear from the above quote, in Mill's view state coercion is only justified where the harm is to others: harm to self is not enough nor may coercion be used to uphold society's moral values.

Mill's views have attracted many supporters. In more modern times, Joel Feinberg has defended the harm principle, which he restates as follows:

> (S)tate interference with a citizen's behaviour tends to be morally justified when it is reasonably necessary.....to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion.[173]

In Feinberg's view, State coercion is justified both to prevent harm to the individual and to the State. Moreover, the harm principle covers both harm and the threat of harm. Feinberg's concept of harm differs

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[171] See John Stuart Mill, *On Liberty 9* (Elizabeth Rapaport ed. 1978) (1859), p 9; See also Joel Feinberg, *Harmless Wrongdoing (The Moral Limits of the Criminal Law)*, Vol 4 (Oxford University Press, 1990); For a background discussion of the harm principle see generally, Kent Greenawalt, "Legal Enforcement of Morality" (1995) 85 J. Criminal Law & Criminology 710, 722-725.

[172] According to Mill, at p 73 in his essay *On Liberty*, "[t]hough society is not founded on a contract.....the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. This conduct consists, first, in not injuring the interests of one another, *or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights;* and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labours and sacrifices incurred for defending the society or its members from injury and molestation."

[173] Harm to Others The Moral Limits of the Criminal Law, New York OUP (1984), 11

somewhat from that of Mill. Specifically, in contrast to Mill, who envisaged a conception of harm which was tied to human development, Feinberg understands harm as a "set-back to interests" and considers coercion to be justified only when that set back is wrongful.[174] Moreover, Feinberg considers the harm principle as a valid legislative principle, but not necessarily the only one.

Significantly, the harm principle does not require the State to criminalise actions that may cause harm to others, it simply recognises this as being the only legitimate ground for state intervention.[175] Furthermore, the harm principle incorporates a *de minimis* principle in the sense that if there are other ways of preventing the relevant harm to others which do not involve state coercion, then these ways are preferable.[176]

The harm principle has been enormously influential. According to Harcourt:

> over the course of the 1960s, '70s and 80s, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became the critical principle used to police the line between law and morality within Anglo-American philosophy of law. Most prominent theorists who participated in the debate either relied on the harm principle or made favourable reference to the argument.[177]

Nevertheless, it is not without its critics. As Ripstein observes, difficulties with the harm principle include:

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[174] Feinberg, Harm to Others The Moral Limits of the Criminal Law, New York OUP (1984), 215, "[t]he term 'harm' as it is used in the harm principle refers to those states of set-back interest that are the consequences of *wrongful* acts or omissions by others. This interpretation thus excludes set-back interests produced by *justified or excused conduct (*harms that are not wrongs) and violations of rights that do not set back interests (wrongs that are not "harms"). A harm in the appropriate sense then will be produced by *morally indefensible conduct* that not only sets back the victim's interests, but also violates his rights.

[175] Nils Holtung, "The Harm Principle", (2002) 5(4) Ethical Theory and Moral Practice 357, 360.

[176] See Nils Holtung, The Harm Principle, (2002) 5(4) Ethical Theory and Moral Practice 357, 359 where he explains: "If the state is to be justified in coercing a person to prevent harm to others, the relevant coercion needs to be necessary in order to prevent the harm – or at least morally superior to alternative ways of avoiding it. If the state could prevent a person from harming others simply by asking him nicely, then it should not coerce him."

[177] Bernard Harcourt, "The Collapse of the Harm Principle", (1999) 90 J. Crim. L. & Criminology 109, 131.

> ... it cannot explain the distinctive status that it assigns to harm; why harm matters; when harm matters; or why harm, in particular, would be especially relevant to the criminal law. Nor can it explain the familiar classes of cases in which harm does not seem to matter at all; the harm a person visits on him or herself, harm at the hands of others that is voluntarily undertaken or risked, and harm resulting from fair contest, including market competition, even if the contest was not voluntarily undertaken in any straightforward or self-conscious sense.[178]

Moreover, there is considerable dispute as to what constitutes harm. An individual's behaviour frequently affects others and if all negative effects qualify as harm then it is argued that the principle does not adequately protect individual liberty.[179] According to Harcourt, the harm principle has collapsed under its own weight in the sense that so many types of conduct can be framed in terms of the harm they cause that the principle no longer acts as an effective limitation on state coercion :

> Today, although the harm principle formally remains a *necessary but not sufficient* condition, harm is no longer in fact a *necessary* condition because non-trivial harm arguments are being made about practically every moral offense. As a result, today, we no longer focus on the existence or non-existence of harm. Instead, we focus on the types of harm, the amounts of harm, and the balance of harms. As to these questions, the harm principle

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[178] Arthur Ripstein, Beyond the Harm Principle (2006) 34(3) Philosophy & Public Affairs 216, 219. For example, according to Ripstein, at p. 218 that "narrowly construed, the harm principle fails to account for a significant class of wrongs that most liberals would agree merit prohibition, despite the harmlessness, namely harmless trespass."

[179] On the difficulties of defining "harm" see Nils Holtung, The Harm Principle, (2002) 5(4) Ethical Theory and Moral Practice 357. Having reviewed and discounted various approaches to defining harm, Holtung observes, at p. 387, "... with a few exceptions, proponents of the Harm Principle have devoted insufficient attention to the question of what harm is. Perhaps there has even been an, as it were, 'top-down' tendency to characterize something as a harm if there seemed to be a case for coercion rather than the other way around. It is no great surprise, then, that the Harm Principle has seemed intuitively plausible." On a similar point, Arthur Ripstein, Beyond the Harm Principle (2006) 34(3) Philosophy & Public Affairs 216, 224 observes, "[t]he problem with the harms of bad character, fears, and objections to a lack of consultation is not that they aren't harms, but that if they fall under the harm principle, it isn't a liberal principle. If those harms count, the harm principle underwrites many of the prohibitions it is supposed to exclude."

> offers no guidance. It does not tell us how to compare harms. It served only as a threshold determination, and that threshold is being satisfied in most categories of moral offense. As a result, the harm principle no longer acts today as a limiting principle with regard to the legal enforcement of morality.[180]

Perhaps most fundamentally, while the harm principle claims that the use of state coercion is only justifiably applied to conduct which causes harm to others, as explained, it does not claim that all such conduct should be the subject of state coercion. Consequently:

> The harm principle tells us that the law should not be used to punish harmless activities. But it does not tell us *how* or even *when* harmful activities should be dealt with by the law.[181]

Consequently, as Feinberg himself acknowledges, "in the end, it is the legislator himself, using his own fallible judgment rather than spurious formulas and 'measurements,' who must compare conflicting interests and judge which are the more important."[182]

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[180]Bernard Harcourt, The Collapse of the Harm Principle, (1999) 90 J. Crim. L. & Criminology 109, 114-115; Richard Epstein, The Harm Principle – And How it Grew (1995) 45(4) University of Toronto Law Journal 369; see also Steven D. Smith, The Hallowness of the Harm Principle, (2004) University of San Diego School of Law Public Law and Legal Theory Research Paper Series, Paper 17, who criticises the harm principle as "an empty vessel, alluring but without any inherent legal or political content, into which advocates can pour whatever substantive views and values they happen to favour.....All in all, the harm principle serves to confuse and distract, and to permit advocates to gain illicit rhetorical advantage without earning their way."

[181] Alan Bogg and J. Stanton-Ife, Protecting the vulnerable: Legality, Harm and Theft (2003) 23 Legal Studies, 402; see also Bernard Harcourt, The Collapse of the Harm Principle, (1999) 90 J. Crim. L. & Criminology 109, 113 where he observes, "[t]oday the issue is no longer whether a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent." Harcourt further remarks at p. 182, "[t]he harm principle is silent in the sense that it does not determine whether a non-trivial harm justifies restrictions on liberty, nor does it determine how to compare or weigh competing claims of harms. It was never intended to be a *sufficient* condition. It does not address the comparative importance of harms."

[182] Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others (1984) 203. Similarly, according to Harcourt, Once non-trivial harm arguments have been made, we inevitably must look beyond the harm principle. We must look beyond the traditional structure of the debate over the legal enforcement of morality. We must access larger debates in ethics, law and politics – debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values *that give meaning to the claim that an identifiable harm matter. See* Bernard Harcourt, The Collapse of the Harm Principle, (1999) 90 J. Crim. L. & Criminology 109,183.

THE OFFENCE PRINCIPLE

In contrast to Mill, Feinberg recognised harm as one justification for the criminalisation of certain types of behaviour, but not the only one. According to Feinberg,

> It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.[183]

In other words, Feinberg recognised that there are instances of conduct which the State may rightly and justifiably criminalise even though they do not cause harm to others, or indeed any harm at all, namely where that conduct causes offence.

Feinberg views offence essentially as conduct which causes an affront to people's sensibilities that conduct producing

> Unpleasant or uncomfortable experiences – affronts to sense or sensibility, disgust, shock, shame, embarrassment, annoyance, boredom, anger, fear or humiliation – from which one cannot escape without unreasonable inconvenience or even harm.[184]

Once enough people are sufficiently affronted and certain other conditions are met, the State may justifiably invoke the criminal law, irrespective of those people's reasons for being affronted and whether or not that offense is reasonably taken.[185] However, before criminalising offensive conduct, Feinberg proposes that the legislator should carry out a balancing test. First, he or she should consider both the magnitude of the offense generated by a particular type of conduct and the ease with which members of the public can avoid settings in which that conduct

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[183] Joel Feinberg, Offense to Others, (The Moral Limits of the Criminal Law, Volume Two)(Oxford University Press, Oxford, 1985), p. 5

[184] A. P. Simester and Andrew von Hirsch, Rethinking the Offense Principle (2002) 8 Legal Theory, 269, 270

[185] According to Feinberg, Offense 6, "Provided that very real and intense offense is taken predictably by virtually everyone, and the offending conduct has hardly any counterveiling personal or social value of its own, prohibition seems reasonable even when the protected sensibilities are not.

tends to occur. Secondly, the legislator must consider the importance of the conduct from the actor's perspective: the more central the conduct is to his or her way of life, the more justification is necessary before the State should criminalise that conduct. Relevant in this regard is the ease with which the actor could engage in the relevant conduct in ways which give rise to less offense. Finally, the legislator should take account of the broader social impact of the actor's conduct and "the more independent general usefulness the supposedly offending conduct has, the less the claim to prohibition."[186]

Criticisms of the offence principle raise many of the same issues as criticisms of the harm principle. In particular, it is not clear what is so particular about causing offence that it deserves to be criminalised. Nor is there a clear and constant definition of what constitutes offence.[187]

THE IMMORALITY PRINCIPLE

In its most extreme form, legal moralism is the view "that what is morally required ought to be legally required: law's proper function is to enforce 'morality as such'.[188] However, adherents of legal moralism who accept this definition appear non-existent.[189] Consequently, a more relevant definition is that advocated by Cranor, according to whom, "the immorality of a particular form of conduct provides a reason, but not a sufficient [or necessary] reason for making it criminal."[190] The main difference between legal moralism and the harm principle is that while the latter emphasises harm as the only basis for justifying the use of state coercion, legal moralists claim that morality may also provide such a justification.

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[186] A. P. Simester and Andrew von Hirsch, Rethinking the Offense Principle (2002) 8 Legal Theory, 269, 272

[187] For discussion of the distinction between harm and offence see Duff and Marshall, "How Offensive Can you Get?" in A. Von Hirsch and A.P. Simester (eds) Incivilities: Regulating Offensive Behaviour, (Oxford: Hart 2006)

[188] A Kuflik, "Liberalism, Legal Moralism and Moral Disagreement", (2005) 22(2) Journal of Applied Philosophy 185.

[189] Thomas S. Petersen, "What is Legal Moralism", (2011) 12(1) SATS 80, available at http://philpapers.org/archive/PETWIL, last accessed August 1, 2013.

[190] C.F. Cranor, "Legal Moralism Reconsidered" (1979) 89(2) Ethics 147, 147.

> Legal moralism has a long history.[191] The likings and disliking of society, or of some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion.

Mills of course rejected legal moralism and following the publication of his essay, Lord James Fitzjames Stephen published a book entitled, *Liberty, Equality and Fraternity*, which launched a scathing attack on that essay and strenuously advocated legal moralism. According to Stephen:

> [T]here are acts of wickedness so gross and outrageous that, self protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.[192]

In more modern times, the debate surrounding morality as a basis for State coercion re-emerged following the publication of the report of the Committee on Homosexual Offences and Prostitution (the "Wolfenden Report") which recommended the de-criminalisation of homosexuality. Lord Patrick Devlin, in his Maccabaean Lecture, delivered to the British Academy in 1959 argued that purportedly immoral offences like homosexuality and prostitution should remain criminal offenses. He subsequently published this, and other, essays under the title *Enforcement of Morals*. According to Devlin, it was appropriate for the criminal law to reflect moral values as those values are an essential part of society's structure and permitting serious immoral values could undermine that structure ultimately resulting in social disintegration.[193] According to Devlin:

> If a society has a right to make a judgment and has it on the basis that a recognised morality is as necessary to society as,

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[191] See e.g. James Fitzjames Stephen, *Liberty, Equality, Fraternity*, (1873) (R.J. White ed., Cambridge Univ Press 1967) , who, launched a stinging attack on Mill's essay *On Liberty* 9 (Elizabeth Rapaport ed., 1978) (1859), shortly after its publication. According to Stephens, at 162, "[T]here are acts of wickedness so gross and outrageous that, self protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity."

[192] James Fitzjames Stephen, Liberty, Equality, Fraternity, (R.J. White ed., Cambridge Univ Press 1967) (1873) at 162

[193] P Devlin, The Enforcement of Morals (Oxford University Press, 1965)

> say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.[194]

Devlin's arguments generated much opposition, most significantly from H.L.A. Hart, who in opposing those arguments defended a variation of the harm principle. In particular, Hart rejected the proposition that the breach of any specific moral standard could cause the disintegration of society, describing this proposition as "absurd".[195] It may also be difficult to identify those moral values underpinning a particular society in instances where that society is racially, culturally or even religiously diverse. John Hospers has also attacked legal morality because of its implicit tyranny in that it leaves no room for alternative perspectives.[196]

While Devlin's version of legal moralism has now few supporters,[197] there are still those who consider the immorality of a person's conduct to be a relevant criterion for the purposes of criminalisation. In 2008, a version of legal moralism was the subject of a lecture delivered by Robert E. Goodin at the University of Chicago Law School. Goodwin argued not only for the legitimacy of criminalising immoral behaviour, but also for an ideal set of rules and values which the law is meant to enforce. According to Goodwin, "tracking morality enables the law to do what law is socially supposed to do which is to guide people's behaviour."[198] Goodwin's defence of legal moralism is premised on the

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[194] P Devlin, The Enforcement of Morals (Oxford University Press, 1965), p. 13-14

[195] H.L.A. Hart, Liberty and Morality, (1963) p. 51 – 52 "to more from the acceptable proposition that some shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given moment of its history, so that a change in its morality is tantamount to the destruction of a society. The former proposition might be even accepted as a necessary rather than an empirical truth depending on a quite plausible definition of society as a body of men who hold certain moral views in common. But the latter proposition is absurd. Taken strictly, it would prevent us from saying that the morality of a given society had change and would compel us to say that one society and disappeared and another one taken its place. But it is only on this absurd criterion of what it is for the same society to continue to exist that it could be asserted without evidence that any deviation from a society's shared morality threatens its existence." See also Ernest Nagel, The Enforcement of Morals, (1968) 28(3) The Humanist, 20 – 27, reprinted in Ethics and Public Policy 265 at 275 (Beauchamp ed. 1975)

[196] John Hospers, Libertarianism and Legal Paternalism, (1980) IV(3) The Journal of Libertarian Studies 255

[197] See generally, Gerald Dworkin, Devlin was Right: Law and the Enforcement of Morality, (1999) 40 Wm & Mary L. Rev. 927

[198] Robert E. Goodin, An Epistemic Case for Legal Moralism (2010) 30(4) Oxford Journal of Legal Studies, 615, 615

view that for law to do what it is supposed to do, namely guide action, people need to be able to intuit without too much detailed investigation what the law is. In this respect he observes:

> There are various answers possible to the question of how we can know what the law requires of us..... Whatever other highminded reasons there may be for law to track morality, there is always the lowly pragmatic reason for it to do so, purely in order to maximise citizens' epistemic access to the content of the law, and in that way to enable law to serve its social function of guiding their behaviour.[199]

Again however, questions arise as to how to determine immorality and how to distinguish between immoral acts which should be the subject of the bribery offences, and those which should not.

LEGAL PATERNALISM

Legal Paternalism is the view that it is permissible for the state to legislate against what Mill refers to as "self-regarding actions" when necessary to prevent individuals from inflicting physical or severe emotional harm on themselves. According to Dworkin, one of its leading proponents, it is an "interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced".[200]

In Dworkin's view, a fully rational adult would consent to paternalistic restrictions on freedom in certain situations, including for example, a restriction which protects him or her from making decisions that are "far-reaching, potentially dangerous and irreversible."[201] However, Dworkin also recognises that there are limits to paternalism. Specifically, paternalistic restrictions are only justified if: (1) the state can show that the behaviour governed by the proposed restriction involves the sort of harm that a rational person would want to avoid; (2) the potential harm outweighs the potential benefits of the behaviour, on the calculations of

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[199] Robert E. Goodin, An Epistemic Case for Legal Moralism (2010) 30(4) Oxford Journal of Legal Studies, 615, 615, 616
[200] Gerard Dworkin, (1972), p. 65
[201] Gerard Dworkin, (1972), p. 80

a fully rational person; and (3) the proposed restriction is the least restrictive alternative for protecting against the harm.

Those who oppose legal paternalism frequently do so on libertarian grounds, namely, "that people should absorb the consequences of their own actions and that in any case the State has no right to legislate what people should do as long as their actions harm no one else."[202] John Hospers criticises libertarians for failing to distinguish between two types of paternalism, namely: (1) acting against a person's will to achieve our goals for him or her; and (2) against a person's will to achieve his or her own goals. Hosper proposes a more moderate approach to legal paternalism, suggesting that the greater degree to which a person's action is voluntary, then the less justification there is for the State, or anyone else, to behave paternalistically toward that person. Moreover, according to Hosper, while most libertarians understand voluntary to mean non-coercion, he considers this to be an over-simplification:

> In discussing human action, libertarians place very great emphasis upon voluntariness. But in my opinion most libertarians conceive it too thinly. 'If he was forced, he hasn't acted voluntarily' – this much libertarians all consent to. But too often they fail to see that voluntariness is not as simple as that – that once it is clear that no coercion or pressure has been applied, the action may yet fail of being voluntary."[203]

In contrast, Hosper argues that, to be truly voluntary, a decision must be free from both coercion and pressure; the decision-maker must be fully informed about all the relevant facts prior to making his or her decision; and finally, the decision-maker must be in a healthy psychological state.

WHAT'S WRONG WITH BRIBERY?

Historically, the criminalisation of public bribery has been founded on its immorality, however increasingly those same justifications are being re-

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[202]John Hospers, Libertarianism and Legal Paternalism, (1980) IV(3) The Journal of Libertarian Studies, 255, 256

[203]John Hospers, Libertarianism and Legal Paternalism, (1980) IV(3) The Journal of Libertarian Studies, 255, 264

framed in terms of the harm to which public bribery gives rise.[204] More recently, the immorality and harm arguments have been used to extend the criminalisation of bribery to cover bribery in the private sphere.

THE IMMORALITY OF PUBLIC BRIBERY

The ideas of corruption and evil are fused throughout the writings of mediaeval and early modern England and France.[205] In *Le Dictionnaire de l'Academie Française*, published in 1964, corruption is described as "concerning all moral deprivations and especially those with regard to justice....".[206]. This view of bribery as immoral is further evidenced by its characterisation in the common law as a "corruption" offence. As Tamashasky observes:

> Historically, the common law split offenses into two categories. These categories reflected the belief that some offenses were against morals or the laws of God while other offenses were merely against the laws of men. Those offenses against morals or the laws of God were classified under the term "corruptly".[207]

More modern commentators on bribery still refer to its inherent immorality. According to D'Andrade, "Bribery is wrong. It is immoral almost by definition in the same way that murder is."[208]

While there was, and is, widespread consensus that bribery is immoral, the reasons for viewing it as immoral vary. According to Noonan, initially

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[204] See Bernard Harcourt, "The Collapse of the Harm Principle", (1999) 90 J. Crim. L. & Criminology 109, at 139 where he states "[d]uring the course of the last two decades, the proponents of legal enforcement have increasingly deployed the rhetoric of harm. Armed with social science studies, with empirical data, and with anecdotal evidence, the proponents of regulation and prohibition have shed the 1960s rhetoric of legal moralism and adopted, instead, the harm principle. Whether they have been motivated by moral conviction or by sincere adherence to the harm principle, the result is the same: the harm principle has undergone an ideological shift – or, what Professor Balkin would call an ideological drift – from its progressive origins."

[205] Maryvonne Génaux, "Early Modern Corruption in English and French Fields of Vision", in Arnold J. Heidenheimer & Michael Johnston, (eds) *Political Corruption: Concepts and Contexts*, (Transaction Publishers, 2002) at 107 – 117.

[206] *Dictionnaire de l'Academie Françoise Dédié au Roi* (Genève, 1981), (reproduction of the 1st ed., Paris, 1694), Vol 1 (s.v. corruption: "figurément, de toute depravation dans les moeurs, et principalement de celles qui regardent la justice....").

[207] Eric J. Tamashasky, "The Lewis Carroll Offense: the Everchanging Meaning of "Corruptly" within the Federal Criminal Law", (2004) 31 J. Legis, 129, 133.

[208] Kendrall D'Andrade, "Bribery" (1985) 4 Journal of Business Ethics 239, 239.

at least, those reasons were attributable to the view of God (or a God) as an impartial judge, whom all other judges should emulate. Over time, this rationale developed into a condemnation of bribery because of its tendency to distort official decision-making or because of the wrongfulness of profiting from the use of another's power. Other reasons focus the fact that bribery almost inevitably involves a violation of trust/duty either in the context of a specific relationship, or more broadly.

THE HARM OF BRIBERY

There is no difficulty in identifying harms caused by bribery. Specifically, while there are some who argue that bribery can be efficiency enhancing because bribes remove government-imposed rigidities that impede investment and interfere with other economic decisions favourable to growth, the dominant view is that bribery has overwhelmingly negative effects.[209] In particular, there is widespread agreement that bribery has a negative impact on the rate of growth of countries.[210] In this respect, bribery reduces investment, probably because of the higher costs of doing business in corrupt environments and the uncertainty associated therewith. Specifically, because bribes are secret there is no publicly available information about the level of bribes. Nor is there any way of knowing what one's competitors are paying. Furthermore, as bribes are illegal, the risks of default are high. In addition, the ability to extract bribes may increase regulation in order to create more opportunities for bribery. In this respect, "when rules can

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[209] Vito Tanzi, *Corruption Around the World, Causes, Consequences, Scope and Cures*, Vol 45, IMF Staff Papers, (December 1998), No. 4, p 578. See e.g. Nathaniel Leff, "Economic Development Through Bureaucratic Corruption" (1964) 8(3) American Behavioral Scientist 8; Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press, 1969) and Joseph S. Nye, "Corruption and Political Development: A Cost-Benefit Analysis", (1967) 61(2) American Political Science Review 417; Kevin E. Davis, "Self Interest and Altruism in the Deterrence of Transnational Bribery" (2002) 4(2) American Law and Economics Review 314; David Mills and Robert Weisberg, "Corrupting the Harm Requirement in White Collar Crime", (2008) 60 Stan. L. Rev. 1371, who observe, at 1379, "[G]raft may sometimes encourage productive economic transactions and prod the government to help entrepreneurs at critical times in economic development by reducing uncertainties of investment."

[210] Paul Mauro, "Corruption and Growth", (1995) 110(3) Quarterly Journal of Economics 681.

be used to extract bribes, more rules will be created",[211] leading to an excess of bureaucracy.

Bribery also reduces the quality of the services provided as the briber attempts to recover the costs of the bribe. Furthermore, bribery can distort the allocation of resources as bribes may "tilt the composition of public spending towards projects that facilitate the collection of bribes (e.g. defence spending) at the expense of priority projects".[212] On a related point, bribery may lead to increased government spending as contracts will not be awarded to the lowest bidder and those contracts which are awarded may include clauses that facilitate kickbacks or graft that inflate project costs.[213]

Bribery may also pose specific risks to democracies. First, according to some analysts, bribery tends to increase where there is a divergence between those holding economic power and those holding political power which is frequently the case in a democracy:

> [c]orruption on a large scale is observed on the political scene, if and when the political power is no longer vested in that class which still has economic power. Such separation of powers becomes the more accentuated, irrespective of the form of government, the more the polity is democratised. In the democratic polity political encroachment on economic power continues to increase. Therefore, the increasing tendency on the

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[211] Vito Tanzi, *Corruption Around the World, Causes, Consequences, Scope and Cures*, Vol 45, IMF Staff Papers, (December 1998), No. 4: 578, 582.

[212] Carl Pacini, Judyth A. Swingen, Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public officials", (2002) 37(4) Journal of Business Ethics, 385 at 389. see also Kevin E. Davis, "Self-Interest and Altruism in the Deterrence of Transnational Bribery" (2002) 4(2) American Law and Economics Review 314 according to whom, at 319 "the prospect of receiving bribes may induce officials to award procurement contracts for capital-intensive "white elephant" projects that provide little public benefit that create numerous opportunities to extract bribes". See also Vito Tanzi, *Corruption around the World, Causes, Consequences, Scope, and Cures*, Vol 45, IMF Staff Papers, (December 1998), No. 4, p 578.

[213] Carl Pacini, Judyth A. Swingen, Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public officials", (2002) 37(4) Journal of Business Ethics, 385 at 389. See also Lois Regent Driscoll, "The Illegality of Bribery: Its Roots, Essence and Universality", (1984) 14 Cap. U.L. Rev. 1, according to whom, at 38 – 39, "The briber, instead of selling buys. He recoups the cost of the bribe by adding it to the price he charges for his product. Product quality becomes a secondary concern. Only minimal standards need be maintained while the bribe receiver earns his keep and wards of competition. The principal can expect poor products at inflated prices, the cost of which he passes into commerce."

> part of business to neutralize political will with economic power. Thus corruption of individual officers is followed by the corruption of governing bodies.[214]

Secondly, where bribery comes to light it undermines faith in democracy and democratic institutions by suggesting that all government decisions are for sale to the highest bidder:

> [w]hen government officials act to enrich themselves they act against the fabric on which they depend, for what else does government rest upon except the expectation that those chosen to act for the public welfare will serve that welfare?[215]

Finally, bribery is essential for organised crime to flourish, which may itself pose a threat to democratic institutions. As explained:

> Whenever money is the root of the evil, bribery permeates all cells of the root. It is the foundation and lifeblood of organized crime. No illicit business is established without it, be it in the form of payoffs to officials for requisite licences, or for agreement by officials "to look the other way" or give other forms of assistance while the business is being conducted.[216]

From the perspective of justifying the criminalisation of bribery, the problem is that while all or most bribery causes harm, different types of bribery give rise to different types of harm: and there are many different types of bribery:

> The precise nature of the harm that a given act of bribery causes will vary depending on the nature of the official act that is compromised, whether by judge, legislator, administrator, juror, witness, executive, or other official.[217]

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[214] Wladimir Eliasberg, "Corruption and Bribery", (1951) 42(3) The Journal of Criminal Law, Criminology, and Police Science, 317, at 321 – 322.

[215] John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company 1984), p 704; see also, Carl Pacini, Judyth A. Swingen, Hudson Rogers, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public officials" (2002) 37(4) Journal of Business Ethics, 385; UK Law Commission, *Legislating the Criminal Code, Corruption*, A Consultation Paper, No. 145, LC248, (the Stationary Office, 1998), p 1.

[216] Lois Regent Driscoll, "The Illegality of Bribery: Its Roots, Essence, and Universality" (1984) 14 Capital University Law Review 1, 4.

[217] Stuart P. Green, "What's Wrong With Bribery?", in R. A. Duff and Stuart P. Green

Conversely, different types of bribery may also give rise to different types of benefits, off-setting at least to some degree any harm caused:

> The failure of non-legal scholarship to produce a meaningful definition and political theory to distinguish "acceptable" forms of corruption from non-acceptable forms has only confounded efforts to resolve confusion within legal doctrine itself.[218]

Consequently, there is a general lack of agreement as to how to conceptualise the harm caused by bribery, and:

> ....huge implicit questions lurk about how to conceive the social or economic harm that should motivate public corruption laws, and those questions get masked as, or transformed into, debates over more technical components of crime definition.[219]

Thus, the problem bribery presents from a harm perspective is determining how to capture the various harms to which bribery gives rise into one, or even several, offences.

CRIMINALISING PRIVATE BRIBERY

Private bribery is also viewed as immoral and harmful. Private sphere bribery is generally considered immoral in so far as it involves a breach of trust. However, some commentators distinguish between the immorality of public and private bribery. For example Green argues that the moral content of these two types of bribery is distinguishable as:

> [t]hose who hold public office have duties that are qualitatively different from those held by employees of private firms. In a democracy, they typically hold their jobs either because they were directly chosen by the people or because they were appointed by, and serve at the pleasure of, those who were popularly elected. They are frequently charged with 'serving', 'protecting', preserving, or defending the public interest, and

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(eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, 2005), p 152.

[218] See in particular, David Mills and Robert Weisberg, "Corrupting the Harm Requirement in White Collar Crime", (2008) 60(5) Stanford Law Review 1371, 1381.

[219] David Mills and Robert Weisberg, "Corrupting the Harm Requirement in White Collar Crime", (2008) 60(5) Stanford Law Review, 1371, 1377.

> doing so "truely" and "faithfully". To accept a bribe is to violate that trust, to betray one's office and the polity to commit a kind of 'treason'.[220]

In contrast, according to Green, while decision-makers in the private sphere may owe a duty of trust, the trust is not a public trust. The public are entitled to expect public decision makers to be impartial in their decision-making: however there is no equivalent expectation in existence in the private sphere.

The breach of trust which occurs in private sphere bribery is also relevant to the harm model. Moreover, both public and private bribery may have a similarly adverse economic impact, including reducing market transparency and market confidence. According to the Australian Model Criminal Code Officers Committee:

> Confining bribery to the public sector assumes that public sector corruption does more harm to the community than private sector corruption. That assumption is questionable. The secret commissions paid to Johns in the Tricontinental Bank case amounted to $2 million. The corrupting effect of a secret commission of that amount on confidence in the general commerce and finances of the community were very serious and more harmful than many instances of bribery in the public sector. .....The public needs to be able to have confidence in both the public and the private sector.[221]

In a similar vein, Driscoll observes:

> If bribery of public officials is a prostitution of justice, commercial bribery is a prostitution of commerce. If it were permitted, the best business opportunities would probably go to the heaviest

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[220]Stuart P. Green, "Official and Commercial Bribery: should they be distinguished?" in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law,* (Cambridge University Press, 2013), p 57

[221]Model Criminal Code Officers Committee, *Model Criminal Code Chapt 3: Theft, Fraud, Bribery and Related Offences* (December, 1995) pp 271-273 available at http://www.sclj.gov.au/sclj/standing_council_crimelaw/standing_council_model/standing_council_chapter3.html, last accessed on June 25, 2013.

> bribers or the most dishonest employees - not a healthy climate in which one could expect free competition to flourish.[222]

On a further point, it would be more difficult to combat bribery in the public sector if it were permitted to proceed unabated in the private sector. This is *a fortiori* the case given that the two sectors are not always readily distinguishable.

MODELS OF BRIBERY

As is clear from the above, there are various ways of conceiving the immorality / harm of bribery and the differing conceptions of why bribery should be criminalised have implications for the scope of the bribery offences and the type of harms / immorality covered.

This section considers six models of bribery rooted in either immorality or harm, or both, namely the distortionary model, the acquisitiveness model, the rent seeking model, the market model, the agent-principal model and the general breach of duty model.

THE DISTORTIONARY MODEL

According to Noonan, the idea of God as an impartial judge pre-dates Christianity and can be found in writings regarding the Sun-god in ancient Egypt and the god, Amon-Re, circa 1230 BC.[223] For its part, the Hebrew Bible admonishes judges to imitate God and not let their judgments be influenced by offerings. In the words of the Book of Deuteronomy, God "does not take shohadh". According to the Book of Job, the Creator does not reciprocate:[224] In the Christian world from very early on there was a concept of something which ought not to be sold:

> [f]ixed in the biblical basis of Western culture is the model of the Ruler-Judge who is above all attempts to bribe Him. We are to be like Him. Fixed in the Christian tradition which has been recurrently invoked to reform our civilisation are the image of

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[222]Lois Regent Driscoll, "The Illegality of Bribery: Its Roots, Essence, and Universality" (1984) 14 Capital University Law Review, 1, 8.
[223] See John T. Noonan, Jr. *Bribes*, (Macmillan Publishing Company 1984), Chapts 1 and 3.
[224]Ibid.

> what cannot be bought, the paradigm of the Donor who identifies with the donees, and the teaching that what is freely received must be freely given. Generous gifts and base bribes are demarcated forever by religious example and instruction.[225]

Over time, the immorality of selling justice broadened into a more general condemnation of bribery because of its distortionary impact on decision making.[226] If bribes were permitted, then wealth alone would determine the use of public power. In other words, if bribes "were not morally objectionable, we would live in a world of pure plutocracy where wealth would be the measure of all things".[227]

The purchase of public power also violates the deeply rooted right of individuals to be treated equally before the law. While the particular expression of this principle differs depending on its temporal, social and cultural context, the essential injustice of exploiting the poor, the very young and the otherwise vulnerable is and has always been widely recognised.[228] Moreover, in democracies, the idea of equality before the law has evolved into a principle of procedural fairness. Bribery violates this principal as it asks that "some persons be allowed to stand ahead of others, that like cases not be treated alike, and that some persons be preferred".[229]

The impartiality model essentially conceives the wrong of bribery as lying in a breach of a duty to act impartially in instances where the recipient of the bribe is under such a duty because he or she is exercising a conferred power which is meant to be exercised impartially.

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[225]John T. Noonan, Jr. *Bribes*, (Macmillan Publishing Company 1984) p 705.
[226]James Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev 1695, 1704.
[227] John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company, 1984), p 703.
[228] see e.g. John T. Noonan, Jr. *Bribes*, (Macmillan Publishing Company, 1984), Chapt 1, and specifically, p 6, where he observes that "[t]he most famous lawgiver of antiquity, Hammurabi, makes it the recommendation of his decrees for Babylon that they are issued so that 'the strong might not oppress the weak and that justice might be dealt the orphan and the widow'. The theme by 1700 B.C. is familiar. The claim to protect the helpless goes with the staff of royal authority. The ruler's claim depends on divine inspiration. Hammurabi legislates, 'by the order of Shamash, the great Judge of heaven and earth'."
[229] Scott Turow, "What's wrong with Bribery" (1985) 4 Journal of Business Ethics 249, 250.

In instances where the rationale for criminalising bribery lies in a breach of a duty to act impartiality, the question arises as to whether the offences should cover payments given because of the recipient's official position but which are not linked to any official act (positional payments) or payments made for generating goodwill on the part of the recipient, but which are again not linked to a specific official act. Moreover, while the distortionary impact of a bribe on official decision making is clearly an important concern, it is one which is almost exclusively relevant in the public domain. Specifically, while the use of public power is only justified where there are legitimate reasons for that use, there is no such concern with the use of private power. In particular, those operating in the purely private sphere are entitled to make their decisions based on good reasons, bad reasons, or no reasons.

THE ACQUISITIVENESS MODEL

In earlier times, at least in the UK, the immorality of bribery was primarily attributable to concerns regarding the use of the King's power for personal gain. As Lindgren comments:

> Bribery arose as an offense in English law primarily in contexts suggesting concern for how officials acquire wealth. The concern seems to be greedy officials, rather than powerful subjects distorting government.[230]

According to Lindgren, even now:

> ...the exploitation of public power for personal gain is an important justification for a law against bribery. An official accepting a bribe is using public leverage, the leverage of the government or the public, to make deals for his personal benefit.[231]

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[230]James Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev 1695, 1705.
[231]James Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev 1695, 1705.

While Lindgren was referring to public bribery, this rationale can be easily extended to cover private bribery, by substituting professional or occupational leverage for public leverage.

Basing the immorality of bribery on wrongful acquisition justifies a broad approach to the criminalisation of bribery. Specifically, on this basis, bribery to do the right thing and the receipt of a bribe to do nothing at all (including positional and goodwill payments) fall within the bribery offences because, while these types of bribery do not give rise to specific harms, they nevertheless involve the acquisitive use of state power. In *Bribes,* Noonan even cites two literary examples where an official is "double-damned because he takes a bribe and does not act upon it."[232]

Identifying the central immorality (or harm) of bribery in terms of the acquisitive use of power, presents two main difficulties. First it does not justify criminalising the bribery of foreign monarchs or others whose power is not in fact acquired as such. Secondly, it may be very difficult to apply in the private sphere at least outside the area of employment since it may not be possible in all cases to determine conclusively whether or not power exists, and if it is, from whom, or from where.

THE RENT-SEEKING MODEL

The rent-seeking model is in many ways a modern articulation of the acquisitiveness model. It is outlined by Yu Gaoneng in his article "*The 'Trading Model' of Bribery: Power, Interest and Trilateral Structure*" in which he suggests that as all power derives from the people, bribery can be viewed as a kind of rent-seeking by anyone who holds a certain kind of power. In this respect, he observes that in bribery:

> power is used as a special kind of resource which can be rented out and produce great interest without any cost (...). Therefore a conclusion can be reached that the essence of bribery is rent seeking by power.[233]

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[232]John T. Noonan, Jr. *Bribes*, (New York; Macmillan Publishing Company, 1984), 697.

[233] Gaoneng Yu, "The 'Trading Model' of Bribery: Power, Interest and Trilateral

However, interestingly, (in view of Harcourt's comments above), Gaoneng divorces this argument from its historical moral roots claiming instead that "bribery causes social harm by impeding the normal function of specific power and position."[234]

The rent-seeking model encounters the same two main difficulties as the acquisitiveness model. Gaoeng himself acknowledges the difficulty with determining whether power exists, a fundamental requisite for bribery to occur, observing that "unfortunately, power is also a word of multi-disciplines and with multiple meanings."[235] Having reviewed the concepts of "legitimate power" and "institutional power", Gaoneng suggests that:

> It might be easier to identify power by referring to the power holder's position. By this standard, power can be classified as state power, social power and private power. State power includes legislative power, administrative power and judicial power. Social power covers a wide area of professionals from lawyers, accountants, doctors, professors, referees, arbitrators, notaries and those in forensic work to people involved in special matters such as witnesses and voters, etc. Private power mainly refers to the economic power that exists in the business field.
>
> According to the roles they play, the powers mentioned above can be further divided into two groups: power of authority and power of influence. While state power and professional power belong to the former, the latter mainly includes political power (vote), economic power, and power of mass media.[236]

This appears to me to be a very vague approach to determining the parameters of a criminal offence. Gaoneng goes on to suggest that the easiest approach to determining whether or not there has been an illicit trade of power is to employ a "but-for" test:

Structure," (2008) 72 The Journal of Criminal Law 441, 452.

[234]Ibid.

[235]Gaoneng Yu, "The 'Trading Model' of Bribery: Power, Interest and Trilateral Structure", (2008) 72 The Journal of Criminal Law 441, 459.

[236] Gaoneng Yu, "The 'Trading Model' of Bribery: Power, Interest and Trilateral Structure", (2008) 72 The Journal of Criminal Law 441, 459

> In this test, the element of taking advantage of one's position is decided by answering the following question: but for the receiver's special position, would the interest be offered or given? If the answer is "no", taking advantage of position is established; otherwise, it is not. The function of this test is to prove the link between the power held by the receiver and the conferring of the interest, which is an essential requirement of bribery.[237]

However this appears too broad and fails to adequately distinguish between bribery and other types of conduct. For example if a doctor accepts a payment to lobby for the approval of a particular medical product, this payment is clearly being offered because of his or her professional power, but this hardly makes it a bribe *per se*, at least as that concept is usually understood.

THE MARKET MODEL

Alldridge proposes basing the bribery offences not "so much in any particular individual or relationship, but in fuller regard to these other actors as a market."[238] He argues that this:

> would have the benefit that the offence could be defined by reference to the harm which the offence is thought to create. It would enable a more rational view to be taken of the respective gravity of various cases of corruption in order better to inform decisions on prosecution and as to sentence.[239]

Under this market model of bribery, the wrongdoing involves either: (1) the distortion of a legitimate market; or, (2) the creation of a market that does not exist.[240] The former "covers cases where competition in a market is prevented from functioning properly, so as to prevent (according at least to classical economic theory) competition benefiting

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[237] Gaoneng Yu, "The 'Trading Model' of Bribery: Power, Interest and Trilateral Structure", (2008) 72 The Journal of Criminal Law 441, 460

[238] Peter Alldridge, "The law relating to free lunches" (2002) 23(9) Comp. Law 264, 267.

[239] Ibid.

[240] see Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264, 269.

the eventual consumer....."[241] In these cases, there is a market whose existence is desirable or, at least, legitimate, and which has rules as to how competition is to work. Bribery denies the benefits of competition to the end-user and competition may also be damaged.

The second wrong is essentially concerned with trading in things which in principle ought not to be traded. These cases are attempts to buy or sell the proper functioning of government (such as policing, votes, administration of justice, local government and other public services). As observed:

> There are some positions from which people should not profit at all or should only profit in specific clearly designated ways. Such people do wrong simply to acquire property or advantage at all in virtue of those positions. Immigration or police officers provide examples. Anything that they receive as a result of holding those offices, other than benefits from the employer, may be thought as tainted.[242]

Under the market model, bribery would consist of conferring or receiving a benefit: (1) with the intention of corrupting the proper functioning of a regulated market; or (2) with the intention of corrupting the proper functioning of government and public services. To determine the proper functioning of a market or government/public services, reference is to be made to rules which are to be found: in European law, in statutes, in statutory instruments; by prerogative powers, under powers conferred by one of the former, by self regulation (generally arising from contractual obligations) or in rules from a combination of sources.

The difficulties with this model stem partially from the fact that it overlaps in some respects with competition law. Specifically, one of the central concerns of competition law is to prevent the distortion of existing markets and at least on one view, there is little point in duplicating this concern by also making it the focus of the bribery

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[241] Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264, 268 – 269.
[242] Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264, 269.

offences.[243] Moreover, in identifying the wrong of bribery as being the harm done to governments and economies this model risks excluding acts of bribery which are too minor to exert this type of harm. In this respect,

> The link between a single act of corruption and harm to governments and economies is tenuous. A one-off act of corruption is unlikely to have anything more than a negligible impact, if any, on the proper operation of governments and economies.[244]

Furthermore, identifying the "proper functioning" of a market is likely to be very difficult, and referring to self-regulatory guides in order to determine this issue is unsatisfactory in that it gives such guides a legal effect which they quite simply should not have.[245]

THE AGENT – PRINCIPAL MODEL

In (more) modern times, the agent-principal model of bribery may well have become the central immorality of bribery and "alienation of agency is the additional immorality of bribery beyond any immorality of the act solicited by the bribe."[246] The agent-principal model has also become one of the main ways of describing the harm caused by bribery according to which the essential harm of bribery is a betrayal of a specific kind of trust.[247] Specifically, "[b]y accepting the bribe, the

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[243]Law Commission, *Reforming Bribery*, Consultation Paper 185 (Stationary Office 2007), p 266; see also Jeremy Horder, "Bribery as a Form of Criminal Wrongdoing" (2011) Law Quarterly Review, 37, 47 - 48: "There can, of course, be no doubt that bribery can and does lead to the distortion of markets. However, to make the prevention of such distortion central to the justification for prohibiting private sector bribery leaves prohibitions on bribery in that sector vulnerable to the claim that free competition is adequately protected by separate laws governing anti-competitive behaviour."

[244] Abdul Gofur, A Panoptic Study of Corruption, (2006) Opticon(1826) 1, 4, available at http://www.opticon1826.com/article/view/opt.010605, last accessed August 1, 2013.

[245] For further difficulties with the market model, see Jeremy Horder, "Bribery as a form of criminal wrongdoing" (2011) Law Quarterly Review, 37, 48 – 49.

[246]Kendell D'Andrade, "Bribery" (1985) 4(4) Journal of Business Ethics 239, 239.

[247] see Stuart P. Green, "What's Wrong with Bribery?", in *Defining Crimes: Essays on the Special Part of the Criminal Law,* R A Duff & Stuart P Green (eds), (Oxford University Press USA, 2005) 143.

recipient is acting in his or her own interests, or those of the payer, and betraying the trust of the employer or principal."[248]

A principal-agent relationship exists where a principal delegates some task or assignment to an agent, who is then made responsible for acting in the principal's interest. Under this model, a bribe is a payment made by a third party to an agent of a principal, in which the agent agrees to take an action that is contrary to his duty as an agent and is thus not in the interest of the principal.

The agent-principal relationship is a well recognised one in commercial law. For the purposes of this model of bribery, however, the use of the term "agent" usually bears a much broader meaning than in the general law and describes any person on whom a particular type of duty is imposed. Economists and political scientists frequently use the agent-principal model to explain public corruption.[249] Principal-agent theory suggests that public sector corruption is the result of a corrupt transaction between three individuals: the principal, who is either the governing entity, or, in some models, the state's citizenry as a whole; the agent (a corruptible individual whose work and duty is in the service of the principal); and a third party (the corrupter).[250] The agent is expected to act on the principal's behalf and to advance the principal's interests, however, the agent and the principal may in reality be pursuing different, even mutually incompatible goals, which is facilitated by their asymmetric access to information. In particular, the principal cannot effectively monitor the agent because it does not know enough about the agent's moral character and has poor information about the agent's activities. For instance, where the principal employs an agent to collect taxes, the agent will evidently be in a better position to identify opportunities for corruption than the principal. Since the agent's actions cannot be observed without costly monitoring, the agent may take a

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[248]Law Commission, *Reforming Bribery*, Consultation Paper 185 (Stationary Office 2007), p 28.

[249]See e.g. Susan Rose-Ackerman, *Corruption: A Study in Political Economy,* (Academic Press, 1978).

[250] Susan Rose Ackermann, "The Economics of Corruption" (1975) 4 Journal of Public Economics, 187, who observes, at 187, "The person bribed must necessarily be acting as an agent for another individual or organisation since the purpose of the bribe is to induce him to place his own interests ahead of the objectives of the organisation for which he works." See also Susan Rose-Ackermann, *Corruption: A Study in Political Economy* (Academic Press, 1978).

bribe in the knowledge that there is a relatively low risk of discovery. There are two ways of combating this problem. One is to provide incentives for honest behaviour while the second involves increasing the probability of being detected and increasing punishments, including through criminalisation.

The agent-principal approach to bribery is criticised on a number of grounds.[251] In particular, it may be overly dependent on the existence of a highly principled principal. However, there may be several principals involved, each with different principles and objectives. Secondly, the principal may himself be corrupt and not acting in the interests of the society. Thirdly, there may be no principal.

In addition, this model fails to account for the harm caused by certain types of bribery, including, for example, bribery involving two principals. Moreover, even in instances where the bribe does involve a betrayal of trust, it may be the trust of someone other than the principal. For example, in an instance where an employee of a bank accepts a bribe to invest trust money in a fund, the actual trust betrayed is that of the trust's beneficiaries rather than that of the employer, however, "it would be a very strange use of language to describe a beneficiary as the employee's principal."[252] Furthermore, defining the duties an agent owes to his or her principal under this model may be difficult, and in particular it is not always clear whether those duties are fiduciary in nature or whether the concept of an "agent" in this context is broader than the traditional understanding of this term. On a related point, it may permit culturally specific defences to bribery as, under this model, arguably if your 'bribe' is not an invitation to alienation of agency in the culture where it is offered, your act of offering it is not harmful (or immoral).[253] Finally, in focusing on a breach of trust between two parties, the principal-agent model ignores the broader consequences of bribery for the functioning of the State and of the economy. According to Alldridge:

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[251]See generally, Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264.

[252] Law Commission, *Reforming Bribery*, Consultation Paper 185 (Stationary Office 2007), p 30.

[253]Kendell D'Andrade, "Bribery" (1985) 4(4) Journal of Business Ethics, 239, 245.

> on this account, corruption is scarcely more and is sometimes less, than a relatively minor breach of an employment contract or duty of confidence. If that is the extent of the harm, then it is difficult to see how it can have anything approaching the significance currently been given to it (...).[254]

THE BREACH OF DUTY MODEL

A number of legal commentators view the harm of bribery in lying in a breach of duty. In an early symposium on bribery, held at DePaul University in the United States in 1983, all four panellists espoused the breach of duty approach to understanding bribery.[255] Writing around the same time, Driscoll defined "bribery" as "anything offered or given to someone in a position of trust to induce him to act dishonestly."[256] The views of the DePaul panellists later influenced Green's formulation of bribery in his article "What's wrong with Bribery" in which he attempted to "articulate a deeper, more universal conception of bribery."[257] For the purposes of that article, Green offers the following working definition of a bribe:

> X (a bribee) is bribed by Y (a briber) if and only if: (1) X accepts, or agrees to accept, something of value from Y; (2) in exchange for X's acting, or agreeing to act, in furtherance of some interest of Y's; (3) by violating some duty of loyalty owed by X arising out of X's office, position or involvement in some practice.[258]

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[254]Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264, 265.

[255] See Kendall D'Andrade, "Bribery" (1985) 4(4) Journal of Business Ethics, 239, at fn 7; See also; Thomas Carson, "Bribery, Extortion and the Foreign Corrupt Practices Act" (1985) 14(1) Philosophy and Public Affairs, 66; John Danley, "Towards a Theory of Bribery", (1983) Business and Professional Ethics 19; Michael Phillips "Bribery" (1984) 94 Ethics, 621; Scott Turow, "What's wrong with Bribery", (1985) 4 Journal of Business Ethics 249.

[256] Lois Regent Driscoll, "The Illegality of Bribery: Its Roots, Essence, and Universality" (1984) 14(1) Cap. U. L. Rev. 2, 13.

[257] Stuart P. Green, "What's Wrong with Bribery?", in *Defining Crimes: Essays on the Special Part of the Criminal Law,* R A Duff & Stuart P Green, (eds) (Oxford University Press USA, 2005), p 145.

[258] Stuart P. Green, "What's Wrong with Bribery?", in *Defining Crimes: Essays on the Special Part of the Criminal Law,* R A Duff & Stuart P Green (eds), (Oxford University Press USA, 2005), p 145.

According to Green, there is a distinction between the wrongfulness of giving and receiving a bribe, in that only the latter involves a breach of duty. In contrast, the wrongfulness of giving a bribe lies in the attempt to induce another to breach his or her duty and can only arise where the briber believes that the offering of the advantage will induce the recipient to breach his or her duty.[259] As is evidenced from the above quote, in Green's view, the duty is not necessarily owed to a person but may arise out of ideals to which X is expected to adhere by virtue of his office, position or practice. Nor does the breach of duty cover all duties. Indeed defining the type of duty which falls within the scope of the bribery offences is one of the key challenges of the generalised breach of duty model.

Problems identified in the agent-principal model of criminalisation are also relevant to the broader breach of duty approach. For example the breach of duty approach does not apply in instances where the person to whom the duty is owed consents to the payment of the bribe, for the simple reason that that consent obviates the existence of a breach. A further difficulty with the breach of duty approach is that it may not account for principal to principal bribery, including cases where the principals are private companies. The duty model is also inadequate for dealing with foreign bribery in instances where the target of the bribe does not owe a duty to either the State or the public, for example, in dictatorships and absolute monarchies. More broadly, the breach of duty model may be criticised because in some cases at least, no harm is caused by the breach to which the payment of the bribe gives rise. Moreover, Alldridge criticises the breach of duty model on the basis that it characterises bribery as something akin to breach of an employment contract or duty of confidence, thus underestimating the collective impact of such breaches of duty.

Breach of Duty Model and the UK Bribery Act 2010

Notwithstanding the criticisms of the breach of duty model of bribery, it has been resoundingly endorsed in the UK, through the adoption of the UK Bribery Act 2010.

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[259] Stuart P. Green, "What's Wrong with Bribery?", in *Defining Crimes: Essays on the Special Part of the Criminal Law,* R A Duff & Stuart P Green (eds), (Oxford University Press USA, 2005), p 165.

The UK began the process of reforming its corruption laws in the mid 1990s, a process which continued into the new millennium. Initially, reform was prompted by concerns that the then existing UK bribery laws were old and anachronistic and replete with inconsistencies of both language and concept. In 1972, the Salmon Committee on Standards in Public Life recommended updating and codifying the then existing bribery laws. Its recommendations were subsequently echoed in the first report of the Committee on Standards in Public Life established by John Major in 1994. In 1998, the Law Commission published its report, "Legislating the Criminal Code: Corruption" but the ensuing draft bill was the subject of widespread criticism. Around this time, however, in 2006, a scandal erupted surrounding the collapse of the Serious Fraud Offices investments into the al Yamamah arms deal between BAE Systems and the Saudi Arabian Government. The collapse was principally attributed to the inadequacies of the existing bribery law and as well as giving rise to considerable public concern, was the subject of vociferous condemnation, particularly on the part of the OECD.[260] The scandal led the UK Government to ask the Law Commission to review, once more, the existing bribery laws and make recommendations for their modernisation. The resulting report, published in 2008, met with widespread, albeit not universal, support, and ultimately resulted in the enactment of the Bribery Act 2010.[261] The Act is accompanied by official guidance, published by the Ministry of Justice in 2011. The Official Guidance was accompanied by separate "Joint Prosecution Guidance" published by the Director of the SFO and the Director of Public Prosecutions.

That UK Bribery Act 2010 repeals the earlier common law offences, the previous Corruption Acts and the Anti-Terrorism Security Act and replaces them with three new bribery offences. Specifically, Sections 1 and 2 of that Act provide for two general bribery offences of offering or receiving bribes while Section 6 criminalises foreign bribery.

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[260]See Transparency International, 2008 Progress Report on Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

[261]Brian Loughman and Richard Sibery, Bribery and Corruption - Navigating the Global Risks (Wiley 2011)

The general bribery offences set out in sections 1 and 2 of the UK Bribery Act 2010 are both based on the breach of duty model of bribery as distinct from the agent-principal model employed in the PCA 1906. In this respect, section 1 makes it an offence for any person to offer, promise or give a bribe in the private or public sector with the intention of inducing another person to perform a "relevant function" improperly or in breach of a position of trust, or rewarding such a person for doing so. Section 2 makes it an offence for any person to request or agree to receive or accept a bribe to perform such a function improperly or as a reward for doing so.

According to s. 3(1) of the 2010 Act, a function or activity must fulfil two requirements in order to be a "relevant function".[262] First, it must be either a function of a public nature or an activity which is: connected with a business, trade or profession; performed in the course of a person's employment; or performed by or on behalf of a body of persons (whether corporate or unincorporated). Secondly, a person performing the function or activity must be expected to perform it in good faith, impartially, and/or be in a position of trust by virtue of performing it. The UK Bribery Act 2010 does not explain when and if such duties are likely to arise, which is a matter for general law, and more specifically the jury.

Duty to Act in Good Faith

A duty to act in good faith can arise in a number of situations and the nature of that duty may vary depending on the situation in which it arises. For example, a director is under a legal duty to act in good faith in the way he or she considers to be most likely to promote the success of the company for the benefit of its members as a whole, under s. 172(1) of the UK Companies Act 2006. An employee is under a duty of good faith with respect to his or her employer. This means:

> He must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict;

[262]Bribery Act 2010, s.3(1)

> he may not act for his own benefit or for the benefit of a third party without the informed consent of his employer.[263]

An obligation to act in good faith also applies to the employer. While in the UK there is no implied duty to act in good faith in most commercial contracts, there may be an express duty. In some instances, a duty to act in good faith will arise where there is no contractual relationship between the parties, for example in a private procurement process.[264]

Duty to Act Impartially

The duty to act impartially "may arise in a broad range of activities where wholly objective judgment or advice on the merits is called for."[265] This most obvious instance where such a duty arises is in the case of judges, but it applies more broadly to a wide variety of decision makers in the public sector.

In its report, the Law Commission distinguishes between a duty to act in good faith and a duty to act impartially on the basis that in some circumstances a decision-maker is entitled to be partial, but must nevertheless act in good faith. For example a person writing a reference for someone else may be partial, but that partiality should be based on their personal knowledge of the person or his or her record and not on the existence of a payment. To base partiality on the acceptance of a payment is therefore to breach a duty to act in good faith. As the Law Commission explains:

> While prospective employers expect referees to be favourable to those for whom they write references, they expect opinions and judgments to be given in good faith, in the belief that they represent the truth. Knowing that this is what employers expect from a referee, particularly from former teacher, R fails to act in accordance with an expectation of good faith, when writing the misleading reference for P.[266]

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[263]Attorney General v Blake [1998] 2 WLR 805, CA, per Lord Woolf MR
[264]See Law Commission, Bribery, 20007, p. 44
[265]Law Commission, Bribery, 2007, p. 46
[266]Para 3.114

Similarly, an agent is fully entitled to be partial towards tenders from contractors with whom he or she has had past favourable experiences although he or she is not entitled to award a tender on the basis of a payment.

Existence of a Position of Trust

A person may be in position of trust arising out of some legal or equitable duty. However, a position of trust may also exist in other situations. According to the Law Commission:

> It follows that a "position" of trust should not be construed narrowly as if it was a recognised "relationship" of trust, such as exists between banker and client, doctor and patient, and so forth. People can be in a position of trust in some respect (say, with regard to access to documents or premises) whatever the nature and level of their duties.

The Law Commission also observes that "it can amount to a betrayal of trust that one acted for the wrong reasons, and not solely that one's action was in itself wrong". In other words:

> Acting in accordance with a position of trust does not mean simply conforming one's conduct to an external requirement, such as issuing a visa at a particular time to a particular person, awarding a contract to the highest bidder, or making a grant from a fund to a beneficiary entitled to it. It may in some instances mean avoiding doing something for the wrong reason (an advantage offered or provided), even if in themselves they are the right thing to do.[267]

For example, in circumstances where the CEO of a company with another company has already decided to sign a contract merging his company with another company, but is then secretly paid a large sum by the other company to sign the contract, then the CEO will be in breach of his position of trust within the company.

Whether or not someone is under a duty to act impartially or in good faith or is in a position of trust is a matter to be determined by the jury,

[267]Law Commission, Bribery (2008), p. 47.

as is the question as to whether that person failed to live up to expectations or betrayed the position of trust. According to the Law Commission, "at some point the law must rely on the common sense of juries. If it does not, the irony is that the law may become too complex for juries to understand and apply."[268]

From the perspective of this thesis, it is noteworthy that because of the UK breach of duty model includes breach of a duty of trust, it necessarily covers all types of breaches falling within the scope of the PCA 1906 Act. Specifically, the breach of trust which arises where bribery occurs in the agent-principal content is undoubtedly covered by the UK model. The most significant difference in this respect is that the UK model extends to other types of breaches of trust, as well as to a breach of a duty of impartiality and a breach of an expectation to act in good faith.

CONCLUSION

As set out in the introductory chapter, this thesis examines the contours and scope of the bribery offences set out in the PCA 1906, in order to determine whether the existing agent-principal model of bribery which underpins that Act adequately meets the needs of a modern bribery law or whether those needs would be more effectively met through basing the offences on the more generalised breach of duty model as set out in the UK Bribery Act 2010. In doing so, it is based on two propositions. First, that the harm / immorality principles are legitimate reasons for criminalising certain types of behaviour; and secondly, that, the breach of duty model is the most suitable model upon which to base new bribery offences, in the event that the agent-principal model is inadequate.

Criticisms of the harm / immorality principles of criminalisation focus largely on their failure to offer a bright line to distinguish between harms / immorality which warrant criminalisation and those that do not. In contrast, the fundamental proposition that some harms / immoral acts warrant criminalisation does not appear to be in dispute.

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[268]Law Commission, Bribery, 2008, p. 52.

In the particular case of bribery, the above-mentioned criticisms of the harm / immorality principle are of less relevance. Specifically, there is widespread agreement that the harm / immorality of bribery is sufficient to warrant its criminalisation. In the public sphere, at the very least, the acceptance of bribes is an abuse of public power which causes extensive economic and social damage, undermines public trust and confidence in elected representatives and is capable of eroding the very legitimacy of the State. In the private sphere, it is an abuse of private power which causes similar economic and social damage as well as undermining the trust and confidence necessary for an effectively functioning commercial sphere. As set out in the previous chapter, each of the relevant international instruments refer to the harm of bribery as a justification for its criminalisation.

The real problem with bribery is determining what it is about bribery that gives rise to the above harms / immorality, a problem which has attracted relatively little scholarly attention. The PCA 1906 is based on the assumption that they are caused by the breach of the specific duty of trust owed by an agent to his or her principal. This thesis tests that assumption by analysing whether the manner in which the agent-principal model is articulated in the PCA 1906 is capable of meeting the demands of a modern bribery law, and if not, whether this lack of capacity is attributable to underlying problems with the agent-principal model itself, or merely with that articulation.

As previously stated, this thesis uses the inquiries conducted by the PCTs and the requirements of the relevant international instruments for the purposes of testing the existing offences and identifying their strengths and weaknesses.

This thesis considers the breach of duty model as an alternative to the agent-principal model for several reasons. Generally, while, as discussed, there are a number of criticisms of the breach of duty model, some of these are relatively easily met. Specifically, Gaoneng's concern is that the breach of duty concept cannot explain the relationship between the receiver and the payer or the relationship between the payer and the victim. However, Green's proposal in his article "What's Wrong With Bribery" to the effect that the wrong committed by the payer

lies in tempting another to act in breach of his or her duty seems to adequately explain both these relationships.

As mentioned, Alldridge suggests that the breach of duty model characterises bribery as something akin to breach of an employment contract or duty of confidence underestimates the collective impact of such breaches of duty. Horder, in his article on "Bribery as a Form of Criminal Wrong, is partially concerned with the justification for criminalising bribery which involves "harmless wrong-doing" in circumstances where the payment of the bribe does not affect the outcome of the decision-making process. He argues that even in such circumstances, its criminalisation is justified because of "the nature and degree of remote harm that may result if bribery is left unpunishable." He concludes:

> Bribery is rightly made a criminal offence because, it is wrongdoing, that if left unpunishable, would result in an unacceptably enhanced risk that a whole variety of grave harms would become more widespread around the globe. In that respect, it is no real argument against this criminalisation of bribery that, in itself, an act of bribery involves only harmless wrongdoing.

By analogy, the same argument can be made to counter Alldridge's criticism. Specifically, while some bribery may amount to little more than a breach of an employment contract or duty of confidence: a) this is not true of all bribery; and b) the remote harm of widespread breaches of such contracts or duties if bribery is not criminalised is likely to be multiples of the harm caused by any individual breach. Support for this latter proposition may be found in the circumstances leading to the enactment of the PCA 1906. As outlined in Chapter 2, prior to that enactment, bribery was a matter for the civil courts but this did not prove a sufficient deterrent to bribery, leading to it becoming rampant in mercantile circles and necessitating the criminalisation of private sector bribery.

In support of the breach of duty approach, it is also noteworthy that that model meets the requirements of the relevant international instruments. Specifically, as set out in the previous chapter, some of the offences set

out in those instruments specifically refer to the breach of duty model of bribery. For example, in so far as private bribery is concerned, under the COE Convention, the focus is on payments to a person "to act or refrain from acting in breach of his or her duties." UNCAC uses similar terms: the relevant provision refers to payments made to any person who directs or works for a private sector entity to act or refrain from acting "in breach of his or her duties". The EU's framework decision is in similar terms. Moreover, regarding public bribery, the EU Convention also explicitly refers to payments made to an official "to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties". While for the purposes of public bribery, the COE, UN and OECD Conventions focus on payments made to an official for him or her to act or refrain from acting in the exercise of his or her functions, in the case of these payments the breach of duty element may be viewed as implicit: as officials are under a duty to act impartially and in a position of trust, the offer or receipt of any unsanctioned payment may itself be regarded as a breach of duty.

The breach of duty model also obviates the need to have separate offences for public and private bribery. Such a distinction is undesirable for a number of reasons. According to the UK Law Commission in its 2007 Consultation Paper on Reforming Bribery:

> The main objection to having separate offences is that it is very difficult to define with sufficient clarity the distinction between public sector and private sector functions. Increasingly, what were formerly public sector functions are sub-contracted out to private companies while public bodies now frequently form joint ventures with public companies.

For its part, the Australian Model Criminal Code Officers' Committee suggested that any distinction between public and private bribery would be arbitrary, observing:

> Given that the distinction between the functions to be privatised are based primarily on economic criteria, linking the offence of bribery to functions which happen to be performed in the public sector for the time being is arbitrary. For example, whether a corrupt payment to a prison officer

> constitutes bribery will depend on whether the official works in a prison that is privatised. In a state like Queensland, where some prisons are private and some are public, the arbitrariness of the public/private distinction is stark.

The single offence approach also avoids possible mistakes as to the correct offence for charging purposes. In other words:

> ..... [i]t could be the case that mutually exclusive statutes criminalising official and commercial bribery statutes would create a situation in which a defendant charged with one offence could avoid conviction by arguing that he had actually committed a different offence.

Although Green argues that private bribery gives rise to a different type of immorality or harm than public bribery because of the different nature of the duties owed, this does not necessarily lead to the conclusion that the two should be criminalised under separate offences. Specifically, while those in the private sphere may well owe different duties to those owed in the public sphere, persons operating in the private sphere do not necessarily owe the same duties as each other either. The focus of the immorality or harm is the fact that a duty has been breached not in the precise source of that duty. Moreover, to the extent that public bribery is more immoral or results in greater harm than its private sector counterpart this may be adequately reflected in the type of sanctions available and/or the strength of sanctions imposed.

Finally, this thesis focuses on the breach of duty model as articulated in the UK Bribery Act 2010 for a number of reasons. Specifically, that Act grew out of concerns regarding the then existing bribery offences, which share the same roots as the Irish offences, namely, the common law, the PBCPA 1889 and the PCA 1906. It was also impelled by concerns regarding the UK's compliance with international conventions: Ireland is party to these conventions and the need to comply with their terms has driven recent amendments to the PCA 1906. Perhaps more practically, the UK Bribery Act 2010 is also the result of years of analysis and critique of the bribery laws on the part of eminent and erudite individuals. Given the fact that the key drivers of that analysis and criticism are also relevant in this jurisdiction, its potential significance is

clear. This is not to argue that the Bribery Act 2010 will inevitably meet the needs of an Irish bribery law, but simply to state that whether or not it does meet these needs is an issue that merits academic analysis.

CHAPTER 4: THE BRIBE

The purpose of this chapter is to consider the definition of the term "bribe" for the purposes of the bribery offences. Its focus is on the types of payments, advantages or benefits which fall within the scope of this term. In considering this, the main questions which arise are: whether the term covers both pecuniary and non pecuniary advantages and if so what types of non-pecuniary advantages; whether it covers both the conferral and the withholding of an advantage; whether there is a de minimis standard; and whether the concept of a bribe covers benefits which essentially comprise the avoidance of nefarious consequences.

INTRODUCTION

The noun "brybe" first appeared in English writing in the fourteenth century.[269] The noun meant a piece or scrap given to a beggar and the verb, "to bribe" first connoted living on alms or professional begging, then to pilfer or commit petty larceny and later, to steal, rob, spoil or plunder. In fact, it was not until the end of the 16th century that its modern meaning became common usage.[270] Today, the term "bribe" most frequently "conjures up images of fat envelopes stuffed with hundred dollar bills".[271] Nevertheless, bribes may come in many forms and are frequently disguised as gifts, political donations, loans and payments for goods or services.

While the term "bribe" clearly encompasses cash payments, it is also widely understood to extend beyond these payments to encompass other benefits rendered to the bribee. For example, the *Concise Oxford Dictionary* defines a bribe in the following terms:

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[269]See generally, Lois Regent Driscoll, "The Illegality of Bribery: Its roots, essence, and universality", (1984) 14 Cap. U.L. Rev. 1, at 14.

[270]See J. T. Noonan, *Bribes* (Macmillan, 1984); G. Hughes, *Words in Time: A Social History of the English Language,* (Oxford: Basil Blackwell, 1988); G.P. Marsh, *Lectures on the English Language,* (New York: Charles Scribner, 1860).

[271]Stuart P. Green "What's Wrong with Bribery", in R.A. Duff and Stuart P Green (eds) *Defining Crimes: Essays on the Criminal Law's Special Part,* (Oxford University Press, 2005) p 149.

> Bribe n. money etc. offered to procure (often illegal or dishonest) action or decision in favour of giver.[272]

Similarly, *Black's Law Dictionary* defines "bribe" as:

> [a]ny valuable thing given or promised, or any preferment, advantage, privilege or emolument, given or promised corruptly and against law as an inducement to any person acting in an official or public capacity to violate or forbear from his duty, or to improperly influence his behaviour in the performance of his duty.[273]

Moreover, from the perspective of the harm / immorality principles, there appears to be no justification for confining the concept of a bribe to cash payments: the central question is whether the benefit offered is capable of inducing a breach of duty (whether agent-principal or general).

One of the key questions, therefore, in defining the term "bribe" is to identify the non-cash benefits which fall within the definition of this term. Most obviously, such benefits should include all those which are in material form, including, for example, property and investment shares, restaurant meals and tickets for athletic events.[274] However, non-material/intangible benefits may have the same effect as a material benefit, including, for example: the offer of a school place for the recipient's child, support for society/social or business opportunities, access to exclusive clubs, and/or career assistance, including promotions and VIP contacts.[275]

While in some traditions, even "pleasant words" of flattery may be a bribe,[276] it is widely accepted that the benefit must be one which is

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[272] H.W. Fowler, FG Foley, JB Sykes, *The Concise Oxford Dictionary of Current English*, 7th ed., (Oxford University Press, 1982) s.v. "bribe."

[273] *Black's Law Dictionary*, 3rd ed., (West Publishing Co, 1968), p 250.

[274] See e.g. Albert Crew, *Bribes and Bribery in Business* (London, 1916), p 11; see also Robert Maynard Leonard, *The War Against Bribery,* (Secret Commissions and Bribery Prevention League, London, 1913), p 7.

[275] Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low, Peter J. Cullen (eds), *The OECD Convention on Bribery,* (Cambridge University Press, 2007), p 102.

[276] See Babylonian Talmud, Ketubbort 15b; Meir Tamari, Al Chet*: Sins in the*

capable of being given a monetary value. In other words, the harm / immorality associated with a breach of duty arises once there is a breach which is attributable to the offer / receipt of a benefit which is capable of monetary valuation rather than to a breach attributable to other types of inducements. This does not prevent immaterial benefits from constituting a bribe as:

> .... It is quite possible to give a monetary value to an immaterial benefit. For instance, every promotion, a larger office, more leisure time, and other forms of professional advancement can be measured in salary terms. The improvement of professional opportunities can also be valued. If the bribe in question consists of new contacts, of a personal or also sexual nature, there is a market for these, enabling the price to be (approximately) calculated.[277]

Nevertheless, it does exclude certain types of inducements to act from being a bribe, including the aforementioned pleasant words, as these cannot be valued. Other excluded inducements are acts originating in a personal relationship such as friendship or a family connection which will, without more, be incapable of valuation.

It is also noteworthy that the inclusion of immaterial benefits as bribes may make the line between benefits which constitute a bribe and those which do not difficult to draw in certain cases. This is well illustrated by the US case in which it was claimed that the prosecutor's offer of leniency to a defendant in exchange for testimony constituted a bribe.[278]

In instances where it is accepted that the bribe must be capable of valuation, the question also arises as to whether its value is to be assessed objectively or subjectively. The advantage of an objective

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Marketplace, (Northvale, NJ: Aronson, 1996), 137 as cited in Stuart P. Green, "What's Wrong with Briber", R.A. Duff and Stuart P Green (eds), *Defining Crimes: Essays on the Criminal Law's Special Part,* (Oxford University Press, 2005), p 149.

[277]Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low, Peter J. Cullen (eds), *The OECD Convention on Bribery,* (Cambridge University Press, 2007), p 102.

[278]See e.g. *U.S. v Singleton*, 144 F.3d 1343 (10th Cir. 1998), rev'd by 165 F.3d 1297 (10th Cir. 1999) (en banc), cert. denied, 527 U.S. 1024 (1999); By way of contrast, see *U.S. v Medina* 41 F.Supp2d (D. Mass. 1999).

assessment is that it obviates the need to subjectively evaluate the value of the bribe to either the briber or the bribe, something which may be difficult to do. On the other hand, as observed, the problem with an objective test is that "legally recognized value" rather than "conduct influencing value" would weaken the enforcement possibilities of the statute by excluding many possible sources of influence from the statutory ban.[279] Ultimately from the perspective of the underlying harm / immorality of bribery, the key question is, logically, whether the benefit is sufficient to act as an inducement in the particular circumstances in which it is offered, thus auguring in favour of a subjective approach to this issue.

The approach taken to determining whether or not a thing is "of value" is also relevant in determining whether there is a *de minimis* standard for bribes. Specifically, where the value of a bribe is determined objectively, such a standard may well exist, either implicitly or explicitly. On the other hand, a *de minimis* standard appears inappropriate where that value is determined subjectively. Where an advantage is of minimal objective value, it may still be a bribe where it can be proved to be of subjective value to the recipient or intended recipient. Again this appears to best reflect the underlying harm / immorality of the breach of duty model.

Clearly the idea of a benefit encompasses both the idea of a positive advantage as well as the avoidance of negative consequences, for example the calling-in of a loan, or the repossession of property. More difficult issues arise where the "benefit" is for the purposes of obtaining equal treatment or to avoid physical harm, whether to the recipient or to someone close to him or her, or other illegal behaviour. While typically payments for these purposes are more associated with the offence of extortion, there appears to be nothing in theory to prevent them from being considered as bribes for the purpose of the bribery offences, although obviously the purpose of the payment may be relevant when dealing with the question of intent.

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[279] James L. Winckler, "Drafting an Effective Bribery Statute", (1972) 1 Am. J. Crim L, 210, 215.

Difficulties may also arise in determining whether a bribe may take the form of a political advantage, for example the endorsement of a candidate for an election, as chair (or member) of a particular committee or, for any other type of elected office. Other forms of common (and necessary) political practices such as "horse-trading" and "pork-barrel politics" also pose this question. However, the answer to this appears to turn more on the intention of the parties conferring/receiving the benefit rather than on whether such benefits may be considered as bribes in the first place.

THE BRIBERY OFFENCES IN THE PCA 1906

For the purposes of the PCA 1906, a bribe may constitute a "gift", "consideration" or "advantage". Prior to the enactment of the PC(A)A 2010, the passive bribery offence referred to benefits in the form of a "gift, consideration or advantage", while the active offence referred to benefits in the form of a "gift or consideration".[280] However, that Act amended the earlier Act so that both offences now encompass benefits given in the form of advantages.[281]

The term "gift" is not defined in the PCA 1906. According to the Collins *English Dictionary*, it comprises, inter alia "something given; a present."[282]

For its part, the term "consideration" is defined in the PCA 1906 to include valuable consideration of any kind.[283] The classic definition of the term is to be found in *Currie v Misa*:[284]

> "A valuable consideration, in the sense of the law, may consist either in some right, interest profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."

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[280]Prevention of Corruption Act 1906, ss. 1(1) and (1(2) as substituted by Prevention of Corruption (Amendment) Act 2001, s. 2.
[281]Prevention of Corruption Act 1906, s. 1(2) as amended by Prevention of Corruption (Amendment) Act 2010, s. 2(a).
[282] Collins *English Dictionary,* Millenium Edition, (HarperCollins Publishers, 2000), p 646.
[283] Prevention of Corruption Act 1906, as amended, s.1(5).
[284]*Currie v Misa* (1875) L.R. 10 Exch. 153, 162.

The term "advantage" is not defined under the PCA 1906. However, according to the Public Bodies Corrupt Practices Act 1889, which also uses this term, it:

> Includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.[285]

THE PCA 1906 AND THE PCTS

In the main, the benefits inquired into by the PCTs comprised either cash payments usually in the form of gifts, political donations, loans, or payments for goods/services. The PCTs did not deal with non-material bribes. For example, there was no evidence before the PCTs of benefits paid in the form of political endorsements.

There appears to be little difficulty in classifying the types of benefits inquired into by the PCTs as a gift, consideration or advantage within the meaning of the PCA 1906: it is clear from its wording that the PCA 1906 extends to all benefits capable of material evaluation, including but not limited to cash benefits. However, some of the benefits inquired into were for relatively small amounts, raising the question as to whether the PCA 1906 covers de minimis payments and whether the value of the bribe is to be assessed objectively or subjectively. The inquiries conducted by the PCTs also raise the question as to whether a promise which fails to materialise can constitute a bribe or a benefit which is perceived to be advantageous when offered, but which subsequently turns out to be worthless.

[285]Public Bodies Corrupt Practices Act 1889, s. 7.

THE PCTS AND GIFTS, POLITICAL DONATIONS, LOANS AND PAYMENTS FOR GOODS AND SERVICES

Gifts

The McCracken Tribunal inquired into cash gifts of approximately IR£1.3m from Mr Dunne to Mr Charles J Haughey.[286] Similarly, the Moriarty Tribunal inquired into a number of substantial cash payments to Mr Haughey, many of which were described as gifts.[287] The Moriarty Tribunal also inquired into the gift of a painting made by Dr Michael Smurfit to Mr Haughey.[288] It further inquired into the circumstances under which the Haughey family company, Larchfield Securities Ltd. acquired its yacht, Celtic Mist and into payments connected with the subsequent renovations to that yacht.[289]

Political Donations

The PCTs inquired into a number of cash payments which were described as political donations. For example, the Hamilton Tribunal inquired into payments of £225,000 made by Mr Larry Goodman to the Fianna Fáil Party, which both claimed were political donations.[290] The Moriarty Tribunal inquired into a payment of £50,000 which originated with the Norwegian company Telenor, to the Fine Gael Party.[291] Similarly the Mahon Tribunal inquired into a number of donations to political parties as well as donations to national and local elected representatives and electoral candidates. One of the most significant of these was Mr Tom Gilmartin's donation of £50,000 to the Fianna Fáil party, which he gave to the then party treasurer and Minister for the Environment, Mr Padraig Flynn. In his testimony before the Tribunal, Mr Flynn disputed that the donation was to the party and claimed that it

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[286]See Report of the Tribunal of Inquiry (Dunnes Payments), (1997), p 33.
[287] These included gifts from Mr Ben Dunne. See Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011), pp 212 – 235.
[288]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011) p 162.
[289]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011), p 258 – 264.
[290]See Fintan O'Toole, *Meanwhile Back at the Ranch – the Politics of Irish Beef*, (Random House, UK, 1995) p 69 – 70.
[291]See Report of the Tribunal on Payments to Politicians and Related Matters, Part II Vol 1, (2011), Chapter 3.

was an "unsolicited personal political donation"; however, the Tribunal preferred Mr Gilmartin's testimony on this issue.[292]

Loans

A substantial number of the benefits inquired into by the PCT's were described as "loans". Of these, perhaps the most notable was the so-called "good will loan" which Mr Bertie Ahern claimed to have received from a group of his friends and which was inquired into by the Flood/Mahon Tribunal.[293]

Payments for Goods/Services

In so far as goods or services are concerned, the Moriarty Tribunal inquired into payments which were claimed to be for: an option agreement over lands;[294] a horse;[295] flying lessons[296] and "investments" into Mr Haughey's son's company, Celtic Helicopters.[297]

For its part, the Flood/Mahon Tribunal inquired into benefits of £1,000 a month paid by the developers, Messers Joesph Brennan and Tom McGowan to Mr Ray Burke, which were claimed to be fees for auctioneering services.[298] At the time those payments were made, Mr Burke was both a local councillor and an estate agent. That Tribunal also inquired into payments of £1,400 from Mr O Callaghan, a developer, to Mr McGrath by way of secretarial fees[299] as well as several payments to Mr Gilbride pursuant to an agreement that Mr O Callaghan would fund his leave of absence from his teaching position

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[292]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 224 – 247.
[293]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1353.
[294]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011) p 54.
[295]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011), pp 104 – 105.
[296]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011), p 287.
[297]Report of the Tribunal on Payments to Politicians and Related Matters, Part II, Vol 1, (2011), p 267.
[298]Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, (2002), p 15.
[299] The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1006.

during which period Mr Gilbride intended to further his political career.[300] It also inquired into a number of benefits indirectly conferred by Mr O Callaghan on various allies, in the form of contracts for services. For example, Cllr Mcgrath, who was very supportive of Mr O Callaghan's attempts to rezone the Quarryvale site, had a company, Essential Services Ltd., which received almost £800,000 from companies involved in the construction of Liffey Valley.[301] While Mr O Callaghan did not direct those companies to engage Essential Services Ltd, he did encourage them to employ locals. Similarly, another supporter of one of Mr O'Callaghan's development projects, Cllr O Halloran, provided lucrative catering services to Quarryvale contractors.[302] Yet another supporter, Cllr Tyndall, obtained a valuable insurance contract from Mr O' Callaghan for the insurance company of which he was both a director and shareholder.[303]

Application Of The PCA 1906 To Gifts, Political Donations, Loans And Payments For Goods/Services

As set out above, the PCA 1906 covers bribes paid in the form of a "gift", "consideration" or "advantage." There is little difficulty in applying these terms to the types of benefits inquired into by the PCTs. Generally, the term "gift" will apply to payments made in the absence of an agreement between the payer and the recipient, whereas the term "consideration" applies where such an agreement exists. This seems clear from UK cases such as *R v Braithwaite*,[304] and *Beaton v H.M. Advocate*.[305] In *R v Braithwaite*,[306] the appellants were charged with accepting a gift or consideration in the form of car tyres or work to cars. They admitted having received the tyres or work but claimed that they had paid or at all times intended to pay for them. In its judgment, the

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[300]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 912

[301]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1020.

[302]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1063.

[303]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1085.

[304]*R v Braithwaite* [1983] 1 W.L.R. 385,

[305]*Beaton v H.M. Advocate* [1993] JC 35

[306]*R v Braithwaite* [1983] 1 W.L.R. 385,

court explained as follows:

> the word 'consideration" connotes the existence of something in the shape of a contract or a bargain between the parties. (...) The word "gift" is the other side of the coin, that is to say it comes into play where there is no consideration and no bargain. Consideration deals with the situation where there is a contract or a bargain and something moving the other way.[307]

This definition was reiterated in *Beaton v H.M. Advocate*.[308] In that case, the defendant had been convicted for bribery: the bribe in question was the use of several hired skips in connection with renovations to his home. The defendant appealed the conviction to the High Court of Justiciary on the basis that the trial judge should have directed the jury that the prosecution had to establish not only that he had had the use of the skips but that he had failed to pay for them or had failed to pay for them in full. This argument was rejected by the High Court which observed that the word "consideration" is not a synonym of gift, but its antithesis:

> It is its direct opposite, because when consideration is given or received this assumes that something else is being given or received in return. What that something else may be, whether it represents full value for what has been given or received or less than full value, is not important.[309]

Pecuniary payments may also constitute an advantage, and while something given as a "gift" will not constitute "consideration" there appears to be some overlap between these terms, on the one hand, and the term "advantage" on the other.[310] For example, the definition of the term "advantage" in the PBCPA 1889 specifically refers to "aid", a term which could apply to a political donation, as could the term "gift". According to the UK Law Commission, "the word 'advantage' seems wide enough to cover the doing by one person of any act which is either

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[307] *R v Braithwaite* [1983] 1 W.L.R. 385 at 391.
[308] *Beaton v H.M. Advocate* [1993] JC 35.
[309] *Beaton v H.M. Advocate* [1993] JC 35, 41.
[310] See e.g. Albert Crew, *The Law Relating to Secret Commission and Bribes,*(Sir I. Pitman & Sons Ltd., 1913), p 79.

desired by, or in the interests of, another."[311] In this respect, it clearly covers the sorts of benefits inquired into by the PCTs.

De Minimis Payments

At least some of the bribes inquired into by the PCTs were of relatively low value and the question therefore arises as to whether such benefits fall outside the scope of the PCA 1906.

It is clear from the terms of that Act that it does not explicitly require that the benefit, whether in the form of a gift, consideration or advantage, be of a specified size. However, there have been some suggestions that such a requirement nevertheless exists before a benefit can constitute a bribe. For example, according to Hawkins, in his *Treatise of Pleas to the Crown*, writing in 1824, "Bribery in a strict sense is taken for a great misprision of one in a judicial place taking any valuable thing whatsoever, except meat and drink of small value, of anyone who has to be before him in any way, for doing his office, or by colour of his office, but of the King only".[312] This definition appears to exclude benefits of small or minor value from being considered as a bribe. Similarly, in *Woodward v Maltby*[313], the Court held that a box of matches was not a reward.[314]

In reality, however, the importance of the size of the bribe is probably best viewed as going to the issue of intent, rather than to whether a benefit constitutes a gift, consideration or other advantage. In other words, where a benefit is of minor value, it is less likely to have been conferred or received as an inducement. As explained in the South African case, *S v Deal Enterprises (Pty) Ltd*:[315]

> The difference between legitimate entertainment and bribery lies in the intention with which the entertainment is provided, and that is something to be inferred from all the circumstances,

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[311] Law Commission, *Legislating the Criminal Code, Corruption*, A Consultation Paper, No. 145, (the Stationary Office, London, 1998), p 90.
[312] William Hawkins, *Please of the Crown* 8th ed., (Curwood) vol. i., p 414.
[313] *Woodward v. Maltby* [1959] V.R. 794.
[314] See also the *Bodmin* Case (1869) 1 O'M & H 121 in which Willes J mentioned how he had been required to swear that he would not take any gift from a man who had a plea pending unless it was "meat or drink, and that of small value.
[315] *S v Deal Enterprises (Pty) Ltd* (1978) 3 SA 302.

including the relationship between giver and recipient, their respective financial and social positions and the nature and value of the entertainment.[316]

A natural corollary of this approach to *de minimis* payments is that in evaluating whether or not a payment constitutes a bribe, the focus is subjective in the sense that the key question is whether it constitutes or was intended to constitute an inducement to the person to whom it is offered, rather than whether it would constitute an inducement if offered to a "reasonable" person.[317]

Benefits Which Do Not Materialise

The Mahon Tribunal inquired into a benefit in the form of a promised consideration, which subsequently failed to materialise. Specifically, Mr Eoin O Callaghan and Mr Frank Dunlop contacted Mr Gerry Leahy to enlist his assistance in lobbying Cllr Peter Brady to support Mr O Callaghan's development plans for Quarryvale, County Dublin. It appeared from a note of the meeting between these three individuals that Mr O Callaghan agreed to appoint Mr Leahy's employer, Gunnes Estate Agents, as either the selling agent or letting agent for Quarryvale, once the development was complete, in exchange for Mr Leahy's support. However, he did not ultimately do so.[318] While there was some dispute as to whether Mr O Callaghan had in fact made such a commitment, it appears clear that such a commitment could constitute an "advantage" for the purpose of the PCA 1906. Specifically, as defined under the PBCPA 1889 that term covers the holding out of any expectation of any gift, loan, fee, reward, or advantage.

Perceived Advantages

The Moriarty Tribunal inquired into a benefit conferred by Mr Charles

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[316]*S v Deal Enterprises (Pty) Ltd* (1978) 3 SA 302, p 311, per Nicholas J.

[317]This is certainly the view of the US courts in determining whether a benefit constitutes a bribe. See e.g. *United States v. Gorman*, 807 F.2d 1299, 1304 – 05 (6th Cir. 1986), cert. Denied, 484 U.S. 815 (1987).

[318]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 845. According to the Mahon Tribunal, at p 849, it was satisfied that, in so far as such a commitment was given, it "was given entirely on the basis that Mr Leahy would proceed to lobby the support of Cllr Brady for Quarryvale."

Haughey, at a time when he was Taoiseach, on Mr Ben Dunne. The benefit in question related to the calculation of Capital Gains Tax on a Discretionary trust which was set up by the Dunne Family. Revenue initially calculated the tax liability as being in the region of £38.8 million but subsequently offered to reduce their estimate to £16 million, after a payment from Mr Dunne to the then Taoiseach, Mr Haughey. While the envisaged benefit was clearly substantial, ultimately the courts held that the trust was not subject to Capital Gains Tax and no liability to tax arose.[319]

There appears to be little difficulty in applying the PCA 1906 to such payments. As observed by the Law Commission in relation to the UK PCA 1906:

> The courts are unlikely to be detained by specious pleas that what seemed advantageous at the time of the transaction (say, a grant of shares) should not be regarded as advantageous in fact, because unbeknownst to P [the Payer] or to both parties, what was offered turned out to be worthless.[320]

THE RELEVANT INTERNATIONAL INSTRUMENTS

UNCAC, the COE Convention and the EU's framework decision describe the bribe as "an undue advantage" while the OECD Convention refers to "any undue pecuniary or other advantage".[321] For its part, the EU Convention refers to "an advantage of any kind".

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[319]See The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 596.

[320]UK Law Commission, *Reforming Bribery*, Report (Law Com no. 313) (The Stationery Office, London, 2008), p 22.

[321] see Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 2; United Nations Convention Against Corruption (2003), Article 15(a) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 1.1.

THE TYPES OF ADVANTAGES COVERED

It is clear that each of the relevant instruments covers bribes given in the form of pecuniary and non pecuniary advantages whether tangible or intangible.

COE Convention

According to the Explanatory Report for the COE Convention, in so far as that Convention is concerned:

> the undue advantages given are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of an offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.[322]

The OECD Convention

The OECD's commentaries do not specifically address the meaning of the terms "undue pecuniary advantage" or "undue advantage". However, according to the OECD's *Glossary of International Standards in Criminal Law*, a bribe may be in the form of:

> money, a loan, shares in a company, a holiday, food and drink, sex, enrolment in a school for an official's child, or a promotion, as long as it places the official in a better position than he was before the commission of the offence.[323]

To be a bribe, the benefit must be one which is capable of valuation.[324]

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[322] Explanatory Report on the Criminal Law Convention on Corruption (ETS 173), para 37.

[323] OECD, *Corruption: Glossary of International Criminal Standards* (OECD, 2008) p 36.

[324] See Ingeborg Zerbes, "Article 1: The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *The OECD Convention on Bribery A Commentary,* (Cambridge University Press, 2007) p 102 –

UNCAC

According to the *Legislative Guide* for UNCAC:

> The offence must cover instances where no gift or other tangible item is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.[325]

The EU Convention and Framework Decision

Under the EU Convention, the concept of an advantage is also very broad and embraces:

> not only material objects (money, precious objects, goods of all kinds, services rendered) but also anything that might represent an indirect interest, such as settlement of the corrupted person's debts, work on property belonging to him. This list is not exhaustive. The concept of advantage, required, received or promised covers all kinds of material or intangible advantages.[326]

The concept of an advantage in the framework decision appears similarly broad.

WHAT IS AN "UNDUE" ADVANTAGE UNDER THE RELEVANT INTERNATIONAL INSTRUMENTS?

UNCAC, the COE Convention, the OECD Convention and the EU's Framework Decision only apply to advantages which are "undue". In contrast, the EU Convention covers all advantages, once given with the requisite intent.

The term "undue" clearly refers to something to which the recipient was not entitled. On one level its purpose may well be to exclude from the scope of the bribery offences payments such as salaries, expenses, and

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[325] Legislative Guide for the implementation of the United Nations Convention against Corruption(2006), p 83.

[326]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), para 2.4.

benefits which could otherwise fall within their scope. Nevertheless, it is an inherently vague term, capable of being defined in several different ways and the Conventions which use this term do not appear to share a common definition. Specifically, while the requirement that the advantage be "undue" appears to exclude from the scope of each of the instruments which use that term, payments which are required pursuant to binding legal provisions, it may exclude other types of benefits from the COE Convention as well. The legislative guide for the implementation of UNCAC does not address the meaning of "undue" in the context of the bribery offences provided for in that Convention. Nor does the EU's Framework Decision define this term.

The OECD Convention

According to the Commentaries to the OECD Convention, an advantage will not be "undue", if it is permitted or required by the written law or regulation of the country of the foreign public official, including case law.[327] Advantages accepted by local custom, tolerated by local authorities, of minimum value and/or necessary to "do business" are likely to be undue, unless legally endorsed.[328] In other words, "it is only express permission of the advantage, not simply the failure to outlaw it, which allows the benefit to be conferred."[329]

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[327]Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997), Commentary 8; As observed by the International Bar Association in its *Report of the IBA,'Report of the Task Force on Extraterritorial Jurisdiction'* (February 6, 2009), p 239, the precise scope of this defence is unclear and many questions remain unresolved, including "what types of measures qualify as local law; whose law governs the determination of whether a measure qualifies as local law – the host country or the country whose transnational law may be applied; what the relationship is between written law and practice or enforcement policy; whether local law must mandate a particular action or whether it suffices for local law to permit it; and whether this analysis is affected by the legal system of the host country, especially whether it is a civil, or common, law system." This issue proved central in some of the investigations surrounding the Oil for Food scandal, see, in particular, Australian Cole Commission, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme* (2006), available at www.ag.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report. That Commission concluded that the fees were akin to a tariff imposed by the Iraqi government on all goods imported under the Oil-for-Food Programme and that it was open to conclude from this that the payments were lawful, or at least not unlawful, as a matter of Iraqi law.

[328] Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997), Commentary 7.

[329]Ingeborg Zerbes, "Article 1:The Offence of Bribery of Foreign Public Officials", in

Moreover, even payments required by law may fall within the scope of the OECD Convention if made with the intent to exert the relevant influence on a public official. As one commentator observes:

> there can be no explicit or implicit statutory permission for a benefit or advantage designed to generate an impermissible official act or indeed to influence the exercise of official discretion in an unreasonable [non-objective] way.[330]

COE Convention

While the COE Convention also excludes advantages permitted or required by law from being "bribes", it may also exclude other types of advantages. According to the Explanatory Report to that Convention:

> "undue" should be interpreted as something that the recipient is not lawfully entitled to accept or receive. ..... The adjective "undue" aims at excluding advantages permitted by law or by administrative rules, as well as minimum gifts, gifts of very low value or socially acceptable gifts.[331]

Consequently, that Convention permits not only payments made on a statutory basis but also those in compliance with administrative rules, *de minimis* payments as well as socially acceptable gifts. There appears to be no requirement that the gifts be expressly permitted as is the case under the OECD Convention.

BRIBES UNDER THE RELEVANT INTERNATIONAL INSTRUMENTS AND UNDER THE PCA 1906

The concept of a "bribe" for the purposes of the PCA 1906 appears to comply with the requirements of the relevant international instruments subject to the observations below.

Mark Pieth, Lucinda A. Low and Peter J. Cullen, (eds), *The OECD Convention on Bribery A Commentary,* (Cambridge University Press, 2007) p 105.

[330]Ingeborg Zerbes, "*Article 1:The Offence of Bribery of Foreign Public Officials*", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *The OECD Convention on Bribery A Commentary,* (Cambridge University Press, 2007) p 106.

[331] Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173), para 38.

THE TYPE OF ADVANTAGES COVERED.

As discussed above, the concept of a "bribe" for the purposes of the PCA 1906 is very broad and covers material and immaterial benefits as well as tangible and intangible ones. It thus appears to comply with the requirements of the conventions. Nevertheless, two issues arise for consideration. First, the Law Commission, in its consultation paper on corruption, expressed its concern that the term "advantage" may not cover a forbearance to act to the detriment of the bribee. Specifically, while the PBCPA 1889 includes within the definition of the term "advantage", "any forbearance to demand any money or money's worth or valuable thing", it is not clear whether this covers the payer agreeing to refrain from doing something that the recipient does not want him or her to do.[332]If it does not then the concept of a bribe within the PCA 1906 may fall short of the requirements of the international instruments, at least in so far as the thing the recipient does not want the payer to do is capable of being valued. Nevertheless, it appears that the concept of an advantage is broad enough to encompass such benefits, at least in so far as that benefit relates to something that the payer is legally entitled to do. Moreover, where the payer and the recipient reach an agreement based on the payer's forbearance, this would constitute "consideration" for the purposes of that Act. Consequently, this issue does not appear to pose compliance problems from the perspective of the Conventions.

Secondly, the OECD has expressed its concern that the term "advantage" as used in the PCA 1906 may not be broad enough, in view of the fact that that Act merely refers to an "advantage", whereas the bribery offences contained in the CJ(TFO)A 2001 refer to "an advantage of any kind whatsoever". According to the OECD, "while the difference in terminology may not seem significant on the surface, in practice it raises questions about whether one is meant to be broader than the other."[333] In an earlier report, the OECD observed with respect to the

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[332] Law Commission, *Legislating the Criminal Code: Corruption*, Consultation Paper No. 145, (the Stationary Office, London, 1998) p 90.

[333] OECD, Ireland: Phase 2*bis* Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business

PCA 1906 that "it might still not necessarily be clear that an "advantage" includes a non-pecuniary advantage, in light of the different wording in the Criminal Justice (Theft and Fraud Offences) Act."[334] The OECD's concerns in this respect appear misguided. Specifically, in interpreting the provisions of the PCA 1906, the courts will give the term "advantage" its literal meaning. As that Act simply refers to an advantage without limiting the term in any way, there is no basis for the courts to impose a limitation.[335] Nor, given the lack of ambiguity in the term as used in the PCA 1906, is there any reason for the courts to refer to the wording of the bribery offences in the CJ(TFO)A 2001.[336] Moreover, the definition of the term "advantage" in the PBCPA 1889 explicitly refers to "money or money's worth or valuable thing". It therefore covers any benefit capable of being valued, as required under the OECD Convention.

THE REQUIREMENT THAT THE ADVANTAGE BE "UNDUE"

The most significant difference between the PCA 1906 on the one hand, and the COE Convention, the EU's Framework Decision, the OECD

Transactions (2008), p 25.

[334]OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendations on Combating Bribery in International Business Transactions (2007), p 49.

[335]See e.g. *Rahill v Bradley*, [1971] IR 69 at 86 who summed up the Irish courts approach to statutory interpretation as follows, "In the absence of some special technical or acquired meaning the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction has prima facie preference there is also a further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intent of the legislature were; but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature." See also Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC-CP14-1999).

[336]Law Reform Commission, *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC-CP14-1999). In any event, if the courts did in fact compare the two terms, the most likely outcome is that they would be considered to have the same meaning. As stated in *Cronin v Youghal Carpets (Yarns) Ltd* [1985] IR 312, per Griffin J., "[i]t is a well established principle to be applied in the consideration of an Act that, where a word or expression in an Act has received a clear judicial interpretation, there is a presumption that the subsequent Act which incorporates the same word or expression in a similar context should be construed so that the word or expression is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears."

Convention and UNCAC on the other, is that under the PCA 1906 there is no requirement that the benefit be "undue".

The significance of the difference between a bribery offence which refers to "undue" advantages and those which simply refer to "advantages" is probably best explained by the UK Law Commission. In the course of its work on Reforming Bribery, it considered whether or not to insist that the advantage be undue. It decided against insisting on this "for the simple reason that our model for bribery was focused on the impropriety of conduct, and not on the impropriety of the advantage."[337] In the case of such a model, "[i]t would be an unnecessary and complex restriction to insist that the advantage be undue."[338]

It is clear from this that the absence of a requirement that the gift, consideration or advantage given or received be proven to be "undue", for the purposes of the PCA 1906 means, to the extent that it is of any significance, that the 1906 Act has a wider scope than those conventions. While the PCA 1906 clearly does not apply to payments which are legally required, as discussed, it does apply to *de minimis* payments as well as those necessary to do business. It is also clear that that Act applies to bribes that are illegal but tolerated as well as bribes dictated by social norms/customs. However, these issues are considered in more detail in the chapter dealing with intent.

THE PCA 1906, THE AGENT-PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

Conceptualising the harm / immorality of bribery in terms of the agent-principal model or the more general breach of duty, has several consequences for the definition of the term "bribe". Specifically, in determining what sort of inducement may constitute a bribe, the focus is not on the form of the payment itself, but rather on the extent to which it is capable of inducing a breach of duty on the part of another. As such the term "bribe" for the purposes of these models should cover all inducements capable of valuation, irrespective of the precise form in

[337]The Law Commission, *Reforming Bribery*, (Law Com No 313) (The Stationary Office, London, 2008), p 24.
[338]The Law Commission, *Reforming Bribery*, (Law Com No 313) (The Stationary Office, London, 2008), p 24.

which they are conferred, their objective value, and whether the inducement is an advantage or such, or the avoidance of some negative consequence. There appears to be no reason in principle as to why certain political practices should not constitute bribes.

These consequences are reflected in the concept of a bribe under the PCA 1906 pursuant to which a bribe may be in the form of a gift, consideration, or advantage. This formulation is clearly very broad and is capable of covering pecuniary and non-pecuniary benefits and tangible as well as intangible ones. It is sufficiently comprehensive to cover the various types of bribes inquired into by the PCTs, irrespective of their form, their amount, whether or not the benefit was offered or solicited, whether it ever materialised and regardless of whether it was real or perceived.

Similarly, the concept of a bribe for the purposes of the PCA 1906 complies with the requirements of the relevant international instruments. While the Law Commission has queried whether the term is broad enough to cover instances where the payer agrees to do or refrain from doing something that the recipient does not want him or her to do, there does not appear to be any evident reason as to why this would not constitute an advantage. Moreover, although the OECD's WGB has expressed its concern regarding the different terminology used in the PCA 1906 as opposed to the CJ(TFO)A 2001, both Acts appear to cover all advantages capable of being valued as required by that Convention.

In sum, the agent-principal model of bribery both generally, and as articulated in the PCA 1906 is sufficiently broad to encompass each of the types of payments inquired into by the PCTS, as well as meeting the requirements of the relevant international instruments. This is in keeping with the harm / immorality underlying the agent-principal model which arises where a benefit is offered which is capable of inducing a breach of trust on the part of the agent, rather than on the precise form of the inducement offered.

CHAPTER 5: THE PAYOR, THE PAYEE, THIRD PARTIES AND INTERMEDIARIES

This chapter focuses on the persons involved in corrupt transactions. Specifically, it considers who is capable of offering a bribe and who is capable of soliciting or receiving one. While bribery offences typically take a broad approach to determining the persons capable of offering a bribe, determining the identity of the recipient poses more difficulties.

INTRODUCTION

For the offence of bribery, there must be at least two parties to the corrupt transaction: a) the person seeking to influence another person's conduct through payment of the bribe (the "payer"); and b) the person whose conduct the briber is seeking to influence (the "bribee"). Nevertheless, any particular bribery offence may involve more than two parties. For example, while the bribee is often also the recipient of the bribe, this is not necessarily the case, and the bribe may in fact be paid to a third party (the "recipient"). Moreover, in many instances, the persons seeking to influence another's conduct will act through an intermediary rather than paying the bribe directly to either the bribee or some other recipient, as the case may be.

Traditionally, any natural person is capable of bribery, and, more recently, any legal person.[339] However, the issue of who precisely can be bribed was and remains significantly more controversial and tends to be closely intertwined with the understanding of the basic harm / immorality underlying the bribery offence.

Historically, bribery was concerned with bribes paid to judges because of the importance of protecting the impartiality of judicial decisions.[340] According to an edict of King Harmab of ancient Egypt, around 1300

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[339] See Chapter 6 of this thesis.

[340] According to John T. Noonan Jr, *Bribes,* (Macmillan Publishing Company, 1984) at p xx "Reciprocity is so regularly the norm of human relations that the conception of a transcendental figure, a judge beyond the reach of ordinary reciprocities was of enormous importance for the idea that certain reciprocities with earthly officials were intolerable. That conception of a transcendental Judge was shaped in the ancient Near East. Communication of this image to the West was largely dependent on religion. Accepted as divine revelation, Scripture by commandment and paradigm inculcated a teaching on impartial judgment. The concept of the bribe was cast in a biblical mould."

BC, bribery of judges was a capital offence.[341] The bible also condemns the bribery of judges. Moreover, the first English statute that was later considered to be a bribery statute prohibited judges from taking any "robe, fee, pension, gift, nor reward of any but the King, except reward of meat and drink, which shall be no great value."[342] According to Noonan:

> It took a major intellectual effort to extend the idea beyond judges. It took such an effort because the Biblical paradigm was that of God as judge. God was not presented by the Bible as an administrator nor as a member of a legislature. It was hard to extend the paradigm to administrators and to legislators. Reflection eventually achieved the extension.[343]

In fact, in the UK, the offence now called bribery may not have been routinely applied to administrative officials until the 1800's, although prior to that bribe-taking on the part of such officials appears to have been punished as extortion.[344] Indeed, writing in the 17th Century, Coke explained the difference between bribery and extortion as being "that bribery is only committed by him, that hath a judicial place, and extortion may be committed both by him that hath a judicial place, or by him that hath a ministerial office."[345]

One rationale for extending the offence of bribery to all public officials essentially lies in the recognition that those entrusted with public power must exercise that power in the public interest, and, if they fail to do so they have betrayed that trust. As Noonan explains:

> The notion of fidelity in office, as old as Cicero, is inextricably bound to the concept of public interest distinct from private

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[341]John Wigmore, *Panorama of the World's Legal systems,* (Washington Law Book Company Binding, 1936) at 15 – 16; see also John T Noonan, *Bribes*, (Macmillan Publishing Company, 1984) p 11.

[342] 8 Rich. 2, c. 3 (1384), (repealed by the Statute Law Revision Act, 44 & 45 Vict., c. 59 (1881)) (based on 18 Edw. 3, stat. 4 (1344) (oath of justices)); see also 3 ENG. HIsT. Doc. 369 (H. Rothwell ed., 1975) (Royal Proclamation of Oct. 20, 1258).

[343]John T Noonan, (1985-1987) "Bribery" 2 Notre Dame J.L. Ethics & Pub. Pol'y 741, 747.

[344]See James Lindgren, "The Theory, History, and Practice of the *Bribery*-Extortion. Distinction", (1993) 141 U. Pa. L. Rev. 1695, 1696.

[345]See James Lindgren, "The Elusive Distinction between Bribery and Extortion from the Common Law to the Hobbs Act" (1988) 35 U.C.L.A. L. Rev, 815, p 865.

> advantage. It is beyond debate that the officials of the government are relied upon to act for the public interest not their own enrichment. When they take bribes they divide that loyalty. Whether or not they consciously act against the public interest, they have adopted a second criterion of action, the proper reciprocation of the bribe. Their resultant conflict of interest is always a dilution of loyalty, always a betrayal of trust.[346]

In some countries, the core concept of bribery probably remains, as described by Noonan "an inducement improperly influencing the performance of a public function meant to be exercised gratuitously".[347] For example, at federal level in the US the bribery offences are uniquely concerned with public bribery.[348] Nevertheless, in instances where the bribery offences focus only on public bribery, difficult questions can arise as to the definition of the term "public official", particularly in instances where the performance of some public functions is carried out by private bodies. Moreover, on a related point, confining bribery to the bribery of public officials can appear arbitrary, given that the notion of what constitutes the State is dynamic rather than static: not only does it differ from country to country, but the domestic concept of the State may also evolve, sometimes quite dramatically, over time.

Several jurisdictions and several international conventions have extended the bribery offences to cover bribery in the private sphere. However, as in the case of public bribery, determining who can be a recipient of a bribe in the private sphere can prove problematic and it is necessary to have a clear concept of the harm the bribery offences are meant to criminalise in order to determine this issue. In instances, where that harm remains a breach of trust, then the offence of bribery is frequently couched in terms of the agent-principal relationship. In fact, framing bribery offences in these terms is a simple extension of the breach of trust model used for public bribery to the private sphere. However, establishing bribery still requires the existence of a duty of trust owed by the intended target of the bribe to another person.

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[346] John T Noonan, Jr *Bribes*, (Macmillan Publishing Company, 1984) p 704.
[347] John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company, 1984) p XX.
[348] 18 USC §201.

The more generalised breach of duty model has a wider personal scope than the agent-principal model. Specifically, the latter model is particularly focused on the agent – principal relationship and while typically the term "principal" is interpreted more broadly than in the context of commercial affairs, it is still a limiting element in the scope of the offences based on this model. In contrast, the generalised breach of duty model is not circumscribed by the agent-principal relationship, and, in particular, it encompasses not only bribes paid in the context of relationships where a duty of trust is owed, but also those paid in other types of relationships, for example where there is a duty to act impartiality, or an expectation that someone will act in good faith. In some cases, the general model extends beyond duties owed to a specific person, to encompass duties owed to abstract entities. As there is no evidence to suggest that breach of duty of trust owed by the agent to his or her principal is associated with specific harms or particularly immoral, it is not clear why the criminal offences should focus purely on breach of that duty, to the exclusion of other duties arising in a professional / occupational context.

THIRD PARTY BRIBERY

As mentioned, bribes are not always paid directly to the person whose conduct it is intended to influence. Some of the more obvious third party recipients include, for example: the bribee's spouse, children and/or other relatives; off-shore companies; political parties; and/or charities or other types of foundations. One of the issues which arises in framing bribery offences is whether or not those offences should cover such payments. Moreover, where third party payments are covered, it is also necessary to consider whether or not the persons whose behaviour the payer is ultimately seeking to influence must be aware of the payment to the third party for bribery to occur.

Extending the scope of the bribery offences to cover third party bribery falls easily within the logic of both the agent-principal model of bribery and the more generalised breach of duty model. In particular, as third party bribery can easily give rise to the same types of harm / immorality that those models seek to combat, there appears to be no reason in

principle why it should not be covered by offences based on those models.

BRIBERY THROUGH INTERMEDIARIES

Intermediaries are frequently involved in corrupt transactions and may facilitate such transactions in a number of ways. In particular, they may assist in identifying individuals willing to bribe or to be bribed. They may also act as a pivot of trust. Specifically, as bribery is an illegal act, a payer has no legal recourse if the recipient fails to keep his or her end of the deal. The involvement of an intermediary can help reduce the risks of such a failure both by helping to identify those "honest" individuals who follow through on their bargains and by sanctioning those who do not by, for example, excluding them from future corrupt transactions:

> The acquisition of a reputation for "honesty" in illegal dealings, thanks to the circulation of information on previous behaviour within the restricted circle of agents involved in the corrupt game, permits the reduction of the expected risks of interactions in a wider network of exchange.[349]

Moreover, the use of an intermediary may enable those who engage in corrupt transactions to distance themselves from them and to evade prosecution and conviction should the transaction be uncovered as:

> If the intermediary is found to have paid a bribe, the company can try to deny responsibility, arguing the middleman acted on his own initiative.[350]

In sum, therefore, the presence of intermediaries affects both the pervasiveness of bribery and the effectiveness of anti-bribery policies:

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[349]Donatella della Porta and Alberto Vannucci, "The governance mechanisms of corrupt transactions", in Johann Graf Lambsdorff, Markus Taube and Matthias Schramm (eds) *The New Institutional Economics of Corruption* (Routledge, 2005), p 154.

[350]John Bray, "The use of intermediaries" in Johann Graf Lambsdorff, Markus Taube and Matthias Schramm (eds) *The New Institutional Economics of Corruption* (Routledge, 2005), p 118.

> by eliminating uncertainty with respect to whom and how much to bribe, by reducing the risk of breaching of corrupt deals and by lowering the chances of detection.[351]

There is also evidence to suggest that intermediaries lower the moral and psychological costs of bribery on the part of the principal.[352]

Again, there appears to be no reason in principal why the agent-principal model and / or the generalised breach of duty model should not cover bribery through intermediaries. Specifically, the harms / immorality which those models seek to criminalise naturally encompasses a breach of duty which arises by the actions of an intermediary. Failing to address such bribery would greatly undermine the effectiveness of those models in combating breach of duty in both the public or private spheres.

THE BRIBERY OFFENCES IN THE PCA 1906

Under the PCA 1906 the payer may be either a natural or legal person. As previously discussed, the PCA 1906 has its roots in concerns regarding the secret commissions frequently paid to agents around the time of its enactment. For the purposes of that Act, to constitute a bribe a payment must be directed at a person who is an agent, however the recipient maybe either an agent or a third person.

AGENTS

On a strict technical meaning, a person is an agent of another where he or she "has an authority or capacity to create legal relations between a

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[351] Klaus Abbink and Danila Serra, "Anti-Corruption Policies: Lessons from the Lab" (October 13, 2011), p 9, available at SSRN: http://ssrn.com/abstract=1971779 or http://dx.doi.org/10.2139/ssrn.1971779.

[352] Klaus Abbink and Danila Serra, "Anti-corruption policies: Lessons from the Lab" (October 13, 2011), p 20, available at SSRN: http://ssrn.com/abstract=1971779 or http://dx.doi.org/10.2139/ssrn.1971779; See also Mikhail Drughov, John Hamman and Danila Serra, "Intermediaries in Corruption, An Experiment" (April 17, 2012), available at SSRN: http://ssrn.com/abstract=1838591 or http://dx.doi.org/10.2139/ssrn.1838591.

person occupying the position of principal and third parties".[353] However, the PCA 1906 defines the term more extensively to include "any person employed by or acting for another, whether in the private or public sector." That Act also provides that the term "agent" includes a number of listed domestic and foreign public officials.

In the case of domestic public officials, the list includes: (1) an officeholder, director or holder of a designated position of employment within a public body, within the meaning of the Ethics Act 1995, as amended;[354] (2) Oireachtas Members; (3) Members of the European Parliament; (4) the Attorney General; (5) the Comptroller and Auditor General; (6) the Director of Public Prosecutions; (7) judges; and (8) any other person employed by or acting on behalf of the public administration of the State. To a large extent, the foreign public officials listed as agents are the foreign or EU counterparts of the abovementioned domestic public officials.[355]

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[353] Right Honourable Lord MacKay of Clashfern (ed)*Halsbury's Laws of England*, 4th ed., (LexisNexis Butterworths, 1990) vol 1(2), p 4.

[354]The Ethics Act 1995, s. 2(1) as amended defines an "officeholder" to include: Ministers, Ministers of State; a member who holds the office of the Attorney General; the Chairman and Deputy Chairman of the Dáil and Seanad; the holder of a designated office of chairman of either House; and the holder of a designated office of chairman of a joint committee of both Houses. Pursuant to s. 19(1) of that Act, a "special advisor" is a person whose function or principal function is to provide advice or other assistance to or for an officeholder and who is appointed to that position or awarded a contract for services by the officeholder, personally, other than by means of a competitive procedure. Pursuant to s. 17(1) of the Ethics Act 1995, as amended the term "Director of a Public Body" includes: members of a health board, and members and directors of some public, state controlled and/or state financed companies. According to s. 18(1) of that act, the term "occupier of a position of employment in, a public body" includes, inter alia, employee's in the ombudsman's office, local government, the health board and some public, state controlled and/or state financed companies.

[355] For example, that list includes: (1) a member of the government of any other state; (2) a member of a regional or national parliament of any other state; (3) a member of the European Parliament other than one elected pursuant to the European Parliament Elections Act, 1997; (4) a member of the E.C. Court of Auditors; (5) a member of the E.C. Commission; (6) a public prosecutor in any other state; (7) a judge of a court in any other state; (8) a judge of any court established under an international agreement to which the State is a party; (9) a member of, or any other person employed by or acting for or on behalf of, anybody established under an international agreement to which the State is a party; 10) any other person employed by or acting on behalf of the public administration of any other state, including a person under the direct or indirect control of the government of any such State; (11) a member of, or any other person employed by or acting for or on behalf of, any international organisation established by an international agreement between states to which the State is not a party. The term "state" is defined to include: any territory for whose external relations the State or its government is wholly or partly responsible; a subdivision of the government of the State; and a national, regional, or local entity of the State.

It is unclear whether a person who is not an agent can be successfully prosecuted for bribery under the PCA 1906 if he or she obtains a corrupt payment by purporting to be one. According to Professor A.T.H. Smith in relation to the equivalent UK provision:

> It is outside the mischief at which the offence, even at its broadest, seems to be aimed, since the recipient of the bribe is in no sense in any position to exploit an office that he does not actually hold. On the other hand, the person handing over the bribe believes that the recipient will be influenced by it and is in a position to affect his affairs favourably, and the recipient knows that this is his belief, and it might be said that this should suffice.[356]

BRIBERY OF THIRD PARTIES

Under the PCA 1906, the recipient of the bribe may be either the person whose conduct it is sought to influence, or a third party. Moreover, there is no requirement that the relevant agent know of the bribe. For example, a benefit conferred on the spouse of an agent of which the latter has no knowledge could fall within the section if, in return for the benefit, the spouse promises to use his or her influence with the agent to bring about a specified result, as discussed further below.

BRIBERY INVOLVING INTERMEDIARIES

Under the PCA 1906, in cases where a bribe is given or solicited through an intermediary both the intermediary and the payer/bribee may be guilty of bribery. In this respect:

> Broadly speaking liability for participation encompasses both the intentional influencing of the decision of the principal to commit

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[356] A.T.H. Smith, *Property Offences*, (Sweet and Maxwell 1994), para 25 – 04. See also *United States v Abbas* 560 F.3d 660 (7th Cir. 2009) in which the US Seventh Circuit held that the crime of extortion (which overlaps significantly with bribery) did not extend to a private citizen masquerading as a public official. However, this ruling is criticised as being at odds with the historical approach to extortion in John S Gawey, "The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes" [2011] 87 Notre Dame Law Review 383, 390.

the full offence and the intentional helping or assisting of the principal to commit the full offence.[357]

Moreover, the Criminal Law Act 1997 expressly provides that any person "who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender."[358] The expression "aiding and abetting" is generally taken to mean giving some assistance towards the act or encouraging the commission of the act.[359] In the UK case *R v Calahem*,[360] "counsel" was said to mean "advise, solicit or something of that sort".[361] In *Attorney-General's Reference (No. 1 of 1975)*,[362] the English Court of Appeal considered that procure means to "produce by endeavour". A person could not be said to procure an offence if there was no causal link between his or her conduct and the commission of the offence. In each case, an indictable offence must be committed before liability can be imposed.

In so far as bribery is concerned, clearly instructing someone to pay a bribe, or supplying the money for payment of a bribe, could constitute aiding, abetting, counselling or procuring an offence, depending on the circumstances. However, while it is possible to hold a principal liable for the actions of an intermediary, in practice it may be difficult to establish the requisite *mens rea*, as discussed further in the chapter on intent.

BRIBERS, BRIBEES, THIRD PARTIES, INTERMEDIARIES AND THE PCTS

The benefits inquired into by the PCTs were largely paid by businessmen, including in particular developers. The recipients of those benefits varied. Some were paid directly to the current holders of elected public office and/or ministerial office in their official capacity. Others were paid directly to public officials but in the guise of payments connected with their secondary activities. Still others were paid at a time

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[357] Finbar McCauley and Paul McCutcheon, *Criminal Liability*, (Roundhall, 2000),p 444 – 445.
[358] Criminal Law Act 1997, s.7(1).
[359] see Finbar McCauley and Paul McCutcheon, *Criminal Liability*, (Roundhall, 2000),p 464.
[360] *R v Calahem* [1985] 1 Q.B. 808.
[361] *R v Calahem* [1985] 1 Q.B. 808 at 813.
[362] *Attorney-General's Reference* (No.1 of 1975) [1975] Q.B. 773, 779.

either before the recipient became an elected public official, or after his or her retirement from public life. Some benefits were paid directly to a political party or other third parties, including charitable organisations and corporate entities, rather than to an individual official. A significant number of bribes were paid through intermediaries.

PAYMENTS TO ELECTED PUBLIC OFFICIALS

The PCTs inquired into a substantial number of benefits paid to current holders of local and national elected office including ministers. Generally, payments to such persons do not pose any difficulties for the purpose of the bribery offences as they clearly fall within the scope of the agent-principal relation itself. Specifically, in a democracy:

> ... politicians are agents of their political supporters; they accept the obligation to act on behalf of particular individuals or groups in exchange for political support. ...From this principal-agent perspective, corruption occurs when agents renege on their agreements with principals in favour of their personal interests.[363]

In a similar vein:

> Without doubt, the relationship between voters and politicians in a representative democracy can be considered to be a principal-agent relationship. Voters want politicians to look after their interests, and in exchange provide these politicians with their votes and thus with positions.[364]

Moreover, as mentioned, the PCA 1906 specifically lists holders of national and elected office as included in the term "agent". Nevertheless, it is noteworthy that the application of the term "agent" to such persons has been the subject of criticism.[365] According to one

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[363] Thomas D. Lancaster & Gabrielle R. Montionola "Towards a methodology for the comparative study of political corruption"(1997) 27 Crime, Law & Social Change 185, 190.

[364]Nico Groenendijk, "A principal-agent model of corruption" (1997) 27 Crime, Law & Social Change 207, 222.

[365]See Paul D. Finn (ed), *Fiduciary Obligations,* (Law Book Company Ltd, 1977) para 498.

commentator, referring critically to the civil law bribe cases of *Attorney-General v Goddard*[366] and *Reading v. Attorney-General*:

> the courts have attempted to impose private law relationships upon the holders of public offices..... This is much to be regretted, not only because opportunities to clarify the law relating to public officers were foregone, but also because little service has been done to the fiduciary relationship by forcing into its mould officers whose positions are, it is suggested, regulated by a distinct though similar body of public law.

As discussed in the previous chapter, the PCTs investigated a number of payments claimed to be for made for goods or services in the context of an official's secondary activities, rather than *qua* Agent. For example, the Flood/Mahon Tribunal inquired into a number of payments made, in particular, to local councillors which were claimed to be for, *inter alia* consultancy services, and/or the provision of insurance,[367] security services and catering services,[368] but which it found to be linked to their public functions. It also inquired into a situation where a developer enabled a local councillor to take a sabbatical from his teaching job, by paying him a replacement salary for several months, so that the councillor could canvas to get a party nomination for a national election on the understanding that he would promote the developer's rezoning

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[366] *Attorney-General v Goddard* (1929) 98 LJKB 743.

[367] Cllr Tyndall who was initially an employee of Marine and General Insurance Ltd, but subsequently become a director and shareholder of that company, successfully lobbied a developer to appoint that company as the insurance broker for other companies associated with that developer. According to the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2012), Vol II, p 1098 that Tribunal was "satisfied that Cllr Tyndall exploited his position as an elected councillor (and more particular the role as a councillor exercising his entitlement to vote on matters relevant to the development of Quarrvyale) in circumstances which benefitted a company with which he was closely associated, Marine & General Insurances, and in doing so acted improperly."

[368] A company owned by Cllr McGrath, who was an active supporter of the Quarryvale rezoning, received £15,000 from the company owned by the sites developer for the provision of security and miscellaneous services on the site as well as about £800,000 from companies engaged by the developer in the construction of the Liffey Valley Shopping Centre. See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012) p 1020 – 1022. Similarly, Cllr John O'Halloran, who also actively supported Quarryvale, was engaged to provide on-site canteen facilities to Sisks, one of the principal Quarryvale contractors. The Tribunal was satisfied that "Cllr O'Halloran secured the Sisk contract following [the developers] intervention on his behalf and that [the developer] was requested by Cllr O'Halloran to approach the contractors in question. See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1065.

interests while canvassing.[369] There is no legal difficulty in applying the PCA 1906 to such payments although practically it may be difficult to ascertain whether or not they truly relate to an Agent's functions *qua* agent or to his/her secondary activities.[370]

BENEFITS PRE-DATING OR POST-DATING PUBLIC OFFICE.

Benefits which pre-date the assumption of public office pose greater difficulties and the PCTs also investigated a significant number of these. For example, the Moriarty Tribunal found that Mr Dunne's first payments to Mr Haughey were made by way of six cheques valued at £32,000 in total, each payable to the bearer, and dated January 28 1987.[371] At the time of the payment the Dáil had been dissolved for 8 days and a general election was called for February 17th. According to Opinion Polls, Fianna Fáil was widely expected to win the election, which it did, although it failed to get an overall majority of votes and was sworn in as a minority government. Mr Haughey was sworn in as Taoiseach on March 10, 1987.

According to the UK Law Commission, to constitute a bribe under the UK PCA 1906 the bribe must be offered to the agent during the currency of the agency.[372] Similarly, according to A.T.H. Smith, again commenting on the UK legislation, the PCA 1906 does not appear to cover bribes given to someone in anticipation of them becoming an agent, as "there must be some sort of agency agreement already established."[373] If these views are correct, this is clearly problematic. Benefits offered prior to an election may well escape the scope of the bribe offences.[374] For example, if the UK Law Commission's view is correct, then the above payments to Mr Haughey or, more generally, to

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[369]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 915 – 919.

[370]See *R v Mills* (1979) 86 Cr. App. R. 154.

[371] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Vol 1, (2006), p 210 – 212.

[372] The Law Commission, *Legislating the Criminal Code: Corruption* Consultation Paper No 145, (LC 248) (Stationary Office, London 1998).

[373]A.T.H. Smith, *Property Offences*, (Sweet and Maxwell, 1994), p 801.

[374] 18 U.S.C § 201(b)(1) sets out the main US federal offence of bribery of a public official. For the purposes of that offence the term, "public official" is defined in § 201(a)(1) so as to explicitly cover a Member of Congress, Delegate, or Resident Commissioner, "either before or after such official has qualified."

national electoral candidates, may not fall within the scope of the PCA 1906.

The PCTs, and in particular, the Moriarty Tribunal, also inquired into a number of benefits paid to a former public official. Specifically, a significant amount was paid, either directly or indirectly, to Mr Haughey after he ceased holding public office. These included two payments by Mr Dermot Desmond, Chief Executive of NCB Stockbrokers to Mr Haughey in 1994 and 1996, totalling STG £125,000, which that Tribunal concluded were motivated by Mr Haughey's former public office of Taoiseach.[375] That Tribunal also inquired into a number of payments to Mr Michael Lowry made subsequent to his resignation as Minister for Transport, Energy and Communications but which were connected to actions taken by him in that capacity.[376]

Benefits which post-date a position as an agent pose fewer difficulties from the perspective of the PCA 1906 than those which pre-date such a position. At least, according to the UK Law Commission, it is not necessary that a person be an agent at the time of the payment of the bribe as long as the agreement to pay or receive the bribe was made during the currency of the agency.[377] However, this only deals with rewards paid on the basis of a pre-existing agreement and does not deal with pure rewards.

According to its wording, the PCA 1906 covers any bribe given on account of an agent doing any act or making any omission in relation to his or her agency function. On the one hand it could be argued that this suggests that that Act covers rewards given to a former agent as long as it relates to functions carried out by him or her as an agent, even in the absence of an intent to affect the agent's performance of those functions. On the other hand, it could equally well be argued that the statute only applies to payments made on account of an agent actually doing an act or making an omission, to the exclusion of payments made on account on that agent having done an act or having made an

[375]See in particular, Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 241 – 247.
[376]See in particular, Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, Vol 1, (2011), p 215 – 220.
[377] Law Commission, *Legislating the Criminal Code: Corruption,* Consultation Paper No 145, (LC 248)(Stationary Office, London, 1998).

omission. Moreover, in cases of pure rewards it is likely to be very difficult to prove an intent to influence, which is relevant in determining whether the benefit was given with the requisite *mens rea*.

BENEFITS PAID TO POLITICAL PARTIES AND OTHER THIRD PARTIES

The PCTs inquired into several payments to third parties including political parties, charitable organisations, corporate entities and relatives. For example, the Hamilton Tribunal heard extensive evidence as to the nature and extent of donations made to political parties. During the course of that evidence, it emerged that between January 31 and February 12, 1987, the Fianna Fáil party's election fund had received £50,000 from Goodman International, about 5% of the £1 million that Fianna Fáil party headquarters had spent on the national election campaign.[378] Between 1987 – 1989, Goodman International donated £175,000 to the Fianna Fáil party.[379] For its part, one of the more notable payments inquired into by the Moriarty Tribunal was the payment of £50,000 by Telenor, the Norwegian State owned telecommunications giant, to Fianna Gael.[380] The Flood/Mahon Tribunal also inquired into payments to political parties, including: a payment of £50,000 from Mr Gilmartin to Mr Padraig Flynn for the Fianna Fáil Party;[381] and a payment of £80,000 from the developer Mr Owen O' Callaghan, again to Fianna Fáil.[382] It also inquired into two payments of £4,000 and £5,929 made to Saatchi & Saatchi in discharge of a debt owed by the Fianna Fáil party.[383]

Other third party payments inquired into by the PCTs included payments to charitable organisations as well as payments to corporate entities,

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[378]Fintan O'Toole, *Meanwhile Back at the Ranch – The Politics of Irish Beef*, (Random House, UK 1995), p 69 – 70.
[379]Penrose, Dáil Debates, Co 742, Sept 1, 1994.
[380]See in particular, Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II (2011), Vol 1 p 67. According to that Tribunal, at p 67 "Any suggestion that the payment by Telenor was legitimate as an expression of interest in Irish affairs, ... , was specious and untenable."
[381]See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 224.
[382]See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 730.
[383]See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 1968 ff.

and payments to relatives and friends of public officials. Specifically, the Moriarty Tribunal was concerned with payments made to Mr Haughey's family company, Larchfield Securities,[384] as well as payments made to his son's company Celtic Helicopters.[385] For its part, the Flood/Mahon Tribunal inquired into payments made in the form of local youth club sponsorship and a financial contribution for Neilstown Boxing Club which was solicited by Cllr John O'Halloran from Mr Frank Dunlop and Mr Owen O'Callaghan.[386] It also inquired into several payments made to companies associated with Mr Liam Lawlor, including a payment of £28,300 from Monarch Properties to Economic Reports Ltd, a company beneficially owned by Mr Lawlor.[387] It inquired into a number of payments into accounts legally owned by Mr Lawlor's son.[388]

Benefits paid to third parties, including political parties, are not paid to "agents" as defined in the PCA 1906. Nevertheless, in at least some instances, those benefits will fall within the scope of the bribery offences as payments to "any other person". Specifically, the PCA 1906 will cover situations where a benefit is paid to a third party on account of an agent doing or failing to do something in connection with his or her public office, whether or not the agent is aware of that payment. For example, in *R v Harrington*[389] the defendant, an ex police officer turned private detective, had solicited money from a third party on the pretext that the money would be used as an inducement to persuade a police officer not to proceed with charges against the third party. The police officer was not a party to the scheme, the defendant was not acting as the police officer's agent and the defendant intended to keep the money for himself. The defendant was convicted of bribery under s.1(1) of the

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[384]e.g. Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part 1, (2006), p 258 – 264.

[385]See e.g. Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part 1, (2006), p 277 – 305.

[386]See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1063.

[387]See the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1065.

[388] See e.g. the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1236.

[389]*R v Harrington* (Unrept), 28 September 2000 (Kennedy LJ, Forbes and Steel JJ). See also *Singh v State of Trinidad and Tobago* [2006] 1 W.L.R. 146, in which the Privy Council approved of the decision in *R v Harrington*. See also *Williams v R.* JM (2011) CA 30.

Public Bodies Corrupt Practices Act 1889. His conviction was upheld on appeal. According to the Court:

> Furthermore, in our view, on the plain wording of the statute, it is not necessary to prove that any member, officer or servant of a public body was in fact aware of what was going on when the improper offer was made or the bribe was passed, provided that the apparent purpose of the transaction was to affect the conduct of such a person corruptly.

The PCA 1906 will also apply to a payment made to a political party on account of a member of that party who is him or herself an agent, doing or failing to do something in connection with his or her exercise of public office.

However, third party benefits may be more difficult to uncover and investigate. In particular in the case of payments to political parties, difficulties may arise in identifying the agent whose conduct the payer is seeking to influence.[390]

BENEFITS PAID THROUGH INTERMEDIARIES.

Intermediaries played a significant role in the corrupt payments inquired into by, in particular, the Flood/Mahon Tribunal.[391] For example, that Tribunal inquired into a substantial number of payments made by the lobbyist, Mr Frank Dunlop, to councillors on behalf of various developers.[392]

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[390]For example, the Hamilton Tribunal was unable to link Mr Goodman's "political donations" to the Fianna Fáil party with a number of decisions made by Mr Albert Reynolds, while Minister for Industry and Commerce, in relation to export credit insurance which predominately benefitted Mr Goodman's companies. It pronounced itself satisfied, at p 12 of its Report of the Tribunal of Inquiry into the Beef Processing Industry (1994) "that such contributions were normal contributions made to Political Parties and did not in any way affect or relate the matters being inquired into by the Tribunal."

[391]See, for example, the Final report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 2344, where that Tribunal commented on the key role played by the lobbyist, Frank Dunlop, in facilitating corruption in the planning process.

[392] According to that Tribunal: "Mr Dunlop, in the period particularly from late 1990/early 1991, adopted a simple and very successful strategy to achieve his undoubted success in persuading councillors in County Dublin to support a number of rezoning (and on occasion material contravention) proposals which, in order to

There is no difficulty in applying the PCA 1906 to intermediaries, although in order to hold the payer responsible, it will be necessary to prove that he or she intended the intermediary to pay the bribes at issue. Wilful negligence or even recklessness is not sufficient in this regard. This is a matter of concern from the perspective of the inquiries conducted by the PCTs. As mentioned, one of the reasons why intermediaries are employed is to enable the briber to distance him or herself from the corrupt payment. The high standard of knowledge required under the PCA 1906 doubtlessly facilitates the use of agents for this purpose. This issue of intent is addressed in more detail in the relevant chapter.

THE RELEVANT INTERNATIONAL INSTRUMENTS

The COE Convention, UNCAC and the EU Convention each cover the bribery of domestic/national public officials. The OECD Convention does not cover domestic bribery. The COE Convention, the OECD Convention and UNCAC each cover the bribery of "foreign public officials", while UNCAC also specifically covers "officials of a public international organisation." Meanwhile, the EU Convention is more restrictive in scope and only applies to "Community Officials". UNCAC, the COE Convention and the EU's Framework decision each cover private bribery. Each of the international instruments also addresses third party bribery and bribery through intermediaries.

DEFINING THE TERM "PUBLIC OFFICIAL"

Generally, the COE Convention and the EU Convention, on the one hand, and the OECD Convention and UNCAC, on the other, adopt two different approaches to defining the public officials falling within their scope. In this respect, the former largely rely on existing definitions in

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succeed, required majority councillor approval. On occasion, that support also involved a willingness on the part of councillors to sign motions, and to actively influence fellow councillors to support particular proposals. When that strategy proved successful as it frequently did, the financial rewards for the relevant landowners/developers were enormous by any standards, and very substantial also for Mr Dunlop himself." See Final report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 2342.

national law[393] while the latter contain autonomous definitions. However, in the case of each of the conventions and protocols, the person must be a public official at the time the bribe was offered or solicited. Consequently, the conventions do not cover the bribery of officials of political parties or candidates for political office, or any person in anticipation of his or her becoming an official.[394] However, there is no requirement that that person also be a public official at the time of payment. In this sense, each of the Conventions cover the deferred payments of bribes.

The COE Criminal Law Convention

According to the COE Convention, a "domestic public official" is any person falling within the definition of "official", "public officer", "mayor", "minister" or "judge" in the national law of the State in which the person in question performs that function and as applied in its criminal law.[395] However that Convention also specifies that the term "judge" is to include prosecutors and holders of judicial office.[396] Moreover, State

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[393]In the case of the COE Convention, this appears to be attributable to the fact that its main objective is to establish the necessary legal conditions to facilitate effective mutual legal assistance, extradition and confiscation of the proceeds of crime. The dual criminality requirement traditionally underlies such judicial assistance and the Convention seeks to ensure that that requirement can be met. It is therefore sufficient to permit the definition of "public official" to be determined by national law. In the case of the EU, it is merely seeking to ensure a minimum approximation of laws in certain fields. Consequently, it is not necessary for the EU to provide for an overarching definition of a "public official". See Ingeborg Zerbes,"Article 1. The Offence of Bribery of Foreign Public Officials", in *The OECD Convention on Bribery, A Commentary,* Mark Pieth, Lucinda A. Low, and Peter J Cullen eds), (Cambridge University Press, 2007)p 57.

[394] OECD, *Corruption A Glossary of International Standards in Criminal Law*, (OECD, 2008) p 32; see also Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Official, Commentary 10; The EU's Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (OJ L 192 31 July 2003, p 54) refers to "the deliberate action of an official" in the passive bribery offence and "the deliberate action of whosoever promises or gives .... an advantage of any kind whatsoever to an official ... ".

[395]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 1(a).

[396]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 1(b).

parties must criminalize the bribery of members of domestic public assemblies exercising legislative or administrative powers.[397]

The COE Convention adopts a similar approach to the definition of "foreign public officials" which, again, is largely determined by the national law of the place of work. However, in the case of proceedings involving a foreign public official, the prosecuting state has the option of applying its law "only to such officials whose status is compatible with that of national public officials under the national law of the prosecuting State."[398]

The COE Convention also specifically requires state parties to criminalise the bribery of: members of foreign public assemblies exercising legislative or administration powers in any other State;[399] officials or other contracted employees of any public international or supranational organization or body of which the State Party is a member; any person, whether seconded or not, carrying out functions corresponding to those performed by such officials or agents;[400] members of parliamentary assemblies of international or supranational organizations of which the Party is a member;[401] and holders of judicial office or officials of any international court whose jurisdiction is accepted by the Party.

Unlike UNCAC and the OECD Convention, the COE Convention does not deal specifically with bribery involving public enterprises or private enterprises under State control. However, this lacuna is more apparent

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[397]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 4; According to the Explanatory Report on the Criminal Law Convention (ETS 173), para 45, this category of persons should include "members of local and regional assemblies and members of any other public body whose members are elected or appointed." According to that same paragraph, the expression "administrative powers" "is aimed at bringing into the scope of this provision members of public assemblies which do not have legislative powers, as it could be the case with regional or provincial assemblies or local councils. Such public assemblies, although not competent to enact legislation, may have considerable powers, for instance in the planning, licensing or regulatory areas".

[398]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 1(c); see also the Explanatory Report on the Criminal Law Convention (ETS 173), para 30.

[399]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 6.

[400]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 9.

[401]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 10.

than real as the COE Convention also applies to private sector bribery and requires State parties to criminalise the active and passive bribery of "any persons who direct or work for, in any capacity, private sector entities".[402] Consequently, that Convention also applies to persons who work for such enterprises.

The EU Convention

As mentioned, like the COE Convention, the EU Convention does not contain an autonomous definition of the term "official". In this respect, it simply states that the term "national official" "shall be understood by reference to the definition of "official" or "public officer" in the national law of the Member State in which the person in question performs that function for the purposes of the application of the criminal law of that Member State."[403] Significantly, and unlike the other Conventions, "the concept of 'national official' does not automatically include members of Parliament, ministers, members of the highest courts or members of a court of auditors in the Member States."[404]

In contrast, the EU Convention does define the term "Community Officials". According to the relevant definition, this term encompasses not only permanent Community Officials but also contractual staff, national experts seconded to the European Communities to carry out functions equivalent to those performed by Community officials and

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[402]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Articles 8 and 9; In this respect, the Explanatory Report on the Criminal Law Convention on Corruption (ETS 173) observes, at para 52, that one of the reasons for extending criminal responsibility for bribery to the private sector is that "over the years important public functions have been privatized (education, health, transport, telecommunication etc). The transfer of such public functions to the private sector, often related to a massive privatization process, entails transfers of substantial budgetary allocations and of regulatory powers. It is therefore logical to protect the public from the damaging effects of corruption in business as well, particularly since the financial or other powers concentrated in the private sector necessary for their new functions, are of great social importance".

[403]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption Involving Officials of Member States of the European Communities or Officials of Member States of the European Union (OJ C195 25 June 1997, p 1), Article 1(c).

[404]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), para 1.4; See also Explanatory Report on the Protocol to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5).

other servants.[405] Members of the Community institutions are also Community Officials.

UNCAC and the OECD Convention

As mentioned, both UNCAC and the OECD Convention contain a fully autonomous definition of the public officials falling within their scope.[406] Pursuant to UNCAC, the term "domestic public official" encompasses: i) any person holding a legislative, executive, administrative or judicial office of a State Party whether appointed or elected, whether permanent or temporary, whether paid or unpaid irrespective of that person's seniority; (ii) any other person who performs a public function including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party.

With regard to non domestic public officials, there is a slight difference between the OECD Convention and UNCAC, in that the former applies to foreign public officials while the latter applies to both foreign public officials and officials of a public international organisation. However, this difference is of no real significance in that the OECD Convention defines the term "foreign public official" to include officials of international organisations. Therefore both those Conventions require State Parties to cover the bribery of:

- Any person holding a legislative, administrative or judicial official of a foreign country, whether appointed or elected
- Any person exercising a public function for a foreign country,

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[405]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption Involving Officials of Member States of the European Communities or Officials of Member States of the European Union (OJ C195 25 June 1997, p 1); See also Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313 of 23 October 1996, p. 1),Article 1(b).

[406] United Nations Convention Against Corruption (2003), Article 2(a) and (b); OECD Convention on Bribery of Foreign Public Officials in International Business Transactions (1997), s. 1(4), however that definition and its scope is addressed in much more detail in the Official Commentaries to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), commentaries, 12 – 19.

including for a public agency or public enterprise

- Officials or agents of a public international organisation.

In contrast therefore to the COE Convention, both UNCAC and the OECD Convention define the term "foreign public official" to include persons holding legislative, administrative or judicial office. Moreover, those Conventions require State Parties to criminalise bribery involving officials or agents of any public international organisation and not merely those of which the relevant state is a member.

Both the OECD Convention and UNCAC apply a very extensive definition to the concept of "the State". Specifically, while neither of those Conventions defines the term "public enterprise", according to the Commentaries on the OECD Convention, all cases of direct and indirect Government control over an enterprise are covered. This includes cases where the Government holds the majority of the enterprise's subscribed share capital, controls the majority of the votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.[407] The key question is whether the Government is dominant in the sense of controlling the main corporate decisions and may be achieved even in the absence of a legal foundation for that control. Overall:

> [w]hat counts is the nature of the power exercised by the enterprise pursing the activity in question: if the dominant source of this power is the state, i.e. Staatsmacht, the activity will be deemed to be public in nature, regardless of ideology or politics."[408]

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[407]Official Commentaries to the OECD Convention on Bribery of Foreign Public Officials in International Business Transactions (1997), Commentary 14. This definition is also cited with approval in the Legislative Guide for the implementation of the United Nations Convention against Corruption (2006), p 87, fn 41.

[408]Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in, Mark Pieth, Lucinda A. Low, and Peter J Cullen (eds), *The OECD Convention on Bribery, A Commentary,* (Cambridge University Press, 2007)p 65.

SCOPE OF PRIVATE BRIBERY

As set out above, UNCAC, the COE Convention and the EU's Framework Decision address private bribery. Each of the relevant offences focus on benefits paid to persons who "direct or work for" a private sector entity "in any capacity". They clearly, therefore cover directors, officeholders, and employees of such entities. They also appear to be intended to cover benefits paid to independent contractors and others carrying out services on behalf of the company. According to the COE's explanatory report on its Criminal Law Convention, the notion of a person who directs or works for a private sector entity is:

> a sweeping notion to be interpreted broadly as it covers the employer-employee relationship but also other types of relationships such as partners, lawyer and client and others in which there is no contract of employment. Within private enterprises it should cover not only employees but also the management from the top to the bottom, including members of the board, but not the shareholders. It would also include persons who do not have the status of employee or do not work permanently for the company -for example consultants, commercial agents etc.- but can engage the responsibility of the company. "Private sector entities" refer to companies, enterprises, trusts and other entities, which are entirely or to a determining extent owned by private persons. This of course covers a whole range of entities, notably those engaged "in business activities". They can be corporations but also entities with no legal personality. For the purpose of this provision, the word "entity" should be understood as meaning also, in this context, an individual. Public entities fall therefore outside the scope of this provision.[409]

There is a significant difference between the COE Convention on the one hand and the EU Framework Decision on the other, in that the former only covers payments made in the course of a person's business activity. According to the COE Convention's Explanatory Memorandum,

[409] Explanatory Report on the Criminal Law Convention on Corruption (ETS 173),para 24.

in doing so, the COE deliberately sought to exclude any non-profit oriented activities carried out by persons or organisations, e.g. by associations or other NGO's. In contrast, the EU Framework Decision specifically applies to activities within both profit and non-profit entities.[410]

THIRD PARTY BRIBERY

It is clear from the wording of the bribery offences in the COE, OECD and UN Conventions that bribery is committed if the undue advantage is transmitted directly to a third party recipient rather than being given first to the bribee. The recipient may be anyone irrespective of his/her association with the bribee including, for example, a family member, company, political organisation, trade union or charity. However in cases of active bribery, in order for the Conventions to apply, the public official must be at least aware of the bribe.[411] As explained by the Explanatory Report on the Criminal Law Convention on Corruption:

> The undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point.[412]

Similarly, the EU Convention covers bribes given directly or indirectly to a public official as well as bribes given to third parties.[413] So too do the

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[410]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 2(2).

[411] OECD, *Corruption A Glossary of International Standards in Criminal Law*, (OECD, 2008), p 38.

[412] Explanatory Report on the Criminal Law Convention on Corruption (ETS 173), para 36; see also the Legislative Guide for the implementation of the UN Convention against Corruption (2006), which provides, in similar terms, at para 197 "the undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization."

[413]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), paras 2.2, 2.3 and 3.2; See also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European

active and passive bribery offences contained in the framework decision. However, in contrast to the other Conventions, it does not appear that the public official need necessarily be aware of the bribe for the offence of active bribery to occur.

BRIBERY THROUGH INTERMEDIARIES

All of the international instruments cover bribery involving an intermediary, both where a briber gives, offers or promises a bribe to a bribee through an intermediary, and where a bribee solicits or accepts a bribe through an intermediary. Any person can act as an intermediary and there is no requirement that he or she be connected with either the payer or the bribee.[414]

THE RELEVANT INTERNATIONAL INSTRUMENTS AND THE PCA 1906

In so far as its personal scope is concerned, the PCA 1906 complies with the international conventions under consideration and in some respects even goes beyond them. Specifically, the scope of that Act is not limited to public officials and it applies to all those employed by or acting on behalf of another. In this respect, for example, it covers officials of political parties who are not covered by the conventions. While the OECD WGB has expressed its concern that the PCA 1906 does not cover bribes given to persons working in public enterprises, a term which includes any enterprise directly or indirectly under state control, save for the comments below, this concern does not appear to be well-founded.[415] Specifically, the PCA 1906 applies to all those employed by or acting for another, irrespective of whether they operate in a public or private capacity.

However, there are three main defects in the definition of an agent under the PCA 1906 from the perspective of those conventions in so far

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Union to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5), paras 2.2, 2.3 and 3.3.

[414] see OECD, *Corruption A Glossary of International Standards in Criminal Law*, (OECD, 2008), p 37.

[415] Phase 2*bis*Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2008).

as public bribery is concerned. It is also questionable whether that definition is entirely satisfactory in so far as private bribery is concerned.

PUBLIC BRIBERY

First, it is doubtful whether the definition of an agent encompasses independent contractors. Secondly, it appears that the scope of application of the PCA 1906 is not sufficiently broad to cover all foreign officials falling within the scope of the various conventions. Thirdly, it is not clear that the PCA 1906 covers the situation where the principal consents to the agent accepting the bribe.

Independent Contractors

With regard to the first deficiency, as is clear from the above, the focus of the PCA 1906 is on the agent-principal relationship. As previously mentioned, in framing the offence of bribery in terms of that relationship, the PCA 1906 regards the essential harm / immorality of bribery as the breach of the duty of loyalty owed by an agent to his or her principal.[416] However, it is not altogether clear when such a duty arises for the purposes of that Act. Traditionally, the loyalty owed by an agent to his or her principal stems from the fiduciary character of the relationship. As explained by Millet LG in the UK case, *Bristol & West Building Society v Mothew (t/a Stapley & Co),*[417] the defining characteristic of a fiduciary is:

> ....someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.....[418]

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[416] Law Commission, *Reforming Bribery*(Consultation Paper No. 185), (Stationary Office, London, 2007) p 28; See also Lord Ellenborough CJ in *Thompson v Havelock* (1808) 1 Camp 527; 170 ER 1045, 1046, where he states:"Is it contended that a servant, who has been engaged to devote the whole of his time and attention to my concerns, may hire out his services, or part of them to another?..... No man should be allowed to have an interest against his duty.....there would be no security in any department of life or business, if servants could let themselves out in whole or in part".

[417] *Bristol & West Building Society v Mothew(t/a) Stapley & Co)* [1996] 4 All ER 698.

[418] *Bristol & West Building Society v Mothew (t/a) Stapley & Co)* [1996] 4 All ER 698, 711j-712a; see also the Law Commission, *Fiduciary Duties and Regulatory Rules*

While the definition of an agent for the purposes of the PCA 1906 is broader than the traditional definition of an agent, presumably the relationship is still primarily fiduciary in character and is based on an obligation of loyalty. Any other interpretation would empty the words "agent" and "principal" as used in the act of all their content. However, some relationships are clearly not fiduciary in character.[419] Specifically, in the case of an independent contractor, it is hard to argue that that person has agreed to act for or on behalf of another in a fiduciary sense when carrying out contracts. Consequently, it could be argued that such a contractor falls outside the scope of the PCA 1906. This certainly appears to have been the initial understanding of the PCA 1906. Writing in 1913, Leonard observes that:

> The words "Principal and Agent" are defined and it seems to me that the meaning to be attached to them in the Act is that the agent must be "a person who is either in the employ of a principal or is, if not employed, a person acting for a principal in such a manner as to constitute him a representative or a recognized agent, (...) as distinguished from a person who, whilst in one sense acting for someone else, does not owe to that other person any duty such as a recognized representative or agent must show to his principal.[420]

(Consultation Paper No 124), (Stationary Office, London, 1995), para 1.3, according to which, "[b]roadly speaking, a fiduciary relationship is one in which a person undertakes to act on behalf of or for the benefit of another, often as an intermediary with a discretion or power which affects the interests of the other who depends on the fiduciary for information and advice".

[419] See *Reading v The King* [1949] 2 K.B. 232 which concerned, inter alia whether a British Soldier was in a fiduciary relationship with the Crown, Asquith L.J. observed, at p 236, that "[b]ut the term "fiduciary relation" in this connexion is used in a very loose, or at all events a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose a "fiduciary relation" exists (a) whenever the plaintiff entrusts to the defendant property, including tangible property, as for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise ... and (b) whenever the plaintiff entrusts the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available to him. See also John Breslin,"Banks as Fiduciaries", (1998) 5(2) CLP 47.

[420] Robert Leonard and Edward Fry, *The War Against Bribery*, (Secret Commissions and Bribery Prevention League, 1913), p 23.

More recently, in the Canadian case, *Vici*,[421] a businessman hired a mining engineer and "bribed" him to prepare an inaccurate report. The court held that the defendant was neither an agent nor an employee for the purposes of the equivalent legislation.[422]

Notwithstanding the above, it may well be the case that for the purposes of the PCA 1906, the term "agent" is sufficiently broad to include anyone performing a function under an agreement.[423] Nevertheless, the lack of clarity surrounding the terms "agent" and "principal" as used in the PCA 1906 means that it is difficult to say for sure whether that Act applies to such contractors. As observed;

> The expression "acting for another" in PCA 1906, s.1(2) is somewhat vague. Arguably it includes any person who provides another with his services, even if he is neither an employee nor an agent in the strict sense but an independent contractor acting as a principal in his own right; but it is equally arguable that a person does not act *for* another unless he acts *on his behalf* – that is, as his agent in the strict sense.[424]

In contrast, both UNCAC and the OECD clearly cover the bribery of independent contractors. As mentioned, UNCAC applies to both domestic and foreign public officials exercising a public function. The OECD defines a foreign public official in similar terms. According to the Commentaries to the latter Convention, a "public function" includes any activity in the public interest delegated by a foreign country".[425] Moreover, an activity will always be in the public interest where it is supported by the overarching authority of the State.[426] In this respect:

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[421] *Vici* (1911) 18 C.C.C. 51.

[422] See also *Hospital Products Ltd v United States Surgical Corporation* (1984-5) 156 CLR 41 (High Court of Australia) in which a relationship between a manufacturer and a distributor was held, on the facts, not to be fiduciary.

[423] This at least appears to be the view of the Irish authorities, see e.g. Phase 2*bis* Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2008), p 23.

[424] See e.g. Jacques Parry, Anthony Arlidge, Joanne Hacking and Josepha Jacobson, *Arlidge and Parry on Fraud* 3rd ed., (Sweet and Maxwell, 2007), p 458.

[425] Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997), Commentary 12.

[426] Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997), Commentaries 13 – 14.

> Every other activity carried out following delegation of state powers by a foreign country infers the exercise of a public function within the meaning of the Convention. So a historian charged by an administrative agency to carry out a report on an old building in order to judge its suitability for protection as part of national heritage would qualify as a public official, as would a doctor entrusted with the giving of an opinion on the admission of a particular medicine to the market under public authorization procedures. Equally, a lawyer who comments on a legislative proposal for a Ministry of Justice would qualify as a public official.[427]

Clearly therefore the two aforementioned Conventions require the criminalisation of bribery of independent contractors when carrying out work for the state. The OECD Phase 2 Report on Ireland recommended that:

> Ireland seriously consider amending the Prevention of Corruption Act 2001 to remove any ambiguity concerning whether the prosecution must prove that the foreign public official was an "agent" and whether the agent-principal fiduciary relationship had been violated.[428]

Coverage of Foreign Public Officials

The second deficiency stems from that fact that the PCA 1906 may not cover all foreign public officials within the scope of the OECD, UN and Council of Europe Conventions. As mentioned, the PCA 1906 defines the term "agent" in general terms and then lists a number of foreign

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[427] Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in, Mark Pieth, Lucinda A. Low, and Peter J Cullen(eds),*The OECD Convention on Bribery, A Commentary,* (Cambridge University Press, 2007), p 61.

[428] OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2007); See also OECD Ireland; Phase 2*bis*Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2008), p 24; Note however, that Commentary 3 of the Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997) states specifically that "a statue prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official....could...comply" with Article 1 of the Convention.

public officials included in that term. While other than in these listed cases, the PCA 1906 does not expressly extend to the agents of principals in other countries, in practice there appears to be no reason why it should not apply to such agents. [429] In this respect, as has been observed in relation to the equivalent provisions of the UK PCA 1906:

However, it is not clear from the PCA 1906 whether it is necessary to prove that those persons listed as included in the term "agent" are in fact agents in that they are "employed by or acting for another" or whether this is deemed to be the case. If such proof is necessary, then it may not be possible to adduce it, particularly in the case of officials in countries which are not representative democracies. Specifically, as discussed above, in the context of a representative democracy, the agent/principal paradigm makes a degree of sense:

> In an ideal democracy, politicians are agents of their political supporters; they accept the obligation to act on behalf of particular individuals or groups in exchange for political support. ...From this principal-agent perspective, corruption occurs when agents renege on their agreements with principals in favour of their personal interests.[430]

However, it is questionable whether the agent/principal concept can apply to situations where the public official is not in a position of public trust, for example, where the bribe is given to or solicited by a dictator, or when the person is a member of a royal family in a country where there

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[429] See UK Government White Paper on Corruption, *Raising Standards and Preserving Integrity: The Prevention of Corruption* (Cm 4759, June 2000), para 2.10, which states: "The relationship between agent and principal is central to the concept of corruption as the suborning of an agent..... In many cases, the Agent is acting for, or on behalf of, the public. In this context it is important to note both that this relationship includes persons who have no connection with the United Kingdom and that the public in question can mean the public of another country such as, for example, a foreign public official of any other State, a judge of a court in the United Kingdom or in any other State or a member of a foreign public Assembly."

[430] Thomas D. Lancaster & Gabrielle R. Montionola "Towards a methodology for the comparative study of political corruption"(1997) 27 Crime, Law & Social Change 185 at 190; see also Nico Groenendijk, "A principal-agent model of corruption", (1997) 27 Crime, Law & Social Change 207 at 222, according to whom, "Without doubt, the relationship between voters and politicians in a representative democracy can be considered to be a principal-agent relationship. Voters want politicians to look after their interests, and in exchange provide these politicians with their votes and thus with positions."

are no elected representative institutions.[431] Such a person is neither employed by nor acting for another and to apply an agency – principal concept to such a situation is, to say the least, artificial.

While the PCA 2010 amends the categories of foreign public officials included as agents to cover: any person under the direct or indirect control of the government of any such state, this amendment does not rectify the above problem. Moreover, it was criticised by the OECD Working Group on Bribery. According to that Group, "[a] "foreign public official" is not defined in Article 1(4) of the Convention in terms of control by the foreign government but rather in terms of holding a particular office or "exercising a public function for a foreign country."[432]

Principal's Consent

The third deficiency in the personal scope of the PCA 1906 from an international perspective is that there is some debate as to whether an agency centred approach to bribery covers situations where the principal consents to the payment of the bribe. Specifically, as mentioned that approach considers the wrong of bribery to lie in the breach of trust owed by an agent to his or her principal and there is no such breach if the principal knows of and consents to the payment. As observed by the UK Law Commission:

> It is arguable therefore, that, if C knows all the relevant facts and consents to what is done by A, B or both, that conduct ought not in principle to be caught by the offence.[433]

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[431] See e.g. OECD, Ireland: Phase 2*bis* Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2008)p 23, in which the OECD's Working Group on Bribery expressed doubts as to whether Ireland would be able to prosecute bribery allegations analogous to those in the Al Yamamah arms sales contract. The allegations in that case concerned payment of bribes to various members of the Saudi Arabian royal family.

[432] OECD, Ireland: Phase 2*bis* Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, (2008), p 23.

[433] The Law Commission, *Legislating the Criminal Code: Corruption,* Consultation Paper No. 145 (Stationary Office, London, 1998), p 85; see also Peter Alldridge, "The law relating to free lunches" (2002) 23 Company Lawyer 264 at p 266; Joint

In the UK case, *Horenden*,[434] Romer L.J also emphasised that to constitute a bribe, a gift must be made without the principal's knowledge and consent, observing:

> If a gift be made to a confidential agent with a view to inducing the agent to act in favour of the donor in regard to the transaction between the donor and the agent's principal and that gift is secret between the donor and the agent (that is to say without the knowledge and consent of the principal), then the gift is a bribe in view of the law.

Similarly, according to Crew, explaining the problem with the payments of commissions to agents:

> If it is a profit which arises out of the transaction it belongs to the principal and the agent has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.[435]

This issue of consent could pose problems in applying the PCA 1906 to the bribery of a foreign public company as required by UNCAC and the OECD Conventions. Specifically, where a company is directly or indirectly controlled by the government and the government is aware of and consents to the company receiving the payment, can this be said to constitute a bribe? While in the case of representative democracies, it may be viewed as a bribe on the basis that the principal is in reality the public,[436] as explained above, this is a more difficult argument to make where the government is, for example, a dictatorship. In such cases, it at least arguable that the government is the principal and the fact that it consents to the payment means that the payment is not a bribe within the definition of the PCA 1906.[437]

Committee on the Draft Corruption Bill, Session 2002-2003 HL Paper 157, HC 705 (2003).

[434] *Horenden v. Millhoff* 1900, 83 L.T. 43.

[435] Albert Crew, *Bribes and Bribery in Business* (Jordan & Sons, 1916), p 18.

[436] The Law Commission, *Reforming Bribery*, Consultation Paper 185 (Stationary Office, London, 2007), p 76.

[437] see OECD, Ireland: Phase 2*bis*, Report on the Application of the Convention on Combating Bribery of Foreign Public officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, (2008), p 23.

Private Bribery

As set out above, the private bribery offences in the relevant international instruments each focus on benefits paid to persons who "direct or work for" a private sector entity "in any capacity". It is not clear that the term "agent" is broad enough to cover all persons falling within the scope of those international offences, for example, independent contractors. According to some commentators:

> [o]utside the public domain, the term "agent" must probably be more narrowly construed, so as to apply only to employees and agents in the strict sense (i.e. those who act on behalf of others). A retailer who is described as an "agent" for particular manufacturers, but who is in fact an independent dealer or stockiest, would not appear to be an agent for the purposes of this Act. A bribe offered direct to such a retailer, with a view to securing preferential allocation of products or services, would not therefore appear to be proscribed under the Prevention of Corruption Acts, or for that matter at common law. A briber offered to his agent or employee would be another matter.[438]

Third Party Bribery

In so far as third party bribery is concerned, the PCA 1906 meets the requirements of the international conventions. For example, as in the case of the OECD, COE and UNCAC Conventions a benefit conferred on the spouse of an agent could fall within that Act if, in return, for the benefit, the spouse promised to use his or her influence with the agent to bring about a specified result.[439] However, in contrast to the Conventions, under the PCA 1906, there is no requirement that the agent be aware that a bribe has been offered, given or received by a third party.[440]

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[438] *Blackstone's Criminal Practice* (Oxford University Press, 2012), p 870.

[439] The EU Convention does not cover third party bribery, as it requires that the bribe be given directly or indirectly to the public official, although the official may then pass it on to a third party.

[440] *R v Harrington*, (unreported), 28 September 2000.

Bribery through Intermediaries

As mentioned, under the PCA 1906, where a bribe is given or solicited through an intermediary, both the intermediary and the payer/recipient may be guilty.[441] Specifically, pursuant to the Criminal Law Act 1997, as amended, any person "who aids, abets, counsels or procures the commission of an indictable offence shall be liable, tried and punished as a principal offender."[442] Again the PCA 1906 appears to meet the requirements of the international conventions in this respect.

THE PCA 1906, THE AGENT – PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

The PCA 1906 suffers from a number of short-comings both from the perspective of the inquiries conducted by the PCTs and from the requirements of the relevant international instruments under consideration. In so far as the PCTs are concerned, the key difficulties relate to bribes which pre-date an agent's term as an agent. Specifically, pre-term payments may fall outside the scope of the PCA 1906, which appears to cover only payments offered during the currency of the agency relationship. This may pose particular problems in the case of national elected public officials, in that the Dáil is dissolved once a national election is called. Post-term payments do not present the same difficulties, in particular if based on an agreement made during the currency of the agency relationship. However, it is unlikely that that Act covers pure rewards as these are unlikely to fulfil the *mens rea* requirement.

The PCA 1906 suffers from four main defects from the perspective of the international instruments under consideration, the first three of which are relevant to public bribery and the fourth of which applies to private bribery. First, it is not clear that the term "agent" covers independent contractors. Secondly, the agent-principal model of bribery is difficult to apply in cases of payments made to rulers in non-democratic systems

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[441] see Finbarr McAuley and J. Paul McCutcheon, *Criminal Liability*, (Round Hall, Sweet & Maxwell, 2000) pg. 444 - 445 according to whom "[b]roadly speaking liability for participation encompasses both the intentional influencing of the decision of the principal to commit the full offence and the intentional helping or assisting of the principal to commit the full offence."

[442] Criminal Law Act 1997, s. 7(1).

as such persons cannot logically be regarded as agents for the purpose of that Act. Thirdly, for the purposes of the agency – principal model of bribery, the wrong of bribery is the breach of the duty of trust which an agent owes to his or her principal. There is no such breach where the principal consents to the payment of the bribe and consequently there is a strong argument that such payments fall outside the scope of the PCA 1906. Fourthly, with regard to private sector entities, it is not clear that the term "agent" is sufficiently broad to cover all those who direct or work for such entities, as required by the international instruments: this term may only cover employees and agents in the strict sense.

Not all of these defects are attributable to the agent-principal model as such. Specifically, there appears to be no reason why the agent-principal model could not be expressed in a manner which covers pre-term payments given the probability that these types of payments could give rise to the same type of harm which that model is supposed to combat. In particular, for the purposes of this model, the key question is surely whether the payment is connected with a breach of a duty of trust, and not the time at which the payment is made.

Nevertheless, several of the identified defects are attributable to that model and could be remedied by the introduction of the wider breach of duty model. However, even that model has its limitations in so far as the relevant international conventions are concerned.

Most obviously, the generalised breach of duty model would cover bribery involving independent contractors and is also likely to cover those directing or working for private sector entities so long as in the circumstances of the case, they can be considered to be under a duty to act in good faith when carrying out their duties. Similarly, pre-positional payments should fall within the scope of the offences either because, as in the case of the agent-principal relationship, the key issue is whether a payment is connected with a breach of duty and not whether that duty existed at the time or the payment or, more broadly, because that model covers duties which may arise outside the terms of a formal contract, or prior to the offer / acceptance of a public / professional position. The generalised breach of duty model would also limit the extent to which the principal's consent could negate the existence of bribery.

Specifically, aside from the duty of trust owed by an agent to his or her principal, the breach of duty model also covers other types of breaches of duty. For example, whereas a principal may consent to an agent receiving a payment in connection with the principal's affairs or business, the duty to act in good faith or to act impartially may not in fact be owed to the principal, but to a third party.

However, the breach of duty model is limited in the sense that it does not easily apply to bribery involving certain foreign public officials who are not under a duty to act in good faith, in a position of trust or expected to act impartially. In the UK, this difficulty has been met by "exporting" the duties owed under UK law to evaluate behaviour in other jurisdictions. Consequently whether a relevant duty exists is determined by reference to UK law, rather than the law of the jurisdiction in which the person carries out a relevant function. This approach appears extreme as, ultimately, it means holding people criminally accountable for actions that are not in fact a breach of duty in the context in which they occur but in breach of a duty to which the person is not in fact subject. Another alternative is to include a specific offence dealing with foreign bribery framed to meet the requirements of the relevant international instruments. This alternative is considered in more detail in the last chapter.

Moreover, in certain cases under the breach of duty model, the existence of consent may prevent the existence of bribery. Specifically, in circumstances where the breach in question is a breach of duty owed to a particular person, then it appears that the existence of that person's consent to the receipt of the payment would eliminate any question of impropriety. Consequently, the principal consent problem remains under the broader breach of duty model, although it is a more limited problem than under the agent-principal approach.

The breach of duty model does not logically cover the payment of pure rewards as it is unlikely that a person remains in a position of trust after termination of office. In this respect while the UK Bribery act 2010 does cover rewards, the reward must be connected with a breach of duty while carrying a professional or occupational role. While there is no requirement that the breach of duty must have been motivated by the

expectation of a bribe, in the majority of cases it is the fact that the payment is motivated by an external agreement between the payer and recipient, which makes the exercise of that duty improper in the first place. This means that while the UK Bribery Act may cover a broader range of rewards that the PCA 1906, the circumstances in which a reward will constitute a bribe are still fairly circumscribed. However, given the underlying harm / immorality justifications for criminalising bribery, it is doubtful whether pure rewards should fall within the scope of the bribery offences in the first place. As outlined in the last chapter, a more logical approach would be to deal with them under ethics legislation.

CHAPTER 6: THE OFFER, RECEIPT AND PURPOSE OF THE BRIBE

This chapter considers two issues, first the act of giving or receiving a bribe, and secondly the purpose of the bribe. The first of these gives rise to few difficulties other than resolving the question as to whether, to constitute a bribe, a benefit must be conferred covertly or whether the bribery offences also cover payments made openly and/or disclosed by either the payer and/or the recipient.

In contrast, the second issue raises a number of interesting questions including: how to determine whether any given act or omission is sufficiently connected to the recipient's (or another person's) official and/or professional position; the extent to which the bribery offences do or should cover access, influence or positional payment; the extent to which those offences cover acts which are ultra vires the recipient's or other person's official or professional position; and the extent to which those acts cover payments for equal or fair treatment.

INTRODUCTION

There are two distinct sides to bribery, namely the offer, promise or giving of the bribe, sometimes referred to as active bribery, and the solicitation, acceptance or receipt of the bribe, sometimes referred to as passive bribery. Neither side covers all payments to public officials or other persons. Specifically, in both cases, the payment must be connected with the recipient's or another person's office or position, or with a breach of a duty arising therefrom. While the purpose of the bribe is closely linked to the issue of intent, this chapter considers the type of functions to which the payment must relate, while the issue of intent is then dealt with in the next chapter.

OFFER AND RECEIPT

The issue as to whether a bribe has been "given" or "received" has not been the subject of significant controversy. Nor does it differ significantly depending on the type of immorality or harm which serves as a justification for criminalising bribery. One question which has arisen is whether the bribe must be given or received in secret: in other words,

does bribery cover payments made openly? The advantage of requiring that, to be a bribe, a payment must be given in secret is that it serves to limit the bribery offences to the types of surreptitious payments that people intuitively regard as corrupt.[443] It therefore excludes from the scope of those offences benefits such as gifts and political contributions which could otherwise fall within their scope. Moreover, few dispute that secrecy does in fact surround the payment of many bribes: most people prefer to keep their wrongful acts secret. According to Noonan, for example, one corollary of the illegal nature of bribes is a universal penchant for secrecy.[444] Similarly, Leonard claims that "the very best evidence of corruption is the secrecy characterizing the transaction."[445]

Nevertheless, there are significant drawbacks in making secrecy a determining element of a bribery offence. Specifically, as Lowenstein observes, it "would be anomalous to conclude that an official with enough chutzpah to take bribes openly should thereby become exempt from prosecution."[446] Similar observations apply to those who are simply too inept or too inefficient to keep their bribes secret. Difficulties are also likely to arise in making a secrecy requirement operational. For example, must the parties take affirmative steps to keep their transaction secret, or is mere non-disclosure sufficient?[447] If non-disclosure is sufficient, is this only where a disclosure obligation exists or does it apply in the absence of such an obligation? Must the parties themselves disclose the transaction, or is it sufficient if it becomes

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[443] see Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics", [1985] 32 UCLA Law Rev, p 830.

[444] John T Noonan, *Bribes,* (Macmillan Publishing Company, 1984) p 702

[445] Robert Maynard Leonard and Edward Fry, *The War Against Bribery* (Secret Commissions and Bribery Prevention League, London, 1913), p 23

[446] Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics" [1985] 32 UCLA Law Rev. p 830; Lowenstein also rejects the secrecy requirement on a number of other grounds. In particular he observes that not all secret payments are bribes, and the secrecy requirement would be of no assistance in limiting the scope of the bribery offences as applied to such payments. In addition, he argues that a requirement of secrecy would be difficult to apply to intent issues, namely whether the payment was made with the requisite purpose. see also Mills and Weisberg, "Corrupting the Harm Requirement in White Collar Crime" (2008) 60(5) Stanford Law Review 1371, p 1377, who make an analogous argument about fraud, observing "[s]uch a definitional effort often invokes some concern about deception as the core of the wrong, although there is arguably something unrealistic, if not disingenuous, about the consequent suggestion that the harm of fraud is simply the failure to disclose what would otherwise be corrupt conduct."

[447] Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics" [1985] 32 UCLA Law Rev. p 831.

public through the actions of third parties? More fundamentally, Zimring and Johnson argue that in certain situations there may be benefits to open bribery:

> Just as corruption is, at its core, a use of power, the visibility of corruption can be an advertisement of the corrupt actor's power. Favouring one's relatives and spending vast sums that can only have come from a public treasury are evidence of the great powers possessed by the actor, so that public knowledge of the wrongful act may be a risk worth taking where it demonstrates the magnitude of the offender's power.[448]

Zimring and Johnson also argue that the openness of a payment can be a way of asserting the legality of a payment, which is in reality anything but. In this way:

> [t]he publicly corrupt act becomes a way of asserting its own legality. The openly corrupt activities may serve the offender as evidence that his behaviour is not really wrong.[449]

Significantly, the harm / immorality associated with the breach of duty models is not necessarily dependent on the covert nature of the bribe. This is reflected in the fact that neither the agent – principal model of bribery nor the generalised breach of duty model require that the bribe be given covertly. While intuitively it may be difficult to see how receipt of an overt payment can be a breach of duty, particularly in the private sphere, this is an issue which goes to intent: overt payments are not

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[448]Franklin E. Zimring and David T. Johnson, "On the Comparative Study of Corruption" (2007) 20 Pac.McGeorge Global Business and Development Law Journal 243 at 257.

[449] Franklin E. Zimring and David T. Johnson, "On the Comparative Study of Corruption" (2007) 20 Pac.McGeorge Global Business and Development Law Journal 243 at 257 – 258. Zimring and Johnson also advance another explanation for open bribery. Specifically, they observe that where there has been an evolution in public attitudes towards bribery from tolerance to condemnation, it may take some time before those involved in bribery amend their behaviour to take account of this evolution. They refer to this as the learning curve notion. They also recognise, at p 257 that "[t]he problem with this "learning curve" explanation in the age of the jet-set is that so many intelligent and sophisticated people still seem prone to let favoritism, the conversion of vast sums of governmental resources, and the use of public power for personal gain become public knowledge. It is almost as if there is some benefit to corrupt behaviours becoming well known."

exempt from the scope of either the agent-principal or the breach of duty models of bribery.

OFFICIAL/PROFESSIONAL ACTION

At the core of the various models of bribery is the requirement that the payer must intend to influence the recipient (or another person) in relation to his or her public office or, in the case of private bribery, his or her professional position. There is little difficulty when the thing for which the payment is made falls directly within that person's public or professional competencies. Nevertheless in the case of public bribery, questions have arisen as to whether the bribery offences should apply to all official acts or only those with a sufficient level of formality, involving a more than *de minimis* exercise of public power. There is also the related question as to whether the payment must relate to an actual official act, or whether it is sufficient if made because of the recipient's official position. Difficulties may also arise in determining whether the bribery offences cover actions which only relate indirectly to the recipient's competencies, including for example, where a payment is made in return for access to the bribee or so that the bribee will use the prestige and influence derived from his or her position to the briber's benefit, so called influence peddling. These difficulties tend to be particularly acute when the payment in question is in the form of a political contribution.

Access Payments

Opinions as to whether a payment to grant access to a person is a payment in relation to an official act tend to differ depending on whether the payment is made to a non-elected public official or to an elected official in the form of a political donation. Specifically, some commentators argue that there are sound reasons for treating payments for access as payments for official acts, when made to non-elected public officials. As Hardy observes:

> Courts should not protect officials who provide access to themselves or other officials in exchange for payments that are

> not campaign contributions. Courts that have protected the conditioning of access have done so in order to avoid interfering with normal political activities.... It is neither common nor accepted among officials, however, to exchange access for personal payments.[450]

Nevertheless, difficulties may well arise in determining whether payments given to an official in the form of a gift or in the context of an official's secondary activities are in reality access payments and thus related to an official act.

The position regarding access payments given to elected public officials in the form of political contributions appears to be more nuanced. On the one hand it is argued that "given the realities of an elected official's schedule, an official who conditions access to himself according to a lobbyist's level of campaign contributions has not performed an "official act"...[451] More broadly, it is observed that "[a]ccess by itself is not corruption or its appearance. Favouritism and influence are inevitable in representative politics. Elected officials will respond to those who support them."[452] On the other hand, some commentators observe that "mere" access payments may result in large contributors gaining significant influence among officials. According to this view, an official's "time is so limited that the decision to listen to one person's arguments and information on an issue and not another's is itself an official action."[453] Noonan describes access payments which fall outside the scope of the bribery offences as judicially sanctioned bribes.[454]

While these types of difficulties may arise under both types of breach of duty models, they are more acute in the case of the agent-principal

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[450]Peter D. Hardy, "The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions under the Hobbs Act" [1994] 28 U.Mich J.L. Reform 409, 435.

[451]Peter D. Hardy, "The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions under the Hobbs Act" [1994] 28 U.Mich J.L. Reform 409, 433. Hardy makes this observation in connection with the US Hobbs Act, which he describes, at 409, as "a federal criminal statute which applies to bribery by public officials."

[452]George D. Brown, "The Gratuities Debate and Campaign Reform: How Strong is the Link" (2006) 52 Wayne Law Review, 1371, at 1387.

[453]Daniel H. Lowenstein, "Political Bribery and the Intermediate Theory of Politics" (1985) 32 UCLA L. Rev. 784, 828.

[454]John T Noonan, *Bribes,* (Macmillan Publishing Company, 1984), 689.

model. For example, even if the offer / receipt of an access payment is not in breach of a duty of trust, it may well be in breach of a duty to act impartially and / or in good faith. Consequently, access payments are less likely to fall outside the scope of the generalised breach of duty model.

Influence-peddling

Influence peddling involves using one's influence in government or connections with persons in authority to obtain favours or preferential treatment for another in return for payment. It is sometimes called trafficking in influence or trading in influence. It is useful to distinguish between two types of influence peddling. The first type arises where somebody uses their personal relationship with a person in authority to influence that person's performance of his or her public or professional duties. The second type occurs where somebody uses their own public or professional position to influence another's performance of their public or professional functions. In the first case the person receiving the benefit is clearly not themselves performing an official act when seeking to use their personal relationship with the person in authority to influence his or her performance of an official act. However, in the latter case, the question arises as to whether the use of influence derived from a professional or public position itself constitutes an official act on the part of the recipient of the payment. Answers to this issue may vary. At one extreme, the use of such influence does not in itself constitute an official act while at the other extreme it does. According to an intermediate approach, if the use of the relevant influence falls within the recipient's own functions then it will constitute an official act but if it merely derives from the prestige or influence generally associated with those functions it will not.[455]

As in the case of access payments, and for the same reasons, these difficulties arise under both breach of duty models under consideration, but are most acute under the agent-principal model.

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[455]See e.g. *United States v Rabbitt* 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States v Loftus*, 992 F.2d 1014 (8th Cir. 1993).

THE PCA 1906

The PCA 1906 covers both the offer and receipt of bribes paid on account of "the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business." Irish law also recognizes both inchoate and secondary liability for bribery.

OFFER/RECEIPT OF A BRIBE

Under the PCA 1906, for the purposes of active bribery, the payer must "give", "agree to give" or "offer" the bribe, whereas for the purpose of the passive bribery offence, the bribee/recipient must "accept", "obtain" or "agree to accept" or "attempt to obtain" the bribe.

The PCA 1906 does not define the terms intended to cover the offer or receipt of a bribe. According to Black's Law Dictionary, "to give" means "to transfer or yield to, or bestow upon, another."[456]The verb "to agree" means: "To concur; to come into harmony; to give mutual assent; to unite in mental action; to exchange promises; to make an agreement.[457]The verb "to offer" means, "To bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not."[458]

In so far as the passive bribery offence is concerned, again according to Black's Law Dictionary, the meaning of the term "to obtain" means "To acquire; to get hold of by effort; to get and retain possession of";[459] While there does not appear to be a specific legal definition of the verb

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[456]www.thelawdictionary.org/give.

[457]www.thelawdictionary.org/agree.

[458]www.thelawdictionary.org/offer. These definitions reflect the common definitions of these terms, For example, according to the *Collins English Dictionary*, Millennium Edition (2000), at p 649, "to give" means, "to present or deliver voluntarily (something that is one's own) to the permanent possession of another" and "to transfer (something that is one's own esp money) to the possession of another as part of an exchange"; at p 29, "to offer" means, *inter alia*, "to present or proffer (something, someone, oneself, etc) for acceptance of rejection"; at p 1080, "to agree" is defined, among other things as "to show or express willingness or the intention (to do something)".

[459]www.thelawdictionary.org/obtain; see also *Collins English Dictionary*, Millennium Edition (2000), p 1075.

"accept", it usually includes "to take or receive (something offered)."[460] The verb "to obtain" means "to gain possession of; acquire; get". Finally, with reference to the term "attempt to obtain", the concept of an attempt has a special meaning in criminal law and the criminalisation of an attempt to obtain a bribe in the PCA 1906 is redundant, as an attempt to commit bribery is already an offence at common law, as discussed below.[461]

Attempted Bribery

At common law, attempt is recognised as one of the three relational inchoate offences, together with incitement and conspiracy.[462] Crucially, for the purposes of attempt, the actus reus of bribery has not been completed: inchoate offences "criminalise behaviour that is working towards, or leading up to, the completion of a crime."[463] Haugh J in *The People (Attorney General) v Thornton* described a criminal attempt as "an act done by the accused with specific intent to commit a particular crime."[464] As is clear from this quote, mere intention to commit bribery is not a crime, and an act is necessary for criminal attempt. It is also settled that common law attempt requires more than a mere preparatory act although there is no general agreement as to what constitutes the actus reus of an attempt. As the Law Commission for England and

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[460] *Collins English Dictionary*, Millenium Edition (2000), p 8.

[461] See Law Reform Commission, Consultation Paper, *Inchoate Offences*, (LRC CP48-2008)p 21, according to which "[a] number of substantive offences have their related attempt offence provided for in statute. Attempted murder is provided for in section 11 of the Offences Against the Person Act 1861. Strictly speaking, this provision is unnecessary because once murder is an offence known to the law, the offence of attempted murder automatically exists." The Law Reform Commission further observes, at p 56 "[t]here is no crime of attempt to attempt because the requirement for an act that is more than mere preparation would not be satisfied. In addition, it can be said that merely attempting to attempt a crime would not occasion the requisite mens rea since aiming to bring about a mere attempt means that the target substantive offence is not sought to be completed and, therefore, is not intended." See also Law Reform Commission, Report, *Inchoate Offences* (LRC 99 – 2010).

[462] According to some commentators, at common law only indictable offences can be criminally attempted: it is not an offence to attempt a summary offence. See e.g. Ormerod, *Smith & Hogan Criminal Law* 11th ed (Oxford University Press 2005) at 416. Law Commission for England and Wales Working Paper on Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement (WP No 50 1973) at 73-74 and Report on *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at 54-55.

[463] Law Reform Commission Consultation Paper, *Inchoate Offences*, (LRC CP 48 – 2008),p 2.

[464] The *People (Attorney General) v Thornton* [1952] IR 91, 93.

Wales recognised, "there is no magic formula which can [ ] be produced to define precisely what constitutes an attempt."[465]

In its Consultation Paper on Inchoate Offences, the Law Reform Commission identifies four different approaches to determining the actus reus for attempt:

(i) The proximity theory requires an act close to completing the target substantive offence;

(ii) The "first act" approach is satisfied with any act towards the completion of the target offence;

(iii) The "last act" approach requires the defendant to have done every act necessary on his part to bring about the completion of the target offence;

(iv) The "unequivocal act" approach requires the act to unambiguously bear its criminal intent on its face.[466]

Having reviewed the case law on attempt, the Law Reform Commission recognizes in its consultation paper that the proximity test is the one which most likely represents the law in Ireland.[467]

OFFICIAL/PROFESSIONAL ACTION

As mentioned, the PCA 1906 covers bribes paid on account of an agent "doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business." This formulation is very broad. In particular, it is clear that it covers both acts and omissions. Moreover, the bribe need not relate directly to the agent's office or position and it is sufficient if it relates to the same in any way. In addition, the 1906 Act covers acts which are not at all related to the agent's office or position as long as they are related to his or her

[465]Law Commission, *Report on Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement* (No 102 1980) at paragraph 2.45.
[466]Law Reform Commission, Consultation Paper, *Inchoate Offences*, (LRC CP 48 – 2008) p 22 - 23
[467]Law Reform Commission, *Inchoate Offences*, (LRC CP 48 – 2008), p 42; see e.g. *People (AG) v Sullivan* [1964] IR 169; *People (AG) v England* (1947) 1 Frewan 81.

principal's affairs or business.[468] However, the PCA 1906 does not cover payments made to an agent to do something which falls outside the scope of his or her affairs or those of his or her principal, for example payments made to him or her in another professional or in a personal capacity.

OFFER, RECEIPT AND PURPOSE OF THE BRIBE AND THE PCTS

OFFER AND RECEIPT

The payments inquired into by the PCTs easily fit within the terms "give" "agreed to give", "offer", "accept", "obtain", "agree to accept" or "attempt to obtain" used in the PCA 1906. Specifically, those payments were for the most part given to and accepted by public officials or third persons and a considerable number were in fact solicited by those officials. However, those payments do raise two questions, first, whether the PCA 1906 covers promises and secondly, whether the payment must be given or received covertly.

Promises

As discussed in Chapter 3, the Mahon Tribunal inquired into an instance when a payment appears to have been promised, albeit not subsequently made. Specifically, Mr O'Callaghan lobbied Mr Gerard Leahy to convince Cllr Peter Brady to support Mr O'Callaghan's development plans for Quarryvale. At the relevant time, Cllr Brady was an opponent of those plans, which was a matter of concern to Mr O'Callaghan as he represented an area in close proximity to the Quarryvale lands. In return for Mr Leahy's assistance in convincing Cllr Brady of the merits of the Quarryvale development, Mr O'Callaghan allegedly agreed to appoint Mr Gerard Leahy's employer, Gunnes Estate

[468]See Jacques Parry, Anthony Arlidge, Joanne Hacking and Josepha Jacobson, *Arlidge and Parry on Fraud,* 3rd ed., (Sweet and Maxwell, 2007), p 460. See also *Morgan v. DPP* (1970) 3 All ER 1053, at 1057 where the House of Lords rejected the defendant's claim that to be guilty of bribery an agent must perform some act in direct relation to his principal's affairs or in relation to matters concerning his principal where he owes a duty as an agent.

Agents as either the selling agent or letting agent for Quarryvale, once the development was complete.[469]

While the PCA 1906 does not expressly include the promising of a bribe as an element in the offence, it could be argued that the reference in that Act to "agrees to give" covers promises, although on another view "promise is the wider term because it does not imply a need for agreement on the part of the prospective bribee."[470] In any event, the concept of offering a bribe should also cover promising a bribe, as any promise must surely involve an offer.

Covert Payments

For the most part, payments inquired into by the Flood/Mahon Tribunal were given and received covertly, taking the form of cash payments or cheques made out to cash,[471] sometimes concealed in brown envelopes[472] or newspapers[473] and in the case of payments from corporations almost invariably inaccurately described in company accounts.[474] Nevertheless, in at least some instances, no genuine effort was made to conceal payments which were later to be the subject of inquiry, for example several payments were made by way of personal cheque to a named recipient who duly acknowledged the payment.[475]

The PCA 1906 does not explicitly require that the bribe be paid in secret although, in its original form, one of its main objectives was to deal with "secret payments" made to agents. Specifically, as discussed in Chapter

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[469]According to the Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), at p 849, that Tribunal was satisfied that, in so far as such a commitment was given, it "was given entirely on the basis that Mr Leahy would proceed to lobby the support of Cllr Brady for Quarryvale"

[470] The Law Commission Consultation Paper No 145, *Legislating the Criminal Code: Corruption* (LC 248, 1998), p 64.Albert Crew, *The Law Relating to Secret Commission and Bribes, Christmas boxes, Gratuities, Tips etc* (Sir I. Pitman & Sons Ltd., 1913) p 76.

[471] See e.g. Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1696 – 1704.

[472]See Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012) p 837 – 841.

[473]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, (the Carrickmines Module) p 94.

[474]See e.g. Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012) p 56.

[475]See e.g. Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, p 730

2, the original focus of the PCA 1906 was on private rather than public bribery. It considers the harm of bribery to lie in the breach of the duty of loyalty owed by an agent to his principal. Arguably, this duty is only breached where the principal is unaware of the payment. The importance of the principal's knowledge is clear from the UK case *Parker v M'Kenna*,[476] which predates the 1906 Act and in which the court observed:

> An agent must account to his principal for every benefit or profit obtained in the course or by means of his agency and pay over to the principal such benefit or profit if acquired without the principal's knowledge and consent.

Similarly, Crew, when considering the term "corrupt" as used in the PCA 1906 emphasised the covert nature of the bribes, suggesting that that term covers instances where "an agent wilfully and deliberately acts with a view of obtaining some benefit from a third party either for himself or for another without the consent and knowledge of his principal."[477] Moreover, according to Sir Rufus Isaacs, commenting on the practice of giving agents Christmas boxes and other seasonal gifts shortly after the enactment of the PCA 1906:

> Whenever a man feels any doubt as to whether or not the payment he has been in the habit of making (...) at this season of the year is legitimate, the safest thing is to make it perfectly clear what he is doing, by giving notice to the employer of the person to whom he is making it.[478]

Despite this early emphasis on covert payments, there is nothing in the wording of the PCA 1906 to exclude payments given or received overtly from constituting bribes under that Act. The view that the PCA 1906 covers the overt giving or receipt of bribes is supported by a presumption of corruption set out in the Prevention of Corruption (Amendment) Act 2001. Pursuant to the relevant section a presumption of corruption arises where the recipient of a political donation fails to

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[476]*Parker v M'Kenna*, (1874) 10 Ch., 96.

[478]See Robert, Leonard and Edward Fry, *The War Against Bribery,* (Secret Commissions and Bribery Prevention League, London, 1913), p 18.

disclose that donation in accordance with the requirements of the Electoral Act 1997, as amended. This suggests that while disclosing a donation pursuant to that Act will prevent the presumption from arising, it will not necessarily hinder a prosecution for bribery on the basis of that donation. However, the covert nature of the payment will doubtlessly prove relevant in considering the issue of *mens rea*.

PURPOSE

The extent to which the PCA 1906 covers the purposes for which the payments inquired into by the PCTs were made raises some difficult issues. While some of those payments were made in respect of acts or omissions which were entrusted to the relevant public official by statute, to the extent that others related to his or her office, then it was by dint of custom or usage. Some payments were made for access purposes or to induce the recipient public official to exercise influence over another public official. Moreover, a number of payments appear to have been related to the public official's position itself, rather than to any specific act or omission. The Flood/Mahon Tribunal also inquired into payments made for fair treatment, in other words, to prevent abuse of public office. It also inquired into payments made to a public official relating to matters which purportedly fell within his or her official competence, but did not actually do so. Three of the PCTs inquired into payments claimed to be linked to the recipient public official's secondary employment rather than any of that recipient's official functions.[479]

[479]For example, the McCracken Tribunal inquired into payments made to Mr Michael Lowry's company, Streamline Enterprises, as well as a number of payments made to him individually and claimed to have been paid for consultancy work (see Report of the Tribunal of Inquiry (Dunnes Payments)(1997), p 31). For its part, the Moriarty Tribunal inquired into payments made to Mr Haughey which were claimed to be connected with his stud farm (see Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 105-106). The Mahon Tribunal inquired into a significant number of payments which were claimed to relate to the recipient's secondary activities including in particular, several payments made to Mr Ray Burke (see the Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002) , p 15) and to Mr Liam Lawlor (see in particular Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments Vol III (2012), Chapter 16).

Acts Entrusted by Statute

In a number of instances, the PCTs inquired into payments which directly related to functions entrusted to public officials pursuant to statute. For example, the Mahon Tribunal inquired into a number of payments made to local councillors in return for their signature, and/or support for rezoning motions. At the time those payments were made, the powers of local councillors in the areas of land-use and development were set out in the Local Government (Planning and Development) Act 1963 as amended. There is no difficulty in applying the PCA 1906 in instances where public officials receive corrupt payments in return for exercising their statutory functions.

Acts Entrusted by Custom and Usage

Other payments inquired into by the PCTs related to acts or omissions customarily performed by public officials but which do not have a statutory basis. For example, the Moriarty Tribunal inquired into the connection between payments made to Mr Charles J Haughey by a businessman, Mr Ben Dunne and Mr Haughey's intervention in Revenue's dealings with Mr Dunne's family within weeks of becoming Taoiseach on March 10, 1987.[480] It found there to be a connection between Mr Dunne's payments to Mr Haughey and Mr Haughey's contact with Revenue.[481]

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[480] See Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), Chapter 16. In the mid-1960's Mr Bernard Dunne Snr and his wife, Mrs Nora Dunne placed the assets of the Dunnes Stores business in a Discretionary Trust in order to protect them from tax. Subsequently, two issues arose relating to that trust. First, in 1984 the trust became liable to Discretionary Trust tax which was calculated on the basis of the value of the trust assets. This raised the question of the value of those assets. The second issue related to the calculation of capital gains tax on the trust assets. Shortly after becoming Taoiseach, Mr Haughey requested the then Chairman of Revenue, Mr Parceir to meet with Mr Dunne, which he did some days later and on 3 – 4 subsequent occasions. In relation to the valuation of the trust assets, Revenue and the Dunnes Stores Trust reached a compromise on March 16, 1987 on the basis of an agreed valuation of £82 million. By the time the discretionary trust tax was paid on May 25, 1987, the Revenue was also owed accrued interest of £62,450. However, Mr Parceir had this sum waived. Regarding the capital gains tax liability, prior to Mr Haughey becoming Taoiseach, Revenue had sought in the region of £38.8 million from the trust. Subsequently, after his meeting with Mr Dunne, Mr Parceir offered a settlement of £16 million. This was irrespective of the fact that the trust had not made a settlement offer or counter offer.

[481] See Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 395, which observes as follows: "Again having regard to the totality

At the time of Mr Haughey's intervention, the Revenue's operational independence was established as a matter of principle or convention.[482] Mr Haughey's intervention therefore did not fall within his statutory remit. Nevertheless, the Moriarty Tribunal also noted the existence of the "fairly regular practice"[483] of the Chairman of Revenue "receiving letters from politicians, including Government Ministers, urging more favourable treatment on behalf of constituent tax payers."[484] This raises the issue as to whether the PCA 1906 covers acts falling within an agent's remit by virtue of custom and usage. There does not appear to be any direct case-law on this issue under the PCA 1906, either here or in the UK. However, in the US Supreme Court's century-old decision in *United States v. Birdsall*[485] that Court recognized that for a public officer's action to be "official," for the purposes of the relevant bribery offences:

> it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and

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of the evidence heard, the substantial payments made by Mr Dunne to Mr Haughey must be regarded as payments primarily motivated by his resumption of Office of Taoiseach in 1987, as referred to in paragraph (a) of the Tribunal's Terms of Reference, and accordingly, Mr Haughey's contact with Revenue constitutes an act within paragraph (d) of those Terms of Reference. What may have been actually stated by Mr Haughey must in all probability remain a matter of conjecture, but in the light of the close temporal link between Mr Parceir's reappraisal of the merits of the assessment which, in the view of the Tribunal, amounted to nothing short of a complete about turn in the consistent thinking of Revenue over the previous two year period, the connection cannot be tenably regarded as purely coincidental.

[482] This operational independence was based on a Dáil Statement from 28 February 1923. In the course of the Dáil debate on the Revenue Commissioners Order, the then President of the Executive Council, Mr. W. T. Cosgrave, stated: "In article 9 it is pointed out that 'The Revenue Commissioners shall in the exercise of their duty be subject to the control of the Minister for Finance, and shall obey all orders and instructions which may be issued to them in that behalf by the Minister for Finance'. In that connection I wish to draw the attention of the Dail to the fact that in this clause the control of the Minister for Finance will extend to civil service matters, but will not affect the computation of any individual as to his liability to any tax." Section 101 of the Ministers and Secretaries (Amendment) Act 2011, now places that independence on a statutory footing.

[483] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 396

[484] Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 397

[485] *United States v Birdsall* 233 U.S. 223 (1914).

> fixed the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.[486]

This approach was subsequently confirmed in a number of cases. In particular, the court, in *United States v Biaggi*, relied on *Birdsall* to rule that official acts in the bribery statute "encompass[ed] all of the acts normally thought to constitute a congressman's legitimate use of his office."[487] Similarly, in the recent case of *United States. v Jefferson*, the Court of Appeal of the Fourth Circuit explicitly followed *Birdsall*, and endorsed the lower courts instruction to the jury to the effect that to be an "official" act, the act must first "be among the official duties or among the settled customary duties or practices of the official charged with bribery."

While these cases focus on interpreting the term "Official Act" for the purposes of the US federal bribery statute, their approach appears to be correct. Specifically, in determining whether an act or omission relates to an agent's office or position, reference should be made not only to those which are explicitly acknowledged by statute to relate to it, but also those which are otherwise recognized as part and parcel of that office or position. There does not appear to be any convincing rationale for excluding payments for acts which public officials perform by dint of custom or usage from constituting bribes, if the other requirements of the PCA 1906 are met. Indeed, the inclusion of such acts in the scope of the PCA 1906 may be of particular significance given the parochial nature of much of Irish politics, whereby politicians do favours for people and in return are awarded with their support at the next election.[488]

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[486] *United States* v *Birdsall* 233 U.S. 233 (1914), 230 – 231.

[487] *United States v Biaggi*, 853 F.2d 89, 97 (2d Cir. 1988).

[488] There is much dispute as to whether politicians can offer effective assistance to their supporters. See John Coakley and Michael Gallagher, *Politics in the Republic of Ireland*,4th ed., (Routledge, 2006),p 242 - 251. While commentators frequently refer to the "clientelist' nature of Irish politics, according to these authors, it is more accurate to speak of "brokerage". They explain, at p 253, that "a broker deals in access to those who control resources rather than directly in the resources themselves. ... The main difference between brokerage and clientelism is that clientelism implies a more intense, more permanent relationship. .....Thus to say that Irish politics is characterised by clientelism would suggests that TDs have clienteles, sizeable bodies of people who are

Inclusion of acts performed by dint of custom and usage would mean that were such favours to be carried out in return for benefits, they could well fall within the scope of the bribery offences.[489]

In any event, as discussed, the PCA 1906 covers not only acts falling within the remit of the agent's own functions but also those relating to his or her principal's "affairs or business". Consequently, where an elected official makes representations on behalf of a constituent and these representations do not fall within his or her own functions but do relate to the exercise of state power, then they appear to be covered by that Act. In this respect, it appears clear from the case-law that a principal's affairs or business includes any matter in which the principal is interested *qua* principal. This was the approach taken in the UK cases, *R v Majeed* and *R v Westfield*[490], cases in which the appellants were appealing their convictions, following guilty pleas, for "spot fixing". Majeed was an agent for a number of cricketers representing Pakistan. It was alleged that he had conspired with three Pakistani cricketers, who had been employed by the Pakistani Cricket Board, corruptly to give them money as an inducement to or reward for doing acts in relation to the affairs of their employer, namely to identify in advance occasions during a test match series between Pakistan and England when they would play in a specific, previously agreed manner. Westfield was a cricketer contracted to Essex County Cricket Club. He was charged with accepting or obtaining corrupt payments contrary to s.1(1) of the 1906

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directly linked to them and who are in some way in their debt. (....) To say that Irish politics is characterised by brokerage would imply that there are many people who do not have dealings with TDs, and that even those people who do use TDs as brokers are not under any direct obligation to them." However, irrespective of the differences between clientelism and brokerage, there is a widespread view that the role of the politician as "a fixer" is critical to their electoral success. See in this regard, Neil Collins and Mary O Shea, "Clientelism: facilitating rights and favours" in Mary Adshead and Michelle Millar (eds), *Public Administration and Public Policy in Ireland: theory and methods*, (Routledge 2003), p 96 according to whom "[C]ultivating a substantial personal following is seen as a sure way of guaranteeing an adequate share of first preference votes and the way to ensure such a following seems to be to offer a 'better service' to constituents than any other TD including fellow party members. It sometimes seems that the term 'hard worker' is the best accolade that a politician can possess."

[489]For example, the practice of TDs' making or passing on to the Minister for Justice representations on behalf of constituents charged with or convicted of crimes has been the focus of much criticism and if a TD does so in response to a payment of one kind or another, there appears to be no reason why such behaviour should fall outside the bribery offences.

[490]*R v Majeed* and *R v Westfield*[2012] EWCA Crim 1186; [2012] 3 ALL E.R. 737.

Act on the basis that as an employee of that Club, he had corruptly accepted or obtained money for agreeing whilst playing for the club in a particular match, to bowl in a manner calculated and intended to allow the scoring of runs. Both Majeed and Westfield appealed their convictions on the basis that the bribes did not relate to the principal's affairs or business. According to the appellants, the payments were solely connected to acts or omissions which were personal to them and the boards did not and were not expected to do anything by way of response or as a reaction to the giving and acceptance of the bribes. The Court of Appeal rejected the appellants' arguments. According to Lord C.J., giving judgment:

> In this case the Boards were not involved in the activities of their players. Indeed they were unaware of them. If they had been aware of them, they would have done their best to prevent them. That is because the activities were immensely damaging to their affairs. In short, the Boards were victims of these corrupt activities. There could, in the language of the section, be no clearer indication that the actions [of the appellants] ..... arose in relation to the boards' affairs or business.[491]

This case suggests that the bribery offences apply to any acts performed by an agent who is a public official in return for a corrupt payment as long as those are acts in which the public is interested in its capacity as that agent's principal. This is likely to include many if not all acts performed by public officials on the basis of custom and usage.

Influence Peddling

The PCTs also inquired into a number of payments whose purpose was, at least in part, to induce an official to exercise his or her influence over another public official. For example, the Flood/Mahon Tribunal inquired into several payments made to Mr Liam Lawlor because of his influence or purported influence at national or local level. Specifically, Monarch properties, which was seeking the rezoning of land in Cherrywood, Co Dublin, paid Mr Lawlor at least £72,800 in the years after he lost his

[491] *R v Majeed* and *R v Westfield*[2012] EWCA Crim 1186; [2012] 3 ALL E.R. 737 [2012] EWCA Crim 1186, para 24.

seat as a local councillor.[492] Although he remained a TD throughout the relevant period, he did not represent the Cherrywood area.[493] The Flood/Mahon Tribunal found that those payments were made because Monarch perceived Mr Lawlor "as a person with influence over certain Fianna Fáil councillors within the Council."[494] The above mentioned inquiry by the Mahon Tribunal into Mr O'Callaghan's agreement with Mr Gerard Leahy to influence Cllr Peter Brady in support of Quarryvale is an example of an instance where an alleged benefit was paid to someone to use his influence over a public official, in circumstances where that person was not himself a public official. Mr Haughey's intervention with the Revenue on behalf of Mr Dunne, discussed above, could also be viewed as an instance of influence peddling.

As the PCA 1906 covers third party bribery, any payment to a person on account of an agent doing or failing to do something in relation to his or her official or professional position is capable of constituting a bribe. This means that instances like those involving Mr Lawlor and/or Mr Leahy are capable of falling within the scope of the bribery offences: as long as the person whom it is sought to influence, is an agent, it is immaterial that the benefit is paid to someone other than that person, or whether or not the agent is even aware of that payment.

Position Payments

The PCTs inquired into a number of payments which appear to have been solely motivated by the recipient public official's position, rather than being made for the purpose of that official doing or failing to do something specific in connection with that position. In particular, this was a feature of a significant number of the payments received by Mr Charles Haughey and inquired into by the McCracken and Moriarty Tribunals. For example, in relation to the numerous payments made by

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[492]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, (2012) Vol II, p 1601.

[493]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, (2012) Vol II, p 1601.

[494]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, (2012) Vol II, p 1606. The Mahon Tribunal also considered payments made by Green Property to Mr Lawlor of £52,000. In relation to these payments, it said it was satisfied, at Vol III, p 2417 of its Final Report, that Mr Lawlor had "simply sought financial recompense for the use of his political influence, both as a councillor and as a TD, on behalf of Green Property."

or on behalf of Mr Ben Dunne to Mr Haughey, the Moriarty Tribunal concluded:

> the payments made by Mr Dunne to Mr. Haughey were all substantial payments and were all made in circumstances giving rise to a reasonable inference that the motive for making the payments was connected with the office of Taoiseach held by Mr Haughey....[495]

That PCT also inquired into a number of indirect payments to Mr Haughey, several of which were made to a company, Celtic Helicopters, which was partially controlled by Mr Haughey's son. In relation to some of these payments, the Moriarty Tribunal considered "it is reasonable to conclude that the motive for making the payments was connected with the office of Taoiseach formerly held by Mr Haughey at that time."[496] Other payments made to Celtic Helicopters were significant in that the Moriarty Tribunal found that they were motivated not by Mr Haughey's existing position, but either in anticipation of his being Taoiseach or in recognition of his having been Taoiseach. For example, in respect of payments made at the time of Celtic Helicopters establishment and initial capitalization, the Moriarty Tribunal considered that they were each connected with the office of Taoiseach formerly held by Mr Haughey and which he had the real potential to hold again.[497] The Moriarty Tribunal found a number of other payments made to Celtic Helicopters, to have been made in circumstances "giving rise to a reasonable inference that the motive for making the payment was connected with the office of Taoiseach, formerly held by [Mr Haughey]".[498]

The Moriarty Tribunal also inquired into the circumstances in which Allied Irish Bank discounted £393,000 off a loan which that bank had made to Mr Haughey. While the Tribunal accepted that the bank did not

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[495]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 239.
[496]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 288.
[497]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 277 – 278.
[498]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 271.

seek to influence the manner in which Mr Haughey discharged his public office, it observed:

> What the evidence rather discloses is a deference towards Mr Haughey and a disinclination to address or curb his excesses as a banking customer which built up over several years, which became increasingly pronounced when he became a Government Minister, and which attained particular prominence when the settlement was arrived at in the immediate aftermath of his becoming Taoiseach.[499]

The PCA 1906 does not appear to cover positional payments. Specifically, according to the wording of the relevant provisions, in order to be a bribe, a payment must be made on account of the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business. Payments made only because of a public official's position do not fulfil this requirement.[500] This interpretation is confirmed by the presumption of corruption contained in the Prevention of Corruption Act 1916, s. 2. According to that section a benefit paid to a public official from a person seeking a public contract is presumed to have been given or received corruptly in connection with that contract, unless the contrary is proven. This suggests that the public official can rebut the presumption by breaking the connection between the benefit and the contract irrespective of whether the payment is in fact connected with his or her position as a public official.

Abuse of Office

The Flood/Mahon Tribunal inquired into two payments made for the purpose of preventing the recipient, or another person, from abusing their public office as well as another payment paid for fear of negative repercussions if the payment were not made. Specifically, the developer, Mr Tom Gilmartin paid the Fianna Fáil party £50,000 in

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[499]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 68.

[500]This applies to pure positional payments. Goodwill payments may be made for the purpose of influencing an official act and such payments are considered in the next chapter.

response to a suggestion on the part of Mr Padraig Flynn, then Minister for the Environment, that a substantial donation could help ease or remove obstacles and difficulties then being faced by Mr Gilmartin in relation to the Quarryvale rezoning project: Mr Gilmartin perceived these obstacles and difficulties to be improper or unlawful.[501] Similarly, a developer, Mr Owen O'Callaghan paid the Fianna Fáil party £80,000 in response to a letter from that party seeking a substantial donation from him. At the time of the payment, Mr O'Callaghan was in some financial difficulty and the Mahon Tribunal was satisfied that he:

> felt himself compelled to make this substantial payment to the Fianna Fáil party in circumstances where his company was obliged to use borrowed funds in order to do so, because of his concern, (be that perceived or real), that a failure on his part to so contribute would impact negatively on his efforts to secure Government support and financial assistance for the Stadium project.[502]

While the above payments involved elements of extortion, bribery and extortion are not mutually exclusive, as discussed later. Specifically, the PCA 1906 covers payments made in relation to an act or omission, irrespective of whether the payer was paying for better treatment or merely fair treatment, although this question may be relevant in determining whether a bribe was paid "corruptly". In this respect, there appears to be nothing to prevent the PCA 1906 from applying to payments of the type made to Mr Lawlor or to Fianna Fáil.

Acts purportedly within Public Office

The Mahon Tribunal inquired into a particular instance where payments were made to Mr Lawlor on the basis of representations made by him that he could assist the company by virtue of his official position. The

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[501]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 237. These problems included: difficulties in purchasing lands at Irishtown from Dublin Corporation; demands of money by Mr Lawlor, Mr Redmond (then County Manager) and Cllr Hanrahan; a £5m demand from an unidentified individual at Leinster House; and an intimidating phone call from a person who identified himself as "Garda Burns". See p 244 – 245.

[502]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 730.

company in question was a UK company, Arlington Securities Ltd. which hoped to develop a site in Dublin city centre. Mr Lawlor arrived, uninvited, to a meeting at Arlington's London head office in May-June 1988, claiming to be a representative of the Irish Government and, also, that he could help Arlington through the corridors of power. Arlington subsequently paid Mr Lawlor almost £75,000.[503] The Tribunal found that these payments were attributable to the fact that:

> on the basis of Mr Lawlor's representations, Arlington believed that Mr Lawlor was so close to the Government and the authorities in Dublin that a failure on their part to make significant payments to him might result in a lack of support by the Government and those authorities for the proposed development at Bachelor's walk, rendering the aims of that project more difficult to achieve.[504]

While Mr Lawlor's behaviour clearly constituted trading in influence, it is not at all clear that Mr Lawlor in fact had the powers he claimed to have in that meeting with Arlington, thus raising the question as to whether the PCA 1906 applies in cases where a public official purports to have powers which he or she does not actually have. There does not appear to be any direct case-law on this point, but arguably such behaviour on the part of a public official would be more appropriately prosecuted as fraud, than bribery.[505] Nevertheless, historically at least, it appears that bribery covered such situations. Specifically, that offence occurred either where a judge accepted payment for doing his office or "by colour of his office".[506] This latter situation applied to instances where the judge's act or omission did not fall within the scope of his office per se, but that office provided cover for his corruption, giving it the "colour of official right". In other words, the term "colour of office" "limits these crimes [bribery and extortion] to payoffs for official acts or acts that

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[503]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 139.

[504]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 139.

[505]In *United States v Mazzei* 521 F.2d 639 (3d Cir. 1975) the court held, at 641, that "[a] violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office..."

[506] See James Lindgren, "The Theory, History and Practice of the Bribery-Extortion Distinction"(1992) 141 U.Pa.L.Rev 1695, 1725.

appear to be official acts" (emphasis added).[507] To the extent that Mr Lawlor's office gave credibility to his demands, the bribery offences would appear to apply. In any event Mr Lawlor's behaviour would appear to constitute attempted bribery, an issue which is discussed in more detail below.

In so far as the payer is concerned, the offence of bribery still appears relevant as he or she is still making the payment for the purposes of influencing an official act, which is one of the types of behaviour which the bribery offences seek to curtail.

Secondary Employments

The inquiries conducted by the Mahon Tribunal illustrate the difficulties posed by payments made in the context of both secondary and post-term employments from a bribery perspective, in instances where there is a close connection between those employments and an official's existing or former public functions. Specifically, payments made as reimbursement for activities carried out in the course of a public official's secondary activities do not constitute bribes for the purpose of the PCA 1906 as they do not relate to his or her office or position.[508] Nevertheless, it may not always be easy to distinguish between payments made in the context of such activities and payments relating to the agent's position as agent. This issue is probably best illustrated by payments made to Cllrs Ann Devitt and Sean Gilbride.

Cllr Devitt was engaged by Rayband Ltd, which owned lands at Lissenhall, Co Dublin to negotiate with the Eastern Health Board to relocate a planned roundabout, in order to facilitate the grant of planning permission for the Lissenhall lands. Cllr Devitt was a member of the council to which the planning application was to be made, and was also a local authority member of the Eastern Health Board. In her

[507]James Lindgren, "The Theory, History and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev 1695,1728; see also James Lindgren "The Elusive Distinction between Bribery and Extortion: From the Common Law to the Hobbs Act, (1988) 35 UCLA L. Rev. 815, at 863 "[a]t English common law 'under colour of office' meant by reason or pretense of office, not by virtue of office." Moreover, as discussed, early cases of bribery were frequently prosecuted as extortion and it appears well established that people pretending to be public officials could commit extortion See further, Lindgren, p 908

[508]See e.g. *R v Leslie Ernest Mills* (1979) 68 Cr. App R. 154.

professional capacity she provided legal services, including negotiation advice.[509] While clearly there was a conflict of interest between Cllr Devitt's professional and public roles in this instance, it is not clear that the payments made by Rayband to her in her professional capacity would fall within the definition of bribery set out in the PCA 1906 on the basis that they were not connected with acts or omissions performed in relation to her position as agent, or her principal's affairs or business.

In Cllr Gilbride's case, he was effectively employed by Mr O'Callaghan as part of his Quarryvale team, at a time when he was an elected local councillor and seeking national public office. In conducting his canvassing, Cllr Gilbride actively supported Quarryvale, without however disclosing his relationship with Mr O'Callaghan. As in the case of Cllr Devitt, it is not clear that such payments would fall within the PCA 1906.

OFFER, RECEIPT AND PURPOSE OF THE BRIBE AND THE RELEVANT INTERNATIONAL INSTRUMENTS

OFFER AND RECEIPT

In so far as active bribery is concerned, the OECD, COE and UNCAC Conventions require their signatories to criminalise the "offering", "promising" and "giving" of a bribe. These are also the terms used by the Framework Decision. The EU Convention refers to bribes which are promised or given, but not offered.

According to the OECD's *Glossary on International Standards in Criminal Law* "offering" occurs when a briber indicates that he/she is ready to provide a bribe.[510] "Promising" deals with a briber who agrees with the official to provide a bribe (e.g. where the briber agrees to a

[509]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 1879 – 1874.

[510] see the Explanatory Report on the Criminal Law Convention on Corruption (ETS 173), para 36 which states that "Offering" may cover situations where the briber shows his readiness to give the undue advantage at any moment; see also OECD, *Corruption A Glossary of International Standards in Criminal Law* (2008), pg 26; see also Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds),*The OECD Convention on Bribery* (Cambridge University Press, 2007), p 109.

solicitation from the public official).[511] In neither case is there any requirement that the bribe be actually given.[512] In contrast, "giving" occurs when the briber actually transfers the undue advantage.[513] It is irrelevant whether or not the public official actually receives it.

With the exception of the OECD Convention, each of the other instruments also address passive bribery. Pursuant to the COE Convention, the EU Convention, and the Framework Decision, passive bribery involves the request or receipt of a bribe.[514] According to the Explanatory Report to the COE Convention, requesting may "refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from."[515] In contrast, receiving "supposes at least some kind of acceptance by the public official".[516] While under UNCAC,

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[511] Explanatory report on the Criminal Law Convention on Corruption (ETS 173), para 36 which provides that: "Promising" may, for example, cover situations where the briber commits himself to give an undue advantage later (in most cases only once the public official has performed the act requested by the briber) or where there is an agreement between the briber and the bribee that the briber will give the undue advantage later." See also OECD *Corruption A Glossary of International Standards in Criminal Law* (2008).

[512] Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds) *The OECD Convention on Bribery* (Cambridge University Press, 2007), p 110.

[513] OECD, *Corruption A Glossary of International Standards in Criminal Law* (2008).

[514] see Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Articles 3 and 5.

[515] Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173), para 41; see also OECD, *Corruption A Glossary of International Standards in Criminal Law,* p 27; See also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5), para 2.2 which provides that requesting includes "a unilateral act by an official who requests a benefit for himself by letting it be known to another person explicitly or implicitly, that he will have to 'pay' to have some official act done or abstained from; it is immaterial whether the request is acted on, the request itself being the core of the offence."

[516] Explanatory Report on the Criminal Law Convention on Corruption(ETS 173), para 42; see also OECD, *Corruption A Glossary of International Standards in Criminal Law* s, p 27; See also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5), para 2.2 which provides that accepting and receiving includes "acceptance or receipt by the offender of certain things pursuant to a meeting of minds between himself and the giver; the offence is complete when consents have been exchanged, even if the official subsequently waives performance of the agreement or returns the thing received."

the public official must "solicit" or "accept" the bribe, it appears that nothing turns on this difference in wording.[517]

THE PURPOSE OF THE PAYMENT

Public Bribery

Each of the Conventions essentially identifies the wrong of bribery as being a payment made for the purposes of exerting an improper influence on a public official. For example, the COE Convention covers bribery of a public official "to act or refrain from acting in the exercise of his or her functions." The OECD Convention requires that the advantage be offered, promised or given "in order that the official act or refrain from acting in relation to the performance of official duties." For its part, UNCAC covers advantages promised, offered, given, solicited or accepted "in order that the official act or refrain from acting in the exercise of his or her official duties." The EU Convention applies to the bribery of an official "to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties".

As is clear from their wording, the Conventions cover both acts of and omissions by a public official. For the purposes of the EU Convention, the relevant act or omission sought pursuant to the payment of the bribe must fall within the official's areas of competencies. In this respect, that Convention applies "to performance of, or abstention from performing, any act within the powers of the holder of the office or function by virtue of any law or regulation (official duty) in so far as the acts are carried out in breach of the official's duties."[518] In contrast, the OECD Convention focuses on acts "in relation to" the performance of official duties. Consequently, it also covers situations where a public officer, while not acting strictly speaking within his or her areas of official competence,

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[517] Nevertheless, a significant difference between the COE and EU Conventions, on the one hand and UNCAC on the other, is that the latter does not require State parties to criminalise passive bribery of foreign public officials but merely requires that "they consider adopting such legislative and other measures" see United Nations Convention against Corruption (2003), Article 16.2.

[518] See also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5), para 2.6.

uses the influence and access derived from his or her public functions to realize a personal benefit. In this respect, that Convention targets acts or omissions "which include those falling outside the official's authorised competence."

> The OECD Convention, therefore, is not confined solely to bribery involving a quid pro quo between the offeror and the government's decision-maker. The Convention takes corruption a small step further by incorporating the notion of misuse by an intermediary of the accoutrements of office: that is the employment of one's influence and access to other parts of government to realize a personal benefit.[519]

For example, the OECD Convention covers situations in which a company executive bribes a senior official of a government in order that he or she use his office – though acting outside his competence – to make another official award a contract to that company.[520]

Like the EU Conventions, both the COE Convention and UNCAC only appear to cover acts falling within the scope of the public official's own competencies. Nevertheless, both those Conventions also provide for the offence of trading in influence which would cover situations where a public official misuses the influence and access derived from this official position.[521] However, in so far as UNCAC is concerned, this offence is not mandatory.[522]

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[519] Peter J. Henning, "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law" (2001) 18(3) Arizona Journal of International and Comparative Law, (2001) p 793 at 818.

[520]Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (1997), Commentary 87.

[521] The crime of "Trading in Influence" is defined under the Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999)as: "[Intentionally] promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself of herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."The United Nations Convention Against Corruption (2003) also provides for such an offence, although the article in question is non-mandatory.

[522]See United Nations Convention Against Corruption (2003), Article 18.

Significantly, the OECD Convention does not require the criminalization of facilitation payments, because such payments are not made to distort official decision-making.

Private Bribery

In the case of private bribery, the COE Convention, UNCAC and the EU's Framework Decision each provide that the purpose of the bribe must be to induce a person directing or working for a private sector entity to perform or refrain from performing any act, in breach of that person's duties. However, as discussed, for the purposes of the COE Convention, the offence must also be committed in the course of business activity.

According to the *Explanatory Memorandum on the Criminal Law Convention*, the requirement that the purpose of the bribe be to influence a person in breach of their duties aims not only at:

> ensuring respect for specific contractual obligations but rather to guarantee that there will be no breach of the general duty of loyalty in relation to the principal's affairs or business. The employee, partner, managing director who accepts a bribe to act or refrain from acting in a manner that is contrary to his principal's interest, will be betraying the trust placed upon him, the loyalty owed to his principal. This justifies the inclusion of private sector corruption as a criminal offence. The Convention, in Article 7, retained this philosophy and requires the additional element of "breach of duty" in order to criminalise private sector corruption.[523]

According to the EU's Framework Decision:

> "breach of duty" shall be understood in accordance with national law. The concept of breach of duty in national law should cover as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a

[523] Council of Europe, Explanatory report on the Criminal Law Convention on Corruption (ETS 173), para 55.

person who in any capacity directs or works for a private sector entity.[524]

THE PCA 1906 AND THE RELEVANT INTERNATIONAL INSTRUMENTS

Overall, the PCA 1906 complies with the international conventions under consideration in so far as both the acts of bribery and the purpose of the bribe are concerned.

OFFER AND RECEIPT OF THE BRIBE

Despite the difference in the terms used, the act of bribery covered by the active bribery offence set out in the PCA 1906 appears to correspond with all such acts falling within the scope of the relevant international instruments. As discussed above, while the PCA 1906 does not expressly include the promising of a bribe as an element in the offence, promises appear to be covered, either because every promise involves an offer, or because the term "agrees to give" applies to promises.

This is also the case for the passive bribery offence. As mentioned, under the PCA 1906, for the purposes of passive bribery, the person must accept or obtain the bribe or agree to accept or attempt to obtain it. Again, while there are clear differences in the terms used both between the PCA 1906 and the relevant international instruments and between the instruments themselves, these differences do not appear to affect the scope of the offence. In each case, an offence occurs once an agent requests or solicits a bribe, even in the absence of an agreement between that agent and the person who is to pay the bribe. An offence also occurs where a bribe is paid.

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[524]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54).

PURPOSE OF THE BRIBE

In so far as public bribery is concerned, the PCA 1906 appears to comply fully with the requirements of the public bribery offences set out in each of the international conventions, with the possible exception of the OECD Convention and the coverage of trading in influence. While the private bribery offence complies with UNCAC and the COE Convention, it may not fully comply with the requirements of the EU's Framework Decision.

Trading in Influence

As mentioned, the bribery offence set out in the OECD Convention encompasses advantages given in order that a public official "act or refrain from acting in relation to the performance of official duties". According to Article 4(1)(c) of that Convention, this phrase is defined to include "any use of the public official's position, whether or not within the official's authorized competence."

As discussed, the PCA 1906 clearly covers certain types of influence peddling, namely it applies to payments made to a public official or any other party to influence another public official, either in relation to his or her own affairs or those of his or her principals. It is equally clear that the Act does not apply to benefits paid which do not relate to either an agent's affairs or those of his or her principal.[525]

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[525] For example, in *Commission of Independent Commission against Corruption v Ch'ng Poh* [1997] 1 WLR 1175, the defendant was a criminal who offered bribes to two individuals through his solicitor "A". "A" was a partner in a firm of solicitors. One of the questions which arose in the case was whether there was a breach of s.9 of the Prevention of Bribery Ordinance in Hong Kong, which is effectively in identical terms to the PCA 1906. It was held that there was no such breach as the purpose of the bribe was not to influence "A" in relation to his principal's affairs. In the words of the Hong Kong Court of Appeal, the bribe was offered exclusively to induce "A" to do his client's dirty work. They were not paid to "A" for any purposes associated directly, or indirectly, with his firm's business or affairs. As explained by Lord Lloyd of Berwick in the Privy Council, to which the Court of Appeal's decision was appealed, at p 1180, "For the section to apply, the person offering the bribe must have intended the act or forbearance of the agent to influence or affect the principal's affairs. Accordingly, section 9 would apply if Ch'ng Po had bribed Mr. A. to secure him a benefit at X Co's expense, for example, to arrange a reduction in X Co's ordinary professional fees; or if X Co were induced to act in a way in which they would not otherwise have acted. Thus it is it an essential ingredient of the offence under section 9 that the action or forbearance of the agent should be aimed at the principal. If it is sufficient for the

The question as to whether the PCA 1906 covers payments made to an agent to use the influence he or she derives from his or her position to influence a non-agent is more difficult. While there are no cases directly on this point under the PCA 1906, relevant cases regarding payments given to an official to use the power or influence deriving from his or her position have arisen before the US courts, which have taken conflicting views on this question. On the one hand, in *State v Bowling*[526] the appellate court rejected an argument that accepting payments to use positional influence in areas falling outside the official's functions constituted bribery. In that case, two Arizonan state legislators had accepted money from a person seeking a liquor licence to accompany that person to a meeting with the superintendant of the licensing agency and vouch for his character. The superintendant was not aware that the legislators had been paid for these services. While the appellate court held that the actions of the legislators was inherently improper, it reversed their bribery convictions on the basis that those actions were not performed by them in the legislative capacity. Specifically, there was no legal basis for their actions and the prosecution had not established the usage or custom of legislators influencing a licensing agency's decisions.[527] Similarly, in *People v Herskowitz*,[528] another US case, a state assemblyman was offered a bribe to influence a local government decision in his district. However, the court dismissed the indictment because the assemblyman had "no official power, authority, or responsibility" over the local matter.[529]

On the other hand, in *US v Carson*,[530] the defendant's conviction for bribery was affirmed in circumstances where he used his influence as an administrative assistant to a US Senator to avoid Justice Department prosecution of certain individuals, or to get leniency for them after they were indicted. According to the court:

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purposes of the person offering the bribe that the agent should act on his own without involving his principal, then, whatever other offence may have been committed, it was not a corrupt transaction *with* an agent."

[526] *State v Bowling*, 5 Ariz, App. 436, 427 P.2d 928 (1967)

[527] See Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics" 32 U.C.L.A. L. Rev. 784, 817.

[528] *People v Herskowitz*, 41 N.Y.2d 1094, 364 N.E.2d 1127, 396 N.Y.S.2d 356 (1977)

[529] *People v Herskowitz*, 41 N.Y.2d 1094 at 1096, 364 N.E.2d 1127 at 1128, 396 N.Y.S.2d 356 (1977) at 357.

[530] *United States v. Carson*, 464 F.2d 424 (2d Cir., cert. Denied, 409 U.S. 949 (1972)

> Administrative assistants as part of their "duties" exert the influence inherent in their employment relationship with members of Congress appears "clearly established by settled practices", in the language of United States v Birdsall.....233 U.S. at 231....[T]he determinative factor is that the primary source of any conceivable influence on the Justice Department was the official position held by appellant, enhanced as it was by the status of his employer's membership in the one most powerful congressional committee affecting that Department's operations.[531]

Given that the purpose of the PCA 1906 is to prevent an agent from profiting from the agent-principal relationship outside the terms of the agency agreement, the court's approach in Carson seems preferable and it is likely that the PCA 1906 covers influence peddling once it is established that that influence derives from the person's agency position. Nevertheless, the situation is not entirely clear. According to one commentator:

> While it is the status as an official that provides the position of influence and attracts the payment, it is not clear under the current law whether this would amount to doing something in pursuit of a public duty, as it is not an exercise of official power. Such ambiguity points to a grey area that potentially undermines the purpose of the law of corruption.[532]

In so far as the PCA 1906 does not cover this type of influence peddling, it appears to fall short of the requirements of the OECD Convention. This apparent shortcoming was the subject of criticism by the OECD's WGB in its Phase 2 Evaluation.[533]

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[531] *United States v. Carson*, 464 F.2d 424 (2d Cir., cert. Denied, 409 U.S. 949 (1972) at 434.

[532] See Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge, 2010) p 86.

[533] OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 52.

Private Bribery

In contrast to the international instruments, under the agent-principal model of corruption there is no specific requirement that the agent act in breach of duty for an offence to take place. However such a requirement is implicit in that model and the duty in question is owed specifically to the principal. Payments made to an agent to breach abstract duties, such as, for example, honesty and probity in commercial transactions will not constitute bribes, unless that breach is simultaneously a breach of the duty the agent owes to the principal. While this will frequently be the case, there are instances where it will not, for example, where a principal consents to the agent receiving the payment.

While the COE Convention frames the private bribery offence in terms of a breach of duty, the duty in question is owed to a specific person. As explained:

> The notion of "breach of duty" can also be linked to that of "secrecy", that is the acceptance of the gift to the detriment of the employer or principal and without obtaining his authorisation or approval. It is the secrecy of the benefit rather than the benefit itself that is the essence of the offence. Such a secret behaviour threatens the interests of the private sector entity and makes it dangerous.[534]

Consequently, instances where the principal consents to the receipt of the benefit will also fall outside the scope of those offences.

In contrast, the EU's Framework Decision is not entirely clear as to whether the private bribery offences are concerned with breaches of duties owed to specific persons, or whether they also criminalise the breach of abstract duties. On one interpretation of those offences the concept of a "breach of duty" extends beyond duties owed between two contracting parties, by virtue of that contract, to include more abstract

[534] Council of Europe, Explanatory report on the Criminal Law Convention on Corruption (ETS 173), Para 55. The UN's Legislative Guide for the implementation of the United Nations Convention Against Corruption (2006) does not explain what is required by way of a "breach of duty" for the purposes of its private bribery offence and, in any event, criminalisation of private bribery is not mandatory under that Convention.

duties. However, it is not entirely clear that this is in fact a correct interpretation of that decision, in particular in view of the fact that the EU has not criticised Ireland's implementation of that decision on this issue.

THE PCA 1906, THE AGENT-PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

From the perspective of the actus reus of bribery, both the agent-principal model and the breach of duty model should cover the offer / receipt of both covert and over inducements. This is reflected in the PCA 1906 which describes the actus reus of bribery in very broad terms. There is no difficulty in applying these terms to the payments inquired into by the PCTs. In particular, there appears to be nothing to stop these terms from covering promises and both covert and overt payments. Nor do these terms pose any difficulties from the perspective of the relevant international conventions.

The PCA 1906 also clearly covers payments conferred on an agent in connection with acts entrusted to the agent either pursuant to statute or custom and usage. It also applies to the two types of influence peddling inquired into by the PCTs, namely: (1) payments made to an agent to use the influence derived from his or her position to influence another agent; and (2) payments made to a person who is not an agent to use his or her influence over an agent. Moreover, the PCA 1906 covers both payments made in order to obtain better treatment than the payer is otherwise entitled to as well as those paid to obtain fair treatment. Finally, that Act is also likely to cover payments made to a person who purports that certain functions fall within the scope of his or her official functions, even if this is not the case.

In contrast, the PCA 1906 does not appear to cover positional payments, namely payments made solely because of the fact that a particular person is an agent. In other words, that Act only covers payments made on account of the agent doing any act or making any omission in relation to his or her office or position or his or her

principal's affairs or business and does not cover payments attributable solely to the existence of that office or position.

With regard to the international instruments under consideration, while the PCA 1906 largely complies with their requirements in so far as the purpose of the bribe is concerned, it may not sufficiently cover the issue of influence peddling for the purposes of the OECD Convention. Specifically, that Convention covers advantages connected with any use of an official position. In contrast, the PCA 1906 may only cover advantages given on account of either an agent doing or omitting to do something in relation to his or her own office or position or his or her principal's affairs or business. It may not cover payments to an agent to use the influence derived from his or her position in relation to matters falling outside both an agent's functions and the principal's business. However, the extent to which the PCA 1906 covers such payments is not entirely clear and the courts may well decide that this type of influence peddling is covered on the basis that there is a connection between the conferral of the advantage and the agent's position as agent. This certainly appears to be the more logical approach.

In addition, the extent to which the PCA 1906 covers private bribery may also fall short of the EU's Framework Decision, at least in so far as that Decision requires Member States to criminalise a breach of duties owed to abstract entities, rather than to a principal or employer.

The fact that the PCA 1906 does not cover positional payments is partially attributable to the manner in which the agent-principal model is expressed in that Act. Specifically, there appears to be no reason in theory why receipt of a payment from a third party in the context of the agent-principal relationship should not breach the duty of trust owed to the principal, at least in some cases. In civil law, there is a long history of the courts treating payments made to an agent, because of this position as agent, as payments which are held in trust for the principal on the basis that an agent should not make a covert profit from his or her position. However, the other deficiencies identified appear to arise out of the agent-principal model itself, rather than in the manner in which the PCA 1906 gives it expression.

Basing the bribery offences on a generalised breach of duty model would remedy these deficiencies. Specifically, it is clear that the breach of duty model is more likely to cover pure positional payments, even if made overtly, as long as acceptance of the payment in connection with the exercise of a function is itself a breach one of the duties covered by that model. Indeed, such circumstances are specifically covered in the UK Bribery Act 2010, which makes it an offence to offer, promise or give a financial advantage, knowing or believing "that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity."

Likewise, the wider breach of duty model appears to cover influence peddling. Specifically, the UK Bribery Act 2010 focuses on whether the financial advantage is conferred in connection with a function or activity which the person performing the function is expected to perform in good faith or where he or she is in a position of trust by virtue of performing it. This appears to cover acts committed under colour of office, namely where an official accepts a payment to use his official power, or the prestige and influence derived from that power, even if the specific use of power does not fall within his or her functions per se.

The breach of duty model is also capable of covering a breach of a duty owed to an abstract entity, as well as those owed to identifiable individuals. In particular the UK Bribery Act 2010 refers to functions which the public expect to be performed in good faith, impartially or where the person performing the function is in a position of trust by virtue of performing it. It does not specify to whom the duty of good faith must be owed, or how the position of trust should come about. There is nothing to suggest that its scope is confined to duties owed to identifiable entities. In this respect, the key question appears to be whether the duty exists, and not to whom the duty is owed. If a jury is prepared to find that a duty is owed to an abstract entity, then bribes connected with those duties will fall within the scope of that Act.

CHAPTER 7: MENS REA

This chapter deals with the mens rea or intent and knowledge required for bribery. The issue of intent raises a number of difficult questions. One of the most basic is whether the offence may be committed: (1) intentionally; (2) recklessly; and/or 3) negligently and the nature of the intent which must be established in cases of active and passive bribery. However, much debate also surrounds the role of the quid pro quo in bribery. Issues include whether, to constitute bribery, the benefit must be paid in return for a quid pro quo and, if so, whether that quid pro quo must be explicit and specific or whether an implicit and/or generalised quid pro quo suffices. Difficulties may also arise in distinguishing between legitimate and illegitimate quid pro quos. This is particularly the case where the payment is in the form of a political contribution.

INTRODUCTION

Most crimes require not only an outward and visible action, but also an intention to act, frequently described as the *mens rea*. In other words:

> The paradigm of criminal liability (....) consists in a person subject to criminal law performing or causing the actus reus of the offence with the requisite mental element in the absence of any relevant defence.[535]

This emphasis on the mental element transcends geographical boundaries:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to chose between good and evil.[536]

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[535]Nicola Lacey, Celia Autor Wells, Qliver Quick, *Reconstructing Criminal Law: Texts and Materials*, (Cambridge University Press, 2003)p 40; See also Francis Bowes Sayre, "Mens Rea" (1932) 45 Harvard Law Review 974, who observes, at 410, "[t]he mens rea is as vitally necessary for true crime, therefore as understanding is necessary for goodness"

[536]David C Brody, James R Actor, Wayne A Logan, *Criminal Law*, (Aspen Publishers, 2001) p 165. In contrast, according to John D Van Der Vyner, "The International

However, despite its prevalence, precisely what is meant by the term "mental element" or "*mens rea*" is difficult to define, not least because it tends to differ from offence to offence:

> A mens rea does not mean a single precise state of mind which must be proved as a pre-requisite for all criminality. Mens rea, chameleon-like takes on different colors in different surroundings.[537]

A further contributing factor is that the underlying rationale for requiring *mens rea* may differ, and the "changing underlying conception and objectives of criminal justice" may have a consequent effect on the concept of *mens rea*.[538]

TYPES OF MENS REA

For the purposes of this chapter, the plethora of terms used to denote intention in common law jurisdictions can usefully be encapsulated into three different types of *mens rea*, namely intention, recklessness and negligence.[539] Equivalent types of intention in Romanistic legal traditions are often referred to as: *Dolus Directus; Dolus Eventualis*; and *culpa*. While intention and *Dolus Directus* are defined in similar ways, as are negligence and *culpa*, there appears to be some dispute as to the

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Criminal Court and the Concept of Mens Rea in International Criminal Law", [2004] 12 University of Miami International and Comparative Law Review, 57 at 57 "The criminal-law system in underdeveloped communities is specially noted for laying stress on the external act that constitutes the actus reus of a crime while almost entirely disregarding the subjective element of fault as a condition of criminal liability. Punishment is founded on the *talio* principle (an eye for an eye) and is based on vengeance for the damages or harm suffered by the victim of a wrongful act."

[537] Francis Bowes Sayre, "Mens Rea" (1932) 45 Harvard Law Review 974, 402; see also Jerome Hall, *General Principles of Criminal Law*, 2nd Ed., (The Lawbook Exchange Ltd, 2008) Chapter III.

[538] See e.g. Richard G. Singer, John Q La Fond, *Criminal Law*, 5th ed (Aspen Publishers, 2010), p 59 who comment that between the thirteenth and the middle of the 20th Century, "both common law courts and the legislature used a dizzying variety of adverbs in an attempt to capture the notion of general malevolence and blameworthiness at the heart of the original latin term. These adverbs included "feloniously", "unlawfully", "maliciously" "corruptly" "fraudulently" "spitefully" and "wilfully"."

See Francis Bowes Sayre, "Mens Rea" (1932) 45 Harvard Law Review 974.

[539] For its part, the American Law Institutes' *Model Criminal Code* identifies 4 types of mens rea, namely, purposefully, knowingly, recklessly and negligently. The term "knowingly" equates with the concept of indirect intention outlined above. See Richard G. Singer, John Q La Fond, *Criminal Law*, 5th ed., (Aspen Publishers, 2010) p 65.

extent to which the concept of recklessness equates with that of *Dolus Eventualis.*[540]

Intention and Dolus Directus/Indirectus

Both the concept of "Intention" and that of *Dolus Directus* can be divided into two types, namely direct intention (*Dolus Directus*) and indirect or oblique intention (*Dolus Indirectus*).[541] A person is considered to have acted with direct intention where he or she takes the necessary actions to bring about a certain result while simultaneously seeking to achieve that result. A person acts with indirect intention, if he or she takes actions which will certainly bring about a certain result, irrespective of whether or not he or she seeks to achieve that result. In both cases, while the person must intend to bring about a prohibited result, he or she does not necessarily need to know that that result is prohibited.

Recklessness and Dolus Eventualis

Recklessness involves the conscious undertaking of an unreasonable or unjustified risk of harm, in instances where that harm is not actually intended.[542]Recklessness is like intention in that the actor is conscious of a forbidden harm, he realises that his conduct increases the risk of its occurrence and he has decided to create that risk. However it differs from intention in that the actor does not seek to attain the harm. That he deliberately increased the risk does not alter the essential fact that he did not intend to produce the harm.

Recklessness may be objective or subjective. Objective recklessness is where the accused unknowingly took an unjustified risk but should have been aware of that risk. Subjective recklessness is where the accused consciously took an unjustified risk which the accused knew existed. It

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[540]Antonio Cassesse, *The Oxford Companion to International Criminal Justice,* (Oxford University Press, 2009), p 302.

[541] Roger Greay, *Essentials on Criminal Law*, 2nd ed., (Cavendish Publishing Ltd., 1998) p 14; See also Jeroen Blomsna, "Fault Elements in EU Criminal Law: The Case for Recklessness" in André Klip (ed) *Substantive Criminal Law of the European Union,* (Maklu Publishers, 2011), p 136.

[542]Roger Greay, *Essentials on Criminal Law*, 2nd ed., (Cavendish Publishing Ltd, 1998), p 21; See also Victor Tadros, "Recklessness and the Duty to take Care" in Stephen Shute, A.P. Simester (eds) *Criminal Law Theory: doctrines of the general part,* (Oxford University Press, 2002), Chapter 10.

may include situations where the accused failed to consider the risk, for example, through anger or apathy.

In general terms, *Dolus Eventualis* is present:

> ...when a person, who is going to do something that will cause an event, is fully aware of the possible outcome as a side-effect to such behaviour, but nevertheless decides to continue with the conduct, recognizing and approving the result as a possible cost of attaining the aimed goal. Approval of an evil result though not directly pursued by the actor (side-effect) is the subjective attitude that underpins conviction.[543]

In other words, in contrast to recklessness, the person must not only be aware of the risk but also reconcile him or herself to the prohibited result. Even a small risk may be sufficient if the accused has reconciled himself to it or accepted it as part of the price he or she was prepared to pay to secure his or her objective.[544] As a result there is some disagreement as to whether *Dolus Eventualis* equates with, on the one hand, recklessness[545] or on the other "a degree of fault bordering on negligence."[546]

Negligence and Culpa

Negligence and *culpa* arise when an accused has been insufficiently attentive to foresee the potentially adverse consequences of his or her planned actions, and has gone ahead, exposing a particular individual or unknown victim to the risk of suffering injury or loss. Negligence:

> implies inadvertence i.e. that the defendant was completely unaware of the dangerousness of his behaviour, although

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[543] Antonio Cassesse, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p 302.

[544] Finbarr McAuley and J. Paul McCutcheon, *Criminal Liability,* (Roundhall, 2000) 301 – 303.

[545] Sarah Finnin, *Elements of Accessorial Modes of Liability Article 25 3(b) and (c) of the Rome Statute of the International Criminal Court,* (Martinus Nijhoff Publishers, 2012), p 158.

[546] Antonio Cassesse, *The Oxford Companion to International Criminal Justice,* (Oxford University Press, 2009), p 302.

actually it was unreasonably increasing the risk of the occurrence of an injury.[547]

INTENT AND ACTIVE AND PASSIVE BRIBERY

Differences may arise as to the nature of *mens rea* requirement in the context of both active and passive bribery in the context of the breach of duty models under consideration.

For example, in the case of active bribery, must the payer intend the benefit to induce a breach of duty or is it sufficient if he or she is reckless in this regard? In instances where the payer intends to influence the payee in relation to a specific act, is he or she still guilty of bribery if he or she does not know either: (a) that the payee is under a relevant duty; or, conversely (b) where he or she wrongly believes that the payee is in a position of duty or that the act is connected to that duty? Other difficult issues include the question of whether the bribery offences cover instances where the primary purpose of paying the bribe is: to ensure that the recipient does act in accordance with this duty; to prevent the recipient from acting in breach of duty; or where the payer's motive is in reality to trap the payee rather than to influence a breach of duty.

In the case of passive bribery, issues which must be determined include whether the payee commits bribery when he or she accepts a payment: (a) where he or she is not aware that it is intended to influence him or her to breach her or her duty; (b) knowing that it is intended to influence him or her but not intending to be influenced by it; (c) with the specific intent of being influenced by the payment in the performance of his or her duty, but not in fact carrying out any act in response to the payment;

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[547]Jerome Hall, *General Principles of Criminal Law*, 2nd ed., (The Lawbook Exchange Ltd, 2008), 114; See also John D Van Der Vyner, "The International Criminal Court and the Concept of Mens Rea in International Criminal Law" (2004) 12 University of Miami International and Comparative Law Review, 57, p 61; Some commentators argue that negligence is not a form of men rea as negligence is not necessarily a state of mind. See e.g. Herbert Morris (ed) *Freedom and Responsibility Readings in Philosophy and Law,* (Stanford University Press, 1961), p 218; For an opposing view, see C. M. V. Clarkson, *Understanding Criminal Law,* 4th ed., (Thomson Sweet and Maxwell, 2005) p 73.

or, (d) intending to be influenced by the payment and carrying out a specific act as a result of it, thereby acting in breach of duty.

The reply to these questions depends, at least partially on whether the true purpose of the bribery offences is confined to preventing the harm / immorality associated with certain types of breaches of duty or whether it extends to behaviour which increases the likelihood of such a breach, or beyond that, to behaviour which merely gives rise to the appearance of such a breach. It is highly questionable whether the latter type of behaviour is an appropriate target for the criminal law, and is best dealt with through, for example, ethic laws or laws governing political donations.

BRIBERY AND THE QUID PRO QUO REQUIREMENT

Although instances where a benefit is paid with the explicit intention of obtaining a specific breach of duty will almost always come within the ambit of bribery offences based on the breach of duty model, (once the other elements of the offence are satisfied), differences arise regarding the extent to which those offences cover instances where a benefit is paid in the absence of a quid pro quo.

While the acquisitiveness model clearly covers such payments, the position under the breach of duty model is more nuanced. As discussed in the previous chapter, such payments may fall within the agent-principal model as long as they are covert: it is questionable whether receipt of a payment will be in breach of duty, where the agent informs the principal of its receipt. In any event such payments are more likely to fall within the wider breach of duty model as that model also covers, for example a breach of duty to act impartially or to act in good faith, where the duty is owed to a third party rather than to the principal.

Even in instances where the bribery offences require a benefit to be paid or solicited with a reciprocity in mind, there may be considerable variations as to exactly what is required in this regard. These variations relate to issues such as whether the quid pro quo must be express or implied, whether it must relate to a specific act or whether more generalised favours or even good will payments are also sufficient. For

the most part, they are relevant to both models of bribery under consideration.

Express or Implied Agreement

On a narrow view of the breach of duty models, in order to constitute a bribe a payment must be made on the basis of either an oral or written express statement by the payer or payee as to the purpose of that payment. In its most restricted form, bribery is only committed where there is not only an express statement as to the purpose of the payment but also an actual agreement between the payer and the payee as to that purpose.

The advantage of requiring an actual agreement, or at least an express statement of intent, is that it makes it easier to distinguish between legitimate payments, such as for example, political contributions and illegitimate bribes. It also provides clarity as to the scope of the bribery offences and avoids overbreadth.[548] However, such an approach is also problematic. For example, it may permit the bribery laws to be frustrated by "knowing winks and nods"[549] and ignores the fact that corrupt agreements "are generally made verbally under cloaks of innuendo and ambiguity."[550] As one commentator remarks, insisting on this type of quid pro quo "would be to reward deviousness and hypocrisy. Even if it would simplify the law of bribery, it would do so in an entirely arbitrary manner."[551] Moreover, the essential purpose of bribery offences under the breach of duty models is to prevent bribes being paid to induce a breach of duty and the existence of an express agreement is not necessary and would in fact be a hindrance in achieving this purpose. Lowenstein observes:

> Influence is a matter of probabilities. The briber influences the official if the gift increases the probability that the official will act

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[548]Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics" 32 U.C.L.A. L. Rev. 784, p 825.
[549]*Evans v United States* 504 U.S. 255 (1992) at 274.
[550]Steven C. Yarbrough, "The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials" (1995) 31 Tulsa Law Journal 781, 783.
[551] Daniel Lowenstein, "Political Bribery and the Intermediate Theory of Politics" 32 U.C.L.A. L. Rev. 784, 826.

> as the briber hopes. The existence of an express agreement may increase this probability, but it is only one of the many factors that determine the effectiveness of the proffered bribe. The presence of an agreement is neither necessary nor sufficient to bring about the kind of influence bribery laws seek to prevent.[552]

Perhaps most fundamentally, where there is evidence to prove a quid pro quo agreement beyond reasonable doubt, what possible purpose can be served by also requiring proof that the agreement is express? Any such requirement would simply encourage criminals "to make their deals less explicit, channelling behaviour in socially detrimental ways".[553]

Specific v General Acts

There is widespread agreement that bribery offences cover situations where the bribe is paid in respect of a specific act or matter.[554]In the case of the breach of duty models, that act must also be a breach of duty. However, it is not always clear how closely connected the payment must be to a breach of duty.

For example, whether or not the bribery offences extend to cover more general goodwill payments or non-specified benefits can be controversial. On the one hand, it is argued that "[t]here is ..... no good reason to believe that connections that are proximate and explicit are any more corrupt than connections that are indirect and implicit."[555] It is also observed that while the presence of a specific quid pro quo is evidence of a corrupt transaction, it is not essential to corruption:

> "[T]he object of bribery laws is not the deal itself; the deal is just evidence that influence has taken place. The reason we make

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[552] Daniel Lowenstein,, "Political Bribery and the Intermediate Theory of Politics" 32 U.C.L.A. L. Rev. 784, 825.

[553]James Lindgren, "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1993) 141 U. Pa. L. Rev 1695, 1733.

[554]See e.g., Arnold J. Heidenheimer, "Introduction to Part I, The Context of Analysis", in Arnold. Heidenheimer (ed),*Political Corruption: Readings in Comparative Analysis* (Holt, Reinhart and Winston, 1970) at 18, "Bribery.....creates a very specific obligation on the part of the officeholder."

[555]Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption,* (The Brookings Institute 1995), p 112.

> bribery illegal is that we don't want officials to be affected by monetary considerations, not that we have a particular animus against deal-making.[556]

Again however, classifying benefits paid for general non-specified benefits risks over-extending the scope of the bribery offences to cover behaviour which should either not be criminal at all, or should not be criminalized as bribery. Moreover, according to one commentator, extending the notion of a quid pro quo to cover a mere intention to influence someone's behaviour "robs the term of all analytical usefulness."[557]

In so far as the generalised breach of duty model is concerned, there certainly appear to be some instances where an inducement will be classified as a bribe, even in the absence of a specific connection between the inducement and a particular act. As discussed above, in certain situations, acceptance of an inducement may itself be a breach of duty. In contrast, the agent-principal model is less likely to cover these types of payments, unless there are circumstances which indicate that the receipt of the payment itself is a breach of the particular duty of trust owed by the particular agent to a particular principal.

BRIBES AND POLITICAL DONATIONS

Bribes on the one hand and political donations on the other differ from each other in fundamental ways. Most obviously, bribes are illegal while political donations serve important legitimate functions. Specifically, electoral candidates, elected representatives and political parties "need funding in order to survive, compete and perform their democratic functions."[558] Moreover, contributing money is an important form of political participation and may also be a component of political

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[556]Thomas F. Burke, "The Concept of Corruption in Campaign Finance Law" (1997) 14 Constitutional Commentary 137 – 138.

[557]Daniel H Lowenstein, "When is a Campaign Contribution a Bribe?" in William C Heffernan and John Kleinig (eds) *Private and Public Corruption,* (Rowman and Littlefield Publishers, Inc, 2004) p 154.

[558]Michael Johnston, "Political Finance Policy, Parties and Democratic Development" in *Political Parties and Democracies in Theoretical and Practical Perspectives* (National Democratic Institute for International Affairs, 2005), p 3.

expression.[559] Furthermore, the need to fundraise may make political parties more responsive and accountable to their electoral base. On a more practical level, bribery involves an element of exchange of official power for the receipt of money which is absent in the case of a political donation.[560] In the case of such a donation, the elected representative/electoral candidate merely accepts the payment for political purposes, and at least theoretically neither the donor nor the recipient seek, offer or agree a quid pro quo in return.

Despite the clear theoretical differences between political donations and bribes, in practice the line dividing the two may become blurred. Political donations are frequently given in anticipation of or in return for an electoral candidate's or elected representative's stance on a political or public policy issue,[561] and:

> The more specifically the candidate and the contributor exchange views on future issues to be voted upon, the more clearly the candidate falls within the "in return for" element and the contributor within the "intent to influence" element [of the bribery offence].[562]

In his research, Lowenstein distinguishes between donors who contribute for the purposes of influencing a political or public policy, on the one hand pursuant to an "electoral" strategy and on the other, pursuant to a "legislative" strategy.[563] According to Lowenstein, under the former, donors make contributions in order to further the chances of

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[559]See e.g. *Buckley v Valeo* (1976) 424 U.S. p 1 in which the U.S. Supreme Court held for the first time that political contributions were a form of constitutionally protected free speech while also recognising that the US Congress has the power to impose reasonable restrictions on speech in the interest of protecting the political process from both corruption and the appearance of corruption; See also *Bowman v. UK* [1998] 26 EHRR 1 in which the European Court of Human Rights found that low limits on political contributions during an election campaign and a ban on political advertisements in the broadcast media violated freedom of expression. See generally, Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press, 2010) Chapter 2.

[560]Anonymous, "Campaign Contributions and Federal Bribery Law"(1978) 92(2) Harvard Law Review451, 458.

[561] See Daniel H. Lowenstein, "When is a Campaign Contribution a Bribe?" in William C. Heffernan and John Kleinig, (eds), *Private and Public Corruption*, (Lanham MD: Rowman and Littlefield, 2004).

[562]Anonymous, "Campaign Contributions and Federal Bribery Law"(1978) 92(2) Harvard Law Review, 451, 458.

[563]See generally, Daniel Lowenstein, "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted" (1989) 18 Hofstra L. Rev. 301, 308.

victory of those candidates who are most likely to pursue policies favoured by the donor, if elected. He views such donations as being relatively easy to distinguish from bribes, at least in most circumstances. The distinction lies in the fact that while the donation is paid because of the candidate's position on a particular issue, the donor does not intend to influence that position.

In contrast, Lowenstein asserts that donors who pursue a legislative strategy make donations to those candidates they consider as most likely to be elected, in the hopes that those candidates will pursue the donor's favoured policies, either out of gratitude or a desire to receive further donations. Commenting on the situation in the US, Lowenstein observes that, generally:

> a considerable amount of the money that goes to candidates from economic—group contributors is motivated by a desire to influence the performance of officeholders rather than to influence who is elected.[564]

According to Lowenstein, political donations made pursuant to a legislative strategy may be harder to distinguish from bribes in that they are made with an intent to influence.[565] Much of the debate surrounding the quid pro quo element of the bribery offences is in reality an attempt to distinguish between legitimate donations and illegitimate bribes and to avoid overbreadth in the bribery offences.[566]

The breach of duty models under consideration do not impact significantly on the demarcation of bribes from political donations. Again, because of its broader scope, political donations are more likely to fall within the wider breach of duty model, something that should be taken into consideration when giving it legislative expression, as discussed further in the concluding chapter.

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[564]Daniel Lowenstein, "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted" (1989) 18 Hofstra L. Rev. 301, 313.
[565]Daniel Lowenstein, "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted" (1989) 18 Hofstra L. Rev. 301.
[566]See e.g. Ilissa B. Gold, "Explicit, Express and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s" [2011] 26 Wash U.J.L. & Pol'y 261.

INTENT AND THE PCA 1906

Bribery under the PCA 1906 must be committed "intentionally", as is the case for the majority of Irish criminal offences. However, in addition, the benefit must be given or received "corruptly". Moreover, the PCA 1906 also contains certain presumptions of corruption which facilitate the prosecution in establishing the intention required for bribery in certain circumstances.

INTENTION

There is no general definition of what constitutes intention for criminal purposes in Irish law. However, s.4 of the Criminal Justice Act 1964 defines the *mens rea* for murder as follows:

> (1)Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.
>
> (2)The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.

This appears to reflect the general approach to intention in Irish law, which recognises both direct and oblique intention. In other words, that concept covers instances where a person "acted with the purpose of causing the harm or circumstances outlawed"[567] as well as instances where a person is practically certain that something will be a consequence of his or her action, even though it is not his or her aim to bring it about.[568] In both cases the issue of intent is judged subjectively:

> In other words, the question for the jury is whether the accused actually foresaw the consequences of his act, and what the

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[567]Peter Charleton, Paul A. McDermot and Marguerite Bolger, *Criminal Law*, (Butterworths, 1999) p 31; see more recently, TJ McIntyre, Sinead McMullen Sean O Toghda, *Criminal Law*, (Roundhall, 2012).

[568] Law Reform Commission Consultation Paper, *Inchoate Liability*, (LRC CP48-2008), p 52.

> accused foresaw objectively is merely evidence which the jury may consider in their deliberations.[569]

Generally, a person's wilful ignorance of a fact will not prevent him or her from having the requisite intention. Moreover, it is immaterial whether or not the person is successful in achieving his or her objective. In the case of the PCA 1906, therefore, it is not necessary to prove that the payment actually influenced the agent in the performance of his or her functions: the prosecution must only prove that a benefit was intentionally given or received on account of those functions.[570]

"Corruptly"

As mentioned, the PCA 1906 imposes an additional requirement to that of intention in that the bribe must be given or received "corruptly". Specifically, in the case of passive bribery, the agent or other person must corruptly accept or obtain a benefit, while in the case of active bribery, the payer must corruptly give or agree to give a benefit to an agent or any other person.

The original PCA 1906 did not define the term "corruptly". However, pursuant to an amendment introduced by the Prevention of Corruption (Amendment) Act 2010, this term is now defined to include:

> acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means;

This definition of the term "corruptly" appears to have its roots in US law and specifically, 18 U.S.C § 1505, which criminalises the obstruction of justice and in so doing uses the word "corruptly". In the context of that offence, the US District of Columbia Circuit Appeals Court had declared

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[569]Dr Gerard Coffey, "Codifying the meaning of intention in the criminal law", (2009) Journal of Criminal Law 394 at 408.

[570] See Sir Edmund Fry, who observes "To say whether the bribe has or has not operated on the mind of the Recipient is a metaphysical inquiry, which it is difficult for the man himself and often impossible for others, to answer" quoted in Albert Crew, *The Law Relating to Secret Commission and Bribes, Christmas boxes, Gratuities, Tips etc* (Sir I. Pitman & Sons Ltd., 1913), p 57.

the term to be unconstitutionally vague in the context of conduct consisting in the making of false or misleading statements to the US Congress.[571] Consequently, Congress introduced an amendment defining the term "corruptly" in order to make it clear that that section covered lying or otherwise obstructing Congress. The definition contained in the 2010 Act mirrors that definition.

PRESUMPTIONS OF CORRUPTION

While bribery is a difficult crime to prove, there are three presumptions of corruption which apply under the PCA 1906 and which facilitate the prosecution's task to some degree. While these presumptions have not been challenged in the Irish courts, the courts have upheld similar presumptions in other statutes, holding that they merely transfer the evidential burden of proof to the defendant and not the legal burden of proof.[572]

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[571] *United States v Poindexter* 951 F.2d 369, 379 (D.C. Cir. 1991). In 1990, a jury convicted Admiral John Poindexter, President Reagan's National Security Advisor, inter alia, on two counts of obstruction of justice in violation of Section 1505 of the U.S. Criminal Code for making false and/or misleading statements to congressional committees and for participating in the preparation of a false chronology, deleting information from his computer and arranging a meeting at which Oliver North gave false statements. *United States v. Poindexter*, 951 F.2d at 377. The Court of Appeal reversed Admiral Poindexter's conviction, concluding that Section 1505 was unconstitutionally vague as applied to his false and misleading statements to Congress. The court found the word "corruptly" unconstitutionally vague as applied for two reasons: (1) applying Section 1505 to the making of the false and misleading statements at issue in the appeal would require an "intransitive" reading of the word "corruptly" — i.e., defendant corrupts or defendant becomes corrupt — rather than a "transitive" reading — i.e., defendant corrupts another by causing the other person to act corruptly — and on its face, the statute favoured a transitive reading; and (2) the term "corruptly" was too vague to provide constitutionally adequate notice that it proscribed lying to Congress. The Court therefore reversed Poindexter's Section 1505 convictions. *United States v. Poindexter*, 951 F.2d at 388.

[572] See e.g. *O'Leary v AG* [1993] 1 IR 102 (HC) and [1995] 1 IR 254 (SC) which concerned section 24 of the Offences Against the State Act 1939 according to which possession or proof of possession by an accused of certain incriminating documents shall be evidence, without more, until the contrary is proved that the accused was a member of an unlawful organisation. Costello J. in the High Court concluded that section 24 only imposed an evidential burden of proof on the defendant, not a legal burden. Thus, the defendant could elect not to call evidence in the case and would still be entitled to an acquittal if the evidence did not establish his guilt beyond a reasonable doubt. His decision was upheld on appeal to the Supreme Court. O'Flaherty J. held that the effect of the section was to amount to evidence only, the value of which could be shaken by cross examination, or by pointing to the mental capacity of the accused or circumstances by which he or she came to be in possession of the document. See also *Hardy v Ireland [1994] 2 IR 55* which concerned a challenge to s. 4 of the Explosive

For the purposes of the PCA 1906, the first presumption applies where any money, gift or other consideration has been paid, given or received by an officeholder, special adviser, or a director of, or occupier of a position of employment in a public body, by or from a person or agent of a person holding or seeking to obtain a contract from a Government Minister or a public body. In such circumstances, the money, gift, or consideration is deemed to have been a bribe under the PCA 1906 (and the PBCPA 1889) unless the defendant can prove the contrary. This presumption was specifically introduced by the Prevention of Corruption Act 1916, to reverse the legal burden of proof of a corrupt payment or gift when received by a public official.[573] However, in *R v Webster*,[574] the UK Court of Appeal interpreted that section to impose an evidential burden upon the defendant leaving to the prosecution the ultimate legal burden of proving to the criminal standard that the payment was a bribe.

The second presumption was introduced pursuant to the PCA 2001 and relates to electoral donations.[575] Pursuant to the relevant provision, a presumption of corruption arises where it is established that a person received a donation which he or she did not disclose but should have disclosed under either the Electoral Act 1997, as amended, or the Local

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Substances Act 1883, pursuant to which it is an offence for "any person who makes or has knowingly in his possession or under his control any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object." A majority of the Supreme Court (Hederman, O'Flaherty and Blayney JJ. concurring) held that the section merely placed an evidential burden on the accused and therefore did not violate the presumption. The minority, on the other hand, acknowledged that the legal burden had moved but did not consider that this presented constitutional difficulties. See Una Ní Raifeartaigh "Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence" (1995) 5 I.C.L.J. 135. See also C. Hamilton, "The Presumption of Innocence in Irish Criminal Law: Recent Trends and Possible Exceptions" [2011] 2(1) I.J.L.S. 3. who observes at p 14 that "Hardy is authority for the proposition that reversals of the evidential and, potentially, legal burden of proof (and therefore prima facie breaches of the presumption of innocence) are constitutionally permissible but little else."

[573] In *Braithwaite*, (1983) 1 WLR 329, the Court observed, at p 385, that the effect of this presumption is that "when the matters in that section have been fulfilled, the burden of proof is lifted from the shoulders of the prosecution and descends on the shoulders of the defence. It then becomes necessary for the defendant to show, on the balance of probabilities, that what was going on was not reception of a corrupt inducement or reward. In an appropriate case it is the judge's duty to direct the jury first of all that they must decide whether they are satisfied so that they are sure that the defendant received money or a gift or consideration, and then to go on to direct them that if they are so satisfied, then .... the burden of proof shifts."

[574] *R v Webster* [2010] EWCA Crim 2819.

[575] Prevention of Corruption (Amendment) Act 2001, s. 3

Elections (Disclosure of Donations and Expenditure) Act, 1999, as amended, and the donor had an interest in the person doing or omitting to do something in relation to his or her office or position or his or her principal's affairs or business.

The third presumption is also set out in the PCA 2001 and concerns the performance of specified functions by an officeholder, special adviser, director of a public body or employee of a public body.[576] Where a gift, consideration or advantage is given to such a person and the payer or the person on whose behalf the gift, consideration or advantage was given had an interest in the discharge by the person of specified functions, the gift, consideration or advantage is deemed to constitute a bribe unless the contrary is proved.[577]

ATTEMPT AND INTENT

As discussed in the previous chapter, at common law it is an offence to attempt to offer or solicit a bribe under the PCA 1906. In order to be convicted, it must be established that the defendant intended to offer or solicit a bribe.[578] The issue of intention is of particular significance in cases of attempt because, by definition, the *actus reus* of the offence will not be completed. As the Law Reform Commission explains:

> With inchoate offences the emphasis on the aspects on the offence is the reverse of what is typical in criminal law. That is, the guilty mind of the accused, rather than his or her physical actions, is the most important part of an inchoate offence.[579]

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[576] Prevention of Corruption (Amendment) Act 2001, s. 4.

[577] Prevention of Corruption (Amendment) Act 2001, s. 4(2)., The specified functions are: the grant, refusal, withdrawal or revocation by a Minister or an officer of a Minister or any other person employed by or acting on behalf of the administration of the State by or under any statute of any licence, permit, certificate, authorisation or similar permission; the making of any decision relating to the acquisition or sale of the property by a Minister or an officer of a Minister or by any other person employed by or acting on behalf of the public administration of the State; any functions of a Minister or an officer of a Minister or of any other person employed by, or acting on behalf of, or a member of a body that is part of the public administration of the State under the Planning and Development Act, 2000.

[578] Law Reform Commission, Consultation Paper, *Inchoate Offences*, LRC CP48-2008, p 49.

[579] Law Reform Commission Consultation Paper, *Inchoate Offences,* LRC CP48-2008, p 12.

THE PCTS AND INTENT

A number of the payments inquired into by the PCTs involved alleged acts of classic bribery where one party intentionally and either explicitly or implicitly paid a public official to perform a specific official act and the public official proceeded to perform that act in return for that payment. There is little difficulty in applying the PCA 1906 to such quid pro quo payments. Nevertheless, several types of payments inquired into by the PCTs raise more complex issues. These include: the extent to which rewards may constitute bribes under that Act: goodwill payments; the culpability of the recipient in instances where he or she knows that the payment is being given to influence the performance of his or her official functions but where he or she does not intend to be influenced by it; and, most significantly, the relationship between bribes and political donations. The inquiries of the PCTs also raise a number of questions regarding the establishment of *mens rea* on the part of a principal, where bribery is committed by an intermediary engaged by that principal.

PAYMENTS INQUIRED INTO BY THE PCTS MADE EXPLICITLY OR IMPLICITLY IN RETURN FOR SPECIFIC ACTS

A significant number of the payments inquired into by the PCTs and, in particular, the Mahon Tribunal were quid pro quo payments, given, solicited and/or received in return for specific official acts. A number of these payments were explicitly linked to the performance of a specific official act. These included, for example:

- a payment of £20,000 which was solicited by Cllr Tom Hand from Mr Frank Dunlop specifically in return for his support for the rezoning of the Quarryvale lands, including signing a motion relevant to that rezoning.[580]
- Cllr Hand's statement to Mr Dunlop when lobbied for his support for the rezoning of the Ballycullen lands, to the effect that "it's going to cost you".[581]

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[580]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 929.

[581]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments,

- Cllr McGrath's refusal to lodge a motion to rezone Quarryvale, unless Mr Gilmartin entered into an amended agreement with Mr Owen O'Callaghan.[582]

Other payments were implicitly made in return for a specific act.[583] These included, in particular, the significant number of payments made by developers to politicians in and around the time of local and/or national elections. For example, Monarch Properties made a large number of donations to local councillors at a time when it was seeking the rezoning of its lands at Cherrywood in South Dublin. The Mahon Tribunal found that these donations "were motivated by its desire to ensure sufficient councillor support to achieve increased zoning and residential density levels on its Cherrywood lands."[584]

As set out above, the PCA 1906 applies to bribes paid or received "corruptly" on account of an agent "doing any act or making any omission "in relation to his or her office or position or his or her principal's affairs or business". This is very broad and does not depend on the existence of an explicit or even implicit quid pro quo agreement between the payer and the agent. Specifically, the emphasis of the offence is on whether or not the payment is given "on account of" an agent's performance of his or her official functions, and not whether or not there is an agreement that the act or omission will result from the payment.

REWARDS

In several instances, the PCTs, and in particular the Moriarty Tribunal and the Flood/Mahon Tribunal inquired into payments made as a reward for the manner in which a public official performed his or her official

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Vol III, (2012), p 1729.

[582]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 905.

[583]According to the Mahon Tribunal, in itsFinal Report of the Tribunal of Inquiry into Certain Planning Matters and Payments Vol 1,(2012) p 826, "Many councillors solicited money from Mr Dunlop and/or Mr O Callaghan, while others simply received money in the absence of any such request. Undoubtedly, while some councillors expressly solicited money in return for their support for Quarryvale, others did soon an implied basis."

[584]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 1570.

function. For example, the Moriarty Tribunal inquired into two payments made to Mr Charles Haughey by Mr Dermot Desmond, totalling Stg £125,000, which it found to be connected to his former public office of Taoiseach.[585] Similarly, it found that Mr Michael Lowry received a payment of Stg £300,000 from Mr Denis O'Brien "in circumstances giving rise to a reasonable inference that the motive for making the payment was connected with the public office of Minister for Transport, Energy & Communications, formerly held by Mr Lowry."[586] For its part, the Mahon Tribunal found that Mr Owen O'Callaghan paid Cllr Colm McGrath £20,000 in November 1993 as a reward to him for his assistance in respect of the Quarryvale rezoning, which assistance was provided in Cllr McGrath's role as an elected councillor.[587] Similarly, it found a payment of £5,000 from Mr O'Callaghan to Cllr John O'Halloran in that same month to be a reward for his commitment to Quarryvale, in view of the temporal coincidence between the making of that payment and the confirmation of the Quarryvale rezoning on October 19, 1993.[588]

The PCA 1906 explicitly refers to payments made as a reward to an agent for acting or omitting to act in a particular way. Specifically, that Act applies to gifts, consideration or advantages given as an inducement to or reward for an agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business. From its wording therefore, it is clear that the PCA 1906 applies to payments motivated by an official act, even if they do not act as inducements for the performance, or non performance of that act. The application of the PBCPA 1889, which contains similar wording, was considered by the UK courts in *R v Andrews-Weatherfoil Ltd*[589] and in *R v Parker*.[590] In the first of these, the English Court of Appeal confirmed that for the purposes of the 1889 Act,

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[585] Report of the Tribunal on Payments to Politicians and Related Matters, (2006), p 247.

[586] Report of the Tribunal on Payments to Politicians and Related Matters, Part II, (2010) p 216.

[587] Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II (2012), p 1017.

[588] Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012) p 1061; See also a payment of £2,500 from Mr Frank Dunlop to Cllr O'Halloran which the Mahon Tribunal found to relate to the latter's earlier assistance, in his capacity as a councillor to, in particular, the Quarryvale rezoning project considered by the Tribunal at p 1062.

[589] *R v Andrews-Weatherfoil Ltd* [1972] 1 W.L.R. 118.

[590] *R v Parker* (1986) 82 Cr App R. 69.

the term "reward" covers receipt of money for a past favour without any antecedent agreement. In *Parker*, the appellant was the chairman of a planning committee who was given a wholly unsolicited gift of money by a building firm as an expression of favour. His appeal was dismissed as the appellant court held that the gist of the offence lies not in showing actual favour, but in accepting a reward for doing so.

There appears to be no grounds for treating rewards under the PBCPA 1889 differently than under the PCA 1906. In particular, it appears clear that this later Act was deliberately intended to deal with rewards for two reasons. First, part of the rationale underlying that Act is the view that when an agent undertakes an agency he undertakes to exercise his skill and give his time to the principal, in return for an agreed remuneration and he cannot make any profit over and above that remuneration without his or her employer's consent.[591] More specifically, profits arising out of the Agent-Principal relationship were (and are) considered to belong to the principal and "the Agent has no right to take it, or keep it or bargain for it, or to receive it without bargain, unless his Master knows."[592] Secondly, at the time the Act was enacted, the practice of giving "Christmas Boxes" to agents was a matter of considerable concern. While it was recognised that some of these boxes were given with purely altruistic motives, in many cases they were in reality rewards for past favours or "deferred bribes". Those boxes were viewed as posing particular dangers for the agent-principal relationship which that 1906 Act sought to protect. Specifically:

> The danger in giving and receiving such gifts is that they consciously or unconsciously do pre-dispose the servant to the tradesman and thus tend to give him undue preference. This must ultimately be to the employer's disadvantage.[593]

Nevertheless, while rewards are clearly within the terms of the 1906 bribery offences, it is still necessary to prove that the reward is given "corruptly". Consequently some rewards will not fall within the scope of those offences. For example, a reward given to an agent in

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[591] Albert Crew, *Bribes and Bribery in Business*, (Jordan & Sons Ltd., 1916)p 34.
[592] Albert Crew, *Bribes and Bribery in Business*, (Jordan & Sons Ltd., 1916)p 25.
[593] Albert Crew, *The Law Relating to Secret Commissions and Bribes, Christmas boxes, Gratuities, Tips etc* (Sir I. Pitman & Sons Ltd., 1913)p 104.

circumstances where the payer will not have any further interactions with that agent is much less likely to corrupt than one given in the course of a series of transactions between the payer and agent. Although, arguably at least even in the former case, the reward may have a corrupting effect on the payer's interactions with other agents, in circumstances where his or her propensity to give rewards becomes known, it is not clear that such an effect will be sufficient for a conviction under the PCA 1906.[594]

GOODWILL PAYMENTS

Goodwill payments are payments made to agents which are not made in return for specific quid pro quo (whether explicit or implied). The Moriarty Tribunal inquired into a significant number of such payments made to Mr Charles J Haughey, both while he held the office of Taoiseach and before and after that time. The Moriarty Tribunal found these payments to have been linked to that office. The Flood/Mahon Tribunal also inquired into a number of goodwill payments. For example, when commenting on a number of political donations made by the developer, Mr Joe Tiernan, to local councillors prior to the rezoning of lands at Balheary in Co. Dublin in which Mr Tiernan had an interest, that Tribunal observed:

> Mr Tiernan's motivation, to a large extent, was his desire to ingratiate himself with councillors (including councillors of a different persuasion than his own) in anticipation of their favourable consideration of projects in which he had an interest which required, or might in the future require, their vote in the County Council.[595]

It appears clear that in order for a payment to come within the terms of the PCA 1906, there is no requirement that the payment be made in return for a specific act and that Act covers payments made as "a general 'sweetener' designed to secure generally more favourable

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[594]See generally, Law Commission, *Legislating the Criminal Code Corruption*, Consultation Paper No 145, (Stationary Office, London, 1997), p 73 – 80.
[595]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 2224.

treatment."[596] For example, in the Scottish case, *King v Procurator Fiscal*[597], which concerned a prosecution brought under the PBCPA 1889, the appellant claimed that he had not been given fair notice of the charge he was required to meet. In particular, the appellant argued that the prosecution merely alleged that he had paid money as an inducement to a public official to "show favour" in respect of his application for a betting office licence, without specifying precisely what that public official was to do or to forbear to do by reason of the inducement. The appeal was rejected with the Court of Appeal holding that it was sufficient that the charge should simply narrate that the alleged inducements were offered so that Mrs Mullen would "show favour" in relation to the appellant's application.[598] There was consequently no need for the charge to specify precisely what that favour was to consist of.

Nevertheless, despite this authority, it is not at all clear to what extent the PCA 1906 covers pure good will payments. For example, in *King v Procurator Fiscal*, the act for which the payment was made was non-specific only in the sense that the way in which the public official was expected to show favour had not been specifically articulated. The PCA 1906 clearly covers payments given "on account of any act or omission falling within an agent's functions", and it is easy to see how this requirement is met in that case: the grant of the licence fell within the agent's functions, and a payment made to induce the agent to show favour in granting that licence is clearly a payment made on such account. In contrast, it is much more difficult to understand how that requirement is met in circumstances where the payment is a pure goodwill payment given without any such express or explicit expectations, and/or where there is no specific matter before that public official in which the payer has a personal interest. Such payments do not appear to be covered by the PCA 1906.

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[596]Law Commission, *Legislating the Criminal Code Corruption*, Consultation Paper No 145, (Stationary Office, London, 1997), p 18.
[597]*King v Procurator Fiscal* [2004] Scot HC 44.
[598]See also *Grierson* [1960] Crim LR 733.

KNOWLEDGE AND INTENTION

Another question raised by the inquiries conducted by the PCTs is whether the public official who receives a corrupt payment knowing that the payment is intended to influence him or her in the performance of official functions but not intending to be influenced by it, is guilty of corruption. For example, in its inquiries into the rezoning of lands at Cherrywood in Dublin, the Flood/Mahon Tribunal inquired into payments in the amount of £22,450, which were made to identified councillors over a 2 – 3 month period, around the time of the November 1992 general election. According to the Mahon Tribunal, the purpose of these payments:

> was to garner support for the rezoning proposals that were underway or imminent at the time of payment, and which would be presented to county councillors in the course of the review of the two Development Plans. There was a direct and identifiable association between the payments to councillors (or would-be councillors)) and the pending or expected proposals to the County Council relating to the rezoning of the Cherrywood lands.[599]

That Tribunal went on to observe that it was satisfied that most of the recipients of these payments were aware that Monarch was behind them and also knew:

> that Monarch was closely and actively associated with the proposed rezoning of a substantial portion of lands in Carrickmines, and that as such, it would require and was seeking their voting support at County Council meetings in order to ensure that rezoning (or the rezoning of as much of those lands as possible).[600]

However, many of the recipients of those payments also claimed that the payments did not influence them in their voting on motions relevant

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[599]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 1578.
[600]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 1578.

to Monarch,[601] thus raising the question as to the relevance of such a claim in a prosecution under the PCA 1906. The succinct answer to this question is that it is of no relevance. As Geoffrey Lane LJ of the English Court of Appeal explained in *R v Leslie Ernest Mills*:[602]

> we feel it right to say that in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain, despite the fact that he may make to himself a mental reservation to the effect that he is not going to carry out his side of the bargain. The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act.

Nevertheless, as is also clear from this quote in order for the recipient to be convicted of bribery, he or she must be at least know of the payer's intent to influence.

BRIBES AND POLITICAL DONATIONS

As discussed, at times it can be difficult to distinguish between bribes and political donations. The inquiries conducted by the PCTs shine the spot light on this issue and raise the crucial question as to whether the PCA 1906 sufficiently distinguishes between these two so as to avoid criminalising payments which fall within the remit of "normal political activity" and so as to prohibit payments which do not fall within the remit of such activity.

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[601]Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), p 1578 - 1579; see also the Mahon Tribunal's observations, Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol II, (2012), p 826 regarding the rezoning of the Quarryvale lands, "Some councillors accepted payments without giving any consideration as to their intended purpose. In almost every instance, however, the councillors who accepted money from Mr O'Callaghan and Mr Dunlop (whether or not solicited) did so in the knowledge that the donor had an interest (an an owner or an owner's agent) in lands which they, as elected councillors, were considering for rezoning in the course of the review of the County Dublin Development Plan."

[602]*R v Leslie Ernest Mills* [1979] 68 Cr. App. R. 154; While the court's remarks in this case were *obiter*, it is also supported by the judgment of Goddard CJ. in *Carr* (1956) 40 Cr. App. R. 188, to which the court referred. It is noteworthy however, that Goddard CJ also observes that a person who takes the bribe and directly reports it, may not be acting "corruptly". The quoted passage from R v Mills was also quoted with approval in the Privy Council case, *R v Singh* [2006] Part 4 Case 3 [PC].

As discussed, the PCTs inquired into political donations given: 1) directly in return for the recipient elected official's vote on a planning matter; 2) in the hope that it would influence the recipient to vote in favour of the rezoning of the donor's land, but in the absence of any agreement or understanding to that effect; 3) because the recipient public official supported policies favoured by the donor.

The PCA 1906 covers the offer or receipt of a benefit given on account of an agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business. Clearly this covers each of the types of donations given above. More broadly, and as discussed in the introduction, political donations are frequently given to elected officials because the donor supports their policies. Logically, donors expect that support to encourage and facilitate the recipient official in pursing and implementing those policies and they will withdraw their support in the event that he or she does not do so, or starts to support other polices, which the donor does not support. In the terms of the PCA 1906, this means that most or at least many political donations are given to an agent on account of that agent "doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business."

The only remaining issue for the purposes of determining whether the donation is a bribe within the meaning of the PCA 1906 is whether those donations are given or received "corruptly". As mentioned, prior to the Prevention of Corruption (Amendment) Act 2010, the term "corruptly" was not defined for the purposes of the PCA 1906. According to that Act, it is now defined to include acting with an improper purpose. The Act does not give any indication as to what else might be covered by the term.

Improper purpose

In so far as political donations are concerned, the central question is whether the requirement that a donation be given or received for an improper purpose is of any assistance in distinguishing between legitimate donations or bribes. Clearly this requirement would cover political donations directly linked to the performance of a specific act or

the making of a specific omission on the part of the recipient elected official, and which confer on the donor an advantage which is particular to him or her. Consequently, the first type of donations mentioned above, namely those specifically linked to votes on planning decisions, would fall within the scope of the bribery offences and could properly be prosecuted as bribes.

Assessing whether a donation is given for an improper purpose is more difficult in the second and third cases identified above. The distinction between the first and second case is the absence of an explicit or implicit agreement regarding the purpose of the donation. The distinction between the first and third is the absence of a connection between the donation and a particular act. Whether these types of donations come within the PCA 1906, depends primarily on the notion of what constitutes an "improper purpose" in a political sense.

The PC(A)A 2010 does not define the term "improper". On one interpretation, the term covers any purpose considered as immoral or dishonest. On a broader interpretation, it also includes payments which are either actually unethical or which give rise to an appearance of corruption. There are problems with both these interpretations. Terms such as "immoral" or "dishonest" are difficult to define and any definitions tends to be imbued with subjective notions regarding morality and propriety. Moreover, it is questionable whether payments which are simply unethical or apparently corrupt should ever be considered as bribes. Casting the bribery net so as to incorporate such payments is likely to criminalise a significant number of political donations which either should not be criminalised, or should not be criminalised as bribes. This issue is discussed in more detail in the penultimate chapter.

More broadly, the question arises as to whether the term "improper" raises constitutional problems, from the perspective of the requirements of legal certainty. As discussed in more detail in the next chapter, one formulation of that principle says that "persons should be convicted and punished for doing X only if they in fact did X and X was clearly and accessibly marked out in advance as something that is prohibited and

that can result in punishment".[603] In that report on Corporate Killing, the Law Reform Commission observed that the legality principle requires "clear and precise legislative rules which effectively eliminate the need for creative interpretation by judges."[604] It is questionable whether the term "improper" meets these requirements.

Other meanings

The difficulty with the way in which *mens rea* is defined is exacerbated by the fact that payments with an improper purpose are only one type of payment covered by the term "corruptly". As mentioned, the PC(A)A 2010 does not indicate what other types of behaviour can be considered corrupt.

Historically, there has been some debate as to whether or not the term "corrupt" incorporates a notion of dishonesty.[605] However, this debate has largely been resolved following two cases in the UK, both of which concerned the PCA 1906. First in *Wellburn,*[606] the Court of Appeal approved the trial judge's direction, namely that:

> "Corruptly" is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word, and it means purposely doing an act which the law forbids as tending to corrupt.

Secondly, in *Harvey,*[607] the Court of Appeal confirmed that dishonesty is not an element of the term "corruptly". The defendant in that case was a "relationship officer" with a bank, who received financial inducements to show favour in the management of the bank's affairs towards one of these customers. On appeal, the defence argued that "corruptly" involves an element of dishonesty. The Court of Appeal disagreed, approving the direction to the trial judge that:

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[603] See Law Reform Commission, *Consultation Paper on Inchoate Offences*, (LRC CP 48-2008) p 30.
[604] FinbarMcAuley and J. Paul McCutcheon, *Criminal Liability,* (Dublin: Round Hall, 2000).
[605] See e.g. *Lindley*, [1957] Crim LR 321; *Calland*, [1967] Crim LR 236.
[606] *Wellburn*, (1979) 69 Cr App R 254.
[607] *Harvey* [1999] Criminal Law Review 70 CA.

> "corruptly" 'means purposely, deliberately doing an act, here the giving and acceptance of money, which the law forbids as tending to corrupt.'

Harvey was subsequently approved in *Godden-Wood,*[608] where the Court of Appeal also made clear that the same test applied whether within the public or private sectors.

Following those cases it was at least clear that dishonesty is not required under the PCA 1906, and that a person acts corruptly "if he purposely does an act which the law forbids, as tending to corrupt". However, it is not readily apparent as to what such an interpretation contributes to the offence. As observed:

> This vacuous formula has been repeatedly endorsed. As became apparent from the variety of interpretations offered in responses to the Law Commission's consultation paper, there is no consensus as to the word's ordinary meaning. This makes borderline cases something of a lottery.[609]

Worryingly, from the perspective of political donations, the court in *R v Smith* suggested that while the word is redundant in the context of inducements to act in a particular way in the future, it may add something in the case of a reward for past favours.[610]

On this view, the offer or acceptance of an inducement to show favour in the future may be corrupt by definition, but where a reward is offered or accepted for favour already shown, something more may be required.[611] Such an interpretation presents clear problems when considering the application of the bribery offences to political donations.

As is the case of the term "improper", It is questionable whether the legal certainty test is met with regard to the definition of the term "corruptly" in the PCA 1906. As previously mentioned, the US District of Columbia Circuit Appeals Court declared the term "corruptly" to be

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[608] *Godden-Wood*, [2001] EWCA Crim 1586; [2001] Criminal Law Review 810.
[609] Jacques Parry, Anthony Arlidge, Joanne Hacking and Joseph Jacobson, *Arlidge and Parry on Fraud*3rd ed., (Sweet and Maxwell, 2007), p 453.
[610] *Smith* [1960] 2 Q.B. 423.
[611] Jacques Parry, Anthony Arlidge, Joanne Hacking and Josepha Jacobson, *Arlidge and Parry on Fraud*3rd ed., (Sweet and Maxwell, 2007), p 452.

unconstitutionally vague in the context of conduct consisting in the making of false or misleading statements to the US Congress.[612] In particular, even if the courts were to find the term "corruptly" as defined in the PCA 1906 sufficiently certain to the extent it covers acting with an "improper purpose, it is difficult to see how a more extended definition, covering a category of conduct which is not improper but is nevertheless corrupt, could survive constitutional challenge.

PRINCIPALS AND INTERMEDIARIES

The inquiries conducted by the PCTs, and in particular, those of the Flood/Mahon Tribunal also raise the question as to the intent required on the part of principals in the case of bribes paid by intermediaries.[613]

Under the PCA 1906, in order to convict a principal for bribery committed by an intermediary, it is necessary to prove that the principal had the requisite intention, namely that he or she intended the intermediary to pay bribes or foresees that he or she will certainly do so. This essentially means that a principal may escape prosecution by adopting a head in the sand approach and deliberately distancing him or herself from the activities of his or her intermediary. This is a matter of serious concern from the perspective of the PCTs' inquiries. For example, the Mahon Tribunal inquired into a number of payments made by Mr Frank Dunlop on behalf of certain companies owned by Mr Christopher Jones. One of the issues which arose was whether or not Mr Jones was aware of those payments and Mr Dunlop was asked whether he had ever discussed the specifics of them with Mr Jones. In response, Mr Dunlop stated:

> "Yes, Ms Dillon, you see, in the context of the clinical atmosphere in which you deal with these things now, these are meetings that are taking place with intelligent, reasonable, honourable people who know what business is about, who have been dealing in the construction industry for the best part of 30

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[612] *United States v Poindexter* 951 F.2d 369, 379 (D.C. Cir. 1991).

[613] As previously discussed, the lobbyist, Mr Frank Dunlop played an integral role in the corrupt planning system that prevailed in Dublin during the 1990's. See generally, Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), Chapter 15.

years and it does not require, on any given occasion, for somebody to say 'I want you to pay X, Y and Z'. The culture of the meeting, the atmosphere of the meeting, the circumstances of the meeting, to any reasonable, outside, objective person would indicate that the context was that the ways of the world would apply.[614]

INTENT AND THE RELEVANT INTERNATIONAL INSTRUMENTS

There is some variation in the *mens rea* requirements under the relevant international instruments, although each of them provides for the core bribery offences to be committed intentionally. While none of the international instruments require that the bribe be given or received "corruptly", as previously discussed, with the exception of the EU Convention, each of the other instruments requires that the advantage be "undue".

DOMESTIC PUBLIC BRIBERY

In so far as domestic public bribery is concerned, the COE Convention and UNCAC require that, for the purposes of the active bribery offence, the payer intentionally promise, offer or give a public official an undue advantage for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. The passive bribery offence is framed in similar terms. In both cases therefore the payer and/or public official must intentionally offer or receive an undue advantage. Moreover, it is necessary to establish a link between the undue advantage and a public official's duties. In other words it is necessary to establish that "the accused intended not only to offer the bribe but also to influence the conduct of the recipient regardless of whether or not this actually took place."[615] Consequently, neither of these Conventions covers rewards

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[614] The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III (2012), p 1686; see also: p 1811 – 1813; p 2136.

[615] See the UN's Legislative Guide for the implementation of the UN Convention Against Corruption (2006),p 83; see also the Explanatory report on the Criminal Law Convention on Corruption (ETS 173), para 34 which provides "The offence of active bribery can only be committed intentionally under Article 2 and the intent has to cover all other substantive elements of the offence. Intent must relate to a future result: the

paid after the performance of a particular act, at least in the absence of an earlier implied promise.

Under the EU Convention, the bribery offences must also be done "intentionally, that is to say from a deliberate desire to have acts performed contrary to the duties attached to public service."[616] Similarly, that Convention does not cover rewards.[617] According to the Explanatory Report, it is a matter for national law as to "whether the offence exists where the corrupter is mistaken as to the authority which he believes the official to enjoy".[618]

FOREIGN PUBLIC BRIBERY

The bribery offences applicable to foreign public officials in the COE Convention and in the EU Convention mirror the domestic public bribery offences and again, it is necessary to prove intention with respect to each of the substantive elements of the offences. The UNCAC passive foreign bribery offence is in substantively the same terms as that in the COE Convention.

In contrast, for the purposes of the active bribery offences in both the OECD Convention and UNCAC, it is necessary to prove not only that the payer intentionally promised, offered or gave an undue advantage to a foreign public official in order that he or she act or refrain from acting in the course of his or her duties, but also that the payer's purpose in doing so was to "obtain or retain business or other undue advantage in

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public official acting or refraining from acting as the briber intends. It is, however, immaterial whether the public official actually acted or refrained from acting as intended." See also para 40 in respect of passive bribery.

[616]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), p 5; see also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5), p 9.

[617]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), p 5.

[618]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), p 5; see also Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5),p 9.

relation to the conduct of international business." A person must act intentionally with respect to all the factors or elements making up the offence and "[i]f the accused erred as to one of these elements, it cannot be said that the act was fully willed by him when he made his promise or offered his gift."[619]

With specific reference to the OECD Convention, according to one commentator, the type of intent required under the OECD Convention is at least in the form of *Dolus eventualis*. As discussed, according to some commentators, pursuant to this standard, "[i]f it is obvious that the offender was aware of the main facts, the necessary degree of volition is assumed: he cannot then convincingly argue that he did not intend the damaging consequences of his action."[620]

DOMESTIC PRIVATE BRIBERY

The bribery offences applicable to domestic persons in the private sphere are couched in similar terms in the COE Convention, UNCAC and the EU's Framework Decision. Specifically, for the purposes of active private bribery, the payer must promise, offer or give an undue advantage to any person who directs or works, in any capacity, for a private sector entity, in order that he or she perform or refrain from performing any act in breach of his or her duties. The passive private bribery offences are expressed in similar terms. The most significant difference between the private bribery offences and the public offences is that for the purposes of the former, the undue advantage must not only be linked to the person's performance of his or her business activities, but it must be intended that he or she act in breach of his or her business duties.

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[619]Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds),*The OECD Convention on Bribery*, (Cambridge University Press, 2007), p 159.

[620] Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds)., *The OECD Convention on Bribery*, (Cambridge University Press, 2007), p 158.

THE PCA 1906 AND THE RELEVANT INTERNATIONAL INSTRUMENTS

In considering whether the intent requirements under the PCA 1906 comply with the requirements of the international conventions, two questions arise. The first concerns the type of intention required under Irish law and the second concerns the requirement that the benefit be offered or received "corruptly".

INTENTION

As discussed, under Irish law, bribery must be committed intentionally, in the sense that a defendant must either have positively intended to commit the substantive elements of the bribery offences or have been virtually certain that his or her conduct would result in the commission of those elements. While this standard of intention appears to meet the requirements of the COE Criminal Law Convention, UNCAC and the EU instruments, it is not clear that it complies with the standard set in the OECD Convention.

Specifically, as mentioned, according to one influential commentator, that Convention requires State Parties to provide a standard of intent equivalent to *Dolus eventualis*. As discussed, there appears to be some disagreement as to whether, in common law systems, *Dolus eventualis* equates with recklessness[621] or "a degree of fault bordering on negligence."[622] Irrespective of which is correct, if this is the standard required under the OECD Convention, then the PCA 1906 does not comply with it as it requires actual intent (whether direct or oblique). On the other hand, it is notable that the *mens rea* requirements of the PCA 1906 have never been criticised by the OECD Working Group on Bribery on this specific issue. Nor has the UK Bribery Act been the subject of criticism in this respect, despite the fact that it also requires

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[621] Sarah Finnin, *Elements of Accessorial Modes of Liability Article 25 3(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff Publishers, 2012), p 158.

[622] Antonio Cassesse, *The Oxford Companion to International Criminal Justice,* (2009)p 302.

proof of actual intention rather than mere recklessness for a bribery conviction.

CORRUPTLY

Prior to the introduction of the definition of the term "corruptly" by the PC(A)A 2010, the use of this term was the single most significant problem with the intention required for bribery, from an international perspective and in particular from the perspective of the OECD.[623] The OECD's disquiet largely stemmed from controversy surrounding the definition of the term "corruptly" in the UK in respect of the UK PCA 1906. As observed by one leading commentator in relation to the UK PCA 1906:

> the most difficult question under the 1889 and 1906 Acts is the meaning of "corruptly". The main questions are whether the word adds anything to the remainder of the formulation of the offence, and if so, what it is that it adds. The cases on these questions are in impressive disarray.[624]

As mentioned, in some earlier cases, the term "corruptly" was considered to require an element of dishonesty. The OECD's Working Group on Bribery identified this requirement as a problem.[625] According to that group:

> [t]he risk of this formulation of intention is that it may – contrary to Official Commentary 7 – leave the way open to excuse the offender on the ground that the corrupt practices are customary

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[623]see OECD, "Ireland: Phase 2*bis*, on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2008), p 24.

[624]David Lanham, "Bribery and Corruption" in P. Smith (ed),*Criminal Law: Essays in Honour of JC Smith,* (Butterworths, 1987), 104.

[625] see OECD, "Ireland: Phase 2*bis*, on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2008), p 24.

> in the country concerned or are tolerated by the local authorities. That possibility should be ruled out in practice.[626]

In defining the term "corruptly" so as to include acting with an improper purpose, the PCA(A) 2010 effectively clarifies that dishonesty is not a required element of the bribery offences and it is not open to an offender to offer a defence based on official toleration of the payment of the advantages, or of advantages of this type. In my view, however, a question remains as to whether a payment given in accordance with local custom could legitimately be described as "improper" for the purposes of the PCA 1906. Problems with the constitutionality of the term "corruptly" discussed above are also relevant from the perspective of compliance with the relevant international instruments.

THE PCA 1906, THE AGENT-PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

Certain types of payments that have been inquired into by the PCTs fall outside the scope of the bribery offences set out in the PCA 1906, in particular rewards and goodwill payments. More significantly, the inquiries conducted by the PCTs highlight some serious problems in the *mens rea* requirements for offences committed under the PCA 1906 in so far as political donations and bribery through intermediaries are concerned.

With regard to political donations, the lack of clarity regarding the definition of "corruptly" including what constitutes an "improper purpose" in political terms is clearly problematic. Political donations play a vital role in politics, serving not only to finance political campaigns but also to inform elected officials of constituent preferences. They may also be an important element of political expression. Nevertheless, there is frequently a close connection between political donations and political acts or policies. As recognised by Kennedy J in *McConnell*[627]

> Favoritism and influence are not.... avoidable in representative politics. It is in the nature of an elected representative to favor

[626]Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds) *The OECD Convention on Bribery*, (Cambridge University Press, 2007), p 160.
[627]McConnell v Federal Election Commission, 540 US 93 (2003).

> certain policies, and by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reasons, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing the political outcomes the supporter favors. Democracy is premised on responsiveness.[628]

The PCA 1906 should not criminalise conduct which constitutes either valuable political activity or activity which may be of questionable value but in which all politicians inevitably, constantly and necessarily engage,[629] including fund-raising on the basis of their political agenda. Nor should it impose stiff penalties for conduct not clearly meriting such severe punishment. The definition of the term "corruptly" therefore is a one of the key difficulties associated with the PCA 1906.

The problem with bribes paid through intermediaries is in many ways the converse of the above. Specifically, far from suffering from overbreadth, the bribery offences risk being too narrowly applied to such payments. This is largely because the requirement of actual intent may make it difficult to prosecute those who use intermediaries for the purpose of making corrupt payments. Specifically, the prosecution will have to prove that the principal had actual knowledge of the corrupt payment, and mere recklessness will not suffice.

In so far as the international conventions are concerned, the *mens rea* needed for the purposes of the PCA 1906 appears to comply with their requirements. There is however, some question as to whether this holds true in respect of the OECD Convention. In particular one commentator has suggested that the requisite standard of intent under that Convention is *Dolus eventualis*, a standard of intent at civil law which approximates on its most restrictive interpretation to recklessness rather than actual intent.[630] Moreover, it is questionable whether a payment

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[628] McConnell v Federal Election Commission, 540 US 93 (2003) at 297

[629] See e.g. Peter D. Hardy, "The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions under the Hobbs Act" [1994] 28 U.Mich J.L. Reform 409, at 412.

[630] Ingeborg Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds) *The OECD Convention on Bribery*, (Cambridge University Press, 2007)

which is in conformity with local customs could be considered to have been made for an improper purpose under the PCA 1906. To the extent that there are problems with the constitutionality of the term "corruptly", this is also a deficiency from the perspective of the PCTs.

Each of the above identified deficiencies appear to arise from the PCA 1906 itself rather than being inextricably linked to the agent – principal model. Specifically, the PCA 1906 criminalises inducements paid on account of an agent doing something connected with their public office. Because it does not explicitly relate these payments to a breach of duty, it is necessary to use the term "corruptly" so as to delineate between payments made to exert a legitimate influence from those made to exert an illegitimate influence. However, it is possible to frame the agent – principal model so as to focus on whether the payment is intended as an inducement to breach a duty of trust owned to a principal. In such cases, as long as the payment is paid as such an inducement, it is a bribe and there is no need to include an element of additional wrongful intent in the offence.

Nor would replacing the agent-principal model with a generalised breach of duty model impact on either the difficulty of proving intent in the case of bribery involving intermediaries, or on the standard of intent required. However, these difficulties appear to be independent of the underlying model of bribery, in the sense that it is always open to the legislator to specify a lower standard of requisite intent when formulating an offence, if justified by the harm which it is sought to counter. In other words, whether or not the legislator should specify actual intent, recklessness of some other standard is a question to be resolved by reference to the underlying harm / immorality which criminalisation is supposed to combat. Given the particular role played by intermediaries in the context of bribery, there seems to be ample justification in specifying recklessness as the standard of intent required for bribery through an intermediary, from the perspective of the harm / immorality principles. As mentioned in Chapter 2, this was also one of the key recommendations of the Mahon Tribunal.

CHAPTER 8: CORPORATE LIABILITY

Corporate entities frequently feature as participants in corrupt transactions. While the individuals responsible for a corporation's actions may themselves be held liable for that participation, there is considerable debate as to whether the corporation itself should be held individually liable, whether this liability should be civil or criminal, the theoretical basis for imposing corporate liability and whether it should be supplemental to or additional to individual liability. As many corrupt transactions take place overseas, often in countries which do not themselves have robust bribery offences, a further topical issue is the extent to which a corporate entity may be held liable for the activities of its foreign subsidiaries. This chapter considers these issues, focusing on the criminal liability of companies for corporate acts.

Whether or not corporate entities can be held liable for bribery has significant implications for the ability of either of the breach of duty models under consideration to effectively combat bribery. Specifically, corporate entities are a feature in many corrupt transactions and theory suggests that criminalising the behaviour of those entities may (significantly) contribute to combating the harms which those models seek to prevent. However, in this respect, the central issue is whether and on what basis a corporate entity may be held liable for bribery, rather than on the breach of duty models themselves.

INTRODUCTION TO CORPORATE LIABILITY

While corporations have long been recognised as legal persons, able to sue and be sued, in the past it was also broadly accepted that they were incapable of criminal liability, reflected in the aphorism, *societas delinquere non potest*. In the early 1700's there was considered to be at least four main obstacles to recognising corporate criminal liability.[631] First, courts and legal thinkers of that time thought there was an inherent difficulty in attributing acts to a juristic fiction. Secondly, they did not believe corporations could possess the moral blameworthiness

[631]See V.S. Khana, "Corporate Criminal Liability: What Purpose Does it Serve?" (1996) 109(7) Harvard Law Review 1477; see also LH Leigh, *The Criminal Liability of Corporations in English Law,* (Weidenfeld & Nicholson, 1969) 3 – 14.

necessary to commit crimes of intent, having "no body to be kicked or soul to be damned".[632] Thirdly, the ultra vires doctrine meant that corporations could not be held accountable for acts not provided in their charters, including, obviously, crimes. The fourth and final obstacle was the courts' literal understanding of criminal procedure, including the need to physically present the accused in court. Some of these objections are reflected in the writing of Blackstone, in 1768:

> An aggregate corporation.....cannot appear in person, being invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten, in it's [sic] body politic. Neither is it capable of suffering a traitor's or a felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood.... Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it. Neither can a corporation be excommunicated; for it has no soul.[633]

As the number of corporations increased and their importance grew, courts in some jurisdictions became more willing to hold them criminally liable for their actions.[634] The first developments occurred in cases involving nonfeasance but liability was gradually extended to cases involving misfeasance, from there to all offences that did not require criminal intent, and ultimately to crimes that do require intent. Corporate criminal liability currently exists in many legal systems,[635] although some jurisdictions continue to restrict criminal law to punishing only the

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[632]See John C., Coffee, "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) Michigan Law Review 386, 459.

[633] Blackstone, *Commentaries on the Law of England,* (1769) Volume 1, 464-5.

[634]V.S. Khana, "Corporate Criminal Liability: What Purpose Does it Serve", (1996) 109(7) Harvard Law Review 1477.

[635]See e.g. Gilbert Geis and Joesph Dimento, "Should we Prosecute the Corporation and/or individual", in Frank Pearce and Lauren Snider (eds) *Corporate Crime: Contemporary Debates*, (University of Toronto Press Incorporated, 1996) at p 72, according to whom "Only dim echos linger today in the jurisprudence of the U.S., England and Canada of the once-intensive debate about whether it is proper ethically, judicially and in terms of effectiveness to punish a corporate criminally rather than, or in addition to, punishing individuals within it. The position that corporations are fair game for criminal charges now has swept aside virtually all legal barriers that stood in its path."

criminal acts of natural persons.[636] Moreover, the theoretical justifications for imposing such liability remain disputed. For example, according to Khanna, while in the past corporate criminal liability was useful in that it permitted use of public powers for the purposes of investigation and enforcement at a time when civil enforcement techniques were not well developed, this is no longer the case. He concludes:

> From a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations. Indeed, the answer to the question the title [of this article] poses – 'corporate criminal liability: what purpose does it serve?' – is 'almost none'.[637]

Nevertheless, there appears to be widespread agreement that punishing corporate entities themselves for bribery makes an important contribution to combating its underlying harm / immorality. Specifically, corporate entities are frequently involved in professional / occupational bribery and sanctioning the entity itself may have deterrent effects over and above those associated with sanctioning the individual. From the perspective of bribery, the main advantage of making bribery a criminal offence is that it facilitates mutual legal assistance and sometimes the enforcement of sanctions It also means that the entity itself can be the target of criminal confiscation measures.[638] However, it should be noted that several of the relevant international instruments give State Parties a certain degree of choice between criminal and civil sanctions, as discussed further below.

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[636]Cristina de Maglie, "Models of Corporate Criminal Liability in Comparative Law" (2005) 4(3) Washington University Global Studies Law Review 547.

[637]V.S. Khanna, "Corporate Criminal Liability: What Purpose Does it Serve?" [1996] 109(7) Harvard Law Review, p 1477, 1534; see also e.g. John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability", (2009) 46 Am. Crim. L. Rev 1329, also available at http://ssrn.com/abstract=1457771 according to whom "[r]ecent studies suggest that the additional criminal sanctions can actually undermine the overall deterrent effect of civil liability by creating perverse compliance incentives that are not otherwise present"; See also Assaf Hamdani & Alon Klement, "Corporate Crime and Deterrence" (2008) 61 Stan L. Rev. 271, 274., as cited by Hasnas.

[638] See generally, Imelda Higgins, Corruption Law, (Roundhall, 2012, p. 307

MODELS OF CORPORATE CRIMINAL LIABILITY

A variety of doctrines may be used in order to attribute corporate criminal liability to a corporate entity.[639] Of these the most prominent are the vicarious liability doctrine; the identification doctrine; the organisational liability doctrine; and the aggregation doctrine. It is worth mentioning at this point that while the various doctrines impact significantly on the extent to which it is possible to impose liability on corporate entity for bribery, they are independent of the model of bribery used. In other words, the choice of doctrine for imposing corporate liability does not have different implications for different models of bribery. It is also noteworthy that determining the appropriate doctrine upon which to base corporate liability is generally not directly linked to the specific harm caused by corporate bribery. Rather it is based on a general understanding of the harm to which crime committed on the part of a corporation may give rise, if measures are not taken to deter corporate entities from participating in criminal activities.

Vicarious Liability

Under the doctrine of vicarious liability, also referred to as *respondeat superior*, a corporation, irrespective of its size, itself commits a crime whenever an agent of the corporation commits a crime while acting within the scope of his or her employment with the intent to benefit the corporation. The concept of an agent may either refer to all the individuals who act on behalf of the corporation or, in the alternative, only managers of the corporation.

The US is the most prominent jurisdiction to attribute corporate criminal liability on the basis of vicarious liability: the Supreme Court endorsed this basis in the 1909 case, *New York Central & Hudson River Railroad v United States*.[640] Pursuant to the approach adopted in that and subsequent cases, in the US a corporation can be held liable for any

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[639] These models include: vicarious liability; the identification doctrine; strict liability; organisational liability; reactive liability; aggregation; and flexible attribution. See generally, Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability (Theories of Institutional Design)*, (Cambridge University Press, 1994).

[640] *New York Central & Hudson River Railroad v United States*, 212 U.S. 481 (1909).

crime committed by one of its employees acting within the actual or apparent scope of his or her employment and at least in part to benefit the company.[641]

One of the justifications for vicarious criminal liability is that it encourages shareholders and corporate officers to pay greater attention to the acts of lower level officials and employees.[642] However, it is frequently heavily criticised, not least because:

> fundamentally it involves the imposition of liability on one 'person' (the corporation) for the wrongs of another (the employee or agent) in circumstances where, in the nature of things, the person on whom liability is being vicariously imposed lacks mens rea.[643]

The Identification Doctrine

Under the Identification Doctrine, the acts and state of mind of certain senior officers in a corporation, its so-called "directing minds", are deemed to be the acts and state of mind of the corporation. It was first set out in 1915 in *Lennard's Carrying Co Ltd. v Asiatic Pet Co Ltd.*[644] The classic statement of the rationale behind the identification approach was given in a non-criminal case, but is frequently quoted in criminal decisions. Specifically, in *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd,*[645] Lord Justice Denning stated:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with direction from the centre. Some of the people in the company are mere servants and are nothing more than hands to do the

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[641]Andrew Weissman, "Rethinking Criminal Corporate Liability" (2007) 82(2) Indiana Law Journal 411.
[642]See e.g. J Gobert, "Corporate Criminality: four models of fault" (1994) 14 Legal Studies 393.
[643]Law Reform Commission, *Consultation Paper on Corporate Killing,* (LRC-CR 26-2003), p 20; see also John Hasnas, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) 46 Am. Crim. L. Rev 1329.
[644]*Lennard's Carrying Co Ltd v Asiatic Pet Co Ltd.*, [1915] AC 705.
[645]*H.L. Bolton (Engineering) Co v. T.J. Graham & Sons Ltd*, 1 Q.B. 159, 172 (C.A. 1956).

> work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

In the more recent case of *Tesco Supermarkets Ltd v Natrass*,[646] the court similarly held that a corporate entity could be held criminally liable for the acts of a person who is "an embodiment of the company".[647]

Among those jurisdictions which attribute corporate criminal liability on the basis of the identification doctrine, there is some variation in the approach taken to identifying which officers or employees of a corporation are its directing mind for the purpose of that attribution.

The main criticisms of the identification doctrine centre on the fact that it restricts corporate criminal liability to the conduct or fault of directors or high level managers. This essentially works in favour of larger corporations in that the range of persons in such corporations capable of making the company liable will inevitably constitute a smaller percentage of the total workforce than in a smaller company. Consequently, the company will escape criminal liability for the acts of a [considerably] higher proportion of its employees. Moreover, the principle fails to take into account the fact that corporate decisions and operations are frequently complex and interconnected processes and result from the conduct of a number of individuals at different managerial levels.[648]

The Organisational Liability Doctrine

Under both the vicarious liability and identification models of corporate criminal liability, liability is essentially derivative in that it derives from the liability of individuals operating within the organisation. In contrast, the organisational liability doctrine seeks to attribute liability directly to

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[646]*Tesco Ltd v Nattrass* [1972] AC 153.
[647]*Tesco Ltd v Nattrass* [1972] AC 153, at 171.
[648]See e.g. Brent Fisse, "The attribution of criminal liability to corporations: a statutory model" (1991) 13 Sydney Law Review 277; J Gobert, "Corporate Criminality: four models of fault" (1994) 14 Legal Studies 393; E Colvin, "Corporate personality and criminal liability" (1995) 6 Criminal Law Forum 1.

companies. Specifically, it is based on the notion that corporate fault can be found in corporate policies or culture in so far as they fail to establish and maintain sound operational policies. Under this model "a corporation commits an offence if its corporate policy (or failures in its corporate policy) led to the causation of the offence in question."[649] In contrast to the vicarious liability and identification models, this organisational model has the practical advantage that it does not require proof that any single individual within the corporation is guilty of the relevant offence.

The Aggregation Doctrine

Under this doctrine, the intent of two or more individuals acting as the company is aggregated into one for the purpose of holding the company itself liable for an offence, in circumstances where neither individual on his or her own has the requisite intent to commit the offence.[650] It was developed by the US courts and effectively expands the identification and vicarious liability models of corporate criminal conduct by enabling them to deal with offences which are attributable to a range of decisions taken by individuals at different managerial levels.

LIABILITY OF UNINCORPORATED BODIES FOR BRIBERY

At common law, an unincorporated body is incapable of being held liable for an offence because of its lack of separate personality. However, an unincorporated body may be exposed to liability pursuant to statute. While it was thought that in holding an unincorporated body criminally liable, the courts would proceed by analogy to the law relating to corporations, in L[651], the Court of Appeal rejected this approach on

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[649]Law Reform Commission, *Consultation Paper on Corporate Killing*, (LRC CP 26-2003), p 31; see e.g. Brent Fisse, "The attribution of criminal liability to corporations: a statutory model" (1991) 13 Sydney Law Review 277; L Friedman, "In defense of corporate criminal liability" (2000) 23 Harvard Journal of Law and Public Policy 833; C Wells, "Corporate Criminal Developments in Europe" (2001) 39 Law Society Journal 62.

[650]See e.g. E Lederman, "Models for imposing corporate criminal liability: from adaptation and imitation towards aggregation and the search for self-identity" (2000) 4 Buffalo Criminal Law Review 641.

[651] L, [2008] EWCA Crim 1970; see generally, David Ormerod, John Cyril Smith and Brian Hogan, Smigh and Hogan's Criminal law, p. 269 (Oxford University Press,

the basis that criminal liability of unincorporated bodies involves quite different principles from those relating to corporations.

PARENTAL LIABILITY FOR SUBSIDIARIES

Subsidiaries are frequently involved in foreign bribery, either in their own right, or on behalf of the parent company.[652] For example, the officers or employees of a subsidiary may act as an intermediary for the parent company in paying bribes. Moreover, a subsidiary may be used to channel funds used for bribery in an effort to make these funds more difficult to detect. In some instances, the subsidiary may be specifically established in order to permit the parent undertaking to isolate itself from the bribery through reliance on the limited liability doctrine.

As discussed, a registered company is a body corporate and legal person which is separate and distinct from its shareholders.[653] Where an entity is organised in a group comprising a parent company and subsidiaries each of which comprises a limited company in its own right, then each company in the group is individually responsible for its own actions. In particular, the "veil of incorporation" "operates to make each company in the group a separate legal entity with no liability for the debts or liabilities of other group companies."[654]

However, there are some exceptions to the general principle that the parent company is not liable for the actions of a subsidiary. Specifically, the law is usually prepared to intervene where the notion that the parent and subsidiary are separate legal entities is used for the purposes of

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[652]See e.g. OECD, *Typologies on the Role of Intermediaries in International Business Transactions*, Final Report, (9 October 2009).

[653]*Salomon v A Solomon & Co Ltd* [1897] AC 22.

[654]Stephen Judge, *Q&A Company Law 2008 and 2009* (Oxford University Press, 2008), p 3. The separation between a parent company and its subsidiaries is clear from a quote by Templeman LJ in *Re:Southard Co Ltd* [1979] 1 WLR 1198, at 1208: "A parent company may spawn a number of subsidiary companies all controlled directly or indirectly be the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter to the dismay of its creditors, the parent company and other subsidiaries prosper to the joy of their shareholders without any liability for the debts of the insolvent subsidiary."

defeating public convenience, justifying wrong-doing, protecting fraud or defending crime.[655]

INDIVIDUAL LIABILITY FOR CORPORATE ACTIONS

In contrast to the debate surrounding the issue of corporate criminal liability, there is little dispute on the issue as to whether individuals should be held liable for corporate offences. Specifically, many of those who oppose corporate criminal liability do so on the basis that "it is inappropriate and ineffective to impose criminal liability upon a corporation as distinguished from human agents who actually perform the illegal act."[656] As one commentator remarks:

> There has never been any doubt among lawyers that a crime committed on behalf of an association, corporate or incorporated, must in fact have been committed by an individual, and that therefore guilt is always personal.[657]

Holding individuals personally liable for their actions has different deterrent effects from the imposition of corporate liability. In particular from the perspective of these individuals, the prospect of a criminal conviction, especially one that leads to imprisonment, may have a greater deterrent effect than a sanction imposed on the company.[658]

A more controversial issue is whether individuals should be held liable by virtue of the fact that the corporate entity has committed an offence, even in circumstances where that individual was not directly implicated in the offence.[659] In this respect, several jurisdictions, including for example, both Australia and the UK, provide for a form of derivative

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[655]See e.g. Henry Ballentine, "Separate Entity of Parent and Subsidiary Corporation" [1925] 14(1) California Law Review 12

[656]*United States v Hilton Hotel Corporation*, (1972) 467 F.2d 1000 at 1006

[657]G. Canfield, "Corporate Responsibility and Crime", (1914) 14 Columbia Law Review 469, 472.

[658]A Cowan, "Scarlet letters for corporations? Punishment by publicity under the new sentencing guidelines" (1992) 65 Southern California Law Review 2387, 2393.

[659] See e.g. Submission of New South Wales Lawyers, *Personal Liability for Corporate Fault* (2005) available at www.lawsociety.com.au, last downloaded on 17 June, 2013, according to which "the doctrine of derivative liability fails to reflect the separate concepts of individual and corporate blameworthiness. That is, the fact that a corporation may be blameworthy does not necessarily mean that the individual director is blameworthy in respect of the same offence."

managerial responsibility which, once the corporate entity itself has committed an offence, permits certain individuals within that entity to be prosecuted for the same offence in circumstances where they lack the intent necessary for direct liability.[660] Differences exist as to whether the offence is committed on a strict liability basis, or whether it is necessary for the individual to have contributed to its commission, for example through recklessness, wilful negligence, negligence or inadvertence. Differences also arise regarding the extent to which derivative managerial liability is confined to corporate officers or whether it extends to other high-level employees.

CORPORATE LIABILITY AND THE PCA 1906

Under the PCA 1906 both a corporate entity and an unincorporated body may be convicted of bribery.[661] Moreover, the PC(A)A 2001, as amended also provides for a form of derivative managerial liability for offences committed under that Act.

CORPORATE LIABILITY

In this jurisdiction, it is generally accepted that corporations can be held criminally liable however, the precise model for imposing liability has not been conclusively determined by the Irish courts.[662] Broadly speaking the preferred model appears to be the identification model. In particular, there are a number of civil cases which refer to holding companies being liable for the actions of a person who is their directing mind and will.[663] However it is not clear at what level a person must be in a corporation before his or her intention can be attributed to it.

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[660] See generally, Helen Anderson (ed) *Directors Personal Liability for Corporate Fault A Comparative Analysis*, (Kluwer Law International, 2008).

[661] As an unincorporated body has no legal personality at common law, it cannot incur legal liability. However, it appears that liability may be imposed pursuant to statute. See eg, the UK Case *L* {2008] EWCA Crim 1970 in which the UK Court of Appeal recognised the criminal liability of an unincorporated association (a golf club). See also *Clerk to Croydon Justices, ex p. Chief Constable of Ken* [1989] Crim LR 910 DC where an unincorporated body was held liable for a fixed parking offence. It is also noteworthy that the Interpretation Act 2005, s 18(c) also interprets the word "person" to include unincorporated bodies.

[662]See generally, Shelley Horan, *Corporate Crime,* (Bloomsbury Professional, 2011) Chapter 2.

[663]*Taylor v Smith* [1991] 1 IR 142.

An early criminal case from the turn of the century, *R(Cottingham) v Justices of County Cork*[664] suggests that a company may be held liable for the activities of its agent or manager. Moreover, in the High Court case, *Crofter Properties Ltd v Genport Ltd*,[665] McCracken J referred with approval to the decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*[666] albeit on an *obiter* basis. In *Meridian*, a company's chief investment officer, acting within his authority but unknown to the board of directors, bought a holding in a public issuer which was large enough to make it necessary under New Zealand law for the company to register the holding with the Securities Commission. The Company did not register the holding and that Commission brought proceedings against it. On a narrow approach to the identification doctrine, the investment manager was not sufficiently senior to represent the company's "mind". However, Lord Hoffman refused to limit the identification doctrine to those representing such senior persons, stating that in each case the court must fashion a particular rule of attribution for the particular substantive rule. In *Meridian* the rule was one requiring disclosure of substantial investments to the company and the stock exchange. Consequently, the question was "[w]hose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?". In this case, it was the investment manager who made the investments and the council held that his acts and knowledge could be attributed to the company. More recently, in *Howard v Irish Life & Permanent plc and Guinness and Mahon (Ireland) Ltd*,[667] O'Sullivan J appeared to endorse a broad approach to the identification doctrine where he commented that:

> [i]t would be unfair if, for example, knowledge in the possession of an employee of a branch of the respondents were to be imputed in the present context to the respondent itself in the absence of any evidence that this knowledge constituted the directing mind and will of the respondent.

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[664] *R(Cottingham) v Justices of County Cork*[1906] 2 IR 415.
[665] *Crofter Properties Ltd v Genport Ltd*[2002] IEHC 26.
[666] *Meridian Global Funds Management Asia Ltd v Securities Commission*[1995] 2 AC 500.
[667] *Howard v Irish Life & Permanent plc and Guinness and Mahon* (Ireland) Ltd [2006] IEHC 419, O Sullivan J.

This suggests that O'Sullivan J was prepared to look at the specific circumstances of the case in imputing knowledge to the company rather than merely considering the more formal question as to whether the relevant employee was a company officer.

The Supreme Court considered the issue of corporate liability in a civil case involving fraud, namely *Superwood Holdings plc v Sun Alliance and London Insurance plc.*[668] In that case, the Supreme Court held that a company could be vicariously liable for fraud, on a civil basis, where it was possible, in a practical manner, to identify fraud on the part of the "directing mind and will" of the company. Denham J, giving judgment in the Supreme Court, described the above-mentioned UK case, *Lennard's Carrying Co Ltd v Asiatic Pet Co Ltd*[669]as a "useful precedent" and noted that it had previously been cited in this jurisdiction with approval. She also noted, referencing Ussher, that there are difficulties with the identification doctrine:

> However, there is a danger in applying the principle in a strictly anthropomorphic manner. As stated in Ussher, *Company Law in Ireland*, (1986) at p. 38, in reference to Lord Haldene's theory:
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> > "Although in *Lennard's* case in 1915 this theory provided a rational answer to the question whether a corporation could be guilty of fraud at all, its utility as an analytical tool now that that victory has been won may be questioned, chiefly because it displays an undesirable tendency towards anthropomorphism. To ask who is the very ego and centre of personality of the corporation with a view to attributing fault to it is no more than to ask in two stages rather than one who within the company was lawfully in control of that situation. Attempts to relate parts of an organisation to corresponding parts of the human body was a medieval pastime..... Such anthropomorphic conceits may seem innocent, but there is an artificiality in seeking to force complex and varying corporate structures into a uniform human mould; in particular a search for

[668] *Superwood Holdings plc v Sun Alliance and London Insurance plc* [1995] 3 IR 303.
[669] *Lennard's Carrying Co Ltd v Asiatic Pet Co Ltd*[1915] AC 705.

> Lord Haldene's very ego and centre of personality of the corporation may prove fruitless where power is diffused throughout a company. Irish company law recognises that the functions of the various "organs" may be interdependent and differ from company to company."[670]

Denham J then stated that she was "satisfied that the appropriate test is to apply the essential principle expounded by Lord Haldane to an Irish company in a practical manner and to determine who was in control of the relevant issue."[671]

Overall, in *Superwood*, the Supreme Court appears to have endorsed the identification doctrine. However, that decision also appears to indicate a willingness on the part of the Supreme Court to look beyond a corporation's directors and/or officers when searching for its directing mind. Specifically, Denham J's reference to applying the identification model in "a practical manner" and the need to determine "who was in control of the relevant *issue*" (emphasis added) suggests an approach not too dissimilar to that adopted in *Meridian* and its emphasis on the person whose act was for the relevant purpose intended to count as the act of the company.[672] Nevertheless, it is not clear whether *Superwood* in fact goes as far as *Meridian* and in any event, it is not a criminal case. It is noteworthy in this respect that the Law Reform Commission appears to take a more restrictive reading of *Superwood,* simply observing:

> The identification doctrine has been accepted – with reservation – by the Supreme Court in Ireland in the context of the imposition of civil liability on a corporation. As already indicated, however, there is no reported decision of the Irish superior courts on the

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[670] *Superwood Holdings plc v Sun Alliance and London Insurance plc* [1995] 3 IR 303, 330.

[671] *Superwood Holdings plc v Sun Alliance and London Insurance plc*[1995] IR 303, 330.

[672] See also OECD Ireland: Phase 2*bis* Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions (2008), p 27 according to which "Summarising the situation, high level Irish legal experts stated that there is no clear standard of criminal liability for legal persons in Ireland and that is largely an evidentiary question. The standard may therefore not be as restrictive as the 'identification theory'.

question of whether the doctrine extends to the criminal sphere.[673]

CORPORATE LIABILITY FOR ACTIONS OF SUBSIDIARIES

In certain circumstances, the Irish courts are prepared to lift the corporate veil and hold a parent company liable for the criminal activities of its subsidiaries. Such instances may be specified in statute,[674] or they may fall within the exceptional set of circumstances where the courts are prepared to "pierce the corporate veil". As noted by Lord Denning in *Littlewoods Mail Order Stores Ltd. v. IRC,*[675] incorporation does not fully "cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind."[676]

The main provisions relevant to piercing the corporate veil in cases of corruption engaged in by subsidiaries are to be found in the common law. While there is a considerable lack of clarity surrounding the circumstances in which the courts will be prepared to lift the veil, the following statement of the law by Keane in his book, *Company law,*[677] was approved by Laffoy J in *Fyffes plc v DCC and others*[678] and subsequently by Charleton J in *Millstream Recycling Ltd v Tierney and Others.*[679] According to that statement:

(1) The rule in *Salomon's* case is still the law. The company and its shareholders are separate legal entities and the courts normally cannot infer from the degree of control exercised by the shareholder a relationship of principal and agent or beneficiary and trustee between the shareholders and the company.

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[673]The Law Reform Commission, *Consultation Paper on Corporate Killing* (LRC CP 26-2003), 30.
[674]See e.g. the Companies Act 1963, s. 297A as inserted by the Companies Act 1990;
[675]*Littlewoods Mail Order Stores Ltd. V IRC*[1969] 1 W.L.R. 1241.
[676]*Littlewoods Mail Order Stores Ltd. V IRC*[1969] 1 W.L.R. 1241, 1254.
[677] Keane, *Company Law*, 3rd ed., (Bloomsbury Professional, 2000), Chapter 11, para 11.64.
[678]*Fyffes plc v DCC and others* [2005] IEHC 477.
[679]*Millstream Recycling Ltd v Tierney and others* [2010] IEHC 55.

(2) The courts, however, will not permit the statutory privilege of incorporation to be used for a fraudulent, illegal or improper purpose. Where it is so misused, the court may treat the company thus incorporated as identical with its promoters.

(3) In certain cases, where no actual misuse of the privilege of incorporation is involved, the courts may nonetheless infer the existence of an agency or a trust if to do otherwise would lead to injustice or facilitate the avoidance of tax liability.

(4) In the case of a group of companies, the court may sometimes treat the group as one entity, particularly where to do otherwise would have unjust consequences for outsiders dealing with companies in the group.

(5) The rule in *Salomon's* case does not prevent the court from looking at the individual members of the company in order to determine its *character* and *status* and where it legally resides.

On the basis of these principles, it appears clear, first and foremost, that where a subsidiary is purposefully set up in order to make corrupt payments, the courts are likely to pierce the corporate veil in order to hold the parent company liable for those payments.[680] Secondly, even where there is no misuse of the vehicle of incorporation, the courts may lift the veil either on the ground of agency or that a group of companies is in reality a single economic entity.

Agency

Under the agency theory, a parent company's liability for the actions of its subsidiary is based on the concept that principals are liable for actions taken by their agents within the scope of their authority. In the UK case, *Smith Stone & Knight v Birmingham Corporation*,[681] Atkinson J in holding that a subsidiary was carrying on business as agent of a holding company, listed a number of factors to be taken into

[680]See also L.C.B. Gower, *Principles of Modern Company Law*, 4th ed., (Stevens London, 1979), 137.
[681]*Smith Stone & Knight v Birmingham Corporation*[1939] 4 All ER 116.

consideration in determining the existence of an agent-principal relationship.[682] This case was relied upon by the High Court in *Fyffes v DCC*,[683] in which it reaffirmed the existence of the agency principle although it cast doubt on the general relevance of the factors identified by Atkinson J. According to Laffoy J, a subsidiary will only be deemed an agent of its parent where such an inference is factually justified on the basis of all the facts, including the nature of the parent's interest in the shares of the subsidiary and the relationship between both. Significantly, Laffoy J rejected the suggestion that only evidence of an express agreement between the parties will suffice and stated that the views of the human agents in the company regarding the nature of the relationship between the parent and a subsidiary are not in any way determinative of the situation.

Single Economic Entity

Instances where the courts are prepared to lift the veil of incorporation in order to treat a collection or group of companies as a single entity for the purposes of a particular legal aim tend to involve circumstances where the companies in question are closely related, acting in tandem and the justice of the case requires that they be treated as one. This single economic entity ground can be traced to the UK case, *DHN Food Distributors Ltd v Tower Hamlet LBC*.[684] It was approved in this jurisdiction by Costello J in *Power Supermarkets Ltd v Crumlin Investments Ltd*[685] which concerned a covenant in a lease of a unit in a shopping centre to the plaintiff which restricted the use of the remainder of the shopping centre in a particular manner. The issue in that case was whether the first defendant could avoid being liable to the plaintiff on foot of that covenant by conveying the freehold in another part of the shopping centre to another company, Dunnes Stores (Crumlin) Ltd. Like

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[682] These factors are: (1) Are the profits of the subsidiary treated as the profits of the parent?; (2) Were the persons conducting the business of the subsidiary appointed by the parent? (3) Was the parent the "head and brains" of the trading venture?; (4) Did the parent govern the adventure?; (5) Were the subsidiary company's profits made by the skill and direction of the parent?; (6) Was the parent in effective and constant control of the subsidiary?

[683] *Fyffes v DCC* [2005] IEHC 477.

[684] *DHN Food Distributors Ltd v Tower Hamlet LBC*[1976] 3 ALL ER 462.

[685] *Power Supermarkets Ltd v Crumlin Investments Ltd*, (unrept) (Costello J, HC 22 June 1981).

the first defendant, that company was controlled by the Dunne family and it had commenced trading in that part in a manner restricted by the covenant. In his judgment, Costello J referred to both the *Smith, Stone and Knight Ltd* case and the *DHN Limited* case and observed:

> It seems to me to be well established from these as well as from other authorities..... that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group, or another member of the group, if this confirms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one of the application of this principle. (...). To treat the two companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so would involve considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own.[686]

The single economic entity ground for lifting the corporate veil has since been recognised in this jurisdiction in other cases including, in particular by the Supreme Court in *Re Bray Travel Limited and Bray Travel (Holdings) Limited*,[687] and *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels*,[688] and it was recently affirmed by the High Court in *Fyffes v DCC*. However, despite its general acceptance, it is not always easy to determine when the courts will lift the veil on this ground. According to Murphy J in *Lac Minerals Limited v Chevron Mineral*,[689] two ingredients are required "first, the factual identification of the acts of one body corporate with those of another and secondly, the requirement that justice would be served only if the court ignores the distinction between

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[686] *Power Supermarkets Ltd v Crumlin Investments Ltd*, (unrept), (Costello J, HC 22 June 1981), p 8.
[687] *Re Bray Travel Limited and Bray Travel (Holdings) Limited*, (unrept) (Supreme Court, 13 July 1981).
[688] *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels*[1998] 2 IR 519
[689] *Lac Minerals Limited v Chevron Mineral*[1995] 1 I.L.R.M. 161.

the separate corporate entities."[690] However, these ingredients offer little practical guidance.

INDIVIDUAL AND DERIVATIVE MANAGERIAL LIABILITY

In general, the fact that a corporate entity has its own independent personality means that a director, officer (or employee) of that company is not personally liable for its acts or omissions. However, in some circumstances, directors may be held personally liable at common law for their participation in corporate crime, including by virtue of inchoate liability and/or secondary liability.

In addition, the Prevention of Corruption (Amendment) Act 2001, as amended explicitly provides for the direct liability of directors and corporate officers in situations where the corporate entity itself commits bribery. According to the relevant provision, where a corporate entity commits bribery contrary to the PCA 1906, and that entity is itself guilty of bribery, an officer of that company may also be convicted of that same offence if that bribery is "proved to have been committed with the consent or connivance of or to be attributable to any neglect" on the part of that officer.[691] In order for the prosecution to rely on this provision, it is not necessary that the corporate entity itself be convicted of bribery: it is sufficient if the prosecution prove that the corporate entity has committed that offence.[692]

Consent

In order for a director or officer to consent to bribery, he or she must be proved to know the material facts which constitute the offence by the body corporate and to have agreed, explicitly or implicitly to its conduct of the business on the basis of those facts. The consent must amount to more than acquiescence, but can be established by inference as well as by proof of an express agreement.[693]

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[690] *Lac Minerals Limited v Chevron Mineral* [1995] 1 I.L.R.M. 161, at 187.
[691] Prevention of Corruption (Amendment) Act 2001 s.9.
[692] *DPP v Hegarthy* [2011] IESC 32
[693] See e.g. *Re AG's Reference (No 1 of 1995)* [1996] 1 WLR 970; *R v Chargot Ltd(trading as Contract Services)* [2009] 1 WLR 1

Connivance

Someone may connive at the commission of an offence where he or she knows it may occur and does nothing to prevent its commission. In the UK case, *Huckerby v Elliot*,[694] Ashworth LJ agreed with the stipendary magistrate's definition of "connivance" as something which may occur where a director knows what is going on and while he or she does not actively encourage it, he or she lets it continue and says nothing about it.[695]

Neglect

Neglect may be defined as a failure by a person to do a specific act which he or she knows or ought to know that it is his or her duty to do. In contrast, to consent or connivance, it requires some level of causal connection between the offence and the acts or omissions of the individual.[696]

CORPORATE LIABILITY AND THE PCTS

Each of the PCTs inquired into payments made: (1) by corporate entities to political parties and/or public officials; and (2) by individuals and entities to corporate entities on behalf of public officials.

With regard to payments made by corporate entities, for example, the Hamilton Tribunal inquired into payments to the tune of £175,000 paid by Goodman International Ltd to the Fianna Fáil Party.[697] The McCracken Tribunal inquired into payments from the Dunnes Stores Group to Mr Michael Lowry and to Mr Charles Haughey. Similarly, the

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[694]*Huckerby v Elliot*[1970] 1 All ER 189

[695]The Law Commission, *Reforming Bribery,* Consultation Paper No. 185, (Stationary Office, London, 2007) p 137. See also *Chargot Ltd (t/a Contract Services)* [2008] UKHL 73; [2009] 1 W.L.R. 1 where referring to the use of this phrase in the context of an offence under the Health and Safety at Work Act 1974, Lord Hope commented that: ".....[N]o fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance.....In some cases, as where the officer's place of activity was remote from the workplace or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done, very little more may be needed."

[696]See Shelley Horan, *Corporate Crime*, (Bloomsbury Professional, 2011), p 89.

[697]Fintan O'Toole, *Meanwhile Back at the Ranch – The Politics of Irish Beef*, (Random House 1995), p 69-70.

Moriarty Tribunal inquired into a number of payments made by corporate entities to Mr Charles Haughey, including from: the Dunnes Stores Group;[698] two Hong Kong Registered Companies, Wrytex (Far East) Ltd and Carica Ltd;[699] and Irish Permanent Building Society Ltd.[700] It also inquired into a payment of £50,000 from the Norwegian Telecommunications company, Telenor, to the Fine Gael party[701] as well as several payments from companies owned or controlled by Mr Dennis O'Brien to Mr Michael Lowry or to companies owned or controlled by Mr Lowry.[702] For its part, the Flood/Mahon Tribunal inquired into payments by companies including Monarch Properties Ltd, Riga Ltd, and Barkhill Ltd.

Examples of payments made to corporate entities on behalf of public officials include a number of the payments made by Dunnes Stores Group to Mr Lowry's company, Streamline Enterprises Ltd, which were inquired into by the McCracken Tribunal. Similarly, a number of payments to the benefit of Mr Haughey were made to his family company, Larchfield Securities Ltd,[703] or his son's company, Celtic Helicopters Ltd.[704] A number of the payments made to Mr Liam Lawlor, which were the subject of inquiry by the Mahon Tribunal, were made to companies owned or controlled by him including, Economics Report Ltd and Comex Trading Corporation ltd.[705]

It is significant that, in the case of a number of the payments made to corporate entities, the public official who was the indirect recipient of the payment was neither a director nor an officer holder of that company. Moreover, in a number of those instances the companies were

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[698]See Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 210 – 220.
[699]See Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 220 – 222.
[700] See Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006), p 122 - 124.
[701]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, (2011), Chapt 3.
[702]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, (2011) Chapt 7.
[703]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006), p 258 – 264.
[704]Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, (2006) p 267 ff.
[705] See generally, Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol III, (2012), Chapt 16.

beneficially owned by the recipient public official and there was no evident link between the official and that company. Perhaps the most striking example of the use of beneficial ownership of corporate entities for the purpose of making corrupt payments occurred in the case of payments to Mr Ray Burke, which were inquired into by the Flood Tribunal. Payments totalling £110,000 Sterling were made by a Jersey based company, Canio Ltd into the account of another Jersey based company, Cavier Ltd. Canio Ltd was legally owned by yet another Jersey based company, Ardcarn Ltd which was in turn beneficially owned by three corporate structures, themselves beneficially owned by the developers Messrs. Brennan and McGowan and a third person, Joseph Finnegan, respectively. For its part, Cavier Ltd was beneficially owned by Mr Burke.[706]

THE PCA 1906, CORPORATE LIABILITY AND THE PCTS

The inquiries conducted by the PCTs raise issues both from the perspective of corporate liability itself and from that of derivative managerial liability.

Corporate Liability

From the perspective of the PCTs, the main deficiency with regard to imposing liability on corporations for offences under the PCA 1906 is that the lack of certainty surrounding the basis for imposing that liability could deter prosecutors from prosecuting the corporation itself and cause them to focus instead on associated individuals. This is problematic in that holding corporations liable for the acts of their employees/service providers may have a particular deterrent effect, over and above that of individual liability, since it raises legal and "reputational" risks for corporations as such.[707] In addition, corporations which pay bribes may

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[706]See Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002), p 23 – 34; see also that Tribunal's inquiries into payments made by Cabriole Construction Ltd to a company called Property Development Services Ltd, which was beneficially owned by Mr Richard Lynn detailed in its Final Report, Vol III, (2012), p 1837 – 1839; and into the ownership of Abervanta Ltd, one of the owners of the Cargobridge lands near Dublin airport, Vol III, (2012), 1887-1900.

[707] John C. Coffee, "Corporate Criminal Liability: An Introduction and Comparative Survey" in Albin Eser, Günther Heine and Barbara Huber (eds) *Criminal Liability of*

find their share price adversely affected and be answerable to irate shareholders.[708] In this respect, "a criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty."[709]Perhaps even more significantly the absence of, or the very restricted, liability of legal persons can undermine the ability to confiscate in cases of bribery.

Nevertheless, irrespective of which basis is chosen for imposing corporate liability under Irish law, there would appear to be little difficulty in prosecuting the type of corporate activity inquired into by the PCTs. Specifically, as the payments in question were invariably authorised by directors and officers of the relevant corporate entity, even the narrowest version of the identification doctrine would result in that entity being held liable for the offence.

A more significant problem is that the current state of the law in relation to corporate liability may be unconstitutionally vague. The Law Reform Commission in its *Report on Corporate Killing* voiced the concern that the current state of the law in relation to corporate liability "may fall foul of the legality principle".[710]This principle is a core legal principle and can be stated in various ways.[711] One formulation says that "persons should be convicted and punished for doing X only if they in fact did X and X was clearly and accessibly marked out in advance as something that is prohibited and that can result in punishment".[712] In that report on Corporate Killing, the Law Reform Commission observed that the legality principle requires "clear and precise legislative rules which effectively eliminate the need for creative interpretation by judges."[713]

Legal and Collective Entities International Colloquium, (Edition Iuscrim) at 9; Jennifer Arlen, and Reinier H. Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes", (1997) 72, New York University Law Review 687.

[708] Andrew Weissmann with David Newman, "Rethinking Criminal Corporate Liability" (2007) 82 Indiana Law Journal 411 at 441.

[709] Andrew Weissmann with David Newman, "Rethinking Criminal Corporate Liability" (2007) 82 Indiana Law Journal 411 at 426.

[710]Law Reform Commission Report *Corporate Killing* (LRC 77-2005), p 5.

[711] Finbar McAuley and Paul McCutcheon, *Criminal Liability,,* (Round Hall Press 2000) at 42;Andrew Ashworth *Principles of Criminal Law,*5th ed.,(Oxford University Press 2006) at 68;Donald A. Dripps "The Constitutional Status of the Reasonable Doubt Rule" (1987) 75 Calif L Rev 1665.

[712]See Law Reform Commission, *Consultation Paper on Inchoate Offences*, (LRC CP 48-2008) p 30.

[713] FinbarMcAuley and J. Paul McCutcheon, *Criminal Liability,* (Dublin: Round Hall,

One recent example of a case in which a legislative provision was held to be unconstitutionally vague occurred in the High Court case, *Ebere Doki v DPP*,[714] in which the applicant challenged the constitutionally of s.12 of the Immigration Act 2004. This section required those falling within its scope to produce certain documents or give a "satisfactory explanation of the circumstances which prevent him or her from doing so". Kearns J upheld the applicant's challenge, ruling that:

> In summary therefore I am of the view that, while s.12 was designed as an immigration control mechanism, its vagueness is such as to fail basic requirements for the creation of a criminal offence. As drafted it gives rise to arbitrariness and legal uncertainty. It also offends the principle that a person be not obliged to incriminate himself.

The earlier case of *King*[715] is also instructive on this point. In that case, the Supreme Court struck down provisions of the vagrancy act as being unconstitutional because the terminology used was so vague and uncertain. According to Henchy J in that case, those provisions were:

> .... so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the constitutional provisions with which such an offence is at variance.[716]

2000).

[714] *Ebere Dokie v DPP, HRC, Ireland and the AG* [2011] IR 110.

[715] *King v Attorney General* [1981] IR 233.

[716] *King v Attorney General* [1981] IR 233, 257. According to Kenny J. in that case, at p 263, "[I]t is a fundamental feature of our system of government by law (and not be decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges which made the common law or of offences which created by statute are expressed without ambiguity."

Clearly a finding by the courts that the existing common law on the issue of corporate criminal liability is unconstitutionally vague would mean that legislative action would be needed before a corporate entity itself could be held liable for its actions.

Derivative Managerial Liability

The provisions permitting the imposition of derivative managerial liability substantially extend the circumstances in which directors and officers may be held liable for bribery in that they significantly lower the standard of proof which the prosecution must meet. Specifically, in order to successfully prosecute an individual for bribery, it is necessary to prove that he or she acted with intent. However, under the derivative managerial liability provisions, once the prosecution can prove that the corporate entity itself committed an offence, then the prosecution need only prove that an individual director or officer acted negligently for that individual to be convicted of bribery.

In so far as the inquiries conducted by the PCTs are concerned, one of the difficulties with the derivative managerial provisions is that they do not extend to beneficial owners. In several of the cases inquired into by the PCTs, the corporate entity was effectively acting as an agent of its beneficial owners, including, for example, the above-mentioned payments to Mr Ray Burke. While there is nothing to prevent the prosecution of the beneficial owner for his or her involvement in the offence, the prosecution would have to prove that he or she acted with intent. In this respect, therefore, the use of beneficial ownership structures could successfully mitigate the extent to which the individual ultimately responsible for the commission of the offence could be held liable for it.

The second issue is that the concerns voiced by the Law Reform Commission regarding the legality principle may also be relevant in this context. Specifically, it could plausibly be argued that the lack of certainty regarding the basis for imposing criminal liability on corporations means that any offence based on the existence of such liability is likewise arbitrary and lacks legal certainty.

CORPORATE LIABILITY AND THE RELEVANT INTERNATIONAL INSTRUMENTS

As set out in Chapter 2, it was at least partially the desire to ensure a level competitive playing field that led to international interest in foreign bribery. Moreover, as much foreign bribery is carried out by corporations, a failure to address this issue would have seriously undermined the effectiveness of the relevant international instruments.[717]

Each of those instruments, including the PIF Convention and its protocols, addresses both the issue of corporate liability for bribery as well as the criminal liability of individuals involved in corporate crime. While they do not directly address the issue of parent company liability for the actions of subsidiaries incorporated in foreign jurisdictions, this issue is covered in so far as those instruments require State Parties to criminalise bribery through intermediaries. However, only the OECD WGB has directly considered this issue.

THE COE CRIMINAL LAW CONVENTION

The COE Criminal Law Convention defines the term "legal persons" to mean any entity having such status under the applicable national law,

[717] see e.g. Council of Europe, Explanatory Report on the Criminal Law Convention on Corruption (ETS 173), para 84, which explains that "[i]t is a fact that legal persons are involved in corruption offences, especially in business transactions, which practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organisation, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a bribery offence. Legal persons thus usually escape their liability due to their collective decision-making process. On the other hand, corrupt practices often continue after the arrest of individual members of management, because the company as such is not deterred by individual sanctions". See also John C. Coffee, "Corporate Criminal Liability: An Introduction and Comparative Survey" in Albin Eser, Günther Heine and Barbara Huber (eds) *Criminal Liability of Legal and Collective Entities*(Edition Iuscrim) at 9; Jennifer Arlen, and Reinier H.. Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes" (1997) 72 New York University Law Review 687; Andrew Weissmann with David Newman, "Rethinking Criminal Corporate Liability" (2007) 82 Indiana Law Journal 411.

except for States or other public bodies in the exercise of state authority and for public international organisations".[718]

Corporate Liability

Under the COE Convention, State Parties must ensure that corporate entities can be held liable for the offence of active (but not passive) bribery, although they do not necessarily need to provide for criminal corporate liability.[719] Specifically, according to the *Explanatory Memorandum*:

> Article 18, paragraph 1 does not stipulate the type of liability it requires for legal persons. Therefore this provision does not impose an obligation to establish that legal persons will be held criminally liable for the offences mentioned therein. On the other hand it should be made clear that by virtue of this provision Contracting Parties undertake to establish some form of liability for legal persons engaging in corrupt practices, liability that could be criminal, administrative or civil in nature. Thus, criminal and non-criminal administrative, civil sanctions are suitable, provided that they are "effective, proportionate and dissuasive" as specified by paragraph 2 of Article 19.[720]

The COE Convention requires State Parties to adopt an extended version of corporate liability. Specifically, they must ensure that legal persons can be held liable for corruption offences committed by a person with a leading position within the legal person, where that offence is committed for the benefit of that legal person.[721] A person has such a leading position where he or she is legally or in practice able to engage the liability of the legal person.[722] It can be assumed to exist where that person has a power of representation or an authority to take

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[718]Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 1.
[719] Council of Europe Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 18(1).
[720] Council of Europe, Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173) paragraph 86.
[721]Council of Europe, Criminal Law Convention on Corruption (ETS 173, 27 January 1999), Article 18.
[722]Council of Europe, Explanatory Report on the Criminal Law Convention on Corruption(ETS 173), para 86.

decisions or to exercise control of the legal person. Consequently, while the concept of a "leading position" obviously includes officers of the legal person it is not limited to those with formal powers.

State parties must also extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit an active corruption offence. In this respect, the COE Convention aims "at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person".[723]

Individual Liability

Corporate liability is not a substitute for individual liability under the COE Convention. According to that Convention, State Parties must be able to criminally prosecute individuals who are perpetrators, instigators of, or accessories to, *inter alia*, the active bribery offence.

THE EU CONVENTIONS AND FRAMEWORK DECISION

While the Second PIF Protocol and the Framework Decision both deal with the liability of legal persons, this is not covered by the EU Convention.[724] Each of the three instruments addresses the issue of individual liability for corporate offences.

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[723] Council of Europe,Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173), para 87.

[724] According to the Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), Article 6: "The Convention does not however deal directly with the problem of the liability of legal persons. It should be borne in mind however that Article 3 of the Second Protocol to the Convention on the protection of the European Communities' financial interests (OJ C 221, 19 July 1997, p. 12), requires Member States to provide for various forms of liability on the part of legal persons including liability for active corruption involving the financial interests of the Community. A similar provision is incorporated in the recent OECD Convention. Thus it is safe to say that Member States will in any event be required to consider the matter in the light of the obligations arising from those legal instruments."

Corporate Liability

The provisions dealing with corporate liability in both the Second PIF Protocol and the Framework decision largely replicate those contained in the COE Convention, discussed above, albeit with one significant difference and one significant potential difference.[725] First, the Framework Decision requires State Parties to provide for corporate criminal liability for both active and passive corruption.[726] Secondly, both the Protocol and the Framework Decision may require State Parties to provide for corporate criminal liability for failure to supervise. While the relevant provisions are silent on this point, according to the Commission, commenting on Article 5(2) of its Council Framework Decision, which is in identical terms to the relevant provision in the Second PIF Protocol:

> ..... the liability is a criminal liability, which must be matched by a criminal sanction and such a criminal sanction may be supplemented by other measures which are administrative or civil in nature.[727]

However, in its second evaluation of that decision the Commission stated that "sanctions referred to in Article 5 may also be of an administrative or civil nature"[728]

Individual Liability

Like the COE Convention, both the Second PIF protocol and the Framework Decision stipulate that State Parties must be able to

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[725]Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (OJ C 221, 19 July 1997, p. 12), Article 3; Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 5.

[726]In contrast, the second protocol, like the Council of Europe Criminal Law Convention on Corruption (ETS 173), only requires Member States to provide for criminal liability for active corruption.

[727]Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/5568/JHA of 22 July 2003 on combating corruption in the private sector, (COM (2007) 328 final, 18 June 2007), p 123. The UK Law Reform Commission considers that the EU Commission has incorrectly interpreted the provision. See The Law Commission, *Reforming Bribery*, Consultation Paper No 185, (Stationary Office, London, 2007) p 143.

[728] See Report From The Commission to The European Parliament And The Council based On Article 9 Of Council Framework Decision 2003/568/JHA Of 22 July 2003 On Combating Corruption In The Private Sector (COM(2011) 309 final, 6 June 2011 p 1).

criminally prosecute individuals who are perpetrators, instigators of, or accessories to bribery.[729] Again the Framework Decision applies to both active and passive bribery.

Significantly, both the PIF Protocol and the Second EU Convention also provide for the criminal liability of heads of business pursuant to which Member States must make heads of business personally liable for a failure to supervise. Specifically, those instruments provide that each Member State must take the necessary measures to allow the heads of business or any persons having the power to take decisions or exercise control within a business to be declared criminally liable for failing to exercise proper supervision or control.[730] According to the Explanatory Report on the EU Convention:

> Its purpose is to ensure that heads of businesses or other persons exercising legal or effective power within a business are not automatically exempt from all criminal liability where active corruption has been committed by a person under their authority acting on behalf of the business.[731]

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[729]Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (OJ C 221, 19 July 1997, p. 12), Article 3(3); Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 5(3).

[730]Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313, 23 October 1996, p. 1), Article 7; Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Article 6 (OJ C 195, 25 July, 1997, p 2). According to the Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), "within the meaning of Article 6, a Member State may make heads of business criminally liable if they have failed to fulfill a duty of supervision or control (culpa in vigilando). In this connection the criminal liability of heads of business could be based on an offence, distinct from corruption, of failure to fulfill an obligation under national law to exercise supervision or control. The criminal liability of the head of a business or decision-maker could also attach to negligence or incompetence." While this appears to give Member States a discretion as to whether or not to impose criminal sanctions, as discussed above, in respect of a similarly worded provision contained in Article 5(2) of the Council's Framework Decision 2003/568/JHA, the European Commission commented that "the liability is a criminal liability which must be matched by a criminal sanction and that such a criminal sanction may be supplemented by other measures which are administrative or civil in nature". See, Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (COM(2007) 328 final, 18 June 2007, p 5) p 123.

[731]Explanatory Report on the Convention on the fight against corruption involving

The Convention leaves Member States considerable freedom to establish the basis for the criminal liability of heads of businesses and decision-makers.

OECD CONVENTION

While the OECD Convention makes provision for the liability of legal persons, it does not explicitly deal with the liability of natural persons in relation to corporate offences.

Corporate Liability

In contrast to the above COE and EU instruments, according to its literal wording the OECD Convention simply requires State Parties to establish corporate liability while leaving them with a wide margin of discretion as to how to achieve that goal.[732] However, this discretion may be more apparent than real at least in the case of this jurisdiction. Specifically, according to the Commentaries:

> In the event that, under the legal system of a Party criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

This suggests that in the event that a jurisdiction does provide for corporate criminal liability in respect of other offences, they must also do so for the purposes of the foreign bribery offence. Moreover, as well as requiring each State Party to provide for corporate liability "in accordance with its legal principles", that Convention also requires it to ensure that the bribery of a foreign public official is punishable by effective, proportionate and dissuasive criminal penalties. It is unlikely that this test can be met if corporate entities are not the subject of effective criminal sanctions for involvement in foreign bribery. According to Pieth:

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officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1).

[732] see The Law Commission, *Reforming Bribery*, (Law Com No 313) (Stationary Office, London, 2008) p 113-114.

> We believe that the test of "effectiveness, proportionality, and dissuasiveness' can be met only if this approach deems management failure to include the lack of due diligence in hiring, the absence of education and instruction, and a failure of supervision and control. Those laws which comply with the requirements of Article 18(2) of the COE Convention or with the similar terms of Article 3(2) of the Second Protocol of the EU can also be regarded as consistent with the requirements of the OECD Convention regarding corporate liability.[733]

The OECD's *Best Practice Guidance on implementing specific articles of its anti-bribery Convention*, gives further guidance in this respect. According to that guidance:

> Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:
>
> a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
>
> b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:
>
> - A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
> - A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

[733]see Mark Pieth, "Article 2, The Responsibility of Legal Persons" in Mark Pieth, Lucinda A. Low and Peter J. Cullen, (eds), *The OECD Convention on Bribery* (Cambridge University Press, 2007) p 192.

- A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.[734]

While the OECD Convention does not expressly restrict corporate liability to bribery committed for the benefit of the company, there appears to be a general acceptance that "a liability should arise only if there is some connection between the crime and the legal person or a related legal person (such as an affiliate or another legal person in the same corporate group)."[735] In any event, that Convention only criminalises bribes to foreign public official paid "in order to obtain or retain business or other improper advantage in the conduct of international business."[736]

Parent Company Liability

As mentioned, like the other Conventions under consideration, the OECD Convention "does not directly address acts of bribery by foreign-incorporated subsidiaries of companies that are subject to the parties' national laws proscribing the bribery of foreign public officials."[737] Nevertheless, the WGB frequently addresses this issue in considering State compliance with that Convention. This may be based on the fact that the OECD Convention requires State Parties to criminalise bribery through intermediaries and foreign subsidiaries frequently act as an intermediary in corrupt transactions. For example, according to Zerbes:

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[734] OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex 1 Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para B(26 November 2009).

[735] OECD, *Corruption: A Glossary of International Standards in Criminal Law* (OECD 2008), p 62.

[736] See also, OECD, *Corruption: A Glossary of International Standards in Criminal Law*, (OECD 2008), p 62, according to which "[l]iability should arise only if there is some connection between the crime and the legal person or a related legal person (such as an affiliate or another legal person in the same corporate group).

[737] Keith Lokan, "The OECD Anti-Bribery Convention: Coverage of Foreign Subsidiaries" (2001) 33 Geo. Wash. Int'l L. Rev. 325, 326.

> Given [the] trend in national law toward liability for acts of bribery by subsidiaries, it would not seem unreasonable to interpret the Convention as inferring liability of parent company.[738]

In addition, as the OECD Convention prohibits any form of complicity in abetting or authorising bribery, a parent company may also be liable on this basis for the activities of its controlled subsidiary.[739]

UNCAC

Unlike the OECD Convention, UNCAC deals with both the liability of legal and natural persons with regard to corporate offences.

Corporate Liability

The provisions regarding corporate liability mirror those contained in OECD, although they cover both active and passive corruption offences.[740] In particular State Parties, (apparently) have a choice as to whether liability should be criminal, civil or administrative.[741] Moreover, there is no stipulation that liability only arises where the offence is committed for the corporate body's benefit.

It is unclear whether the UN will take the same liberal approach to the interpretation of the relevant provisions as that of the OECD.

Individual Liability

Like the COE and EU instruments, UNCAC provides that corporate liability must be without prejudice to the criminal liability of the natural persons who committed the relevant offences.[742]

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[738]Ingrid Zerbes, "Article 1. The Offence of Bribery of Foreign Public Officials", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *The OECD Convention on Bribery,* (Cambridge University Press, 2007), 129.
[739]See e.g. Zoe Gounari, "The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Theory and Practice" available at www.dundee.ac.uk/cepml/car.html/CAR9_ARTICLE 2.pdf last accessed on June 19, 2013.
[740]United Nations Convention Against Corruption (2003), Article 26(1).
[741]United Nations Convention Against Corruption (2003) Article 26(2).
[742]United Nations Convention Against Corruption (2003), Article 26(3).

CORPORATE LIABILITY, THE RELEVANT INTERNATIONAL INSTRUMENTS AND THE PCA 1906

The domestic provisions on corporate liability pose a number of difficulties from the perspective of the relevant international instruments. In the first place, the basis for imposing liability on corporate bodies remains unclear. Moreover, to the extent that the applicable basis for imposing liability is the narrow version of the identification doctrine, then this is not compatible with at least some of those instruments. Secondly, there is no equivalent to the offence of failure to supervise contained in the Council of Europe Convention and the second EU Convention. Thirdly, Ireland may not have sufficiently implemented the requirement to make Heads of Business personally liable as required under the PIF Second PIF Protocol and the Second EU Convention.

In the past, one of the most significant deficiencies in the State's implementation of the OECD Convention was the circumstances under which Irish law was prepared to hold a parent company liable for the actions of its subsidiaries. However, this deficiency largely stemmed from the fact that jurisdiction over bribery offences was territorially based, which meant that a parent company could not be held liable for acts on the part of their subsidiaries which occurred wholly outside the jurisdiction.[743] The Prevention of Corruption (Amendment) Act 2010 substantially amended the provisions relating to jurisdiction thereby remedying this problem. This is considered further in the next chapter.

The Identification Doctrine

Clearly, the fact that the basis for imposing liability on corporate bodies under Irish law has not been conclusively determined is problematic from the perspective of the conventions.[744] Moreover, if liability is imposed on

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[743]See e.g. the UK Law Commission, *Reforming Bribery*, Consultation Paper 185, (Stationary Office, London, 2007) p 152.

[744]See e.g. OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007);OECD Ireland: Phase 2 *Bis* Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions (2008).

the basis of the identification doctrine, this also raises compliance issues.

The OECD's WGB has identified three difficulties with domestic laws which impose corporate liability on the basis of the identification doctrine from the perspective of the OECD convention. As mentioned, the requirements of that Convention on this issue appear largely the same as both those of the COE Convention, the EU's Second Protocol and the Framework Decision. According to the OECD:[745]

> The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well documented. The problem is at least threefold. First the identification theory requires guilty intent be attributed to a very senior person in the company. In reality, these persons rarely commit bribery directly. Instead, the crime is often committed by managers or employees who are lower in the corporate hierarchy. Second, a company is not liable even if senior management knowingly failed to prevent an employee from committing bribery or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex structures make it difficult to identify a single decision-maker.[746]

The first difficulty identified in the above excerpt only arises in cases where the courts take a narrow approach to identifying a corporate entity's "controlling mind". It is not clear whether or to what extent this difficulty is relevant to Ireland. As discussed above, Denham J, in *Superwood*[747] appeared to be prepared to take a broad approach in determining those individuals who could be considered as a directing mind for the purpose of imposing liability under the identification

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[745]See e.g. OECD, Australia: Phase 3 Report on Implementing the OECD Anti-Bribery Convention, (October, 2012) p 12.
[746]ABD/OECD Anti-Corruption Initiative in Asia and the Pacific, *The Criminalisation of Bribery in Asia and the Pacific*, (2011) p 39.
[747]*Superwood Holdings plc v Sun Alliance and London Insurance plc* [1995] 3 IR 303

doctrine. For example, in its Phase 1 report on Canada, the OECD WGB considered the Canadian basis for imposing corporate liability to be compliant with the Convention. This was on the basis of information given to the WGB by the Canadian government:

> Canada explained that under its common law, the "directing mind" was not limited to senior management or the board of directors. This concept would include any officer or employee acting in the field assigned to them by the legal person and that judicial interpretation of this concept has given it broad applicability.[748]

Nevertheless, this report was the result of a very early evaluation and the OECD's WGB's views on this issue appear to have become more stringent over time. Moreover, as discussed, for full compliance with the COE Convention, and the EU's Second PIF Protocol, it must be possible to hold a corporate entity liable for the actions of a "leading person" within that entity, which is defined in terms of "a power of representation of the legal person, or an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person." According to the Explanatory Report to the Second Protocol:

> ..... in order to implement the Second Protocol, Member States will have to insert all three elements in their domestic legislation as alternatives on which the leading position may be based.[749]

It is far from clear that this was contemplated by the Court in *Superwood* which appeared more focused on the last of these three alternatives.[750]

There is undoubted merit in the OECD's recommendation in its Phase 2 *bis* report on Ireland, namely that Ireland:

> should give serious consideration to undertaking a review of the relevant law on the criminal liability of legal persons with a view

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[748] OECD, Canada: Review of Implementation of the Convention and the 1997 Recommendation, (23 July 1999), p 23.

[749] Explanatory Report on the Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests (OJ C11, 15 January 1998, p 8), para 3.2.

[750] See in a similar vein, The Law Commission, *Reforming Bribery*, Consultation Paper 185, (the Stationary Office, London, 2007) p 134.

> to codifying and clarifying its scope, and expand the scope of liability to cover, in addition to bribery committed personally by a senior person (e.g. directors and high managerial agents), bribery committed by a lower level person with the express or implied permission of a senior person.[751]

The second difficulty is of clear relevance. Specifically, it is probably not possible under Irish law to hold a corporation liable for bribery where that bribery is attributable to wilful ignorance, deliberate neglect or simple neglect on the part of senior management. The application of the identification doctrine depends on finding the requisite intent for bribery in an individual and then attributing that intent to the corporation. Consequently, that individual must actually intend to commit bribery for the corporation to be successfully prosecuted and establishing *mens rea* which stops short of actual intent will not suffice. The lack of a failure to supervise offence is considered in more detail below.

The third difficulty is similarly relevant. The identification doctrine does not provide for the aggregation of the states of mind of several persons in a company in order to establish that company's liability for bribery. Moreover, there does not seem to be any basis for aggregating liability absent statutory intervention. According to Wells, commenting on UK common-law:

> It does seem clear, however, that the aggregation argument is unlikely to take root in the common law and that statutory intervention would be necessary for it to become a part of the English law of corporate liability.[752]

This also seems true of the Irish position. However, it is not entirely evident that it is necessary to provide for such aggregated liability to comply with the OECD Convention. In this respect, it is notable that the

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[751]OECD Ireland: Phase 2*bis* Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions (2008), p 27.

[752]Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed, (Oxford University Press, 2001). Similarly, according to M Jefferson, in his article, "Corporate Criminal Liability in the 1990's", (2000) 64 Journal of Criminal Law 106 "Meridian did not resolve the problem of the lack of aggregation doctrine, one individual has to be the company for the relevant purpose since two or more individuals cannot jointly constitute it."

OECD's best practice guidance seems to accept that legislation may require that an identifiable individual be at fault before a corporate entity can itself be held liable. As against that, the UK has been subject to criticism on this issue.[753] Specifically, in its Phase 2 approach on the UK's implementation of the Convention the WGB criticised the UK law on corporate liability observing that:

> [t]he necessity of identifying a single individual with the appropriate mens rea does not address modern complex decision-making structures in large corporations where it is often difficult to identify one individual decision-maker within a management chain.[754]

Moreover, aside from the OECD, the Council of Europe also appears to support an aggregation of intent approach.[755] According to the COE's Explanatory Report:

> [i]t is a fact that legal persons are involved in corruption offences, especially in business transactions, which practice reveals serious difficulties in prosecuting natural persons acting on behalf of these legal persons. For example, in view of the largeness of corporations and the complexity of structures of the organisation, it becomes more and more difficult to identify a natural person who may be held responsible (in a criminal sense) for a bribery offence. Legal persons thus usually escape their liability due to their collective decision-making process.[756]

Nevertheless, GRECO did not criticise the provisions relating to corporate criminal liability in its evaluation reports on Ireland.

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[753]See e.g. OECD UK: Phase 2 Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions, (17 March, 2005), p 64.

[754]OECD UK: Phase 2 Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions, (17 March, 2005), p 65.

[755]While, as mentioned, GRECO has carried out three evaluations on Ireland's compliance with the Council of Europe's Criminal Law Convention on Corruption, none of these evaluations deal with the issue of corporate liability or failure to supervise.

[756]Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173) para 84.

Failure to Supervise

The second problem is that, as previously discussed, both the COE Convention and the Second PIF Protocol (in the case of active bribery) require state parties to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the corruption offences. Moreover, in its *Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, the OECD suggests that where the identification doctrine applies, it should be possible for corporate liability to be triggered where "a person with the highest level managerial authority" fails to prevent bribery.[757]There is no offence equivalent to an offence of failure to supervise under the PCA 1906.[758]

While the PCA 2010 extends the personal liability of company officers for bribery committed by the corporation, this liability is dependent on establishing that the corporation itself has committed an offence, including proving the requisite standard of intent. It will not be possible to establish the requisite intent merely on the basis of recklessness or neglect. Moreover, in any event that liability is itself confined to officers which may not include all those possessing the highest level of managerial responsibility.

In any event, as discussed, corporate liability and the individual liability of corporate officers/employee are supplementary rather than substitutable under the international conventions. This is illustrated by the fact that both the Council of European Criminal Law Convention Against Corruption and the EU Second Protocol to the Convention on the Protection of the European Communities Financial interests require

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[757]OECD, Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Para B (26 November, 2009).

[758]This criticism is raised by the Commission in its report, Implementation by Member States of the Convention on the Protection of the European Communities Financial Interests and Its Protocols (COM(2004) 709 final, 25 October 2004 p 5); See also the Commission's second report, Implementation by Member States of the Convention on the Protection of the European Communities Financial Interests and Its Protocols (COM(2008) 77 final, 14 February 2008, p 3) p 10.

State parties to provide for corporate liability as well as the personal liability of high level persons within the corporation.[759]

Liability of Heads of Business

Under Irish law, heads of business can be prosecuted where they intentionally commit bribery, for inchoate offences or on the basis of derivative managerial liability. There appears to be some difference in opinion as to whether this complies with the requirements of the EU instruments. For example, in considering this issue from the perspective of UK Law, the Law Commission considered it to be "an open question whether reliance on the doctrine of complicity and on inchoate offences will be enough to satisfy our Convention obligations." Nevertheless, the EU Commission has criticised Ireland regarding its implementation of this provision. In its first Report, it observed, somewhat laconically, that "IE seems not to have introduced the concept of criminal liability of heads of businesses, requiring 'guilty knowledge' in any case."[760]In its second report, it comments that the scope of coverage of the liability of heads of business is unclear in Irish law.[761] However, this latter comment is not in fact accurate. The circumstances in which Heads of Business can be held liable in Irish law are relatively clear, namely through reliance on the doctrine of secondary liability[762] and inchoate offences.[763] What is not clear is whether this complies with the requirements of the Second Convention and the PIF Convention and its protocols.

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[759]Council of Europe Criminal Law Convention on Corruption (ETS 173), Article 18(1).

[760]Report from the Commission, Implementation by Member States of the Convention on the Protection of the European Communities Financial Interests and its Protocols (Com(2004) 709 final, 25 October 2004, p 5)

[761]Second Report from the Commission; Implementation by Member States of the Convention on the Protection of the European Communities Financial Interests and its Protocols, (COM(2008) 77 final, 14 February 2008, p 3).

[762]Secondary liability provides for the individual liability of a person for the principal offence if that person (A) was engaged in "aiding, abetting, counselling or procuring" another (B) in committing that offence. A's lack of supervision would have to have assisted or encouraged B to commit the offence, it is not clear that a mere failure to exercise control would necessarily be sufficient.

[763] A person can be inchoately liable for encouraging another in the commission of an offence although he or she may have to have foreseen that that other person will commit the offence. It is unlikely that mere negligence or reckless supervision unaccompanied by this foresight will be sufficient.

According to the Explanatory Memorandum to the Second Convention:

> As well as covering the criminal liability of heads of businesses or decision-makers on the basis of their personal actions (as authors of, associates in, instigators of, or participants in the fraud), Article 6 allows Member States to consider making heads of businesses and decision-makers criminally liable on other grounds.[764]

In a similar vein, according to the Explanatory Report on the PIF Convention:

> As well as covering the criminal liability of heads of businesses or decision-makers on the basis of their personal actions (as authors of, associates in, instigators of or participants in the fraud), Article 3 allows Member States to consider making heads of businesses and decision-makers criminally liable on other grounds.
>
> Within the meaning of Article 3 a Member State may make heads of businesses and decision-makers criminally liable if they have failed to fulfil a duty of supervision or control (culpa in vigilando).[765]

This suggests that liability in cases of failure to supervise is optional under those instruments, rather than required.

However, to the extent that those instruments do require Member States to hold heads of business criminally liable for bribery attributable to a failure to supervise on their part, then Irish law does not comply with those instruments.

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[764]Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1), p 8.

[765]Explanatory Report on the Convention on the protection of the European Communities' financial interests (OJ C 191 23 June 1997, p 1), para 3.

THE PCA 1906, THE AGENT-PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

There are significant problems with the issue of corporate liability for bribery from the perspective of both the inquiries conducted by the PCTs and the requirements of the relevant international instruments. The most substantial of these is common to both: the exact basis for imposing corporate liability under Irish law is unclear and the existing law may be unconstitutionally vague. This deficiency may also have implications for the constitutionality of the derivative managerial offence. Moreover, it is likely to deter prosecutors from seeking to pursue the corporate entity itself for bribery and encourage them to focus instead on prosecuting the individuals involved. This is in itself problematic as corporate and individual liability are thought to have different deterrent effects.

In so far as the PCTs are concerned, it is also clear that beneficial ownership has some clear advantages for those engaged in corrupt transactions as the provisions relating to derivative managerial liability only apply in cases of consent, connivance or neglect on the part of corporate officers.

With regard to the relevant international instruments, three further difficulties arise. The first is partially connected with the extent to which corporate liability is based on a narrow understanding of the identification doctrine, pursuant to which a corporate entity is only liable for the actions of corporate officers. This is unsatisfactory from the perspective of each of the relevant international instruments. While there are some indications that Irish law is prepared to adopt a relatively flexible approach in identifying those whose actions may be attributed to the corporate entity, this issue is not fully determined. Moreover, in the absence of statutory intervention there appears to be no basis in Irish law for imposing corporate liability on the basis of the aggregation doctrine. In this respect, that law falls short of the requirements of the COE Convention, and probably the OECD Convention.

The second stems from the lack of a "failure to supervise" offence in Irish law which is a clear deficiency from the perspective of, in particular the COE and EU Conventions and probably the OECD (and UN)

Conventions. According to the relevant provisions, it must be possible to hold corporate entities themselves liable for a failure on the part of a leading person within the organisation to supervise subordinate employees. There is no basis for imposing liability in such circumstances under Irish law.

The third deficiency relates to heads of business liability. Under Irish law, heads of business may themselves be individually liable for the activities of lower level employees on the basis of secondary or inchoate liability and on the basis of derivative managerial liability. It is not clear, however, that either secondary or inchoate liability will arise where there has been a failure to supervise. Moreover, in order to rely on derivative liability it is first necessary to prove that the corporate entity has itself committed an offence. Consequently, the law may well fall short of the requirements of the EU's Second Convention and PIF Protocol. Nevertheless, the position on this issue is not entirely clear, as the precise scope of heads of business liability is itself not entirely evident.

None of the above deficiencies are specifically attributable to the agent-principal model of bribery underlying the PCA 1906, which does not itself dictate any particular approach to the issue of corporate liability.

Regarding the basis for imposing corporate liability, from the perspective of the harm / immorality of bribery, both the identification and vicarious liability principle appear problematic. Specifically, the identification principle raises the risk that corporate entities that should be held liable for bribery will escape conviction because it is not possible to attribute the mind of a particular officer to the company. On the other hand, the vicarious liability model appears too broad and raises the possibility that corporate entities will be held liable for behaviour which they are powerless to prevent. This again does little to combat the harm of bribery. For these reasons, either the aggregation model or the organisational model may provide a more targeted approach, holding corporate entities responsible for the harm of bribery if and only if they could have done something to prevent it.

The introduction of a failure to supervise would also contribute to this aim in so far as it holds a corporate entity liable for not taking appropriate steps to prevent bribery. Corporate entities may thus avoid liability by

taking such steps and those steps should, at least in theory, reduce the risk of corporate bribery from taking place in the first place. The EU Heads of Business offence is based on a similar rationale: heads of business are held responsible for the harm of bribery if they fail to take reasonable measures to prevent bribery from occurring.

CHAPTER 9: ENFORCEMENT AND SANCTIONS

This chapter focuses on the enforcement of the bribery offences, including jurisdiction, time-limits, immunities and defences, and on sanctions for those convicted of such offences.

EXTRA-TERRITORIAL JURISDICTION

Criminal jurisdiction is primarily "territorial," in that it usually applies only to conduct occurring within the territorial boundaries of the regulating state. Territorial jurisdiction is the most common and least controversial of all forms of jurisdiction although differences may arise as to the extent of the territorial contact required in order for a particular State to exercise jurisdiction.[766] Nevertheless, many, if not most, states also apply their criminal law outside their own territory to overseas behaviour, at least to some extent.

The question of extra-territorial jurisdiction over bribery offences is an important one for a variety of reasons. Specifically, bribery and, in particular, corporate bribery frequently involves multiple jurisdictions. A company in one jurisdiction may use an intermediary in another jurisdiction to bribe a public official in a third jurisdiction. The bribe itself may come from an off-shore slush fund and be paid to an off-shore account. In some cases, no part of the bribery offence will take place in the jurisdiction in which the recipient of the bribe is located.[767]

The basis upon which States exercise extra-territorial jurisdiction differs from State to State and, often, within a State, depending on the type of offence. Some States extend the principle of territoriality to crimes where only a small part of the conduct constituting the offence takes place within their territory or if the crime is seen to have originated in the state. This is sometimes referred to as the principle of subjective

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[766]See e.g. Robert Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) 33 Brit YB of Int'l L 146 at 148: "[the] first principle of jurisdiction is that in general every State is competent to punish crimes committed upon its territory. This rule requires no authority to support it; it is everywhere regarded as of primary importance and of fundamental character".

[767]World Bank, *Helping Countries Combat Corruption: The Role of the World Bank,* (September 1997), p 14.

territoriality.[768] Many States also apply some variation of the "effects doctrine", also known as the principle of objective territoriality, which refers to the ability of a state to assert jurisdiction over certain conduct committed by foreigners outside its jurisdiction which has an effect within the territory of the state. Almost all states also exercise 'pure' extra-territorial jurisdiction based on one or more of the following bases:(i) nationality/personality jurisdiction; ii) universal jurisdiction and/or iii) protective jurisdiction.[769]

Personality jurisdiction

Nationality or personality based jurisdiction "refers to the ability of a state to assert jurisdiction over its citizens and, in some cases, its residents or other specified persons acting outside its borders."[770] It has two main forms: active and passive. Pursuant to the active personality form, a state may regulate certain crimes committed by one of its nationals irrespective of where in the world that crime takes place. Some states also include crimes committed by other specified persons, including for example, those resident or domiciled in the territory of the state and/or public servants, members of the military or other agents of the state serving abroad.[771]

Under the passive personality form a state may regulate certain crimes committed outside its territory where the victim is one of its nationals.[772] Again in some instances, some states also exercise jurisdiction in instances where the victim is resident or domiciled in their territory. The exercise of jurisdiction based on the principle of passive personality is more controversial than that based on the principle of active personality:

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[768]Robert Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) 33 Brit YB of Int'l L 146, 156.

[769]On the different bases of extra-territorial jurisdiction, see, Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001), Introduction, p 5.

[770]International Bar Association, *Report of the Task force on Extraterritorial Jurisdiction*, (2009), p 13.

[771]International Bar Association, *Report of the Task force on Extraterritorial Jurisdiction*, (2009), p 145.

[772]Curtis A. Bradley, "Universal Jurisdiction and U.S. Law" (2001) The University of Chicago Legal Forum, 323.

it has been described as "the least justifiable of bases of extraterritorial jurisdiction."[773]

Universal jurisdiction

The terms "universal jurisdiction" or "universal criminal jurisdiction" are used to refer to instances where a state asserts jurisdiction over certain crimes regardless of the geographic location in which the crime occurs and in the absence of a nationality connection with either the offender or the victim.[774] There are two broad, related rationales for the exercise of this jurisdiction. First, certain crimes such as war crimes, genocide and/or torture are so serious and reprehensible that those who commit them are essentially enemies of man-kind and can be legitimately prosecuted by any state. The second is based on the "no safe haven rationale" which emphasises the need to permit prosecution to avoid the impunity that would result if the universality principle was not applied. This second rationale:

> is particularly apt where the entire legal system of the state that would otherwise exercise territorial criminal jurisdiction has collapsed, with the territorial state being unable to investigate or prosecute the suspects, or where the courts of the territorial state are unable to conduct fair trials that are not a sham.[775]

Protective jurisdiction

Under the protective jurisdiction principle, a state may assert jurisdiction over certain conduct committed by foreigners outside its jurisdiction where that conduct could prejudice the state's most vital interests. The rationale behind this principle is that states are entitled to protect their

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[773]Ian Brownlie, *Principles of Public International Law*,6th ed., (Oxford University Press, 2003), p 302.
[774]See e.g. Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights,* Working Paper No. 59 (2010).
[775]International Bar Association *Report of the Task force on Extraterritorial Jurisdiction*, (2009)p 152-153.

own essential security and certain other essential state interests. However, there is no general consensus regarding its scope.[776]

STATUTE OF LIMITATIONS

A criminal statute of limitations establishes a time-limit for investigating or prosecuting a crime or executing a sentence. While periods of limitation vary, many countries also provide for their suspension, interruption and/or extension in specified circumstances.

Justifications for imposing a criminal statute of limitations are generally based on public interest grounds.[777] According to legal scholars, "such limitations serve to balance the competing interests of the state to discover, investigate and prosecute crime against two primary countervailing factors: protecting the defendant and enhancing efficiency."[778] As explained by the US Supreme Court:

> Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past. Such a time-limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[779]

Other justifications for a statute of limitations include the fact that limitation periods encourage the speedy resolution of cases, which is called for by various international law instruments, including the European Convention on Human Rights. Moreover, an offender's personal culpability may diminish over time and as the offence he or she committed fades into the past, the need for prosecution on grounds of

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[776]International Bar Association, *Report of the Task force on Extraterritorial Jurisdiction*, (2009), p 149.

[777]Anonymous, "Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution" (1954) 102 U. PA L. Rev. 630, 641.

[778] Jeffrey Boles, "Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine", (2012) 7(2) Northwestern Journal of Law and Social Policy 219, 223; see also Lindsay Powell, "Unravelling Criminal Statutes of Limitations" (2008) 45 Am Crim. L. Rev. 115; Tyler Ochoa & Andrew Wistrich, "The Puzzling Purpose of Statutes of Limitations"(1997) 28 Pac L.J. 453.

[779]*Toussi v United States* 397 U.S. 112, 114-15 (1970).

individual deterrence may become less pressing. As a corollary, the State's desire for retribution may also fade over-time as "society's desire to punish wrongdoing is at its most urgent in the immediate aftermath of crime."[780]

Despite their benefits, statutes of limitations may also give rise to considerable costs, both generally and in the specific context of corruption. In particular, such statutes "block the prosecution of offenses that it may be in society's best interests to punish, essentially providing amnesty to offenders after the limitations period has expired."[781] They may also prevent the prosecution of an offence in circumstances where newly available evidence overwhelmingly establishes a defendant's guilt and allow no room for the judicial evaluation of the particular offense or offender.[782] Moreover, they are also essentially arbitrary in nature, with the selection of a particular limitation period particularly difficult to justify.[783] Furthermore, depending on the limitation period, a statute of limitations may prevent the prosecution of a disproportionate number of victimless and/or complex offences such as corruption offences thus adversely impacting on the ability of those offences to combat their underlying harm / immorality. In this respect:

> It can be argued that the collection and sifting of evidence in cases of corruption and other economic offences requires a long period of time and that the setting of limits hinders these complex investigations or may even prevent them from being tackled seriously in the first place.[784]

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[780]Peter J. Cullen, "Article 6. Statute of Limitations" in Mark Pieth, Lucinda A. Low and Peter J. Cullen, (eds), *The OECD Convention on Bribery: A Commentary,* (Cambridge University Press, 2007), p 338.

[781] Jeffrey Boles, "Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine" (2012) 7(2) Northwestern Journal of Law and Social Policy, 219, 226.

[782] Alan Adlestein, "Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial" (1995) 37 WM & Mary L. Rev 199.

[783] Lindsay Powell, "Unravelling Criminal Statutes of Limitations" (2008) 45 Am Crim. L. Rev. 115.

[784] See Peter J Cullen "Article 6. Statute of Limitations" in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *The OECD Convention on Bribery: A Commentary*, (Cambridge University Press, 2007),p 339-349. See also, OECD, *Criminalising Bribery and Ensuring Enforcement*, (2012) p 15, "Secret commissions, the use of fake invoices, multiple intermediaries, and so on, may make it very difficult to unmask this type of carefully concealed crime. Cases, especially those involving foreign public officials, are often complex and require the gathering of voluminous evidence and complicated

They may also enable criminals to avoid prosecutions through becoming fugitives of justice until the expiry of the limitation period. Opponents of criminal statutes of limitations also observe that some of the benefits of such statutes may equally well be served through other means. In particular, any possible prejudice to the defendant resulting from the passage of time can be evaluated on a case-by-case approach rather than on the basis of a blanket rule.[785]

IMMUNITIES FROM PROSECUTION

In most legal systems, parliamentarians benefit from two forms of immunity from prosecution. The first is that of criminal non-liability, otherwise known as "non accountability" and the second is that of inviolability. Both types of immunity promote certain legitimate goals but may also pose a barrier to the effective investigation of criminal offences, including bribery offences.[786] Aside from these types of immunities, the doctrine of cabinet confidentially, which applies in some countries and which flows from the collegiate nature of cabinet decision-making, also confers a type of immunity from prosecution in respect of decisions taken at cabinet meetings.

Non-Liability

The principle of non-liability or non-accountability generally refers to the freedom of speech enjoyed by parliamentarians. Pursuant to that principle:

> a Member may state whatever he thinks in debate, however offensive it may be to the feelings, or injurious to the character,

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accounting and financial analysis – sometimes across multiple jurisdictions. For all these reasons, it is essential that the limitation period is sufficiently long for the investigation and prosecution of these offences."

[785] Lindsay Powell, "Unravelling Criminal Statutes of Limitations" (2008) 45 Am Crim. L. Rev. 115.

[786] See e.g. the International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, (2009), p 249, "Immunity must clearly stay within the boundaries of (1) performance of discretionary duties; (2) the scope of the employee's authority; and (3) acts in good faith. To allow the application of a doctrine of official immunity in a situation where these criteria (particularly the second and third) do not prevail would undermine much of the rationale for anti-corruption laws in the first place."

> of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation.[787]

Freedom of speech is considered the single most important parliamentary privilege[788] and serves a number of important functions. Specifically, it helps ensure unhindered speech and debate between representatives which in turn ensures both that citizens' views are fully represented, and that citizens are fully informed about a plurality of proposals and their respective merits.[789]

> As the paramount forum of the land, Parliament must be free to go about its business without fear or favour, and individuals must be able to contribute to the best of their abilities to Parliament carrying out its functions. If a person speaking in Parliament believes a fact is pertinent to the matter under discussion, they should not be deterred from raising it by any prospect of criminal or civil penalty for revealing that fact. Nor should such a threat prevent the honest expression of opinion, whether that is in a debate or in a report or by submission to a committee.[790]

Freedom of speech also helps to ensure the separation of powers as it operates as a constraint on the judicial branch of government[791] as well as on the executive.[792]

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[787] Sir William McKay, *Erskine May Parliamentary Practice* 23rd ed,(LexisNexis Butterworths, 2004), p 96.

[788]United Kingdom, Joint Committee on Parliamentary Privilege, Parliamentary Privilege – First Report, Joint Committee Reports, Session 1998-99, 9 April 1999, HC 214-I, para. 36.

[789]Simon Wigley, "Parliamentary Immunity in Democratizing Countries: The Case of Turkey" (2009) 31 Human Rights Quarterly 567.

[790]House of Commons, *Parliamentary Privilege* (April, 2012), p 11.

[791] See Gareth Griffith, *Parliamentary privilege: first principles and recent applications,* Briefing Paper No 1/09, NSW Parliamentary Library Research Service. See also Report from the Joint Committee on Parliamentary Privilege, HL Paper 43-I (1998-1999) p 18, "Members should not be exposed to the risk of being brought before the courts to defend what they said in Parliament. Abuse of parliamentary freedom of speech is a matter for internal self-regulation by Parliament, not a matter for investigation and regulation by the courts. The legal immunity principle is as important today as ever. The courts have a duty not to erode this essential constitutional principle."

[792]See e.g. David McGee, "The scope of parliamentary privilege" [2004] NZLJ 84.

Inviolability

Pursuant to the principle of inviolability, members of parliament are protected against civil and/or criminal proceedings for acts other than those undertaken in pursuance of their parliamentary duties.[793] The exact scope of this immunity varies from country to country.[794] Sometimes, it is limited to protection from arrest without the authorization of Parliament. Sometimes, it extends to immunity from prosecution. Moreover, while in some countries immunity must be waived when the parliamentarian is caught *in flagrante delicto*, namely in the very act of wrong doing, this is not true of all. Differences also arise with regard to the temporal reach of the protection and in particular as to whether it extends beyond a parliamentarian's mandate to acts taken before that mandate commences or after it terminates.

The underlying rationale of the principle of inviolability is that it protects parliamentarians from "politically motivated, arbitrary or unfounded criminal prosecutions for acts not carried out in the performance of their parliamentary duties."[795] In turn, this protection permits them to fully participate in parliamentary proceedings, which is in the interests of those whose rights they represent:

> For in order to properly fulfil their role, representatives must be able to speak and act without fear of being subjected to a poorly conceived trial, imprecise or outmoded legislation, vexatious charges and so on.[796]

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[793] Robert Myteenaere, *The Immunities of Members of Parliament,* (Geneva, Inter-Parliamentary Union, 1998).

[794] See generally, Marc Van der Hulst, *The Parliamentary Mandate. A Global Comparative Study* (Inter-Parliamentary Union, Geneva, 2000).

[795] Ergon Ozbudun, "Constitutional Debates on Parliamentary Inviolability in Turkey" (2005) 1 European Constitutional Law Review 272, 273.

[796] Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption" (2003) 11(1) The Journal of Political Philosophy 23, 24; See also Simon Wigley, "Parliamentary Immunity in Democratizing Countries. The Case of Turkey" (2009) 31 Human Rights Quarterly 567, 575, where he observes, "The justification for parliamentary immunity derives from the fact that it safeguards the ability of representatives to improve the rights of those they represent. In order to safeguard that ability, it is often necessary to shield the actual representative from becoming the victim of a human rights violation. In such cases, the immunity will protect the representative's public function and, incidentally, the representative themselves."

Moreover, inviolability is sometimes viewed as a logical consequence of the separation of powers pursuant to which the legislative branch is independent not only of the executive but also of the judiciary.[797]

The potential impact of the principle of inviolability on corruption (and other) offences is obvious, particularly when that protection is broadly defined. Indeed, this is one of the main criticisms of this type of immunity. Judge Bonello, in his dissent in the European Court of Human Rights case, *Kart v Turkey*[798], described inviolability as "an ancient institute whose actual advantages appear far more theoretical than real, but whose actual abuse seems far more real than theoretical." He also observed:

> In modern functional democracies, where parliamentarians need no longer tremble at the retribution of despots, parliamentary immunity has become far more conspicuous for protecting dishonest politicians from honest prosecutions than from protecting honest politicians from dishonest ones.[799]

In a similar vein, but with specific reference to corruption, the Organisation for Security and Co-operation in Europe observes:

> In many countries, senior public officials are shielded by immunities to such an extent that criminals often seek public office simply to avoid prosecution. In such cases, there is a very high risk for a vicious cycle of corruption: parliament by virtue of

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[797] See e.g. Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption" (2003) 11(1) The Journal of Political Philosophy 23, 33 "By providing a barrier against each arm of government intimidating the others' activities, parliamentary immunity helps to ensure that power does not gravitate to one place. It prevents one arm of government obtaining greater influence over another arm through the threat or pursuit of legal proceedings."See also Ergun Ozbudun, "Constitutional Debates on Parliamentary Inviolability in Turkey" (2005) 1 European Constitutional Law Review 272, 280: "It may be argued that inviolability has lost some of its original importance, given the fact that in all Western Democracies the judiciary has become essentially independent of the executive branch. Still, the possibility that the executive authorities may be able to influence judicial authorities in more subtle ways or that the courts may be open to other political influences cannot be altogether eliminated. Thus, it may be concluded that parliamentary inviolability still continues to be a fairly important guarantee for deputies."

[798] *Kart v Turkey*, (1999) ECHR 44; See Serkan Yolcu, "Parliamentary Inviolability v. Right to a Fair Trial"http://wwrn.com/abstract=1912200, last downloaded August, 26, 2013.

[799] *Kart v Turkey*, (1999) ECHR 44, 72. Judge Bonello was joined in his dissent by Judges Zupanic and Gyulumyan.

its privileged protection, attracts unethical individuals who then perpetuate and augment corrupt conduct. Some individuals in need of legal protection have even bribed their way onto party election lists in order to secure immunity.[800]

Cabinet Confidentiality

In the Westminister tradition of parliamentary practice, the term "Cabinet" refers to a meeting of senior Ministers summoned by the Prime Minister. Two key interlinked features of Cabinet are collective responsibility and confidentiality. Pursuant to the principle of collective responsibility, members of the Cabinet must publicly support all Government decisions even if they do not privately agree with them.[801] This principle is a central factor in the relationship between Cabinet and parliament in that it provides parliament with the means of holding the government accountable as a whole. The confidentiality of cabinet proceedings "supports the principle of collective responsibility, by promoting open and free discussion including the airing of dissenting views and compromise."[802] Nevertheless, as in the case of parliamentary privilege, this confidentiality is open to abuse as it may prevent the proper investigation of an allegedly corrupt role played by a particular minister in government decision making.[803]

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[800] Organisation for Security and Cooperation in Europe, *Best practices in combating corruption*, (2004) Chapter 5 "Political and Judicial Immunity in Best Practices in Combating Corruption", p 49.

[801] See Imelda Higgins, *Corruption Law,* (Round Hall, 2012), p 493.

[802] Mark Rodrigues, *Cabinet Confidentiality*, Parliamentary Library, Parliament of Australia (28 May 2010), p 2.

[803] In his High Court judgement in *AG v Hamilton* [1993] I.L.R.M. 81, O'Hanlon J rejected the applicant's claim regarding the existence of an absolute ban on disclosure at all times and under all circumstances of what transpires at a government meeting in the following terms, at p 88 "It has not been unknown in the history of government in other countries for totally corrupt governments to come to power and for the members to enrich themselves dishonestly at the cost of the public purse. Were such a situation to arise at some unforeseen future time in our own country and were the information to leak out of discussions at cabinet level at which such a nefarious plot was being considered, the legal submissions now advanced on behalf of the applicant would – if accepted as correct – prevent any future tribunal of inquiry appointed by the Houses of the Oireachtas from obtaining the information it needed to establish guilt where guilt existed."

DEFENCES

Clearly the type of defences available to a person accused of bribery is significant in terms of effective enforcement. Perhaps the most controversial of the bribery-specific defences is the facilitation payment defence, which essentially excludes payments made to expedite routine government action from the scope of the bribery offences. Another controversial defence is that of effective regret which exculpates a person entirely where that person confesses to committing a corruption crime to the authorities very shortly after the offence. The purpose of this defence is to encourage the reporting of corruption crimes.

SANCTIONS

The formal legal sanction for a criminal offence is a sentence, which may include, for example, probation, fines, or incarceration, depending on the gravity of the offence. Generally speaking sentences serve at least two purposes, first that of deterring both the convict and other individuals from committing that offence in the future and second, retribution.[804] These purposes are also relevant to bribery. However, two issues of particular interest to bribery offences are so-called "asymmetric punishments" and corporate sanctions.

Asymmetric Punishments

There are always at least two parties to a bribe, the payer and the receiver. While some countries sanction both equally, others take an asymmetric approach imposing relatively milder sanctions on the payer than on the receiver. The idea of asymmetric penalties was first explored by Rose-Ackerman who observed that since it takes two people to commit the specific crime of corruption, it might in fact suffice to deter one of the two parties. To enforce this, she suggested asymmetric penalties to undermine the bond between the payer and the receiver.

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[804]Other purposes include: rehabilitation, incapacitation, denunciation and recognition of harm to victims and the community. See e.g. New South Wales Law Reform Commission, *Sentencing,* Discussion Paper 33, (April, 1996) at paras 3.2-3.24.

In so far as bribery is concerned, the idea of asymmetric penalties was taken up again by Lambsdorff and Nell, according to whom an additional way to deter bribery, other than sanctions, is to increase the uncertainty inherent in corrupt transactions by using asymmetric penalties (and leniency) to encourage one or other of the parties to the transaction to cheat. They observe:

> In fact, asymmetry and ex-ante leniency might unleash higher deterrent effects of anti-corruption laws, if deterrence is understood in the broader sense of reducing potential perpetrators' willingness to participate in illegal acts. Thus, in order to clamp down vigorously on corruption, legislators should seriously consider the benefits of asymmetric sanctions and leniency in their (re-) formulation of the respective anti-corruption laws.[805]

Corporate Sanctions

As mentioned, the principal forms of criminal sanctions are imprisonment and/or fines. In so far as corporate entities are concerned, however, imprisonment is clearly not an option and the fine is frequently the penalty of default. Nevertheless the question remains as to whether fines by themselves are the optimal way of achieving the dual purpose of criminal sanctions (deterrence and retribution) and, if not, what other types of sanctions are likely to achieve this purpose.

Commentators who consider fines to be a sub-optimal punishment in the corporate sphere essentially point to the profit maximising nature of corporations and emphasise that for corporations the risk of being fined is simply a factor to be taken into account in determining corporate strategy. Where the expected profit from the payment of a bribe outweighs the risks of detection and the cost of a fine, then a rational corporation can be expected to pay the bribe. In other words:

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[805]Johann Graf Lambsdorff and Mathias Nell, *Fighting Corruption with Asymmetric Penalties and Leniency*, Center for Globalization and Europeanization of the Economy, Discussion Paper 59 (2007), p 17; see further Christoph Engel, Sebastian J. Georg and Gaoneng Yu, *Symmetric v Asymmetric Punishment Regimes for Bribery*, Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2012/1.

> The problem with fines, whatever the species, is that they lend themselves, all too easily, to a cost-benefit analysis. Like the costs of labour and advertising, the fine becomes simply another entry on the corporate balance sheet. If a continuation of a company's illegal practices, burdened by the occasional fine, will be profitable, a rational company may well not be deterred from its criminogenic way of doing business. The crime is viewed not as a wrong against society but as a non-capital expenditure.[806]

Moreover, it may be impossible in at least some cases to impose fines which adequately deter bribery, in view of its expected benefit: "[t]he real problem is that if a deterrent effect is sought, the size of the penalty might have to be so great that the unintended side-effects would indeed be intolerable."[807]

Because fines do not serve all the objects that should be addressed at sentencing, some commentators argue for more extended options for sentencing corporations. These may include:[808] equity fines;[809] incapacitation;[810] correction orders;[811] community service orders;[812] publicity orders;[813] and/or reparation.[814]

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[806]James Gobert, "Controlling Corporate Criminality: Penal Sanctions and Beyond" (1998) 2 Web Journal of Current Legal Issues; see also Celia Wells, *Corporations and Criminal Responsibility*,2nd ed.,(Oxford University Press, 2001), p 36. Brent Fisse, "Sentencing options against corporations" (1990) 1 Criminal Law Forum 211 at 232-233.

[807]Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed.,(Oxford University Press, 2001), at 166.

[808]See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17; see also Expert Group Report, *Corporate Homicide*, (Scotland, 2005); Law Reform Commission, Consultation Paper, *Corporate Killing*, (CP 26-2003), Chapter 8, Sanctions and Secondary Issues; Law Reform Commission, Report, *Corporate Killing*, (LRC 77-2005), Chapt 4, Sanctions for Undertakings.

[809]Equity fines are also known as "stock dilution". They require a corporation to issue a certain number of shares to a third party, for example a victims' compensation fund. See e.g. John C. Coffee, "'No soul to damn: no body to kick' an unscandalized enquiry into the problem of corporate punishment" (1981) 79 Michigan Law Review 386; see also See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17.

[810] Incapacitation involves orders, also known as restraint orders aimed at preventing a corporation from carrying out certain commercial, trading or investment activities, or taking advantage of certain rights (referred to as "disqualification") or aimed at winding up a corporation either directly or indirectly (referred to as "dissolution"). See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17; See also Council of Europe Recommendation No. R.(88) of the Committee of Ministers to Member States concerning Liability of

JURISDICTION

At common law, the Irish courts only have jurisdiction to try a criminal offence where the last act or event necessary for its completion occurs within the jurisdiction. However, the legislature may also provide for extra-territorial jurisdiction pursuant to statute.[815] In this regard, the PC(A)A 2001, as amended, provides for an extensive form of territorial jurisdiction, based on the principle of subjective territoriality as well as a nationality based jurisdiction for the purposes of the PCA 1906. While for its part, the CJ(TFO)A 2001, does not amend the common law position regarding exercising jurisdiction on the basis of territoriality, it does provide for nationality based jurisdiction.

Extended Extra-territorial Jurisdiction

Pursuant to s. 8 of the PC(A)A 2001, a person may be tried in the State for an offence under the PCA 1906, if "any of the acts alleged to constitute an offence was committed in the State notwithstanding that other acts constituting the offence were committed outside the State." Pursuant to s.1(2), an "act" includes an omission. The significance of

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Enterprises having Legal Personality for Offences committed in the Exercise of their Activities (1990).

[811]Correction or remedial orders include both probation orders and punitive injuctions. The former aim at altering corporate behaviour, for example by achieving increased internal discipline in the corporation or reforming the organisation by means of external monitoring. Punitive injunctions are generally a more severe form of intervention and may involve specific internal controls or require that particular activities be undertaken or ceased. See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17.

[812]Community service orders may direct a corporation to undertake or contribute to work or projects that benefit the community or a part of the community in some way. See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17.

[813]Publicity Orders include orders designed to inform specific people, groups of people or the community, of details relating to the offender, the offence and the penalty imposed for the offence. See New South Wales, Law Reform Commission Report 102(2003) *Sentencing: Corporate Offenders*, Chapter 5, para 5.17.

[814]Reparation involves orders for both compensation and restitution to victims of corporate crime. See New South Wales, Law Reform Commission Report 102(2003) *Sentencing*: *Corporate Offenders*, Chapter 5, para 5.17.

[815] See e.g. *In re the Criminal Law (Jurisdiction) Bill,* [1977] 1 IR 129; Pursuant to Article 29(8) of the Irish Constitution, Ireland may exercise extraterritorial jurisdiction in accordance with the generally recognised principles of international law.

this section is that it is not necessary for the last act necessary to complete the offence to occur in the State: it is sufficient if any act is committed in the State.

Consequently, under the PCA 1906, an act of corruption could occur partially in Ireland, where, for example, an offer of a bribe is made abroad but received in Ireland. Conversely, an offer or promise of a bribe, confirmation of a promise or discussion about the details of a bribe made through a telephone call, fax or email emanating from Ireland, would also trigger territorial jurisdiction. It appears that Irish courts would also have jurisdiction even where the call, fax or email does not emanate from Ireland but relates to the bribing of a person within the jurisdiction.[816]

Nationality Based-Jurisdiction

In certain instances under both the PCA 1906 and the CJ(TFO)A 2001 the State may exercise jurisdiction based solely on the nationality of the defendant even where no part of the offence was committed within the State. Under the CJ(TFO)A 2001, the State may also exercise jurisdiction where acts of corruption are directed at certain specified individuals, irrespective of the nationality of the defendant.

The PCA 1906

Where an offence is committed under the PCA 1906, Irish courts may exercise jurisdiction in respect of offences under that Act irrespective of whether or not an element of the offence occurred in Ireland, where the defendant is: an Irish citizen; an individual who is ordinarily resident in the State; a company registered under the Companies Acts; or any

[816] The Law Commission, *Reforming Bribery – A Consultation Paper*, Consultation Paper 185, (2007) p 176. In *Somchai Liangsinpraseret v United States* [1991] 1 AC 225, Lord Griffiths in the Privy Council observed, with respect to inchoate offences: if the inchoate crime is aimed at England with the consequent injury to English society, why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within the jurisdiction or through extradition procedures?.... Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of offences in England.

other body corporate established under a law of the State. It may also exercise jurisdiction in respect of such offences where the person allegedly committing the offence is an office holder, special adviser, director of a public body or an employee of a public body. This is also true of offences committed by a person who is the D.P.P., a judge, or any person employed by or acting on behalf of the public administration of the State.[817]

CJ(TFO)A 2001

Under the CJ(TFO)A 2001, the State may exercise jurisdiction over active or passive corruption committed by a person outside the State, if that person is: an Irish citizen, a national official: or a Community Official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its head-quarters within the State.[818]

In cases of active corruption, it may also exercise jurisdiction in instances where the corruption is directed against an official, or "a member of one of the institutions mentioned in paragraphs (i) to (iv) of the definition of "national official" in section 40, who is an Irish citizen."[819] The relevant institutions are the EU Commission, Parliament, Court of Justice and Court of Auditors.[820]

TIME LIMITS

Normally, proceedings for summary offences must be brought within six months of the date of the offence. The PC(A)A 2010 extends this time period to 12 months from that date or six months from the date on which evidence sufficient to justify proceedings came to the knowledge of the person instituting proceedings. However, in any event, proceedings must be commenced within two years from the date on which the

[817] see the Prevention of Corruption (Amendment) Act 2001, s. 7(2).
[818]Criminal Justice (Theft and Fraud Offences)Act 2001, s. 45(2)(a).
[819]Criminal Justice (Theft and Fraud Offences) Act 2001, s. 45(2)(b).
[820] Criminal Justice (Theft and Fraud Offences) Act 2001, s. 40.

offence concerned was committed.[821] There is no equivalent extension for offences brought under the CJ(TFO)A 2001.

There is no statutory time limit for the prosecution of offences on indictment.[822] However, in cases where a considerable amount of time has elapsed since the commission of an offence, the courts will not permit a trial to go ahead if convinced that this elapse will prejudice the accused's right to a fair trial.[823] That prejudice may be actual, involving the loss of previously available evidence, or presumptive, namely, the difficulties necessarily inherent in giving evidence after a lengthy period.[824] There are two types of delay.[825] First, pre-complaint delay, which occurs when the victim of a crime delays for weeks, months or even years before reporting the alleged offence to the authorities. Secondly, post-complaint delay, which occurs after authorities have received a complaint from the victim.

An application to prohibit the prosecution of a charge on grounds of delay is made by the accused to the High Court by way of judicial review.[826] The reviewing court must decide whether, because of the lapse of time since the alleged offence, the accused's trial is no longer constitutional, and is in fact a "parody of justice".[827]The onus of proof lies on the applicant,[828]and the standard to be reached is the balance of

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[821]Prevention of Corruption (Amendment) Act 2001, s. 9(4).

[822] Criminal Justice Act 1951, s.7. This is the case even where an indictable offence is tried summarily: *DPP v. Logan* [1994] 3 I.R. 254; *S. v. DPP* (Supreme Court, unreported, 19 December 2000); *Gormley v Smyth* [2010] IESC 5*; DPP v Gregg* [2009] IESC 17.

[823]See e.g. *State (O'Connell) v Fawsitt* [1986] I.R. 362, 378, where Finlay C.J., with whom Walsh J., Henchy J, Griffin J, and McCarthy J agreed, stated "I am satisfied that if a person's trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial, then the appropriate remedy by which the constitutional rights of such an individual can be defended and protected is by an order of prohibition."

[824]See *P.M. v Malone* [2002] 2 I.R. 560, 572-573.

[825]Paul O Mahony (ed),*Criminal Justice in Ireland*, (Institute of Public Administration, 2002), p 55.

[826]A trial judge does not have jurisdiction to hear an application to stay or to quash an indictment on the grounds of delay.

[827]This was how Henchy J. described the hearing of a civil action relating to an industrial accident some 23 years earlier: *O'Keeffe v. Commissioners of Public Works* (Supreme Court, unreported, 24 March 1980). See also the judgment of Hardiman J. in *J.O'C. v DPP* [2000] 3 I.R. 478, where he describes the jurisprudence on delay as having its origins in civil cases.

[828]*Z. v. DPP* [1994] 2 I.R. 476.

probabilities.[829]The test as to whether the delay has sufficiently prejudiced the accused's right to a fair trial is different for each type of delay, as discussed further below.

IMMUNITIES

Under the Irish Constitution, parliamentarians are privileged in respect of any utterance made in either House of the Oireachtas.[830] Publications of such utterances are also privileged as are official reports and publications.[831] Irish parliamentarians are also privileged from arrest in going to and returning from, and while within the precincts of, either House.[832]

Both the principles of collective responsibility and that of cabinet confidentiality also enjoy constitutional protection. According to Article 28.4.2 the Government must meet and act as a collective authority and is collectively responsible for the Departments of State administered by the Government members. For its part, Article 28.4.3 provides that the "confidentiality of discussions at meetings of the Government shall be respected in all circumstances", subject to two relatively limited exceptions. This Article is the result of a constitutional amendment arising out of proceedings before the Hamilton Tribunal.[833] The

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[829]The *People (DPP) v. Byrne* [1994] 2 I.R. 236; although see *C. v. DPP* [2009] I.E.H.C. 121.

[830]The Irish Constitution, Article 15.13. This privilege extends to witnesses appearing before a committee of an Oireachtas Committee pursuant to the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, s. 11. See further, Imelda Higgins, "Parliamentary Privilege and Free Speech in the Oireachtas" (2010) 17(1) Dublin University Law Journal, 94.

[831]The Irish Constitution, Article 15.12.

[832]The Irish Constitution, Article 15.13. This protection against arrest when travelling to and from the Oireachtas has been the source of considerable controversy because of the protection it offers TD's who commit traffic offences while so travelling. See e.g. Sarah McInerney, "Oireachtas: TD's don't need to be told to obey the rules of the road" The Sunday Times, July 28, 2013, p 7.

[833]During the course of his inquiry, Justice Hamilton requested that the cabinet meetings of October 21, 1988 be disclosed to the tribunal as this was the date on which the Cabinet decided to provide Goodman International with export credit insurance. The Attorney General successfully challenged this request before the Supreme Court, in *Attorney General v Hamilton* (No 1) [1993] 2 IR 250, which held that Cabinet deliberations were confidential and consequently could not be investigated by the Houses of the Oireachtas or their agents. The seventeenth amendment to the Constitution restricted the broad scope of the Supreme Court's decision by permitting cabinet confidentiality to be lifted in limited circumstances. See Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* 4th ed., (LexisNexis Butterworths,

amendment was introduced so as to enable the disclosure of the minutes of cabinet meetings in certain, restricted circumstances.[834]

SANCTIONS

Both the PCA and the CJ(TFO)A 2001 provide for sanctions. In addition, those convicted of corruption offences may also be banned from tendering for certain public procurement contracts.

PCA 1906

Under the PCA 1906, bribery may be prosecuted either summarily or on indictment.[835] A summary conviction may result in a fine not exceeding €3,000 or a Class B fine and/or up to 12 months imprisonment.[836] A person convicted on indictment may be fined and/or imprisoned for up to 10 years.

CJ(TFO)A 2001

Again, under this Act, bribery may be prosecuted either summarily or on indictment. A summary conviction may result in a fine not exceeding €1,904.61 or a Class C fine and/or up to 12 months imprisonment.[837] A person convicted on indictment may be fined and/or imprisoned for up to 5 years.[838]

Public Procurement Contracts

In certain instances, conviction for bribery may also result in the defendant being excluded from being considered for awards of public

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2003), 459. See also Gerard Hogan, "The Cabinet Confidentiality Case of 1992", (1993) 8 Irish Political Studies, 136.

[834]However, according to Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* 4th ed., (LexisNexis Butterworths, 2003) 467, the amendment also makes clear, "that the duty of confidentiality precludes the release of the minutes of government meetings under the thirty year rule or the justification of a ministerial dismissal or resignation by reference to what transpired at Government meetings".

[835] The Prevention of Corruption Act 1906, s. 1(1).

[836]The Prevention of Corruption Act 1906, s. 1(1); see also Fines Act 2010, s. 3

[837]Criminal Justice (Theft and Fraud Offences) Act 2001, s. 53; see also Fines Act 2010, s. 3.

[838]Criminal Justice (Theft and Fraud Offences) Act 2001, ss. 44 and 45.

contracts and/or from tendering processes. Specifically, under the European Communities (Award of Public Authorities Contracts) Regulations, 2006, a contracting authority is required to exclude any person convicted of an offence involving corruption, including bribery (as defined in the EU Convention), from being considered for awards of public contracts.[839] Moreover, the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 also requires contracting authorities to exclude any person convicted of active bribery(as defined in the EU Convention) from tendering processes.[840] Irish law also provides for extensive criminal and civil asset confiscation.[841]

ENFORCEMENT, SANCTIONS, THE PCT 1906 AND THE PCTS

In the area of enforcement and sanctions, the provisions regarding extra-territorial jurisdiction and time-limits do not present any difficulties from the perspective of the inquiries conducted by the PCTs as evidenced by recent criminal and civil corruption cases in which the courts have considered the impact of delay on such proceedings.

In contrast, both the privilege attached to parliamentary utterances and the extensive nature of cabinet confidentiality could present barriers to prosecuting the types of bribery inquired into by the PCTs and have already in the past prevented both the Hamilton and Mahon Tribunals from carrying out certain aspects of their inquiries. Moreover, in so far as sanctions are concerned, while sanctions for individuals appear adequate, it is questionable whether the sanctions applicable to corporate entity are sufficiently effective for the purposes of either deterrence or rehabilitation.

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[839] European Communities (Award of Public Authorities Contracts) Regulations, 2006, s. 53.

[840] European Communities (Award of Contracts by Utility Undertakings) Regulations 2007, ss. 55(5), 56(4); see generally, William Sope, "The Mandatory Exclusions for Corruption in the New EC Procurement Directives", (2006) 31(5), E.L. Rev. 711.

[841] See generally, Imelda Higgins, *Corruption Law*, (Roundhall 2012) Chapter 7.

EXTRA-TERRITORIAL JURISDICTION

The Irish courts would have jurisdiction over the payments inquired into by the PCTs, including those made abroad. As mentioned, pursuant to the PC(A)A 2001, the Irish courts may exercise jurisdiction in respect of offences where the person allegedly committing the offence is an Irish citizen, or an office holder, special adviser, director of a public body or an employee of a public body, irrespective of whether an element of the offence occurs in Ireland.[842]

As discussed in the previous chapter, in the past, the OECD's WGB has criticised the extent to which Irish law imposes (or fails to impose) liability on parent companies for the activities of their over-seas subsidiaries. However, this lacuna has been remedied by amendments introduced by the PC(A)A 2010, pursuant to which the Irish courts now have jurisdiction over offences committed by corporate entities registered under the Companies Acts or established under a law of the State. Consequently, corporate entities may now be held liable for overseas offences committed by overseas subsidiaries, either on the basis on inchoate or secondary liability and in cases where the courts are prepared to lift the corporate veil.

TIME-LIMITS

With regard to time-limits, most of the payments inquired into by the PCTs took a considerable number of years to come to light. It is also evident that delay in prosecuting offences under the PCA 1906 is likely to arise either pre or post complaint. In both cases, however, an order prohibiting the prosecution of an offence on the grounds of delay will only be made in exceptional grounds and the courts will take into account the very serious nature of corruption charges in determining whether to make such an order. The Irish courts have recently considered the impact of delay in two criminal cases connected with the Mahon Tribunal's inquires and also in a civil case arising out of the

[842]The CJ(TFO)A 2001 is not considered for the purpose of this discussion as the bribery offences in that act are only concerned with bribery which is likely to damage the European Communities' financial interests. There is no evidence to suggest that the instances of bribery inquired into by the PCTs were likely to result in such damage.

Moriarty Tribunals inquiries. In all three of those cases, the Supreme Court permitted the trial/case to proceed.

Pre complaint delay

Because bribery is an offence which frequently involves the rich and/or powerful members of the community, complainants may be reluctant to come forward out of fear of reprisals or a belief that their complaint will not be acted upon.[843] As is clear from the inquiries conducted by the Mahon Tribunal, following Mr Tom Gilmartin's complaint to the Gardaí regarding the various corrupt demands made of him, he received a telephone call from a man who identified himself as "Garda Burns" who told him "that the complaints he was making were not welcome and that the best thing he, Mr Gilmartin could do was go back to where he had come from."[844]

In seeking to prohibit a trial on the grounds of pre-complaint delay, the accused must show, on the balance of probabilities, that the delay in reporting has resulted in prejudice so as to give rise to a real and serious risk of an unfair trial.[845] The court also retains a residual jurisdiction to grant an order of prohibition in exceptional circumstances where it would be unfair or unjust to put an accused on trial.

As mentioned, the courts will only prohibit the prosecution of a case on the grounds of delay in exceptional circumstances,[846] preferring instead to rely on the trial judge's ability to ensure due process and the rule of law in the context of the trial itself.[847]

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[843] While the whistleblower protection introduced by the Prevention of Corruption (Amendment) Act 2010, s. 4 may serve to alleviate fears of reprisals on the part of those covered by that act, it is unlikely to dispel them completely. Moreover, that protection does not apply to, for example, independent contractors. The government has recently published a Public Interest Disclosures Bill (2013), which if enacted, will provide for pan-sectoral whistleblower protection.

[844] The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 202.

[845] See *S.H. v D.P.P* [2006] IESC 55; [2006] 3 I.R. 575.

[846] *P.D. v DPP* [2008] IESC 22.

[847] See e.g. *D.C. v DPP* [2005] 4 IR 281, 283, "Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director having taken such a decision the courts

Post-Complaint Delay

Post-complaint delay may be attributable to blameworthy prosecutorial delay. For example, the Mahon Tribunal found that the Gardaí did not thoroughly investigate the above-mentioned complaints by Mr Gilmartin.[848] That Tribunal thought it "likely that Mr Lawlor's position as a TD was a factor in the decision taken by the investigating Gardaí not to interview him."[849] It was also:

> ....puzzled as to why the final Garda report went to such lengths to exonerate Mr Lawlor and Mr Redmond in the absence of a more comprehensive inquiry into complaints of corruption involving those two individuals.[850]

However, post-complaint delay is not necessarily blameworthy and may be attributable to factors such as the complexity of the investigation, difficulties in contacting suspects or witnesses and/or the need to rely on mutual legal assistance. The Courts take different approaches in considering the effect of each of these types of post-complaint delay.

Culpable Prosecutorial Delay

In *McFarlane v the DPP*[851] Kearns J summarised the present law on culpable prosecutorial delay as follows:

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are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial. In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial. See also Sinead Ring, "Beyond the Reach of Justice? Complainant Delay in Historic Child Sex Abuse Cases and the Right to a Fair Trial" (2009) 2 Judicial Studies Institute Journal, 162.

[848]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 210.

[849]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 210.

[850]The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol 1, (2012), p 210.

[851]*McFarlane v the DPP* [2008] 4 IR 117.

(a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition;

(b) prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition;

(c) where there is a period of significant (as distinct from minor) blameworthy prosecutorial delay less than that envisaged at (b), the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v Malone* [2002] 2 I.R. 560 and *P.M. v DPP* [2006] IESC 22, [2006] 3 I.R. 172 are demonstrated;

(d) actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.[852]

He also held that the same principles apply to systemic delay, arising since the inception of the criminal process. In *P.M. v Malone*[853], Keane CJ identified the fundamental issues to be considered in a delay case as being whether there was: (a) loss of liberty pending trial; (b) anxiety and stress to the accused over and above the normal stress from a pending prosecution; and (c) impairment of the defence. In *P.M v D.P.P.,*[854] the court held that one or more of the interests protected by the right to an expeditious trial must be shown to have been interfered with so as to warrant the granting of an order of prohibition. The courts have also held that in circumstances where the applicant alleges actual prejudice he or she must:

engage with the facts of the case so as to demonstrate that

[852]*McFarlane v the DPP* [2008] 4 IR 117 at pp 162-163.
[853]*P.M. v Malone* [2002] 2 IR 560.
[854]*P.M. v DPP* [2006] IESC 22, [2006] 3 IR 172.

> there is a real impairment, by virtue of the problem relied on, in the ability to present a defence rather than a theoretical possibility which might loosely be summed up under the phrase "you never know what might have turned up."[855]

Kearns J's approach and the above statement was recently approved by the Supreme Court in *Enrich v D.P.P.*[856] In that case, the Court refused to prohibit the applicant's prosecution on ten grounds of forgery relating to incidents alleged to have occurred between the 1st of January, 1994 and the 21st of August, 1994, over 18 years earlier. While the Supreme Court accepted that the "prosecution delay here has been significant and is largely unexplained"[857] it also observed that it had caused no actual prejudice to the appellant and as the case against the appellant was largely based on documents it was not therefore substantially reliant on human factors. In the absence of actual prejudice, the court did not consider there was a basis for presuming prejudice. Applying the three factors identified in *P.M. v Malone*, the Supreme Court observed that there had been no loss of liberty, no impairment in the appellant's capacity to defend himself and the applicant had failed to identify any specific stress element. It also emphasised that the applicant himself had failed to take any steps to bring on an earlier trial of the offences in question.

In two cases involving criminal proceedings connected with the Mahon Tribunal namely, *Cosgrave v DPP*[858] and *Kennedy v DPP*,[859] the Supreme Court also commented on the issue of prejudice. These cases arose out of charges of bribery preferred, in 2010, against the developer Mr Jim Kennedy and four local councillors, in relation to the development of the Carrickmines lands in County Dublin. Both Mr Kennedy and one of the councilors, Mr Liam T Cosgrave sought unsuccessfully to prevent their trials on the grounds of prosecutorial delay. In *Cosgrave*, Denham J found that the applicant had failed to establish exceptional stress over and above that usually associated with

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[855] See *Kennedy v DPP*, [2012] IESC 24, Clark J, para 5.4.
[856] *Enright v DPP* [2012] IESC 54.
[857] *Enright v DPP* [2012) IESC 55, para 13.
[858] *Cosgrave v DPP* [2012] IESC 24.
[859] *Kennedy v DPP* [2012] IESC 34.

legal proceedings. In *Kennedy*, Denham J rejected the applicant's claim regarding the impairment of his defence, on an *obiter* basis. In so doing, she observed:

> I am not satisfied that the prejudice alleged is such as to prohibit a trial, as the deaths of witnesses referred to relates to evidence, the essence of which can be obtained from other sources. In fact, when this matter was addressed during the hearing it became clear that there was insufficient engagement with the facts so as to show that there was a real risk of an unfair trial. Indeed the argument fell apart and the prejudice was not established.

In both *Cosgrave v DPP* and *Kennedy v DPP,* the Supreme Court also considered the application of the balancing test in instances where there has been significant prosecutorial delay, again on an *obiter* basis. It is clear from both those cases that the Courts consider that: "where there are charges of corruption of public officials, there is a very significant interest in permitting such allegations to proceed to trial."[860] The Supreme Court took a similar approach when considering an application to dismiss a civil case for want of prosecution in the cases *Comcast Int Holdings v Minister for Public Enterprise and Others* and *Persona Digital Telephony Ltd v Minister for Public Enterprise and Others.*[861] Both of these cases concerned actions brought by Comcast and Persona respectively, seeking damages arising out of losses incurred as a result of alleged corruption in the award of the State's second mobile licence, an issue which was the subject of inquiry by the Moriarty Tribunal. In considering, on an *obiter* basis, whether the balance of justice favoured or was against proceeding in the case, the Supreme Court emphasised the serious nature of the allegations made. In this respect, Denham J observed:

> these proceedings make serious allegations of corruption by a Minister of the Government, not a matter which should be struck out on a technicality but which should be addressed in a full hearing in open court. In submissions it was argued by the State

[860] See *Cosgrave v DPP* [2012] IESC 24, per Denham J, para 59.
[861] *Comcast Int Holdings v Minister for Public Enterprise and Others and Personal Digital Telephony Ltd v Minister for Public Enterprise and Others*[2012] IESC 50.

> that the appellants' actions were not in the public interest, but were private commercial interests. However, this is not a case between private companies, rather it involves allegations of corruption by a Minister of State. There is a public interest in determining such a claim of corruption in high office. It is a matter of public interest as to whether a Minister of Government corrupted a State process. This is an important aspect of the case.[862]

Non-Culpable Prosecutorial Delay

As outlined above, prosecutorial delay is not necessarily blameworthy and may result from factors not within the control of the prosecution, including: the complexity of the case; difficulty in locating witnesses; and/or the nature of cross-border investigations. This issue arose in both *Cosgrave v DPP* and *Kennedy v DPP* in which the prosecutorial delay in bringing the proceedings was primarily attributable to the DPP's decision to await the conclusion of the trial against Mr Frank Dunlop, who is one of the key witnesses in the prosecution's case. The Supreme Court accepted this reason for the delay and found that there was "no blameworthy prosecutorial delay".[863]

In cases of general delay, as opposed to blameworthy prosecutorial delay, the key issue is again whether, as a result of that delay, there is a real risk of an unfair trial. However, significantly, in balancing the applicant's right to an expeditious trial and the public interest in prosecution, the public interest in ensuring an efficient investigative procedure is not at issue. It is therefore likely to be more difficult for the applicant to succeed in prohibiting his or her trial. Moreover in *Kennedy v DPP*, Clarke J suggested that significantly more weight should be given to an impairment to the applicant's defence resulting from prosecutorial delay than cases where there is no such resulting impairment.[864] Indeed, Clarke J, in *Kennedy v DPP* suggested that in cases of general delay, the courts should only prohibit a trial in

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[862] *Comcast Int Holdings v Minister for Public Enterprise and Others and Personal Digital Telephony Ltd v Minister for Public Enterprise and Others*[2012] IESC 50, para 44.
[863] *Kennedy v DPP* [2012] IESC 34, para 66.
[864] *Kennedy v DPP* [2010] IESC 34, para 5.7.

instances where a fair trial is impossible.[865] For his part, Fennelly J expressly reserved the issue as to the correct burden to be imposed on an application for the prohibition of a criminal trial on grounds of general delay considering that for the purposes of the Kennedy case the test of a "real risk of an unfair trial"[866] sufficed.

Reluctance to order Prohibition

As in the case of pre-complaint delay, in cases of both blameworthy and reasonable prosecutorial delay, the courts are reluctant to prohibit a trial on the grounds of delay, preferring instead to rely on the trial judge to ensure that the accused receives a fair trial. As observed by Clarke J in Kennedy:

> I fully agree with the jurisprudence that places reliance on the fact that any impairment in the ability of an accused to present a defence may be reduced, or even completely cured, by other appropriate measures such as directions from the trial judge. It seems to me that the degree of impairment must be assessed by reference to such considerations. Finally, I agree that there are many cases where the best place to identify impairment and to weigh it with any competing factors will often be the trial judge who will have a much clearer view of the real issues likely to be material. There is, in my view, an excessive tendency to seek to prohibit trials in advance rather than allow the trial judge to decide on impairment or fairness issues.[867]

IMMUNITIES

Both cabinet confidentiality and the protection of utterances were relied upon by witnesses to the PCTs to prevent the relevant PCT from inquiring into certain aspects of their conduct. While the constitutional provisions on cabinet confidentiality have since been amended, they remain problematic. There have been no changes regarding the

[865] *Kennedy v DPP* [2012] IESC 34, para 5.6.
[866] *Kennedy v DPP* [2012] IESC 34, para 17.
[867] *Kennedy v D.P.P* [2012] IESC 34, para 5.4.

protection of parliamentary utterances, however, the exact extent of that protection under Irish law is unclear

Cabinet Confidentiality

As previously discussed, the Hamilton Tribunal inquired into allegations that the State's Export Credit Insurance Scheme ("E.C.I.S.") was improperly used to benefit Mr Larry Goodman and his related companies. One of Mr Albert Reynold's first acts after he became Minister for Industry and Commerce in March 1987 was to reinstate export credit insurance for Iraq, which had been discontinued by the previous Fine Gael government because of that country's worsening political and economic situation.[868] Over the following two years, he increased the amount of insurance available despite emphatic departmental advice to the contrary and the continuing deteriorating situation in Iraq. During this time, only two companies benefitted from this insurance, Hibernia Meats Ltd and Mr Goodman's company AIBP, with the latter obtaining the lion's share. Mr Reynolds justified his actions on the basis that the national interest required that support be given to the export of commercial beef. However, the Tribunal found that much of the beef being exported under the E.C.I.S. was in fact intervention beef and not commercial beef and that the benefits to the Irish economy were illusory rather than real.[869] A key issue therefore for that Tribunal was whether or not Mr Reynolds was aware that the beef being exported by AIBP was intervention beef. The Tribunal established that both Mr Ray McSharry, than Minister for Finance and Mr O'Kennedy, the then Minister for Agriculture, knew that Mr Goodman was using intervention beef. It was however prevented by the Supreme Court from inquiring into whether they had shared this information with Mr Reynolds at a June cabinet meeting at which export credit insurance was specifically discussed.[870] Ultimately, the Tribunal concluded that Mr

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[868]Report of the Tribunal of Inquiry into the Beef Processing Industry (1994), Chapt 6.
[869]Report of the Tribunal of Inquiry into the Beef Processing Industry (1994), p. 215.
[870]*AG v Hamilton (No. 1)* [1993] 2 IR 250. According to Finlay C.J. with whom Hederman J. agreed, at p 266 "[t]he obligation to accept collective responsibility for decisions and presumably, for acts of government as well, involves, as a necessity, the non-disclosure of different or dissenting views held by Members of the Government prior to the making of decisions."

Reynolds was unaware that the beef being exported by AIBP was intervention beef.[871]

Following the Supreme Court's decision in *AG v Hamilton (No. 1)*[872] the Constitution was amended to as to reduce the absolute nature of cabinet confidentiality endorsed in that decision. Pursuant to that amendment, that confidentiality can now be lifted in two situations. First, where the High Court determines that the disclosure is in the "administration of justice" and secondly, where it determines that disclosure should be made by virtue of an over-riding pubic interest pursuant to an application by a Tribunal of Inquiry. While confidentiality can now be lifted for the purposes of Tribunal investigations thus remedying the lacunae encountered by the Hamilton Tribunal, this issue of cabinet confidentiality remains problematic. Specifically, the Gardaí and not Tribunals of Inquiry are usually responsible for investigating corruption allegations and it is not clear whether confidentiality can be lifted for the purposes of a Garda investigation. In particular, the meaning of the phrase "administration of justice" is not entirely clear and it seems that it may not cover the pre-trial phase of an investigation. According to McCarthy J in *Goodman International v Hamilton*,[873] the critical factor [in the definition of the administration of justice] is trial and adjudication, not inquiry.[874] Moreover in *Ryan v O'Callaghan*,[875] Barr J held that the issue of a search warrant prior to the commencement of a prosecution was "part of the process of criminal investigation and executive rather than judicial in nature." In light of this, it might not, for example, be possible for the Gardaí to apply for a waiver of cabinet confidentiality while investigating an offence, prior to the

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[871]Report of the Tribunal of Inquiry into the Beef Processing Industry (1994), p 213. The Hamilton Tribunal's conclusions on this issue were widely disbelieved – even the published trade statistics showed that beef which was exported under the cover of ECIS was intervention beef. According to Mr John Bruton, speaking in the Dáil, Dáil Debates, 1 Sept 1994, Col. 257 "I do not believe the Taoiseach's evidence on this matter. I believe he knew from early on that he was insuring intervention beef and that the tribunal would have come to the same conclusion if it had drawn together competently the evidence spread throughout different parts of the report which shows that it would have been almost impossible for the Taoiseach not to have found out or been told that he was insuring intervention beef." See also O'Malley, Col. 3002, Mitchell, Col 649.

[872]*AG v Hamilton (No. 1)* [1993] 2 IR 250.

[873]*Goodman International v Hamilton* [1992] 2 IR 542.

[874]*Goodman International v Hamilton* [1992] 2 IR 542 at 607.

[875]*Ryan v O'Callaghan*, (unrept),(High Court, Barr J., July 22, 1987).

commencement of a prosecution. However, whether or not a prosecution is commenced may in turn be dependent on obtaining such a waiver. This suggests that in certain cases, the principle of cabinet confidentiality may ultimately prove to be a significant barrier to the effective investigation of [some] high level political corruption.

Protection of Utterances

This issue arose both in the context of proceedings before the Hamilton Tribunal and before the Mahon Tribunal.

The Hamilton Tribunal

The Hamilton Tribunal was established as a result of allegations made by three Dáil Deputies. That Tribunal determined that the protection of parliamentary utterances meant that those Deputies could not be compelled to furnish to the Tribunal the identity of the source of allegations which had been made by them within the Dáil Chamber. It also considered that the repetition by the Deputies of these allegations in statements of evidence made to the Tribunal did not constitute a waiver of that protection. The Attorney General subsequently and unsuccessfully challenged this determination by way of judicial review proceedings.[876] According to the Supreme Court the immunity attaching to the statements made within the Dáil was not lost by the repetition of the same allegations outside the House to the Tribunal. In the course of his judgement, Finlay CJ stated that the Deputies concerned:

> have been put in the position, as a result of the proceedings at the Tribunal, of an attempt being made to compel them under the sanctions provided ... to answer questions in order to disclose the identity of informants who gave them the information upon which they based the allegations they made in speeches in Dáil Éireann. As such, there can be no doubt in my mind that they are persons who, as members of the Dáil, have made utterances in respect of which the attempt to compel them to answer questions before the Tribunal is an attempt to make them amenable to an

[876] *Attorney General –v- Hamilton (No. 2)* [1993] 3 IR 227.

> authority other than the Dáil ... and the jurisdiction of the Tribunal to compel answers to those questions is, accordingly, ousted.

The Mahon Tribunal

During the course of its public hearings into certain transactions involving the then Taoiseach, Mr Bertie Ahern, the Mahon Tribunal were prohibited, by the High Court, from questioning Mr Ahern regarding inconsistencies between statements he had made to the Tribunal and statements he had made to the Dáil. According to that Court:

> A consideration of the terms of art. 15.13 and the relevant case-law demonstrates that the article protects a member of the national Parliament from both direct and indirect attempts to made such a person amenable to anybody other than the Houses themselves in respect of any utterance made in such Houses.
>
> Drawing Mr Ahern's attention to statements made by him in Parliament which are inconsistent with statements made outside it, may incorporate a suggestion that the words spoken in Parliament were untrue or misleading. That is not permissible.
>
> I do not accept the contention of the Tribunal that the purpose of such an exercise is to ensure that the evidence before the Tribunal is complete. Rather there is a clear suggestion which imputes impropriety to Mr Ahern in respect of utterances made in Parliament. The court cannot permit the Tribunal to engage in such activity.[877]

Corruption investigations and Parliamentary Privilege

As is clear from the above cases, the constitutional protection of parliamentary utterances means that deputies may not be questioned or held liable in the context of legal proceedings, for statements made in parliament.

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[877] *Ahern v Members of the Tribunal of Inquiry into Certain Planning Matters and Payments* [2008] IEHC 119; [2008] 4 IR 704.

From a corruption perspective, the difficulty with freedom of speech is that it is a privilege which is easily abused in that "it protects against the possibility of both the uncorruptness (the function of representation) and corruptness (the neglect of the function of representation)".[878] Specifically, the privilege of free speech precludes criminal proceedings in any case where it is necessary to point to an act which occurred within Parliament and assert that what occurred was attributable to an improper motive. Consequently, in order to prosecute a parliamentarian for corruption, it must be possible to establish the complete offence without reference to parliamentary debates or proceedings.[879] This could again prove to be a barrier to effective prosecution in some instances.

SANCTIONS

The sanctions against individuals namely, imprisonment and/or fines appears sufficient from both a retributive and a deterrent perspective. The position in relation to legal persons is somewhat less clear. Specifically, as there has been no conviction of a legal person for bribery it is difficult to know whether the amount of any fine is likely to be adequate or not. However, in other areas, the courts have at least been willing to take into account a company's means in determining the amount of a fine, and it is probable that they will also be prepared to do so for the purposes of the bribery offences. For example, in *DPP v Oran Pre-Cast Ltd,*[880] which concerned a prosecution under the Health and Safety Regulations, Hardiman J considered that the fine imposed must be proportionate to the level of fault and the means of the offender.[881]

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[878] Simon Wigley, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption" (2003) 11(1) The Journal of Political Philosophy 23, 30.

[879] See Law Commission, *Legislating the Criminal Code Corruption,* Consultation Paper No 145, (Stationary Office, London, 1997), p 67, referencing the Attorney-General's submission to the House of Commons Privileges Committee on this issue.

[880] *DPP v Oran Pre-Cast Ltd*, (Unrept) Court of Criminal Appeal, Hardiman J. (ex tempore) December 16, 2003.

[881] For example, in *People (DPP) v Roseberry Construction Ltd* [2003] 4 IR 388, the Court of Criminal Appeal refused a corporation leave to appeal against the severity of fines totalling IR£200,000 (€254,000) imposed on it under the Safety, Health and Welfare at Work Act 1989. The fines were not regarded as excessive on the basis of information before the Court that the company was a medium to large company which was building 90 houses at the time of the fatal accident and was judged, at the time to be "a substantial, relatively complex and profitable enterprise". Evidence was also

For its part, the Law Reform Commission has described fines as the "most effective means of sanctioning an undertaking."[882]

Nevertheless, despite their overall effectiveness, the fact that fines are the only available sanction for corporate offenders is problematic. As previously discussed, fines suffer from a number of disadvantages from the perspective of both deterrence and retribution.[883] In this respect, the following observation of the Law Reform Commission in its consultation paper on Corporate Killing also appears relevant in the context of the bribery offences:

> The Commission considers that the limitations of the fine as an effective and just means of sanctioning undertakings highlight a need for alternative sentencing options. We recommend that the fine should therefore play a role as one alternative in a broader range of sentencing options open to the sentencing court.[884]

Asset confiscation

The criminal and civil asset confiscation provisions are relatively robust and are an important addition to the states' ability to penalize bribery effectively.[885] While confiscation under Irish law is reparative rather than punitive,[886] it is generally acknowledged that reparation has important

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given that the payment of the fine would not drive the company out of business. See Law Reform Commission, *Corporate Killing*, Consultation Paper, (CP 26-2003), p 189.

[882]Law Reform Commission, *Corporate Killing*, Report, (LRC 77-2005), p 81.

[883] See e.g. Law Reform Commission, *Corporate Killing*, Consultation Paper, (CP 26-2003), p 190: "A particular problem with fines as a sanction in respect of corporate killing is the secondary or 'spill-over' effect of fines - the cost of meeting the fine may be indirectly borne by others: innocent employees, who may be made redundant in a cost cutting exercise (low-level employees will regularly be more expendable than the undertaking's high managerial agents); innocent customers may be faced with extra charges; and, in the case of private sector corporations, innocent shareholders may find the value of their investments depleted. If an undertaking is driven out of business by the fine imposed upon a conviction for corporate killing, its employees, suppliers and distributors will suffer, and ultimately the State may end up footing the bill in the form of unemployment benefits while itself suffering a loss in tax revenues. Fines also have a spill-over effect when imposed on individuals - such that the offender's family and creditors are indirectly affected."

[884]Law Reform Commission, *Corporate Killing*, Consultation Paper, (CP 26-2003), 191.

[885]See generally, Imelda Higgins, *Corruption Law*, (Roundhall, 2012), chapt 7.

[886]See e.g. *Gilligan v Special Criminal Court & Ors*(unrept), McCracken J, High Court, November 8, 2002.

punitive effects. As observed by the Lord Chief Justice of England and Wales, Mr Justice Woolf in *R v Sekhon*:[887]

> One of the most successful weapons which can be used to discourage offences that are committed in order to enrich the offender is to ensure that if the offenders are brought to justice, any profit which they have made from their offending is confiscated.[888]

In a similar vein but in the earlier case of *R v Waterfield*,[889] Lawton L.J. commented:

> The first thing that the law should do is to ensure that those who break it.....should not make any money out of their wrongdoing.....This court is firmly of the opinion that if those who take part in this kind of trade know that on conviction they are likely to be stripped of every penny of profit they make and a good deal more, then the desire to enter it will be diminished.[890]

Criminal Confiscation

At equity, where an Agent accepts a bribe, it is treated as a legitimate payment for the principal's benefit and the Agent must account to him or her for the bribe.[891] The Courts may also consider that the Agent holds the bribe on constructive trust for the principal, thus making the agent accountable for any profits earned from that bribe, for example, in the form of investments.[892]

The Criminal Justice Act 1994 provides for the criminal confiscation of the benefits of crime in instances where the defendant has been convicted of an offence on indictment.[893]

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[887]*R v Sekhon* [2003] 1WLR1655.
[888]*R v Sekhon* [2003] 1 WLR 1655, 1658.
[889]*R v Waterfield* [1975] EWCA Crim J0215-5.
[890]*R v Waterfield* [1975] EWCA J0217-5, p 8.
[891]*Reading v AG* [1951] AC 507.
[892]*AG for Hong Kong v Reid*[1994] 1 AC 324.
[893]Criminal Justice Act 1994, s. 9 as amended by s. 23 of the Criminal Justice (Terrorist Offences) Act 2005.

Civil Confiscation

The Proceeds of Crime Acts 1996 and 2005 enable the courts to order the confiscation of assets suspected to derive from criminal activity, in the absence of a conviction and based on the civil standard of proof. As well as permitting the confiscation of assets suspected to constitute the proceeds of crime generally, those Acts contain specific provisions empowering the High Court to make a corrupt enrichment order. Specifically, that court may order the confiscation of any assets where those assets are obtained as a result of or in connection with corrupt conduct, including any offence under the Prevention of Corruption Acts 1889 - 2010.[894]

Lands at Carrickmines which were the subject of inquiry by the Mahon Tribunal are currently subject to a freezing order under the civil confiscation procedure, on the basis that the €53 million increase in the value of those lands following their rezoning from agricultural to industrial stemmed from corrupt payments made to local councillors by Mr Frank Dunlop.

RELEVANT INTERNATIONAL INSTRUMENTS, ENFORCEMENT AND SANCTIONS

Each of the relevant international instruments addresses the issues of jurisdiction, time limits, immunities and sanctions, to some degree.

JURISDICTION

Each of the instruments views territoriality as the primary jurisdictional basis for anti-corruption measures but also provide for some degree of jurisdiction based on nationality over corruption offences.[895]

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[894]Proceeds of Crime Act 1996, s. 16B as inserted by s. 12 of the Proceeds of Crime (Amendment) Act 2005.

[895]Some of the Conventions also provide for other mandatory basis for jurisdiction. Under the Council of Europe, Criminal Law Convention on Corruption (ETS 173), Article 17(3) and United Nations Convention Against Corruption (2003), Article 42(4), each State party must be able to exercise jurisdiction where the offender is present in its territory and extradition is refused on the basis of nationality. Under the UN Convention, Article 42(1)(b) State Parties must be able to exercise jurisdiction where the offence is committed on a vessel or aircraft of the country. One of the criticisms of

Territorial-based Jurisdiction

Each of the instruments under consideration stipulates that a party must have jurisdiction over a bribery offence where the offence is committed within its territory.[896] With the exception of UNCAC, each of the other instruments provides that each State party must establish jurisdiction over bribery offences where the offence is committed "in whole or in part" in its territory. In contrast, the UNCAC simply requires that jurisdiction be established when "the offence is committed in" the territory of the State Party.[897] This has raised the fear that under that Convention, State parties may be permitted to "establish a narrow basis for territorial jurisdiction that is ill-suited to the prosecution of transnational bribery in particular."[898] In contrast, the approach adopted in the other Conventions "permits territorial jurisdiction to be established in a much wider array of circumstances."[899]

With regard to the OECD Convention, the Commentaries state that the "territorial basis for jurisdiction shall be interpreted broadly so that an extensive physical connection to the bribery act is not required."[900] In this respect:

> even the slightest connection is sufficient. This includes all objective elements of the crime (promise, offer, giving) and any necessary intermediate actions. It includes, in particular, the use of the telephone, fax or email by the offeror".[901]

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the Conventions is that while their implementation will clearly result in concurrent jurisdiction arising over particular acts of bribery, they do not establish any priorities or criteria for determining which states should have priority over any particular prosecution. See International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009), p 229 and 251

[896] United Nations Convention Against Corruption (2003), Article 42(1)(a).

[897] United Nations Convention Against Corruption (2003), Article 42(1)(a).

[898] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (2009), p 228.

[899] International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, (2009), p 228.

[900] Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), paragraph 25.

[901] Mark Pieth, "Article 4. Jurisdiction", in Mark Pieth, Lucinda A. Low, Peter J. Cullen(eds) *The OECD Convention on Bribery, A Commentary,*(Cambridge University Press, 2007) p 267.

Nationality-based Jurisdiction

Each of the relevant international instruments also address nationality-based jurisdiction. In this respect, UNCAC is the least stringent in that the establishment of such jurisdiction is permissive rather than mandatory.

In contrast, pursuant to the OECD Convention each State party must be able to prosecute its own nationals for bribery committed abroad, where it otherwise has jurisdiction to prosecute its nationals for offences committed abroad.[902] However, as all OECD countries have jurisdiction to prosecute their nationals for some very serious offences committed abroad, it appears that the wording of Article 4(2) does not accurately reflect the requirements of the Convention. Specifically, the obligation to provide for jurisdiction based on nationality only arises where a state party already provides for such jurisdiction in relation to similar offences.[903]

The COE and EU Instruments are the most stringent in that they require all state parties to establish jurisdiction based on nationality. In this respect, the COE Convention provides that state parties must have jurisdiction where "the offender is one of its nationals, one of its public officials, or a member of one of its domestic assemblies".[904] A State Party must also be able to exercise jurisdiction over offences involving "one of its public officials or members of its domestic public assemblies or any person referred to in Articles 9 – 11 who is at the time one of its nationals." Articles 9 – 11 deal with, respectively, the bribery of: officials

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[902]Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(1997), Article 4(2).

[903] see Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(1997), paragraph 26 which provides that "[n]ationality jurisdiction is to be established according to the general principles and conditions in the legal system of each party.....For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based." According to Mark Pieth, "Article 4. Jurisdiction", in Mark Pieth, Lucinda A. Low, Peter J. Cullen (eds) *The OECD Convention on Bribery, A Commentary,* (Cambridge University Press, 2007), p 281, "The primary consequence of this rule is that the consistency of the decisions about jurisdiction over transnational corruption is subject to the evaluation by the WGB."

[904] Council of Europe, Criminal Law Convention on Corruption, (ETS 173), Article 17(1)(b).

of international organisations; of members of international parliamentary assemblies; and judges and officials of international courts.

According to each of the EU instruments, each Member State must be able to exercise jurisdiction where the offence is committed by one of its nationals. Moreover, under the EU Convention and the PIF Protocol, Member States must also establish jurisdiction over offences committed by: one of its officials; or a Community official working for a body with its headquarters in the Member State in question.[905] They must also be able to exercise jurisdiction over any offences committed against: national officials, including those of other Member States: Community Officials; and Members of the European Communities Commission, Parliament, Court of Justice and Court of Auditors where that official is also one of its nationals. For its part, the Framework Decision requires Member States to exercise jurisdiction over offences committed on behalf of a legal person with its headquarters within its territory.[906] While under each of the EU instruments a Member State may notify the Commission that it will not apply, or will only partially apply these rules on jurisdiction, Ireland has not done so.

TIME-LIMITS

Only the OECD Convention and UNCAC address this issue. According to the OECD Convention, statutes of limitations applicable to the offence of bribery of a foreign public official must allow "an adequate period of time" for the investigation and prosecution of this offence.[907] There are two principle differences between these requirements and those contained in UNCAC. Specifically, pursuant to the latter convention, State Parties must provide for a "long statute of limitations" in respect of offences established in accordance with that Convention.

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[905]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption Involving Officials of Member States of the European Communities or Officials of Member States of the European Union (OJ C195 25 June 1997, p 1), Article 7;Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ C 313 of 23 October 1996, p 1), Article 6.

[906]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, p 54), Article 7.

[907]OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions(1997), Article 6.

In addition, they must either suspend or provide for a longer statute of limitations "where the alleged offender has evaded the administration of justice."[908]

IMMUNITIES

Only UNCAC explicitly deals with immunities.[909] According to that Convention, state parties must ensure "an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions, and the effective investigation, prosecution and adjudication of corruption offences".[910] The Legislative Guide explains further:

> It would be highly damaging to the legitimacy of the overall anti-corruption strategy, public perceptions of justice, private business functioning and international cooperation, if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences. The objective of article 30, paragraph 2, is to eliminate or prevent such cases as much as possible.[911]

Despite the fact that the other international instruments do not specifically address the issue of immunities, clearly this issue may be relevant in assessing compliance with other articles of the those instruments, including that bribery be subject of effective and proportionate penalties.

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[908]United Nations Convention Against Corruption (2003), Article 29.

[909]See Lucinda A. Low, "The OECD Convention: A US Perspective on Combating Bribery in International Business", in Mark Pieth, Lucinda A. Low and Peter J. Cullen, (eds) *The OECD Convention on Bribery,* (Cambridge University Press, 2007) who observes, at p 146 that "The UN Convention and other international instruments have not tackled the sensitive issues of official immunities in any significant way. But abuse of immunities is a significant barrier to prosecution in many countries. Development of an instrument dealing with the abuse of immunities, although a challenging task, is likely to become necessary in the near future for anti-corruption efforts to reach their full potential".

[910] United Nations Convention Against Corruption (2003), Article 30.2.

[911]Legislative guide for the implementation of the UN Convention Against Corruption (2006), paragraph 387.

SANCTIONS

Each of the international conventions and the EU instruments also deals with sanctions both generally and with specific reference to legal persons. The CoE, OECD and UN Conventions also require State parties to provide for the confiscation of the proceeds of bribery.[912]

The Council of Europe Convention

Under the COE Convention, State Parties must provide "effective, proportionate and dissuasive sanctions and measures" in respect of those criminal offences established in accordance with that Convention.[913] Where an offence is carried out by a natural person, these penalties must include "deprivation of liberty which can give rise to extradition." While the wording of this Convention differs from both the EU and the OECD Conventions, both of which explicitly require the imposition of effective etc *criminal* sanctions, this difference is more apparent than real. As set out in the Explanatory Memorandum to the COE Convention:

> this paragraph obliges explicitly the Contracting Parties to draw the consequence from the serious nature of these offences by providing for criminal sanctions that are "effective, proportionate and dissuasive", an expression that can also be found in Article 5 of the European Union Convention of 26 May 1997 and in Article 3, paragraph 1 of the OECD Convention of 20 November 1997. This provision involves the obligation to attach to the commission of these offences by natural persons penalties of imprisonment of a certain duration ("which can give rise to extradition"). This provision does not mean that a prison sentence must be imposed every time that a person is found guilty of having committed a

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[912] This issue is not dealt with in the EU instruments under consideration. There are however a number of EU instruments which deal specifically with the issue of asset discovery including, in particular Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 05 July, 2001); Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, (OJ L068, 15 March, 2005.)

[913] Council of Europe, Criminal Law Convention on Corruption, (ETS 173), Article 19.1.

corruption offence established in accordance with this Convention but that the Criminal Code should provide for the possibility of imposing prison sentences of a certain level in such cases.

Legal Persons

The COE Convention also deals explicitly with the issue of sanctions for legal persons. According to that Convention, state parties must provide for "effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions" where offences are committed by such persons.[914] According to the Explanatory Memorandum, sanctions may be "penal, administrative or civil in nature."[915] While the wording of the Convention suggests that the imposition of monetary sanctions is optional, according to the Explanatory Memorandum, State Parties are compelled to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable of a corruption offence.[916]

Confiscation

The COE Convention also requires State Parties to provide for the confiscation of the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.[917]

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[914]Council of Europe, Criminal Law Convention on Corruption, (ETS 173), Article 19, paragraph 2.
[915]Council of Europe, Explanatory Memorandum to the Criminal Law Convention on Corruption (ETS 173), paragraph 91.
[916]Council of Europe, Explanatory Memorandum to the Criminal Law Convention on Corruption (ETS 173), paragraph 91.
[917]Council of Europe, Criminal Law Convention on Corruption, (ETS 173), Article 19, paragraph 3. The terms used in this paragraphs are considerably expanded upon in paragraph 94 of the Explanatory Report to that Convention, according to which: "Article 1 of the Laundering Convention is instrumental in the interpretation of the terms "confiscate", "instrumentalities", "proceeds" and "property", used in this Article. By the word "confiscate" reference is made to any criminal sanction or measure ordered by a court following proceedings in relation to a criminal offence resulting in the final deprivation of property. "Instrumentalities" cover the broad range of objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences established in accordance with Articles 2 – 14. The term "proceeds" means any economic advantage as well as any savings by means of reduced expenditure derived from such an offence. It may consist of any "property" in the

The EU

The EU Convention and the PIF Protocols each address the issue of sanctions, as does the Framework Decision. Moreover sanctions for corruption may also be found in the EU's public procurement directives.

According to the EU Convention and the First PIF Protocol, State Parties must provide effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.[918] This requirement is without prejudice to the exercise of disciplinary powers by the competent authorities against national officials or Community officials. In determining the penalty to be imposed, the national criminal courts may, in accordance with the principles of their national law, take into account any disciplinary penalty already imposed on the same person for the same conduct.

Like the EU and OECD Convention, the Framework Decision requires Member States to ensure that active and passive bribery offences are punishable by effective, proportionate and dissuasive criminal penalties.[919] However, that Decision goes on to specify that those offences must be punishable by "a maximum of at least one to three years of imprisonment."[920] Moreover, in instances where a natural person in relation to a certain business activity has been convicted of

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interpretation that the term is being given below. In the wording of this paragraph, it is taken into account that the national legal systems may show differences as to what property can be confiscated in relation to an offence. Confiscation may be possible of objects that (directly) form the proceeds of the offence or of other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds, the so called "substitute assets". "Property" therefore has to be interpreted, in this context, as including property of any description, whether corporal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It is to be noted that Contracting Parties are under no obligation to provide for the criminal confiscation of substitute assets as the words "otherwise deprive" allow for their civil forfeiture also."

[918]Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union, on the Fight Against Corruption Involving Officials of Member States of the European Communities or Officials of Member States of the European Union (OJ C195 25 June 1997, p 1), Article 5; Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313 of 23 October 1996, p. 1), Article 5.

[919]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 4, paragraph 1.

[920]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54), Article 4, paragraph 2.

active or passive bribery, the Framework Decision requires Member States to ensure that:

> that person may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption.[921]

Legal Persons

Both the Framework Decision and the Second PIF Protocol deal explicitly with sanctions for legal persons.[922] Under the Framework Decision in cases of both active and passive corruption, and under the Second PIF Protocol in cases of active corruption, Member States must provide for penalties that are effective, proportionate and dissuasive, however they may be criminal or non-criminal in nature. They may include sanctions such as: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; and a judicial winding up order.

In cases of failure to supervise, both the Framework Decision and the Second PIF Protocol require State Parties to ensure that a legal person held liable for such failure is subject to effective, proportionate and dissuasive sanctions or measures.

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[921]Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54),Article 4, paragraph 3.

[922]Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, (OJ C 221, 19 July 1997, p. 12), Article 4; Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, 54),Article 6.

The EU Public Procurement Directives

In addition to the above, the EU public procurement directives[923] include mandatory provisions requiring contracting authorities to exclude corrupt suppliers from public contracts in support of EU anti-corruption policy. The term "corruption" for the purposes of those directives includes active corruption as defined in the EU Convention and the Council's Joint Action on Corruption in the private sector.[924]

The OECD Convention

As in the case of the EU instruments, the OECD Convention requires State Parties to provide for "effective, proportionate and dissuasive criminal penalties." The range of penalties must be comparable to those applicable to the bribery of domestic public officials, and, in the case of natural persons, must "include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."[925]

The OECD Convention also requires State Parties to "consider the imposition of additional or administrative sanctions upon a person subject to sanctions for bribery of a foreign public official."[926]

Legal Persons

In instances where a State Party applies criminal responsibility to legal persons, then those sanctions must be effective, proportionate and dissuasive." This is also true in instances where State Parties do not provide for such responsibility, although in such cases, sanctions must include monetary sanctions.[927] According to the Official Commentaries, aside from non-criminal fines, the types of civil or administrative

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[923]Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 45; Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[924]98/742/JHA Joint Action of 22 December 1998 adopted by the Council on the basis of Article K3 of the Treaty on the European Union, on corruption in the private sector.

[925] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 3(1)

[926]OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 3(4).

[927] OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 3(2).

sanctions which may be imposed on legal persons for bribing a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision or judicial winding-up order.[928]

Confiscation

State Parties must provide for the seizure and confiscation of the proceeds of bribery of a foreign public official, or that monetary sanctions of comparable effect are applicable.

UNCAC

In contrast to the other instruments, UNCAC requires State Parties to ensure that sanctions take into account the gravity of the offence.[929] Sanctions "must therefore be sufficiently severe to deter or dissuade the offender and others from committing the offence, but not so heavy as to be disproportionate to the gravity of the offence."[930] Again, unlike the other instruments under consideration, that instrument does not explicitly require state parties to provide for criminal penalties. The requirement to impose sanctions is without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

Unlike the other Conventions, according to UNCAC, where the gravity of the offence so warrants, state parties must consider disqualifying those convicted of a convention offence from holding public office and holding office in an enterprise owned in whole or in part by the State. However, a State party is only required to introduce such a provision in so far as it would be consistent with "the fundamental principles of its legal system."

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[928]OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), paragraph 24.
[929] United Nations Convention Against Corruption (2003), Article 30(1).
[930] OECD Glossaries, *Corruption* (OECD 2008), p 42. See also the Legislative Guide for the implementation of the UN Convention (2006), para 383.

Legal Persons

In so far as legal persons are concerned, like the other Conventions, UNCAC requires State Parties to ensure that legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.[931] According to the Legislative Guide, these may include:

> exclusion from contracting with the Government (for example public procurement, aid procurement and export credit financing),forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgement, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures.[932]

Confiscation

Like the CoE and the OECD Conventions, UNCAC also provides for the confiscation of the proceeds of bribery. Under that Convention, State Parties must adopt measures, to the greatest extent possible within their legal system, to enable the confiscation of proceeds, equivalent value of proceeds and instrumentalities of offences covered by the Convention, and to regulate the administration of such property.[933]

THE PCA 1906 AND THE RELEVANT INTERNATIONAL INSTRUMENTS

The subjects of jurisdiction, immunities, time limits, defences and sanctions each raise issues of greater or lesser significance regarding the compliance of the PCA 1906 with the international instruments.

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[931]United Nations Convention Against Corruption (2003), Article 26(4).
[932]Legislative Guide for the implementation of the United Nations Convention Against Corruption (2006), para 338.
[933]United Nations Convention Against Corruption (2003), Article 31.

JURISDICTION

As discussed, under the PCA 1906, extra-territorial jurisdiction is based either on a territorial connection between the offence and the State or on the nationality of the person suspected of committing the offence. This is also the case under the CJ(TFO)A 2001, although there are distinct differences between the two sets of provisions. Specifically, in so far as territorial jurisdiction is concerned, under the PCA 1906, it is sufficient if any act necessary to constitute the offence is carried out in the territory, while under the CJ(TFO)A 2001 it must be the last act, in keeping with the common law position. Moreover, in so far as the nationality provisions are concerned, while the PCA 1906 may be enforced against both nationals and residents, the CJ(TFO)A 2001 may be enforced against Irish citizens or national/Community officials, but not necessarily against residents.

There are difficulties with the extent to which both territorial and nationality based jurisdiction comply with the relevant international instruments. Several of these stem from the existence of overlapping offences in the PCA 1906 and the CJ(TFO) 2001. However, past concerns expressed by the OECD's WGB regarding the extent to which the State may exercise jurisdiction over the subsidiaries of Irish companies appear to be met, to some extent, by recent amendments introduced by the PC(A)A 2010.

Territorially-based Jurisdiction

There are two difficulties with the provisions applicable to territorially based jurisdiction. First, the scope of the PCA 1906 appears itself to be too narrow, at least from the perspective of the OECD Convention. Secondly, the CJ(TFO)A 2001 does not satisfy the requirements of the international instruments on this issue.

Scope of PCA

Under the PCA 1906, the circumstances in which the courts will exercise jurisdiction based on the existence of a territorial connection

with the State appear to be too narrow for compliance with those conventions. For example, it is not clear that the mere fact that the benefit occurs in Ireland would be sufficient to found jurisdiction under the PCA 1906.[934] Specifically, the essence of bribery is to offer, give, solicit or accept an advantage in return for doing (or not doing) a particular act. The conduct required by the offence is the corrupt offer, giving, solicitation or acceptance of a bribe, and as soon as this occurs the offence is complete. The prosecution need not prove that any particular benefit actually flowed from the act. Consequently, the fact that the benefit occurs in Ireland does not appear to be "an act alleged to constitute the offence" as required by the relevant section. According to the OECD's WGB, in their Phase 2 report, they were "not convinced that territorial jurisdiction under Irish law is broad enough to enable the effective application of the offence under section 6 of the Prevention of Corruption (Amendment) Act 2001".[935]

Scope of the CJ(TFO)A 2001

Under the CJ(TFO)A 2001, the Irish courts may only exercise jurisdiction for bribery offences prosecuted under that Act where the last act necessary to complete the offence occurs within the jurisdiction. This fails to comply with the requirements of the OECD Convention, the COE Convention, and the EU instruments, each of which require State Parties/Member States to exercise jurisdiction over offences occurring partially within their territory. It also breaches the general principal of equivalence under EU law. Pursuant to that principal, rules protecting Union rights must not be less favourable than those governing domestic actions.[936]

This deficiency is of some significance given that pursuant to the *lex certa* principle, where the substantive elements of the bribery offences

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[934]OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (2007), p 40.

[935]OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 40-42.

[936]Case C-261/95 *Palmisani v INPS* [1997] 3 CMLR 1356; Case C-326/96 *Levez v Jennings (Harlow Pools) Ltd* [1998] ECR I-7835.

contained in the CJ(TFO)A 2001 are met, then offences should be prosecuted under this Act, rather than under the PCA 1906. In other words, in such circumstances it does not appear to be open to the DPP to prosecute the offence under the earlier Act. Specifically, pursuant to that principle, as articulated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.[937]

As explained by the ECHR in *S.W. v United Kingdom: C.R. v United Kingdom*, this principle enables each community to regulate itself:[938]

> With reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible – an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of criminal law.

Consequently, it appears to follow from this principle that offences which satisfy the constituent elements of the bribery offences set out in the CJ(TFO)A 2001 should be prosecuted under that Act and that it may not be open to the DPP to resort to the PCA 1906 for prosecuting such offences.

Nationality based Jurisdiction

The provisions relating to nationality jurisdiction appear problematic from the perspectives of both the COE and EU instruments, in so far as natural persons are concerned, and from the perspectives of the OECD

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[937]See also the Universal Declaration of Human Rights (1948), Article 11; and the International Covenant on Civil and Political Rights (1966), Article 15(1).
[938]*S.W. v United Kingdom: C.R. v United Kingdom* (1995) 2 EHRR 363.

Convention and the Framework Decision in so far as legal persons are concerned.

Natural persons

As discussed, under the COE Convention, the EU Convention and the PIF Protocol, each State party/Member State must be able to exercise jurisdiction over offences involving one of its public officials. Under the PCA 1906, the State can only exercise jurisdiction where the offence is perpetrated by certain specified individuals: it cannot exercise jurisdiction over all offences involving its public officials. Nor can it establish jurisdiction over all offences where the offender is working for a Community body with its headquarters in the State, at least in so far as the relevant offender is not also resident in the State or an Irish national.

Legal Persons

Under the PCA 1906, following amendments introduced by the PC(A)A 2010, the State is entitled to exercise jurisdiction in all cases where the offender is a company registered under the Companies Act or any other body corporate established within the State. While in the past, the OECD's WGB expressed concern about the extent to which corporate bodies could be held liable for the actions of their overseas subsidiaries, as a consequence of these amendments the PCA 1906 itself now meets the requirements of the OECD Convention. However, in contrast, under the CJ(TFO)A 2001, there is no equivalent provision conferring jurisdiction over extra-territorial offences committed by corporate entities. Consequently, the State does not appear to be able to exercise jurisdiction over offences committed by such entities which fulfil the constituent components of the bribery offences under that Act. Moreover, as discussed, pursuant to the *lex certa* principle, offences which satisfy those elements should be prosecuted under that Act. This falls short of the requirements of the OECD Convention and the PIF protocols.

Moreover, both the PCA 1906 and the CJ(TFO)A 2001 fail to meet the standards imposed under the framework directive. Specifically, under

that directive, Member States must be able to exercise jurisdiction over offences committed for the benefit of a legal person that has its head office within the State. This is only possible under Irish law either on the basis of inchoate or secondary offences, which require the legal persons to have played some role in the offence, or in the limited instances where the courts are prepared to lift the corporate veil. This appears to fall short of the requirements of the framework decision.

Time Limits

The time limits applicable to indictable offences appear compatible with the relevant international instruments, however, again the difference in the time limits applicable to summary offences under the PCA 1906 and the CJ(TFO)A 2001 raises some difficulties. Under both Acts, proceedings are commenced once a complaint is made. There is no need for the defendant to be present when a complaint is made. There is therefore no possibility under Irish law of fugitives from justice evading prosecution though reliance on a statute of limitations.

As discussed, in the case of indictable offences including those tried summarily, while inordinate or blameworthy delay may lead to an order of prohibition restraining the prosecutor from proceeding with a trial, such orders are exceptional and are made on a case by case basis. Moreover, in considering whether or not to make such an order, the courts will take into account the extent to which the accused contributed to the delay.

In summary cases, under the PCA 1906, proceedings must be commenced, in any event within 2 years from the date on which the offence concerned was committed. In contrast, under the CJ(TFO)A 2001, they must be commenced within 6 months. This means that in certain instances less favourable rules apply to offences falling within the scope of the relevant international instruments then apply to other similar offences at national law, which falls short of the requirements of, for example, the OECD Convention and the PIF Protocols. It is also questionable whether the time limit provided under the 2001 Act is "adequate" as required under that Convention, given that the State

considered it necessary to introduce a longer limitation period for the purposes of the PCA 1906.

Immunities

It is not altogether clear whether the immunities available under Irish law are compatible with the international conventions. Specifically, as mentioned, of these only UNCAC deals with immunities and, according to one view, that Convention, gives "states almost unfettered discretion regarding immunities."[939]In its first evaluation report on Ireland, the GRECO working group commented:

> the immunities offered to the President and privileges of the members of the Parliament (House of Oireachtas) are generally acceptable and within the guiding principle 6, concerning the undertaking to limit immunities to the degree necessary in a democratic society.[940]

While that conclusion took into account that Members of Parliament are not answerable either civilly or criminally for utterances in either house, the examiners remarked that the provision protecting utterances is not dissimilar to the "speech or debate" clause in the American constitution. However, this is not entirely correct, as that clause only covers utterances made in the legislative process, whereas the Irish position on this issue is unclear.[941]Moreover, according to GRECO in another report, Compliance with Guiding Principle 6 "requires that the process of lifting immunities should be clear, objective, swift and transparent."[942] This requirement is clearly not fulfilled in this jurisdiction where there is no process for lifting parliamentary privilege.

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[939] Lucinda A. Low, "The United Nations Convention Against Corruption: The Globalization of Anti-Corruption Standards", prepared for the IBA/ICC/OECD Conference on "The Awakening Giant of Anti-Corruption Enforcement," Paris 22-23 April 2004.

[940] GRECO, Eval 1 Rep (2001) 9E (2001), p 27. Guiding principle 6 is set out in Resolution (97) 24 on Twenty Guiding Principles Against Corruption (1997) which states that State Parties agree "to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society."

[941]See in particular Imelda Higgins, "Parliamentary Privilege and Free Speech in the Oireachtas" (2010) 17(1) Dublin University Law Journal 94.

[942] GRECO, Lessons Learnt from the Three Evaluation Rounds, (2000 – 2010), p 46

The OECD *Glossaries on Corruption* indicate that the requirements regarding immunities maybe somewhat more stringent than sometimes realised. According to those Glossaries:

> In particular, immunities should only be functional in nature, i.e. the immunity applies only to acts carried out in the performance of official duties. Immunities should also have limited duration; they should apply only while an official is in office and not indefinitively. (....)
>
> An effective system for lifting immunities is also essential. (...._ The process must also allow the gathering of evidence that would support the lifting of the immunity.[943]

The domestic law on either privileged utterances or cabinet confidentiality does not appear to comply with the requirements stipulated in the *Glossaries on Corruption.* In particular, it is unclear under Irish law whether freedom of speech attaches to utterances made when carrying out parliamentary functions, or whether it applies to all utterances made within the precincts of the Oireachtas.[944] In her dissenting judgment in *Attorney General v Hamilton (No. 2)*[945] Denham J supported the later interpretation observing:

> The Constitution of Ireland clearly grants non-amenability to utterances 'in either House' and not to the process, or part of the process of either House. Bunreacht na h'Éireann means what it says it means. It is an all embracing non-amenability for utterances in the place name, by the person named.[946]

However, the issue was not directly addressed by the majority in that case.

Similarly, it is not clear whether privilege can be waived either by the Oireachtas itself or by the individual who made the privileged statement.

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[943]OECD, *Corruption: A Glossary of International Standards in Criminal Law* (OECD, 2008), p 51-52.
[944]See Imelda Higgins, "Parliamentary Privilege and Free Speech in the Oireachtas" (2010) 17(1) Dublin University Law Journal 94.
[945]*Attorney General v Hamilton (No 2)* [1993] 3 IR 277.
[946]*Attorney General v Hamilton (No 2)* [1993] 3 IR 277 at 300.

While in *Attorney General v Hamilton (No 2),*[947] the majority of the Supreme Court appeared to assume that a member can waive privilege under Art. 15.13, as it found that in any event the three deputies whose utterances were at issue had not waived that privilege, it did not consider this issue in any depth. Moreover, in the High Court, Geogheghan J was inclined to take the view that to the extent that privilege can be waived then this is a matter for the House and not the individual members. However, again, he did not consider the issue in much depth.

Finally, with regard to cabinet confidentiality, while it may be lifted it is doubtful that the process for lifting that immunity permits the necessary gathering of evidence for this purpose. As discussed in the previous section, it may not be possible to breach cabinet confidentiality for the purposes of a Garda investigation into corruption until court proceedings have commenced.

Defences

With regard to defences, while the PCA 1906 does not specifically provide for any defences, as previously mentioned, given the agent-principal focus of the bribery provisions, it may be possible for a defendant to rebut a charge of bribery on the basis that the principal consented to the bribe. If this is the case, that Act falls short of international standards and in particular of the OECD Convention.

Sanctions

Sanctions are generally compliant with the relevant international instruments however, they fall short of the requirements of the OECD Convention, UNCAC, and the PIF instruments to some extent.

The OECD Convention

There are three difficulties in relation to sanctions, from the perspective of the OECD Convention. The first is attributable to the fact that the

[947] *Attorney General v Hamilton (No 2)* [1993] 3 IR 277.

offences contained in the PCA 1906 and the CJ(TFO)A 2001 overlap but the sanctions differ, with those under the latter Act being subject to a term of imprisonment of 5 years as opposed to 10 years under the former. As previously discussed, pursuant to the *lex certa* principle, cases involving foreign bribery could and should be prosecuted under the later Act, where the constituent elements of the bribery offences provided under that Act are met.[948] According to the OECD WGB, the latter penalty "if applied in practice, could raise issues of conformity with Article 3(1) of the Convention, which prescribes that the penalties for foreign bribery 'shall be comparable to that applicable to the bribery of the Party's own public officials".[949]

Secondly, as discussed, in certain instances, a conviction for bribery may result in the defendant being excluded from being considered for awards of public contracts and/or from tendering processes. Specifically, under the European Communities (Award of Public Authorities Contracts) Regulations 2006, a contracting authority is required to exclude any person convicted of an offence involving corruption, including bribery, from being considered for awards of public contracts.[950] Moreover, the European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 also requires contracting authorities to exclude any person convicted of active bribery from tendering processes.[951] Both of these exclusions only cover active bribery as defined in the EU's Second Convention and Joint Action on Corruption in the Private Sector. While there is substantial overlap between those instruments and the OECD Convention, they do not

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[948]See e.g. Michael Faure, Morag Goodwin, Franziska Weber, "The lex certa principle in criminal law: reconciling economics and human rights" available at http://www.eale.org/conference/eale2012/paper/view/170/68, last accessed July 11, 2013, according to whom "Lex certa requires that the law authorising the nature (form) and degree (severity) of punishment be specific, definite, and clear. This includes specifying the type of punishment that a judge is (and is not) authorised to impose on an accused. It also requires the law to differentiate between the specific maximum (severity) applicable to different crimes."

[949]OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 57.

[950] European Communities (Award of Public Authorities Contracts) Regulations, 2006, s. 53.

[951] European Communities (Award of Contracts by Utility Undertakings) Regulations 2007, ss. 55(5), 56(4); see generally, William Sope, "The Mandatory Exclusions for Corruption in the New EC Procurement Directives", (2006) 31(5), E.L. Rev. 711.

cover all foreign public officials.[952] Consequently, the existing legislation does not comply with Article 3.1 of the OECD Convention which requires that the range of penalties for foreign public bribery "be comparable to that applicable to the bribery of the Party's own public officials".[953]

Thirdly and finally, the lack of certainty regarding the ability to impose corporate criminal liability on undertakings and the basis for so doing means that "concerns remain as to the effective, proportionate and dissuasive character in practice of sanctions applicable to legal persons."[954]

UNCAC

Currently, a conviction under the PCA 1906 will not prevent a person from holding elected public office or holding office in an enterprise owned in whole or in part by the State. This falls short of the requirements of UNCAC, at least in so far as a prohibition on holding such offices for those convicted of bribery would be compatible with fundamental principles of Irish law. There does not appear to be any reason in principle why a bribery conviction should not prevent people from running for public office. Specifically, according to Article 16.1.1 of the Constitution every citizen is eligible for membership of the Dáil save those placed under disability or incapacity by the Constitution or by law. Section 41 of the Electoral Act 1992, as amended provides for a list of

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[952]See OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), in which the OECD WGB recommended, at p 62, that the public procurement authorities, "take due consideration of prior convictions for all foreign bribery offences in their contracting decisions"; See also p 69 of that Report.

[953]See e.g. OECD, *Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption* (2008), which observes, at p 14 "in order for sanctions for the bribery of foreign public officials to be sufficiently "effective, proportionate and dissuasive" more may be needed than the traditional punitive sanctions such as fines, confiscation and imprisonment. For instance, a temporary or permanent disqualification from contracting opportunities with the government could hit companies much harder than a financial sanction, which, depending on the size of the company, might easily be absorbed by the cost of doing business."

[954] See OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 58.

persons who are ineligible for membership, including those serving a prison sentence of more than 6 months and an undischarged bankrupt. There appears to be no reason why this list could not include those convicted of corruption in public office.[955]

The PIF Convention and Protocols

As mentioned above, under the principle of equivalence in EU law, rules protecting Union rights must not be less favourable than those governing domestic actions.[956] The fact that the CJ(TFO)A 2001 provides for less stringent sanctions that those provided for under the PCA 1906 appears to breach this principle.

Corporate Sanctions

The principal difficulty identified in the area of corporate sanctions arises from the lack of clarity regarding the basis for imposing corporate criminal liability, discussed in the previous chapter. In this respect, the OECD's WGB has commented that given this lack of clarity "concerns remain as to the effective, proportionate and dissuasive character in practice of sanctions applicable to legal persons."[957]

It is however, noteworthy that while several of the international instruments envisage alternate sanctions for corporate entities in

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[955]See GW Hogan and GF Whyte, *JM Kelly; the Irish Constitution*, 4th ed, (Butterworths, Lexis Nexis, 2003), p 309, "Article 16.1.1 clearly allows the Oireachtas to prescribe that certain categories of persons will be ineligible for membership of the Dáil. By the same token, however that latitude is not unlimited and, by analogy with the case law as it has evolved in other areas of the Constitution it may be said that the authority of the Oireachtas to impose a 'disability or incapacity....by law' means that it must not stoop to methods which ignore the fundamental norms of the legal order postulated by the Constitution. Since the right of the citizens to stand for election is one of those 'fundamental norms', it would seem to follow that the Oireachtas must be able to present sound objective reasons to justify the disqualification of any particular category of persons."

[956]Case C-261/95 *Palmisani v INPS* [1997] 3 CMLR 1356; Case C-326/96 *Levez v Jennings (Harlow Pools) Ltd* [1998] ECR I-7835.

[957]OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (2007), p 58; The OECD WGB also recommended, at p 60 that "Ireland consider providing for the imposition of additional civil or administrative sanctions by the courts on legal and natural persons convicted of foreign bribery, as is possible for other related offences."; see also p 69 of that Report.

addition to or as an alternative to fines, there are no such sanctions available under Irish law for bribery as such.

THE PCA 1906, THE AGENT-PRINCIPAL MODEL AND THE BREACH OF DUTY MODEL

In the case of both the inquiries conducted by the PCTs and the international instruments under consideration, the most significant joint problems in the area of enforcement are the issues of parliamentary privilege, cabinet confidentiality, and corporate sanctions. However, in so far as the international instruments are concerned, the PCA 1906 also suffers from a number of other deficiencies.

With regard to parliamentary privilege and cabinet confidentiality, it is clear that inquiries into certain types of bribery may be significantly hampered by these immunities, thus inhibiting their ability to combat the harm / immorality underlying those offences. In so far as parliamentary privilege is concerned it could preclude criminal proceedings in any instance where the case relies upon pointing to an act which occurred within Parliament and asserting that it was attributable to bribery. Moreover, while that privilege serves many important aims, it is not clear that the Irish law on parliamentary privilege achieves an appropriate balance between those aims and the effective investigation and prosecution of corrupt offences, as required by UNCAC. There are two specific problems in this regard. First, to the extent that parliamentary privilege covers all utterances made within the precincts of the Oireachtas, it appears too broad for those aims. Secondly, it is not clear whether that privilege can be waived, and if so by whom. Accordingly Ireland may not have "an effective system for lifting immunities" which the OECD *Glossaries on Corruption* describe as an "essential component" of those immunities.

With regard to cabinet confidentiality, while the particular problems encountered by the Hamilton Tribunal have been remedied pursuant to a constitutional amendment, it is not clear whether confidentiality can be lifted for the purposes of a Garda investigation into corruption. Specifically, while the Constitution provides that the High Court can lift confidentiality for the purposes of the "administration of justice" that

phrase is not well-defined in Irish law. Moreover, there are several cases which suggest that it is only applies in instances where there are proceedings in existence before the Courts and not during the earlier stages of an investigation. Again in certain instances this may prove a significant barrier to the investigation of a suspected bribery offence. Moreover, it is not at all clear that such extensive protection is necessary to achieve the purposes of cabinet confidentiality thus again raising the question as to whether this immunity achieves the appropriate balance required by UNCAC.

Corporate entities convicted of bribery may be subject to unlimited fines. Although fines are considered to be an effective sanction, they suffer from a number of deficiencies which suggests that they are most effective when coupled with other sanctions. With the exception of some types of bribery, however, there are no other sanctions provided under Irish law. This appears problematic given the role frequently played by corporate entities in bribery and their consequent contribution to the harm / immorality associated with bribery.

In so far as the international instruments are concerned, the provisions relating to enforcement and sanctions under the PCA 1906 also raise other issues. Specifically, it is not clear that the territorial basis for exercising jurisdiction under the PCA 1906 is sufficiently extensive for full compliance. Moreover, under the CJ(TFO)A 2001, the State may only exercise jurisdiction where the last act necessary to complete the offence occurs within the State. This falls short of the requirements of the OECD, COE and EU instruments. In so far as nationality jurisdiction is concerned, the PCA 1906 and the CJ(TFO)A 2001 fall short of the requirements of the COE Convention, the EU Convention and the PIF Protocol as the State is not able to exercise jurisdiction over all offences involving its public officials. Moreover, it can only establish jurisdiction over offences committed by those working for a Community body with its headquarters in the State, where that individual is either an Irish national or resident in Ireland. There are two further difficulties with the provisions on nationality based jurisdiction which specifically concern legal persons. Firstly, while under the PCA 1906 corporate bodies may be held liable for the actions of their overseas subsidiaries in certain circumstances, this is not the case under the CJ(TFO)A 2001.

Secondly, in contrast to the requirements of the EU's Framework Directive, the State cannot establish jurisdiction over all offences committed for the benefit of a legal person that has its head office within the State.

With regard to time limits, the difference in time limits applicable to the prosecution of summary offences under the PCA 1906 and the CJ(TFO)A 2001 appears to fall short of the equivalence required under the OECD Convention. Moreover, in view of the longer period of limitation specified for offences under the early Act, it is questionable whether the period applicable to offences under the 2001 Act is "adequate" as required by that Convention.

Two further issues also arise in relation to sanctions. First, the fact that persons convicted of bribery pursuant to the offences set out in EU Convention may be blacklisted from tendering for certain public procurement contracts is an issue from the perspective of the OECD Convention, pursuant to which the range of penalties for offences under that convention must be comparable to those imposed for bribery of domestic officials. Secondly, the fact that there is no possibility of preventing a person convicted of bribery of holding public office appears at odds with the requirements of UNCAC.

These deficiencies are not attributable to either the manner in which the bribery offences are articulated in the PCA 1906, nor with the agent-principal model underlying those offences. Nor would they be rectified through the adoption of a more generalised breach of duty models. Nevertheless, in so far as they limit the effectiveness of the bribery laws, they clear limit the extent to which those laws can effectively combat the harm/immorality which justify the criminalisation of bribery in the first place. Several of these limitations could be effectively rectified in the context of a bribery statute. However, in so far as immunities are concerned, any attempt to remedy these limitations will need to take place in the context of a broader review of their purpose and the need to balance the legitimate aims which they pursue against the need for a well-functioning criminal law.

CHAPTER 10: CONCLUSION

This first and second sections of this chapter reviews the findings of this thesis regarding the limitations of the agent-principal model of bribery and the extent to which the adoption of a more generalised breach of duty model could rectify those limitations. The following section then analyses the substantive elements of the proposed new bribery offences before addressing the issues of corporate liability and enforcement and sanctions. The final section sums up this thesis and makes a number of residual findings, based on the analysis conducted herein.

INTRODUCTION

This thesis is based on the premises that the harm / immorality of bribery justifies its criminalisation and that a breach of duty is an integral part of that harm / immorality. The model of bribery which underlies the PCA 1906, the main Irish bribery statute, is the agent-principal model and the main purpose of this thesis is to ascertain whether that model effectively meets the needs of a modern bribery law, or whether it should be replaced with the broader breach of duty model. The reasons for opting for the broader breach of duty model are explained in some detail in Chapter 3 of this thesis.

For the purpose of this assessment, this thesis determines the contours and scope of the bribery offences contained in the PCA 1906 from the dual perspectives of: a) the typologies of corruption identified by the PCTs; and b) the requirements of the relevant international instruments.

It is clear from this analysis that in view particularly of the more limited purposes for which it was originally passed, the PCA 1906 has proved surprisingly robust. Specifically, the agent-principal model of corruption, which views the harm of corruption as lying in the breach of the duty of trust owed by an agent to his or her principal, successfully criminalises most forms of bribery inquired into by the PCTs and meets most of the requirements of the relevant international instruments.

In the public sector, the agent-principal model is effective for criminalising the bribery of both elected and appointed public officials

whether foreign or domestic, with the possible exception of those countries in which officials are not agents of the State. In the private sector, it covers all agents as such and all those who are under equivalent duties of trust even if those duties are not strictly fiduciary in nature.

The substantive components of the offences set out in the PCA 1906 are also robust. Any type of advantage capable of monetary evaluation may constitute a bribe. Whether or not something is an advantage is determined subjectively and there is no *de minimis* standard. In addition to actual advantages, the PCA 1906 recognises that a bribe may comprise an advantage which is perceived, rather than real, as well as an advantage which fails to materialise.

The payer of the bribe may be any natural or legal person. While the bribe must be intended to influence the conduct of an "agent", as discussed, this term includes all domestic public officials as well as many foreign ones, together with a significant proportion of those working in the private sector. Moreover, there is no need for the bribe to be given to or received by an agent and the bribery offences cover payments made to third parties for the purpose of influencing an agent, irrespective of whether or not the agent is aware of that payment. They also apply to bribes paid through intermediaries. There is no requirement that the bribe be actually conferred on an agent or third party, and the offence is complete once a bribe is offered or solicited, whether covertly or overtly.

The type of purpose for which the bribe must be paid is particularly broad. It includes acts or omissions falling within the scope of the agent's own functions including those entrusted to the agent pursuant to statute, custom or usage and possibly some acts purportedly within public office. It also includes acts or omissions which do not fall within the scope of those functions as long as they relate to the agent's principal's affairs or business. The bribery offences cover most cases of trading in influence, including payments made to any person, whether or not that person is an agent, to use his or her influence with (another) agent. There is no exception for facilitation payments.

In so far as corporate entities are concerned, it is clear that the bribery offences cover both corporate and unincorporated bodies. Where a corporate entity is proved to have committed bribery, an officer of that company may also be convicted of that offence once it can be proved that the bribery was committed with his or her consent, connivance, or because of his or her neglect.

Finally, with regard to enforcement and sanctions, while both parliamentary freedom of speech and cabinet confidentiality may impede a prosecution for bribery, there are no other relevant immunities for public officials and none at all for private individuals. Moreover, time-limits for prosecution are relatively long for summary offences and are assessed on a case-by-case basis for indictable offences. Significantly, in recent cases the courts have shown that they are prepared to take into account the substantial public interest in prosecuting bribery in carrying out this assessment. The State may establish jurisdiction over bribery committed abroad either on the basis of territoriality or on the basis of nationality. Finally, sanctions for bribery include both imprisonment and fines while in some instances, companies may be excluded from tendering for public procurement contracts.

SHORTCOMINGS OF THE PCA 1906

Despite its clear strengths, the PCA 1906 suffers from a number of short-comings both from the perspective of the PCA 1906 and from the perspective of the relevant international instruments. In so far as both the PCTs and the relevant international instruments are concerned, two of those relate to the agent-principal model of bribery and the issue of corporate offences. Other issues concern *mens rea*, including from the perspective of the PCTs political donations, and immunities.

For the purpose of the inquiries conducted by the PCTs, issues also arise regarding the purpose of the payment and the treatment of intermediaries under the PCA 1906. In so far as the relevant international instruments are concerned, additional issues arise regarding the bribery offences in the CJ(TFO)A 2001: extra-territoriality; time-limits and sanctions. While the OECD WGB and/or GRECO have

also identified a number of other problems, some of these do not stand up to closer scrutiny.

This chapter reviews these shortcomings in the order they are inquired into in this thesis.

AGENT-PRINCIPAL MODEL

As discussed in chapter 5, there is no difficulty in considering the various public officials inquired into by the PCTs as "agents" for the purposes of the PCA 1906. However, it is not clear that that Act covers payments which pre-date the agency agreement, meaning that at least some of the payments inquired into by the PCTs do not fall within its scope. This is obviously a significant problem given the fact that during the period immediately prior to each national election the Dáil is dissolved. This means that advantages conferred on electoral candidates during that period may not fall within the scope of the bribery offences.

In so far as the relevant international instruments are concerned, the principal difficulty with the agent-principal model of corruption in so far as public bribery is concerned is that it is ill-suited to prosecuting the bribery of those foreign public officials who do not owe a duty of trust to the State, including for example, certain monarchs and dictators. These types of officials cannot logically be regarded as agents and in fact are probably principals in their own right. Nor does the model cover at least some independent contractors, considered to be foreign public officials for the purpose of the OECD Convention. Moreover, because of the difficulties in applying the agent-principal model where the principal consents to the payment of the bribe, other officials in such monarchies or dictatorships may also fall outside the scope of the bribery offences. Specifically, it is at least probable, that unlike officials in democratic countries, those officials owe a duty of trust not to the State itself, but to the relevant monarch or dictator. If the latter consents to the payment of the bribe, it is likely that this would render the PCA 1906 inapplicable.

The agent-principal model of corruption may also be inadequate in criminalising private corruption, mainly because it may require the

existence of a fiduciary type relationship which will be lacking, for example, in the case of independent contractors. The consent issue may also prove problematic in this context. Specifically, the relevant conventions require the criminalisation of bribes paid to persons who "direct or work for" a private sector company. While the director of a public company may well be viewed as the agent of the company's shareholders, in the case of a private company, he or she may also be the main shareholder or at least a majority shareholder and be in a position to consent to the payment, either individually or in association with another shareholder.

INTERMEDIARIES

As discussed in chapters 5 and 7, much of the bribery inquired into by the PCTs was conducted through intermediaries. While the PCA 1906 covers this type of bribery, in order to successfully convict the principal of bribery it is necessary to prove that he or she had the requisite intent. As is evidenced by the PCTs' inquiries, this will not always be possible. In particular, in instances where the principal is deliberately blind to bribery committed by an intermediary on his or her behalf, he or she is likely to successfully avoid a bribery conviction.

THE PURPOSE OF THE PAYMENT

The main difficult regarding the purpose of the payment relate to positional payments. A significant number of the payments inquired into by the PCTs were positional/goodwill payments. These types of payments are not connected with any specific act or omission on the part of the recipient and they are consequently outside the scope of the PCA 1906.

There is some justification for this. Specifically, a positional or goodwill payment is not given or received in connection with an actual breach of the duty of trust owed by an agent to his or her principal. Consequently, criminalizing such payments is not necessary to counter the harm / immorality of such a breach of duty. There are, however, also several difficulties with this justification. Specifically, gifts frequently engender

feelings of reciprocity on the part of the recipient.[958] Moreover, cash gifts are particularly suspect, as money "can create expectations of reciprocity and the result can be a form of dependency."[959] McCracken J expressed similar sentiments in his Report when, commenting on the gifts to the value of £1.3 million made by Mr Ben Dunne to Mr Charles Haughey, he observed:

> It is quite unacceptable that a member of Dáil Éireann, and in particular a Cabinet Member and Taoiseach should be supported in his personal lifestyle by gifts made to him personally. It is particularly unacceptable that such gifts should emanate from prominent businessmen within the State. The possibility that political or financial favours could be sought in return for such gifts, or even be given without being sought, is very high, and if such gifts are permissible, they would inevitably lead to bribery and corruption.[960]

Moreover, even in those instances where a payment does not engender expectations or feelings of reciprocity it is at least likely to give rise to an apparent breach of that trust. As one commentator remarked, at the time the Flood and Moriarty Tribunals were established there was "increasing public scepticism about the apparently boundless altruism of people who give money to politicians without receiving or even hoping for, anything in return."[961] As appearances are important, particularly in the political sphere, an apparent breach of trust may give rise to much the same harm as an actual breach of trust:

> Because appearances are often the only window that citizens have on official conduct, to reject the appearance standard is to reject the possibility of democratic responsibility...The logical consequence of rejecting the appearance standard is that only

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[958] See Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform,* (Cambridge University Press, 1999) p 93 where she observes "Gifts differ from bribes by the lack of an explicit quid pro quo. However, if individual gifts are large enough to have a marginal impact on the recipient's behaviour, a quid pro quo is implicit."

[959] Robert Williams "Aspects of Party Finance and Political Corruption" in Robert William (ed), *Party Finance and Political Corruption,* (Macmillan Press, 2000), p 9.

[960] Report of Tribunal of Inquiry (Dunnes Payments)(1997), p 20.

[961] Horgan, "Fate of Public Funding Act Text for New Dail", Irish Times, June 19, 1997.

> officials themselves would decide whether what appears to be wrong really is wrong. The official who looks bad just says 'you must trust me'. Citizens have a right to say that the price of trust in a democracy is that officials have to observe certain standards, which require that they act under conditions that do not give rise to an appearance of wrongdoing. When they violate those standards, they do not merely appear to do wrong: they do wrong.[962]

MENS REA

There does not appear to be any clear definition of the term "corruptly". This could infringe the principle of lex certa meaning there is a risk that the current definition would be found to be unconstitutional.

The existing definition of "corruptly" gives rise to clear problems in the area of political donations. As discussed, the PCA 1906 makes it an offence to corruptly give or receive an advantage, whether directly or indirectly, on account of an agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business. As political donations are frequently given because of the donor's support for an elected official's political agenda they may well be considered to be given on account of that official's promise to implement or to attempt to implement that agenda. In the case of such donations, the only component of the current offence which serves to distinguish legitimate political donations from bribes is therefore the requirement that the advantage be given or received "corruptly". This in turn raises the question as to whether that term is sufficiently precise to distinguish between legitimate political donations and bribes disguised as political donations.

According to the definition of "corruptly" inserted by the PC(A)A 2010, the term includes acting with an improper purpose. Presumably when determining whether a purpose is proper or improper, context is important: what is proper in the political sphere may be decidedly improper in the administrative sphere. Nevertheless, applying the notion

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[962] Dennis F. Thompson, "Paradoxes of Government Ethics" (1992) 52(3) Public Administration Review 254, 258.

of propriety to politics is no easy matter. Take, for example, payments made in return for a specific, explicit *quid pro quo* in the form of the exercise of a political power, such as a vote. Nominally at least, these payments are the closest to bribes. However, even in the case of these types of payments it is possible to distinguish between degrees of impropriety. For example, the Mahon Tribunal inquired into numerous payments made to councillors in return for that councillor's signature and/or support for a rezoning motion the outcome of which would directly affect the value of the donor's land. Few would argue as to the impropriety of the making and receipt of such payments. Suppose however, that the donation is made to an elected official and this time the *quid quo pro* is that the official vote for (or against) an abortion law. Here the impropriety is less obvious. Moreover, if this type of donation is improper, the result is to criminalise conduct which is a routine and necessary part of political life. Specifically, donations are frequently based on an elected official's stated political agenda, one which he or she will presumably implement if possible. Future donations may be conditional on the official continuing to support a relevant policy or position and this may even be explicitly articulated by the donor. Further problems arise when determining the propriety of donations where the *quid pro quo* is either implied or unspecified. For example, the Mahon Tribunal considered it "improper" for councillors to accept political donations from developers in instances where they were aware that that developer's lands were likely to be the subject of a rezoning vote. However, that Tribunal used the notion of impropriety to distinguish certain types of conduct from other, more serious instances of corrupt conduct. Under the PCA 1906, this distinction disappears.

Further difficulties stem from the fact that the PC(A)A 2010 does not confine the term "corruptly" to acting improperly, but merely states that the term includes such actions. This suggests that political behaviour which is not even improper could well be criminalised under the PCA 1906, without however indicating the basis for determining this issue. This problem is exacerbated by the general lack of clarity regarding the meaning of "corruptly", which lack necessitated the introduction of the definition in the 2010 Act in the first place.

In sum therefore, while the PCA 1906 clearly covers bribes given in the form of political donations, it gives little guidance as to which donations are to be considered as bribes and which are not. This is not satisfactory. Both donors and politicians should be able to give and receive donations without being concerned that in doing so they will commit a serious criminal offence. Specifically, contributing money is an important part of political participation. Moreover, in *Bowman v UK*, the European Court of Human Rights recognised that the ability to incur expenditure on behalf of an electoral candidate is a component of the right to freedom of expression under Article 10 of the European Convention of European Rights. It seems a logical corollary to this that the freedom to make donations is also a component of that freedom.[963] On the other side, elected representatives and political parties "need funding in order to survive, compete and perform their democratic functions."[964] Furthermore, the need to fund-raise may itself play an important democratic role by making both politicians and political parties more responsive and accountable to their political base.

Finally, under the PCA 1906, bribery must be committed with actual intent (whether direct or oblique) and recklessness is not sufficient. As discussed in Chapter 7 of this thesis, it has been suggested that the OECD Convention requires State Parties to provide that the *mens rea* for bribery is equivalent to the civil standard of *dolus eventualis*. Nevertheless, the required standard of *mens rea* under the OECD

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[963] This was recognised by the US Supreme Court in *Buckley v Valleo* 424 U.S. 1 (1976) where it held that spending money, whether in the form of contributions of expenditure is a form of speech protected by the First Amendment to the US Constitution. Nevertheless, that Court also upheld limitations on campaign contributions observing, at p 27, that both "the actuality and appearance of corruption resulting from large financial contributions was a sufficient compelling interest to warrant infringements on First Amendment liberties." See also *Citizens Against Rent Control v Berkeley* 454 U.S. 290 (1981) in which the US Supreme Court struck down a city ordinance imposing a $250 limit on contributions made to committees formed to support or oppose ballot measures. The Court found that the contribution limits unduly burdened the committees' rights to free speech as well as the rights of those individuals who wished to express themselves through a group and considered that there was no significant public interest justifying the measures. See more recently, *Nixon v Shrink Missouri Government PACT* 528 U.S. 377 (2000), in which the US Supreme Court again upheld contribution limits acknowledging that such limits are more likely to withstand constitutional scrutiny than other types of campaign restrictions as they merely indicate support for a candidate rather than expressing the contributor's independent political viewpoint.

[964] Michael Johnston, "Political Finance, Parties and Democratic Development" in John Gould (ed) *Political Parties and Democracies in Theoretical and Practical Perspectives,* (National Democratic Institute for International Affairs, 2005).

Convention is not entirely clear and it is noteworthy that the OECD WGB has to date not commented on this apparent shortcoming in its various reports on the implementation of the OECD Convention.

CORPORATE OFFENCES

First and foremost, doubts have been raised by the Law Reform Commission as to the constitutionality of the existing basis for criminalising corporate behaviour. These doubts are also a matter of concern regarding the provisions relating to derivative managerial liability.

Secondly, to the extent that the identification doctrine is the basis for the criminalisation of corporate behaviour, this is inadequate as it only imposes liability on corporate entities for the acts or omissions of its officers, to the exclusion of other individuals who may have decision-making powers. Moreover, even in its extended version, the identification doctrine still relies on the prosecution's ability to attribute the *mens rea* of an identifiable individual to the corporate entity. This is not always possible, particularly in larger corporations where corporate decisions may result from the conduct of a number of different individuals at different managerial levels.

There is no existing basis in Irish law for recognising liability pursuant to the aggregation doctrine which appears to be a requirement for full implementation of the OECD and COE Conventions. On a related point, there is no failure to supervise offence in Irish law, which would permit corporate entities to be held liable for bribery which senior management has failed to prevent. Nor is it possible to hold individuals who are Heads of Business themselves criminally liable for bribery arising out of their failure to supervise, which may fall short of the requirements of the EU Convention and the PIF Protocol.

As the inquiries conducted by the PCTs demonstrate, a further problem relates to the issue of beneficial ownership. Specifically, directors and other officers of a corporate entity may be held liable for bribery committed by that entity if it occurs with their consent or arises from their connivance or neglect. In contrast, beneficial owners can only be

held liable for bribery committed by a corporate entity on the basis of inchoate or secondary liability, both of which require proof of direct or oblique intent.

ENFORCEMENT

Extra-territoriality

As discussed in Chapter 10, under the Prevention of Corruption (Amendment) Act 2001, the Irish courts can exercise jurisdiction over bribery offences committed abroad as long as any act necessary for the completion of the offence takes place in Ireland. The OECD WGB has raised concerns that this is too narrow as it may not, for example, cover instances where the bribe is paid in Ireland, as actual payment (as opposed to, for example, an offer to pay) is not necessarily an element of the offence.

Under the EU's framework directive, Member States must be able to exercise jurisdiction over offences committed for the benefit of a legal person that has its head office within the State. Under the PCA 1906, this is only possible in the event that the legal person is either registered under the Companies Act or established in the State, and has played a role in the commission of the offence. The mere fact that the legal person has benefitted from the offence is not sufficient to establish jurisdiction.

Immunities

The precise parameters of parliamentary privilege and cabinet confidentiality under Irish law are not entirely defined. Parliamentary privilege may apply to all utterances made in the precincts of the Oireachtas, rather than solely to acts carried out in the performance of official duties. Moreover, it is not clear whether that privilege can ever be waived, either by the relevant house of the Oireachtas or by the relevant public official. While cabinet confidentiality can be lifted in specified circumstances, these may not include circumstances where that confidentiality is hindering a Garda investigation into bribery at least prior to the commencement of court proceedings. This appears to go

beyond what is necessary to protect the functioning of Parliament or of the cabinet and to erode the effectiveness of the bribery offences to combat the harm of, in particular, public bribery.

Sanctions

In so far as sanctions are concerned, the fact that there is no provision for disqualifying those convicted of bribery from holding public office falls short of the UN Convention. Moreover, corporate sanctions are limited to fines and there is no possibility of imposing alternative sanctions as envisaged by some of the relevant international instruments.

The CJ(TFO)A 2001

The statutory bribery offences are set out in the Prevention of Corruption Acts 1889 – 2010 and the CJ(TFO)A 2001. There are a number of differences between the offences set out in the PCA, including the PCA 1906 and those set out in the CJ(TFO)A 2001 regarding in particular the issues of extra-territoriality, time-limits and sanctions. In contrast to the situation under the PCA 1906, under the CJ(TFO)A 2001 the State may only exercise jurisdiction on the basis of territoriality where the last act necessary to complete the offence is committed within the State. In addition, the State does not appear to have jurisdiction over over-seas offences perpetrated by companies registered under the Companies Act or established in the State. With regard to time limits, summary proceedings under the 2001 Act must be commenced within six months of the date upon which the offence was committed: under the PCA 1906, the relevant period is two years. Finally, sanctions for bribery under the CJ(TFO)A 2001 are more lenient than those under the PCA 1906. In particular, the maximum sanction under the later Act is 5 years imprisonment as opposed to 10 years under the 1906 Act. Moreover, exclusion from public procurement processes only applies to offences involving community officials, as opposed to all foreign public officials.

These differences are problematic from the perspective of a number of the relevant international instruments. In particular, pursuant to the *Lex*

Certa principle, in instances where an alleged offence meets the substantive requirements of the offences set out in the CJ(TFO)A 2001, then they should be prosecuted under that act. However, in certain instances, this may mean that the prosecution cannot proceed because of the more limited extra-territorial application of that act, or its more restrictive time-limits for summary offences. In any event, under both the OECD Convention and under EU law, State parties/Member States are required to ensure equivalence in the treatment of domestic and foreign bribery. The differences between the PCA 1906 and the CJ(TFO)A 2001 are incompatible with this principle.

OTHER ISSUES

The OECD's WGB has raised a number of other compliance issues regarding the implementation of the OECD's Convention, namely, whether the concept of a "bribe" is sufficiently encompassing for compliance with that Convention; and whether the PCA 1906 adequately covers influence peddling.

The Concept of a Bribe

The WGB has raised two issues regarding the concept of a bribe. The first of these is whether the term "advantage" covers a forbearance to act to the detriment of the bribee. It appears that such forbearance is covered as the term "advantage" is defined to include a forbearance to demand any "valuable thing". In any event, where the agent offers to refrain from acting in return for a payment, this will constitute "consideration" for the purposes of the PCA 1906. The second issue is whether the term "advantage" is broad enough, given the fact that the bribery offences set out in the Criminal Justice (Theft and Fraud Offences) Act 2001 refers to "an advantage of any kind whatsoever". However, there does not appear to be any basis for suggesting that this difference in the formulation of the offences means that some kinds of advantage fall outside the scope of the PCA 1906. Specifically, in interpreting the wording of the PCA 1906, the courts will give the terms used their ordinary literal interpretation as there is no ambiguity in the words used. Moreover, even if the courts were to refer to the 2001 Act

for the purposes of interpreting the earlier provisions, then they are likely to presume that the term "advantage" is intended to have the same meaning in both acts.

Influence Peddling

One of the more substantive concerns voiced by the OECD's WGB is that the PCA 1906 does not adequately cover the issue of "influence peddling". From an examination of the PCA 1906 those concerns may be to some extent misplaced. Specifically, the PCA 1906 covers all payments made to any person on account of an agent doing any act or making any omission in relation to his or her office or his or her principal's affairs or business. The person to whom the payment is made may be, but is not necessarily, an agent. There is no need for the act or omission to fall within the competencies of the agent at whom the payment is targeted as long as it relates to an agent's office, or his or her principal's affairs or business. Consequently, the PCA 1906 certainly covers the type of situation envisaged in Official Commentary 19 namely where one public official is bribed to use his or her influence over another public official as long as the latter is an agent for the purposes of the PCA 1906. In fact, the PCA 1906 extends beyond this to cover situations where an agent, whether or not a public official, uses the influence derived from his or her office or position to influence any agent in the performance of functions in which his or her principal is interested. However, it is not clear whether that act also covers situations where a public official is bribed to use the power and prestige derived from his or her agency position to influence a non-agent in the performance of his or her functions. Nevertheless, the better interpretation appears to be that the PCA 1906 does cover such payments.

THE PCA 1906 AND THE MODELS OF BRIBERY

Having identified the shortcomings of the PCA 1906 from the perspective of the requirements of a modern bribery, this thesis sought to distinguish between those deficiencies which are attributable to the PCA 1906 itself and those attributable to the model of bribery underlying

that Act and to consider to what extent replacing the agent-principal model with a bribery offence based on a more general breach of duty model would remedy those deficiencies. This thesis also identified a number of deficiencies in the existing offences which are independent of the underlying model of bribery.

DEFICIENCIES LINKED TO THE PCA 1906

Several of the deficiencies in the PCA 1906 from the perspective of the payments inquired into by the PCTS and / or the relevant international instruments, are attributable to the manner in which the agent-principal model of bribery is articulated in that Act, rather than to the model itself.

Specifically, to the extent that the PCA 1906 does not cover pre-term payments, this seems to be a problem with that Act rather than the underlying agent-principal model. In particular, such payments appear to fall squarely within the harm / immorality which that model is seeking to combat, namely the agent's betrayal of the principal's trust. The fact that that betrayal commenced before the agency relationship should not negate the harm done to that relationship or its fundamental immorality.

Similarly, positional payments do not fall within the PCA 1906 as that Act only covers payments made on account of an agent doing or failing to do something connected with the agency or his or her principal's affairs of business. However, there appears to be no reason in principle why the agent-principal model should not cover pure positional payments at least in some circumstances. Specifically such payments are clearly capable of giving rise to the harm / immorality which that model seeks to prevent including undermining trust and confidence in public and professional transactions and more general economic harm

Difficulties with the *mens rea* requirements are also capable of being rectified within the context of the agent-principal model of bribery. Specifically, because the PCA 1906 does not explicitly link the payment of the inducement with a breach of duty on the part of an agent, it needs to contain an additional requirement which is capable of delineating between legitimate and illegitimate payments which are connected with the agent's office or his or her principal's affairs or business. In the

context of the PCA 1906, the term "corruptly" serves this purpose but gives rise to a host of interpretative and possibly constitutional difficulties. However, there appears to be no reason why the PCA 1906 could not be re-formulated to expressly link the payment to a breach of the duty of trust owed by an agent to his or her principal thus making the need for a term such as "corruptly" effectively redundant. This would also more accurately reflect the harm / immorality underlying the agent-principal model.

PROBLEMS LINKED TO THE AGENT-PRINCIPAL MODEL OF CORRUPTION

Several of the deficiencies identified in the PCA 1906 are attributable to the agent-principal model on which that Act is based, including in particular deficiencies relating to the personal scope of the bribery offences and the type of purposes for which payments are made.

Scope of the Bribery Offences

In so far as the scope of the bribery offences are concerned, as discussed, one of the main difficulties with the PCA 1906 is that it does not appear to cover the bribery of certain types of public officials, independent contractors or, possibly, those who direct or work for private sector entities. Moreover, it is possible that the fact that the principal consents to the payment of the bribe could negate the existence of a breach of the duty of trust owed by the agent.

As discussed in the relevant chapter, the fact that the personal scope of the agent-principal model of bribery does not extend to cover these types of bribery reflects one of the limitations of that model from the perspective of the harm / immorality which justify the criminalisation of bribery. Specifically, while breach of the duty of trust owed by an agent to his or her principal is a serious matter which is fully capable of giving rise to the types of economic and social harms described in chapter 3, so too are other types of breaches of trust, as well as breaches of other types of professional and / or occupational duties. It is not at all clear from research on this issue why breach of the duty of trust owed by an

agent to his or her principal should be elevated above these other types from a harm / immorality perspective.

Purpose of the Payments

In so far as the purpose of the inducement is concerned, as discussed, the PCA 1906 may not cover certain types of influence peddling. Nor does it cover certain types of overt positional payments or breaches of duties owed to abstract entities.

These difficulties are related to the agent-principal model of bribery underlying the PCA 1906. As discussed that model is focused on preventing the breach of duty of trust owed by an agent to his or her principal. The question therefore is whether, for example, when an agent uses the power and influence of his or her agency position to influence a non-agent, he or she is breaching that trust. Similarly is he or she in breach of trust by accepting positional payments which are not linked to a specific act or omission on his or her part. While these types of payments may give rise to the sort of harm which the agent-principal model seeks to combat, they do so in a way which is more remote than other types of payments and at least in some cases are likely to fall outside that model of bribery.

WOULD ADOPTING A BREACH OF DUTY MODEL REMEDY THESE DEFICIENCIES?

Some, but not all of the problems linked to the agent-principal model could be resolved through basing the bribery offences on a generalised breach of duty model.

Specifically, the generalised breach of duty model would cover bribery involving independent contractors and is more likely to cover those directing or working for private sector entities, as it applies not only to inducements connected to a breach of a duty of trust (and not necessarily fiduciary trust) but also breach of a duty to act in good faith. It would also limit the extent to which the principal's consent would negate the existence of bribery as the existence of the offence would not turn on the agent-principal relationship.

The generalised breach of duty model is also more likely to cover pure positional payments than the agent-principal model, and as discussed these types of payments are specifically referred to in the UK Bribery Act 2010. Likewise, the generalised model is likely to apply to a broader range of influence peddling including the acceptance of inducements to use the power and prestige derived from a public or professional position. The generalised model also covers inducements paid in connection with a breach of an abstract duty: there is no need to identify a specific connection with the duty and a particular person to whom the duty is owned, as in the case of the agent-principal relationship.

The fact that the generalised breach of duty model would remedy these deficiencies is significant, as these present core problems either from the perspective of the PCTS, or from that of the relevant international instruments, or both.

However, modelling the bribery offences on a generalised breach of duty model would not remedy all the deficiencies of the existing offences. In particular, the difficulties in applying the agent-principal model to certain instances of foreign bribery are also relevant to the breach of duty model. Moreover, some positional/goodwill payments will fall outside the scope of the bribery offences. Finally, framing the offence in terms of a breach of duty may mean that certain instances of trading in influence which currently fall within the scope of the PCA 1906 will no longer do so. These matters are considered further below.

PROBLEMS INDEPENDENT OF THE UNDERLYING MODEL OF BRIBERY

The deficiencies connected to the PCA 1906 which are independent of the model of bribery underlying that Act relate in particular to the issue of corporate liability, the lack of a failure to supervise offence, liability of heads of business, as well to problems associated with enforcement. Remedying these deficiencies will therefore require additional measures on the part of the legislator.

Despite the fact that the generalised breach of duty model is not without its limitations, for the reasons explained in chapter 3, it is the model which in my view best reflects the harm/immorality of bribery. Moreover, as discussed in that chapter, the generalised breach of duty model incorporates the breach of trust which underlies the agent-principal model, all bribes which fall within the scope of the latter model will also fall within the more general breach of duty model.

This part outlines the suggested substantive elements of a breach of duty based offence, namely: the concept of a bribe; the personal scope of the offences; *actus reus*, purpose, and *mens rea*. In doing so, it takes into consideration the constraints imposed by the relevant international instruments in relation to those elements, and the lessons learnt from the PCTs, where appropriate.

To the extent that the breach of duty model does not comply with the needs of a modern bribery law then these needs can be effectively met through the introduction of specific offences. Specific measures will also be needed to address those deficiencies which are not linked to the agent principal model of bribery. These measures are considered in the next part

THE SUBSTANTIVE ELEMENTS OF A BREACH OF DUTY BRIBERY OFFENCE

The Concept of a Bribe

For the purposes of each of the relevant international instruments, the concept of a bribe must cover anything capable of objective valuation, and there is no *de minimis* standard. This is also consistent with the breach of duty model which, as discussed, focuses on the breach or incentive to breach a duty owed, rather than the nature or value of the advantage to which the breach is connected. While the PCA 1906 refers to a "gift, consideration, or advantage", an alternative is to simply use the term "advantage" which seems broad enough to include both gifts and consideration or "anything of value".

Personal Scope

This section first looks at the issue of public bribery and then at private sector bribery.

Public Bribery

In the case of public bribery, the relevant international instruments require State parties to criminalise both direct and indirect bribery of (existing) public officials. However, in the case of indirect bribery, this requirement only arises in instances where the target of the bribe is aware of the payment. For the purposes of the breach of duty model, the target's awareness of the bribe is primarily relevant in determining his or her culpability. Irrespective of that awareness, both the payer and the payee have committed the wrong of bribery, namely, seeking to induce a breach of duty on the part of a third person.

A key issue, arising from the inquiries conducted by the PCTs is the extent to which the breach of duty model can be effectively applied to electoral candidates or to other public officials bribed to breach a future duty, in other words, prior to the existence of that duty. There seems to be no reason in principle why the breach of duty model should not cover such bribes. For the avoidance of doubt the bribery offences could also be specifically formulated to cover both existing and future duties. For example in the US, the Federal Bribery Statute specifically defines the term "public official" to mean "Member of Congress, Delegate, or Resident Commissioner, either before or after such person has qualified."[965] The bribery offences also apply to persons "who are selected to be a public official" defined as "any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed."[966] While it is not clear from this thesis whether bribes in respect of future duties are an issue in the private sector, to the extent that they are, then the same formulation could be used as that employed under the US Statute above, with suitable modifications.

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[965] 18 U.S.C. § 201 (a)(1).
[966] 18 U.S.C. § 201 (a)(2).

A further key issue arising from the PCT's inquiries is that of "rewards". As is the case under the PCA 1906, there appears to be no difficulty in applying a model of bribery based on a breach of duty to rewards given after someone has ceased to hold an office or position, once that reward is connected to a breach of duty which occurred while that person was in office or occupied that position. However, that model does not easily apply to pure rewards paid after retirement. In this respect, these types of rewards could most effectively be dealt with in the same way as positional payments, either through conflict of interest provisions governing post-term interests, or through the introduction of a specific offence.

Private Bribery

On a combined reading of the various international instruments, the State is required to criminalise the active and passive bribery of all those who direct or work for a private sector entity in any capacity, irrespective of whether the entity is or is not for profit. There is no difficulty in applying a breach of duty model to this type of bribery: as discussed, the international instruments which address this issue each focus on a breach of duty.

Actus Reus

For the most part, under the international instruments, the active bribery offences criminalise the "offering", "promising" or "giving" of a bribe whereas the passive offences refer to the "request" or "receipt" of a bribe. There is no difficulty in using these same terms for the purposes of a new bribery offence. While in contrast to the PCA 1906, the international instruments do not refer to attempts to obtain a bribe, as discussed, this reference is anyway redundant as attempts are already criminalised by virtue of the common law.

The Purpose of the Bribe

Under the breach of duty model, the purpose of the bribe in the case of payer (and intermediary) is to induce someone else to act in breach of

their duty. In contrast, in the case of the payee, the purpose of the bribe is that the payee him or herself act in breach of a duty. As discussed, the duties in question are those of impartiality and good faith or trust.

Public Bribery

While as discussed, with the exception of the EU convention, the relevant international instruments do not view public bribery in terms of a breach of duty, framing the bribery offences in these terms nevertheless conforms with their requirements. In instances where a person makes or a public official receives an undue payment to "act or refrain from acting in the exercise of his or her functions", this will invariably be in breach of at an expectation to act impartially or in good faith or in accordance with a duty of trust.

From the perspective of the PCTs one of the key issues which arises is whether the bribery offences clearly distinguish between bribes and political donations. Under the breach of duty model, advantages given as political donations may still constitute bribes if given in connection with a breach of an expectation to act in good faith or impartially or in breach of duty of trust. Cases where an elected public official agrees to perform a specific act of personal benefit to the donor, such as voting on the rezoning of his or her land, in return for payments will clearly constitute a breach of his or her duty to impartially represent the interests of his constituents as a whole and to exercise his or her public powers in good faith. On the other hand, where an elected public official accepts a payment offered because of a particular position or policy held by him or her and that position or policy is relevant to a sufficiently significant number of his or her constituents, he or she will not breach a duty by accepting that payment. This seems to satisfactorily distinguish between bribes and political donations. However, another more blunt option would be to simply exclude all donations made in conformity with the Political Finance Acts from being considered as bribes. As the donation limits and disclosure requirements in those acts should be set at a level which excludes the possibility that the donation is made for the purposes of influencing the recipient's political conduct, there is some

basis for this approach.[967] On the other hand it cannot be completely excluded that even relatively insignificant donations will be sufficient to influence some politicians.

Private Bribery

In so far as private bribery is concerned, as discussed, each of the relevant international instruments which deal with this issue focus on a breach of duty on the part of those falling within the scope of the relevant offence. The central question here is whether those instruments are concerned with the breach of concrete duties owed to identifiable individuals or whether they also require the criminalisation of breaches of more abstract duties owed to the "market" or the "public" at large, such as the upholding of honesty and probity in commercial transactions. The answer to this question has obvious implications for whether or not the person to whom the duty is owned can consent to the payment of a bribe.[968] As discussed, there are some grounds to suggest that the EU framework decision requires Member States to criminalise duties owed in the abstract. If this is the case, then the bribery offences should be framed so as to criminalise payments made in respect of these types of breaches, over and above duties owed to identifiable individuals. Such breaches would include, for instance, the breach of duties arising from professional regulations, even in instances where the employer consents to that breach.

Mens Rea

As discussed above, the breach of duty model obviates the need for the advantage to be "undue" or to be conferred "corruptly". This means that the offence is established once the prosecution prove that the defendant intended to carry out the constituent elements of the offence, including the link between the conferral of the advantage, or thing of value, and a breach of duty on the part of the target of the offence. This seems to meet the requirements of the international instruments under consideration, with the possible exception of the OECD Convention. As

[967] See Imelda Higgins, *Corruption Law*, (Roundhall, 2012), p 128 – 130.
[968] See on this issue, Jeremy Horder, "Bribery as a form of Criminal Wrongdoing" (2011) Law Quarterly Review, 37, 41.

discussed, according to one commentator, the OECD Convention requires State Parties to provide for bribery to be committed recklessly. If this is a correct reading of that Convention, then the legislature could either provide for this standard exclusively for the purpose of the foreign bribery offence, or more generally.

From the perspective of the inquiries conducted by the PCTs, the question of whether bribery may be committed recklessly is primarily of interest in the case of bribery via intermediaries. Specifically, as is clear from those inquiries and confirmed in the literature, intermediaries are frequently used in corrupt transactions, not least for the purpose of enabling the payer of the bribe to avoid liability. Currently, under the PCA 1906, in order to successfully prosecute the payer it is necessary to show that he or she acted with direct or oblique intent with regard to the payment of the bribe. This is likely to be difficult to prove. For this reason, the Mahon Tribunal proposed introducing a specific offence of bribery through an intermediary where the requisite *mens rea* is recklessness rather than actual intent.[969] In this respect, however, it also noteworthy that this issue is also addressed in the context of corporate bribery, as discussed in the next section.

ADDITIONAL OFFENCES

As the breach of duty model does not adequately deal with at least some instances of foreign bribery, this part proposes a specific offence dealing with this issue. It also highlights the need for a new offence of trading in influence as well as considering options for controlling positional/goodwill payments.

A Foreign Bribery Offence

A breach of duty model for foreign public officials raises much the same difficulties as the agent-principal approach to bribery. Specifically, some public officials simply do not owe any duty to those they govern: they

[969] Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vol IV (2012) p 2643.

enjoy absolute power.[970] Moreover, even where a foreign public official does owe a duty to another person, the fact that the breach of duty model does not (logically) apply in instances where the principal consents to the payment of the bribe may serve to legitimise payments which are in reality bribes. Furthermore, even in cases where foreign public officials do owe certain duties to the public, it is likely to be very difficult for the Irish courts to ascertain what these duties are.

The UK Bribery Act 2010 adopts a dual approach to this issue. In the first place it stipulates that whether or not a particular duty exists is to be determined by reference to UK standards. Secondly, it includes a specific offence of bribing a foreign public official which reflects the terms of the OECD Convention on Bribery.

From the perspective of the offence of bribing a foreign public official, determining whether or not that official has acted in breach of duty by reference to UK standards seems arbitrary and unfair and to be disproportionate to the harm / immorality associated with this type of bribery. Specifically, that harm / immorality is connected with an actual breach of duty on the part of the official and not with breach of a duty to which that official is not subject.

The alternative approach involves introducing a specific offence covering the bribery of foreign public officials along the lines of the relevant international instruments. The difficulty here is that the instruments themselves are not compatible in their requirements. This problem is best illustrated through a comparison of the OECD Convention and the COE Convention. Specifically, the OECD Convention requires State parties to criminalise all undue advantages conferred in order that the official act or refrain from acting in relation to the performance of official duties. While the term "undue" is strictly defined to mean either permitted or required by law, this is counterbalanced by the fact that the offence only covers bribes paid: 1) in order to an improper advantage; and 2) in the conduct of international business. Moreover, facilitation payments are tolerated under that

[970]See John T. Noonan, Jr., *Bribes*, (Macmillan Publishing Company, 1984),p 751 who referring to the concept of a bribe observes: "On the level of earthly interest, the concept is fundamental to a sound understanding of politics, for a bribe is a breach of the fidelity that alone distinguishes public office from raw power."

Convention. In contrast, the COE Convention requires State Parties to criminalise the giving or receipt of any undue advantage to a foreign public official for him or her to act or refrain from acting in the exercise of his or her functions. It covers all payments and is not limited to those aimed at securing an improper advantage in the conduct of international business. Nor does it exclude facilitation payments from constituting bribes. While that Convention is also concerned with undue payments, for its purposes the term "undue" is broadly define to exclude from the scope of the offences, advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts. This is markedly broader than the meaning of this term under the OECD Convention.

Given the lack of compatibility between the two conventions, the best approach may be to introduce a new offence combining the elements of both. Specifically, that offence would prohibit:

- Offering any advantage to a foreign public official, either directly or indirectly where that advantage is not permitted or required by the written law of the relevant country (or organisation) and where the advantage is conferred in order: that the official act or refrain from acting in relation to the performance of official duties and is:
  - a) paid in order to obtain an improper advantage in the conduct of international business or
  - b) not in conformity with legal, administrative or social norms applicable in that jurisdiction.

Trading in Influence

In its current formulation, the PCA 1906 appears to cover the sorts of trading in influence envisaged under the OECD Convention, notwithstanding the latter's expressed reservations on this issue. However, the reason the PCA 1906 appears compliant with that Convention in this regard is it covers payments made in relation acts or omissions relating not only to the agents own functions but also to his or her principal's affairs or business.

In the event that the offences are reformulated to cover a breach of an expectation to act impartially, in good faith, or in breach of a duty of trust, it is less clear that the broader offence of trading in influence will be covered other than through secondary liability or inchoate offences. In this respect, it appears desirable to provide for a specific offence of trading in influence in order to directly criminalise this type of conduct, as required under the OECD Convention. In this respect it is noteworthy that the COE Convention and UNCAC each contain a specific offence of trading in influence in addition to the bribery offences.

Positional Payments/Goodwill Payments

In some instances the offer and/or receipt of a positional or goodwill payment may itself amount to a breach of duty and be subject to the bribery offences. However, some such payments are likely to fall outside the parameters of an offence based on breach of duty. This is not necessarily a bad thing. As explained

> A gift is given to foster general good will and influence without seeking to extract a specific commitment from the bribe. A bribery statute should not cover gifts of this nature because there is no specific act on which to base prosecution. Though as morally reprehensible as bribery, gifts are a separate form of offense and require a special remedy.[971]

Nevertheless, as outlined above, positional payments are associated with both actual and apparent corruption and their impact on decision-making and public trust may be akin to that of a bribe, particularly in the public sphere. However, there are a number of options for regulating such payments other than through the criminalisation of bribery. One approach would be simply to criminalise the receipt of any payment by a public official where there is a connection between that gift and his or her public office and the gift is not required or permitted by law or administrative practice. For example, the US Federal Bribery Statute, 18 USC §.201 (c) criminalises the offer to or receipt of anything of value by a public official or former public official, or person selected to be a public

[971] James L Winckler, "Drafting an Effective Bribery Statute" (1972) 1 Am. J. Crim. L. 210, 219.

official, otherwise than provided by law, where there is a link between that thing and any official act performed or to be performed by that person. In contrast to the bribery offences, there is no need to establish that the conferral of the thing of value was paid so as to influence the performance of an official act: it is sufficient if there is a link between the two. However, sanctions for committing the gratuities offence are significantly more lenient than for bribery. Another option is to seek to control positional/good-will payments through conflict of interest and political finance legislation. This option may permit a more nuanced approach to such payments, including distinguishing those payments which can be satisfactorily dealt with through disclosure, and those which are best prohibited. Sanctions for the infringement of the relevant provisions may be administrative or criminal, or both.

OTHER MEASURES

Corporate Bribery

From the perspective of the relevant international instruments, corporate liability raises three issues: 1) the liability of the corporate entity for bribery; 2) the liability of that entity for bribery engaged in by others and resulting from that entity's failure to supervise those others; and 3) the personal liability of heads of business for bribery engaged in by others and resulting from their failure to supervise. These issues are also relevant to the inquiries conducted by the PCTs, which revealed the extent to which corporate entities figure in corrupt transactions in this jurisdiction. Each of these issues will need to be addressed in reframing the law on corporate liability.

The inquiries conducted by the PCTs also highlighted the extent to which beneficial ownership may be used to minimise risk under the existing Prevention of Corruption Acts, mainly because beneficial owners do not fall within the scope of derivative managerial liability.

Liability of Corporate Entities

Each of the relevant international instruments require State parties to provide for the liability of those corporate entities which themselves

engage in bribery. While none of those instruments specify that that liability must be criminal in all cases, in instances where a State provides for corporate criminal liability for some offences, it seems they must also provide for such liability for the purposes of the foreign bribery offence under the OECD Convention. Moreover, criminal liability may also be a requirement under the EU instruments. In particular where a State already provides for criminal liability for corporate entities, there may be an argument that they are also obliged to provide for criminal liability for the purposes of the EU instruments, pursuant to the principle of equivalence. As previously mentioned, in accordance with that principle, rules governing actions to protect an individual's rights under Union law should be no less favourable than those governing similar domestic actions.[972]

The further question which arises is concerned with the basis upon which this liability should be imposed. As discussed in Chapter 6, the Council of Europe appears to require an aggregation of intent approach, which permits the intent of two or more individuals acting as the company to be aggregated for the purposes of holding the company itself liable for bribery. Moreover, this also appears to be viewed as best practice under the OECD Convention. The introduction of such a basis for imposing liability could best be ensured by statute.

The difficulty in this respect of course, is the undesirability of providing a specific basis for corporate liability in the case of bribery, with the risk that other basis would apply in other areas. Ideally, therefore, any reform of the law in this respect should be taken as a general measure rather than one specific to bribery. This of course requires a general inquiry into the harms which criminal corporate liability is meant to combat and not one which focuses solely on the harm of corporate bribery.

Failure to Supervise Offence

Compliance with the requirements of the international instruments will also require the extension of corporate liability to cover instances where

[972]Case C-33/76) *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer fur das Saarland* [1976] ECR 1989.

the lack of supervision within the legal person makes it possible to commit the bribery offence. Under the COE Convention, this liability does not have to be criminal liability.[973] This also appears to be the case under the EU Convention, save for the proviso that the EU Commission may well take a different view. It is, however, clear that liability, in whatever form it is imposed must extend beyond the corporate entity's own employees to cover all those acts committed by "subordinate persons acting on behalf of the legal person."[974]

Liability of Heads of Business

The PIF Protocol and the Second EU Convention both require Member States to ensure that heads of business or other persons having the power to take decisions or exercise control can personally be held criminally liable where bribery is committed by a person under their authority acting on behalf of their business. In contrast to the situation where bribery is caused by a failure to supervise, the liability in this case must be criminal. Significantly, the requirement applies to both the Heads of Business and other persons with decision making powers or control. Such persons could also include beneficial owners in certain instances, thus remedying to some extent one of the problems encountered by the PCTs, namely the use of trusts to avoid criminal liability.

It is questionable whether the offence committed should be bribery, given the exceptional gravity of that offence. In this respect, the best way forward may be to introduce a specific offence criminalising the failure of persons having powers over an entity to adequately supervise the behaviour of those under their control. This offence could reflect the terms of the corporate failure to supervise offence.

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[973] See Explanatory Report on the Criminal Law Convention on Corruption (ETS 173), para 87.

[974] See Explanatory Report on the Criminal Law Convention on Corruption, (ETS 173) para 87;Explanatory Report on the Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests (OJ C11, 15 January 1998, p 8), para 3.3.

Enforcement and Sanctions

The areas of enforcement and sanctions raise a plethora of issues from the perspective of both the international instruments and the PCTs, collectively as well as individually. Some of these can be dealt with in the context of the bribery offences themselves, in particular the issues of territorial jurisdiction and sanctions, including corporate sanctions. In contrast, the issue of immunities raises broader problems.

Territorial Jurisdiction

With regard to territorial jurisdiction, the OECD's WGB is concerned to ensure that the State can establish jurisdiction in cases where the benefit from the offence is paid or received within Irish territory. There does not seem to be any evident difficulty in including a provision to this effect in a bribery act.

Sanctions

In so far as sanctions are concerned, the introduction of a new consolidated statute should do much to rectify the OECD's WGB's concerns regarding the differing sanctions currently provided under, on the one hand, the Prevention of Corruption Acts 1889 – 2010 and the Criminal Justice (Theft and Fraud) Offences Act 2001. The level of the sanction ultimately chosen for the new offences should reflect that applicable to analogous domestic offences, such as for example fraud. In addition, the State should ensure that any person convicted of bribery can be excluded from tendering for public contracts, or at least those falling within the thresholds specified in the EU regulations.

Given the Law Reform's Commission's concern regarding the effectiveness of fines as a method of sanctioning corporate entities, consideration should be given to extending the exclusion from tendering to all public contracts. Consideration should also be given to introducing other forms of sanctions for corporate entities, including those identified in chapter 8 of this thesis. In the event that, as recommended, the new law includes a separate offence of bribing a foreign public official, care

should be taken to ensure that sanctions for that offence reflect those provided in respect of the general bribery offences.

Immunities

The position regarding immunities is more difficult, at least in so far as any amendment of the existing law will require a constitutional referendum. Nevertheless, it is clear from the case-law to date that the ambivalence and lack of clarity evident in that law is problematic. For the purposes of the relevant international instruments parliamentary privilege should be confined to utterances made for the purposes of carrying out parliamentary duties, irrespective of whether or not they are made in the precincts of the Oireachtas. Moreover, it should be possible for either the Parliament or the courts to waive that immunity in specified instances. The circumstances in which cabinet confidentiality can be lifted should clearly include Garda investigations.

OTHER LESSONS LEARNT

While the main purpose of this thesis is to analyse the bribery laws themselves with a view to determining their overall effectiveness. This conclusion makes a number of observations on other issues which also emerge from this thesis regarding both the compliance of Irish law with the relevant international instruments and more broadly, on those instruments themselves.

On the issue of compliance, as set out in the Chapter 1, while the existing offences have been evaluated on a number of occasions, the majority of those evaluations pre-date the enactment of the Prevention of Corruption (Amendment) Act 2010. That Act, which was enacted specifically for the purpose of ensuring compliance with the OECD Convention, successfully corrects some of the deficiencies in Ireland's compliance with that convention and some of the other instruments also. In particular: it extends the scope of the term "agent"; extends the *actus reus* of the active bribery offence to cover "advantages"; defines the term "corruptly"; introduces whistleblower protection for complainants; and extends the time-limits applicable to summary

proceedings. Nevertheless, a number of deficiencies remain, both in the implementation of the OECD Convention and that of the other international instruments: it is clear from the analysis carried out in this thesis that Ireland is not yet fully compliant with the requirements of any of these instruments.

Regarding the relevant international instruments, a number of points arise regarding both the difficulties in implementing those instruments and the evaluation procedures connected to that implementation.

IMPLEMENTATION DIFFICULTIES

Compliance with the relevant international instruments is by no means a straightforward task, principally for the following reasons: 1) incompatibilities between what is required by way of compliance; 2) interpretative difficulties surrounding some of the terms used in those instruments; and 3) in the case of some of the instruments, a continuous evolution in what is required by way of compliance.

Incompatibility

As discussed in the previous chapter, the international instruments overlap in several respects and, significantly, in some instances, their respective requirements are not compatible with each other. This is best illustrated through comparing the OECD and COE Conventions. As discussed in Chapter 8, while the OECD Convention criminalises a particularly extensive range of payments, it does so in quite limited circumstances. In contrast, the COE Convention criminalises a narrower range of payments but covers a wider variety of circumstances. State Parties are therefore faced with the choice of either combining the conventions by criminalising an extensive range of payments in extensive circumstances, or implementing those conventions through a number of bribery offences with differing scope. The problem with the first option is that it may lead to over-criminalisation. The problem with the second is that it appears overly complicated and may make it difficult for the public to distinguish between permitted payments and illegal ones. It also raises the risk of defendants being charged under

the wrong statute. These and similar issues put State parties who have ratified the various Conventions into a difficult position and suggests a need for a single international instrument criminalising bribery. Ideally such an instrument should also identify the underlying rationale for criminalising bribery, something which is also largely missing from the existing instruments.

Interpretive Difficulties

On a related matter, determining the measures required to comply with the international instruments may also be quite challenging because of the lack of clarity regarding the interpretation of some of their terms. This lack of clarity has been a recurrent issue in this thesis. For example as discussed in Chapter 7, there is some suggestion that the intent required under the OECD Convention should equate to the civil law standard of *dolus eventualis*, which is a lower standard than direct intent. In so far as private bribery is concerned, whilst the various offences are all framed in terms of a breach of duty, it is not clear in the case of the EU's framework decision whether the duty in question is one owed to a particular individual entity or whether it also covers abstract duties. The answer to this question has considerable implications in so far as in the former instance that decision will not cover bribery where the principal consents, whereas in the latter it more than likely will.

Regarding sanctions, several of the international instruments require State Parties to ensure that sanctions are "effective, proportionate and dissuasive", wording which gives little clarity as to precisely what is required in this regard. The position regarding immunities is also unclear. Although UNCAC is the only convention to address this issue explicitly and directly, immunities could constitute an impediment to effective sanctioning, thus falling within the remit of the other instruments. However, in both instances, it is difficult to determine to what extent national immunities must be restricted or eliminated for compliance purposes. On a connected point, several of the bribery offences contained in UNCAC mirror the wording of the offence contained in the OECD Convention. However, as discussed further below, while the OECD's WGB has tended to adopt an increasingly

broad approach to the interpretation of that Convention, it is not clear whether the provisions of UNCAC will be similarly expansively interpreted.

Dynamic Interpretation

In some respects what is required by way of compliance with the relevant international instruments, and more specifically the OECD Convention, appears to be dynamic in the sense that what constitutes compliance in one year may not do so in subsequent years, despite the lack of any formal changes to those instruments. One clear example of this is the OECD's increasing intolerance of facilitation payments, despite the fact that these are not in fact prohibited by the OECD Convention. Similarly, according to the commentaries to that Convention a statute using the agent-principal model of bribery could comply with its requirements.[975] This no longer appears to be the case and indeed the State has been the subject of on-going criticism by the OECD's WGB for failing to abandon this model. The OECD Convention does not address the issue of corporate responsibility for bribery in any significant detail despite the fact that this is a recurring theme in its evaluation. While admittedly this issue is now covered in the *OECD's Best Practice Guidance on Implementing Specific Articles of its Anti-bribery Convention,* as set out in Chapter 8, the requirements of the Convention appear to have evolved beyond that guidance since it was issued. Specifically, while that best practice guidance does not appear to require State Parties to adopt an aggregation model of corporate liability, as mentioned in Chapter 8, the OECD's WGB has criticised the UK for failing to do so.

EVALUATION

Another point which emerges from this thesis is the role played by evaluation procedures in ensuring the effectiveness of the relevant international instruments. In this respect, the procedure linked with the OECD Convention is undoubtedly the most robust and it appears to be

[975]Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para 3.

no coincidence that many of the amendments to the PCA 1906 have been inspired by the need to conform with the requirements of that Convention, rather than, for example, the COE Convention or the EU Instruments. Evaluation reports also contribute to alleviating the interpretative difficulties referred to above.

However, the evaluation procedures also suffer from some limitations. In particular, to some extent at least they rely on the existence of domestic analysis of the bribery offences: in the absence of such analysis it is difficult for the evaluators to gain a comprehensive and accurate overview of those offences. In at least some instances, the evaluations considered for the purpose of this thesis have not been entirely accurate. For example, the OECD's WGB has repeatedly criticised the State for failing to fully criminalise trading in influence. However, in fact the PCA 1906 does appear to comply with the OECD Convention on this issue. In contrast, some of the other evaluations have failed to highlight areas where the State has clearly fallen short of full implementation of the relevant international instrument. For example, according to GRECO, commenting on the personal scope of the PCA 1906, "the broad, and non-exhaustive, description of the term "agent" allows the Irish statutes to embrace the different categories of persons covered by the Convention and its Additional Protocol."[976] In view of the limits in the scope of that term, analysed in Chapter 5 of this thesis, this does not in fact appear to be the case. Similarly, in its most recent report on compliance with the Framework Decision, the Commission considered that Ireland met "all seven requirements of the definition of active corruption".[977] However, as discussed in Chapter 5, it is doubtful whether the PCA 1906 covers the bribery of independent contractors and thus does not appear to cover the bribery of those who direct or work "in any capacity" for a private-sector entity, as required by the Framework Decision. In that same report, the Commission names Ireland as one of the States which has fully transposed Article 5 of that decision dealing with the issue of corporate liability.[978] Again, however,

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[976] GRECO, Eval III Rep (2009) 4E, Theme 1, p 14.

[977] Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM(2011) 309 final, p 3.

[978] Report from the Commission to the European Parliament and the Council based on

this does not appear to be the case as there is no failure to supervise offence in Irish law.[979]

CONCLUSION

This thesis has sought to provide an analysis of Irish bribery law, in the context of both the PCTs reports and of the relevant international instruments. In so doing, it has identified some significant shortcomings in the domestic legislation on bribery, and has proposed some potential reforms to make the law more effective in combating bribery. The significance of this should not be underestimated. Bribery is associated with extensive economic and social harms and a well-functioning bribery law is a vital tool in combating these harms. The previous neglect of the PCA 1906 belies the importance of a robust anti-bribery statute and the consequences are well illustrated by the various political corruption scandals which have shaken this country to its core, and arguably precipitated its economic collapse.

This thesis makes a number of important contributions to the law of bribery. In particular it is the only substantive academic attempt to determine the contours and scope of the existing Irish bribery offences. Such an analysis is important in its own right as it is clearly essential to understand what is and what is not covered by the existing offences. However it is also a vital first step in identifying the strengths and deficiencies of the bribery offences and in assessing what reform is needed, if any, to ensure those offences constitute an effective tool in the fight against bribery.

This thesis is also the only attempt to analyse the offences contained in the PCA 1906 from the perspective of the harm / immorality underlying those offences, namely the agent-principal model of corruption and to assess whether those needs would be more effectively met through the

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Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM(2011) 309 final, p 6.

[979] Interestingly, this is recognised by the Commission in its report, Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols, (COM(2004) 709 final, 25 October 2004, p 5) which observes, at p 6 that it is doubtful whether Ireland provides "for liability where lack of supervision or control has made it possible for the offence to be committed or where the offence was committed by a subordinate person. See also the Commission's second report on this issue, (COM(2008) 77 final, 14 February 2008, p 3, 10)

adoption of a more generalised breach of duty model of bribery. Determining the underlying harm / immorality which the criminal law seeks to combat is fundamental for assessing the scope and shape of the offences which are to form the key weapons in this combat.

This thesis is also the sole indepth analysis of the inquiries conducted by the PCTs. In many ways the PCTs dominated Irish political landscape for a period of over 20 years and their neglect by the academic community is nothing short of astonishing. Admittedly those inquiries do not lend themselves to easy analysis. In this respect this thesis performs an important function in not only reviewing the payments which were the subject of the PCTs inquiries but in categorising those payments and considering whether they are and whether they should be the subject of the criminal law on bribery.

Finally, while this thesis is not the only attempt to assess the compatibility of the Irish bribery offences with the requirements of the relevant international instruments, it is the only attempt to do so in a holistic fashion. This is significant because from a domestic perspective, the formulation of the bribery offences needs to take into account the collective requirements of those instruments. In contrast, the various reviews of Irish law from the perspective of those instruments have focused on the requirements of each individual instrument in its own right. Moreover, those reviews have largely depended on information received from Ireland about the bribery offences. However, in the absence of any academic analysis of the bribery offences or practical offences, the accuracy of this information is open to question.

It is hoped that this thesis will help to inform the debate on the appropriate scope of the bribery offences. It is also hoped that it will prove a tool in the wider fight against all forms of corruption. By assessing the appropriate role to be played by the bribery offences this thesis provides an important platform for studying the role to be played by other types of anti-corruption measures, including, in particular access to information, ethics rules and political finance legislation.

BIBLIOGRAPHY

PRIMARY SOURCES

DOMESTIC LEGISLATION

Ireland

Irish Constitution
Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997
Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 2004
Companies (Amendment) Act 1990
Companies Act 1963
Criminal Justice (Terrorist Offences) Act 2005
Criminal Justice (Theft and Fraud Offences) Act 2001
Criminal Justice Act 1994
Criminal Law Act 1997
Electoral (Amendment) (No 2) Act 2001
Electoral (Amendment) Act 1998
Electoral (Amendment) Act 2001
Electoral (Amendment) Act 2002
Electoral (Amendment) Act 2004
Electoral (Amendment) Act 2006
Electoral (Amendment) Act 2007
Electoral (Amendment) Act 2009
Electoral (Amendment) Act 2011
Electoral Act 1997
Ethics in Public Office Act 1995
European Communities (Award of Contracts by Utility Undertakings) Regulations 2007
European Communities (Award of Public Authorities Contracts) Regulations, 2006
Explosives Substances Act 1883
Fines Act 2010
Local Elections (Disclosure of Donations and Expenditure) Act 1999
Local Elections Regulations 1995
Ministers and Secretaries (Amendment) Act 2011
Offences Against the Person Act 1961
Offences Against the State Act 1939
Prevention of Corruption (Amendment) Act 2001
Prevention of Corruption (Amendment) Act 2010
Prevention of Corruption Act 1906
Prevention of Corruption Act 1916
Proceeds of Crime (Amendment) Act 2005
Proceeds of Crime Act 1996
Public Bodies Corrupt Practices Act 1889
Safety, Health and Welfare at Work Act 1989
Standards in Public Office Act 2001
Tribunal of Inquiry (Evidence) Acts 1921-2011

UK Law

Prevention of Corruption Act 1906
The Bribery Act 2010

US Law

18 USC §201

INTERNATIONAL LEGISLATIVE INSTRUMENTS AND EXPLANATORY REPORTS

Council of Europe Legislation

Additional Protocol to the Criminal Law Convention (ETS 191, 15 May 2003)
Civil Law Convention on Corruption (ETS 174, 4 November 1999)
Criminal Law Convention on Corruption (ETS 173, 27 January 1999)
Recommendation No. R.(88) of the Committee of Ministers to Member States concerning the Liability of Enterprises having Legal Personality for Offences committed in the Exercise of their Activities (1990).
Resolution (97)24 on the Twenty Guiding Principles Against Corruption, (November 6, 1998)

Council of Europe Explanatory Reports

Explanatory Report on the Criminal Law Convention on Corruption, http://conventions.coe.int/Treaty/en/Reports/Html/173.htm, last accessed on August 28, 2013
Explanatory Report on the Additional Protocol to the Criminal Law Convention, http://conventions.coe.int/Treaty/EN/Reports/Html/191.htm, last accessed on August 28, 2013

European Union Legislation

Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, (OJ C 316, 27 November 1995, p 49)
Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of Member States of the EU or Officials of the Member States of the European Union (OJ C195 25 June 1997, p 1)
Council Framework Decision 2003/577/JHA on Combating Corruption in the Private Sector (OJ L192, 31 July 2003, p 54)
Directive 2004/17/EC of the European Parliament and the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L134 30 April 2004, p 1)
Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L134 30 April 2004, p 114)

98/742/JHA: Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on corruption in the private sector (OJ L358, 31 December 1998, 2)
Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 313 of 23.October 1996, p 1)
Second Protocol drawn on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests (OJ C 221, 19 July 1997, p 12)

European Union Explanatory Reports

Explanatory Report on the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests to the Convention on the Protection of the European Communities' financial interests (OJ C011, 15 January 1998, p 5)
Explanatory Report on the Second Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the Protection of the European Communities' Financial Interests (OJ C11, 15 January 1998, 8)
Explanatory Report on the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ C 391, 15 December 1998, p 1)
Explanatory Report on the Convention on the Protection of the EU's Financial Interests (OJ C 191, 23 June 1997, p 1)

OECD Convention

Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (adopted 21 November 1997, signed 17 December 1997)
OECD, Official Commentaries to the OECD Convention on Combating Bribery of Officials in International Business Transactions (adopted 21 November 1997)

OECD Recommendations

Recommendation of the Council of the OECD on Bribery in International Business Transactions (27 May 1994)
Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials (adopted 11 April 1996)
Revised Recommendation of the Council of the OECD on Combating Bribery in International Business Transactions (23 May 1997)
Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (November 26, 2009)
Recommendation of the Council on Bribery and Officially Supported Export Credits (14 December 2006)
Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement (6-7 May 1996)
Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (May 25, 2009)

OECD Guidelines

Guidelines for Multinational Enterprises (first adopted 1976, revised 2000)
Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, 31 October 2001

UNCAC Conventions

United Nations Convention Against Corruption, Annex, General Assembly Resolution (A/RES/58/422, 31 October 2003).
United Nations Convention against Transnational Organised Crime (G.A./RES/55/25, 15 November 2000)

UNCAC Other Measures

Declaration against Corruption and Bribery in International Commercial Transactions ((A/RES/51/191, 1 December 1996)
Legislative Guide for the implementation of the United Nations Convention against Corruption (2006)
United Nations Declaration 51/191 against Corruption and Bribery in International Commercial Transactions (16 December 1996)

INTERNATIONAL LEGISLATIVE INSTRUMENTS EVALUATIONS AND REPORTS

Council of Europe Evaluation and Compliance Reports

Greco Eval 1 Rep (2001) 9E (20 December 2001)
Greco RC - I (2003) 14E, Compliance Report on Ireland (12 December 2003)
Greco RC - I (2003) 14E, Addendum to the Compliance Report on Ireland (14 October 2005)
Greco Eval II Rep (2005) 9E (9 December 2005)
Greco RC-II (2007) 11E, Compliance Report on Ireland (15 February 2008)
Greco RC-II (2007) 11E, Addendum to the Compliance Report on Ireland (26 March 2010)
Greco Eval III Rep (2009) 4E (4 December 2009)
Greco RC-III (2011) 10E (9 December 2011)

European Union Compliance Reports

EU Commission, Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2004) 709 final, 25 October 2004 p 5)

EU Commission, Implementation of the Convention on the Protection of the European Communities' financial interests and its protocols (COM(2008) 77 final, 14 February 2008 p 3)
EU Commission, Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (COM(2007) 328 final, 18 June 2007 p 5)
EU Commission, Report from the Commission to the European Parliament and the Council based on Article 9 of Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (COM(2011) 309 final, 6 June 2011 p 1)

OECD

OECD, Ireland: Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (June 2002)
OECD, Ireland: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions, (14 March 2007)
OECD Ireland: Phase *2Bis* Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions (11 December 2008)
OECD, Ireland: Phase 2 and *2Bis* Follow-up Report on the Implementation of the Phase 2 and Phase *2Bis* Recommendations (19 March 2010)

REPORTS OF THE POLITICAL CORRUPTION TRIBUNALS

Report of the Tribunal of Inquiry into the Beef Processing Industry (1994)
Report of the Tribunal of Inquiry (Dunnes Payments), (1997)
Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters (Dublin, 2006)
Report of the Tribunal of Inquiry into Payments to Politicians and Related Matters, Part II, (2010)
The Second Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002)
The Third Interim Report of the Tribunal of Inquiry into Certain Planning Matters and Payments (2002)
The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, Vols 1 – IV (2012)

CASES

AUSTRALIAN CASES

Hospital Products Ltd v United States Surgical Corporation (1984-5) 156 CLR 41 (High Court of Australia)

CANADIAN CASES

Vici (1911) 18 C.C.C. 51

EUROPEAN COURT OF HUMAN RIGHTS

Kart v Turkey (1988) ECHR 44
Bowman v UK [1998] 26 EHRR 1

EU CASES

Case C-33/7 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer fur das Saarland* [1976] ECR 01989
Case C-261/95 *Palmisani v INPS* [1997] 3 CMLR 1356
Case C-326/96 *Levez v Jennings (Harlow Pools) Ltd* [1998] ECR I-7835

IRISH CASES

AG v Hamilton (No. 1) [1993] 2 IR 250
AG v Hamilton (No. 2) [1993] 3 IR 227
Ahern v Members of the Tribunal of Inquiry into Certain Planning Matters and Payments [2008] IEHC 119, [2008] 4 IR 704
Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels[1998] 2 IR 519
Braithwaite (1983) 1 WLR 329
C. v DPP [2009] IEHC 121
Comcast Int Holdings v Minister for Public Enterprise and Others and Personal Digital Telephony Ltd v Minister for Public Enterprise and Others [2012] IESC 50
Cosgrave v DPP [2012] IESC 24
Crofter Properties Ltd v Genport Ltd[2002] IEHC 26
Cronin v Youghal Carpets (Yarns) Ltd [1985] IR 312
D.C. v DPP [2005] 4 IR 281
DPP v Hegarthy [2011] IESC 32
DPP v Logan [1994] 3 IR 254
DPP v Gregg [2009] IESC 17
Ebere Dokie v DPP, HRC, Ireland and the AG [2010] IEHC 110, [2011] IR 110
Enright v DPP [2012] IESC 5
Fyffes plc v DCC and others [2005] IEHC 477
Gilligan v Special Criminal Court & Ors (Unrept) McCracken J, High Court, November 8, 2002
Goodman International v Hamilton [1992] 2 IR 542
Gormley v Smyth [2010] IESC 5
Hardy v Ireland [1994] 2 IR 55
Howard v Irish Life & Permanent plc and Guinness and Mahon (Ireland) Ltd[2006] IEHC 419
In re the Criminal Law (Jurisdiction) Bill [1977] 1 IR 129
J.O'C. v DPP [2000] 3 IR 478

Kennedy v DPP [2012] IESC 24
King v Attorney General [1981] IR 233
Lac Minerals Limited v Chevron Mineral[1995] 1 I.L.R.M. 161
McFarlane v DPP [2008] 4 IR 117
Millstream Recycling Ltd v Tierney and others [2010] IEHC 55
O' Leary v AG [1993] 1 IR 102 (HC) and [1995] 1 IR 254 (SC)
O'Keeffe v Commissioners of Public Works (unrept) (Supreme Court, 24 March 1980)
P.M. v DPP [2006] IESC 22, [2006] 3 IR 172
P.M. v Malone [2002] 2 IR 560
People (AG) v Sullivan [1964] IR 169
Power Supermarkets Ltd v Crumlin Investments Ltd (unrept) (Costello J., HC 22 June 1981)
R(Cottingham) v Justices of County Cork[1906] 2 IR 415
Rahill v Bradley [1971] IR 69
Re Bray Travel Limited and Bray Travel (Holdings) Limited (unrept) (Supreme Court, 13 July 1981)
Ryan v O'Callaghan (unrept) (High Court, Barr J., July 22 1987)
S. v DPP (unrept) (Supreme Court, 19 December 2000)
S.H. v DPP [2006] IESC 55; [2006] 3 IR 575
State (O'Connell) v Fawsitt [1986] IR 362
Superwood Holdings plc v Sun Alliance and London Insurance plc [1995] 3 IR 303
Taylor v Smith [1991] 1 IR 142
The People (Attorney General) v Thornton [1952] IR 91
The People (DPP) v Byrne [1994] 2 IR 236
The People (DPP) v Douglas and Hayes [1985] ILRM 25
Z. v DPP [1994] 2 IR 476

JAMAICAN CASES

Williams v R. JM (2011) CA 30

SCOTTISH CASES

King v Procurator Fiscal [2004] Scot HC 44

UK CASES

AG for Hong Kong v Reid [1994] 1 AC 324.
AG v Goddard (1929) 98 LJKB 743
Attorney-General's Reference (No.1 of 1975) [1975] QB 773
Beaton v H.M. Advocate [1993] JC 35
Bodmin Case (1869) 1 O'M & H 121
Calland [1967] Crim LR 236.
Carr (1956) 40 Cr. App. R. 188
Currie v Misa (1875) L.R. 10 Exch. 153
DHN Food Distributors Ltd v Tower Hamlet LBC[1976] 3 ALL ER 462
Godden-Wood[2001] EWCA Crim 1586; [2001] Criminal Law Review 810
H.L. Bolton (Engineering) Co v T.J. Graham & Sons Ltd, (1956) 1 QB 159
Harvey [1999] Criminal Law Review 70 CA
Hovenden v Millhoff 83 LT 43
Huckerby v Elliot[1970] 1 All ER 189

Lennard's Carrying Co Ltd v Asiatic Pet Co Ltd [1915] AC 705
Lindley, [1957] Crim LR 321
Littlewoods Mail Order Stores Ltd. v IRC[1969] 1 WLR 1241
Meridian Global Funds Management Asia Ltd v Securities Commission[1995] 2 AC 500
Morgan v DPP (1970) 3 All ER 1053
Parker v M'Kenna (1874) 10 Ch., 96
People (AG) v England (1947) 1 Frewan 81
R v Andrews-Weatherfoil Ltd [1972] 1 WLR 118
R v Braithwaite [1983] 1 WLR 385
R v Calahemn [1985] 1 QB 808
R v Chargot Ltd(trading as Contract Services) [2009] 1 WLR 1
R v Harrington (Unrept), 28 September 2000 (Kennedy LJ, Forbes and Steel JJ)
R v Leslie Ernest Mills (1979) 68 Cr. App. R. 154
R v Majeed and *R v Westfield*[2012] EWCA Crim 1186; [2012] 3 ALL E.R. 737
R v Mills (1979) 86 Cr. App. R. 154
R v Parker (1986) 82 Cr App. R. 69
R v Sekhon [2003] 3 All E.R. 508
R v Waterfield [1975] 1 WLR 711
R v Webster [2010] EWCA Crim 2819
Re AG's Reference (No 1 of 1995) [1996] 1 WLR 970
Re: Southard Co Ltd [1979] 1 WLR 1198
Reading v AG [1951] AC 507
Reading v The King [1949] 2 KB 232
Rex v Whitaker [1914] KB 1283
S v Deal Enterprises (Pty) Ltd (1978) 3 SA 302
Salomon v A Solomon & Co Ltd [1897] AC 22
Smith[1960] 2 QB 423
Smith Stone & Knight v Birmingham Corporation[1939] 4 All ER 116
Somchai Liangsinpraseret v United States [1991] 1 AC 225
Tesco Ltd v Nattrass [1972] AC 153
Thompson v Havelock (1808) 1 Camp 527; 170 ER 1045
Wellburn (1979) 69 Cr App R 254
Woodward v Maltby [1959] V.R. 794

PRIVY COUNCIL CASES

R v Singh [2006] Part 4 Case 3 [PC]
Singh v State of Trinidad and Tobago [2006] 1 WLR 146
Commission of Independent Commission against Corruption v Ch'ng Poh [1997] 1 WLR 1175

US CASES

Buckley v Valeo 424 U.S. 1 (1976)
Citizens Against Rent Control v Berkeley 454 U.S. 290 (1981)
Citizens United v Fed. Election Comm'n 130 S. Ct. 876 (2010).
Evans v United States 504 U.S. 255 (1992)
*New York Central & Hudson River Railroad v United States*212 U.S. 481 (1909)
Nixon v Shrink Missouri Government PACT 528 U.S. 377 (2000)
People v Herskowitz 41 N.Y.2d 1094, 364 N.E.2d 1127, 396 N.Y.S.2d 356 (1977)

State v Bowling 5 Ariz, App. 436, 427 P.2d 928 (1967)
Toussi v United States 397 U.S. 112 (1970)
United States v Medina 41 F.Supp.2d (D. Mass. 1999)
United States v Singleton 144 F.3d 1343 (10th Cir. 1998), rev'd by 165 F.3d 1297 (10th Cir. 1999) (en banc), cert. denied, 527 U.S. 1024 (1999)
United States v Abbas 560 F.3d 660 (7th Cir. 2009)
United States v Biaggi, 853 F.2d 89, 97 (2d Cir. 1988)
United States v Birdsall, 233 U.S. 233 (1914)
United States v Carson, 464 F.2d 424 (2d Cir., cert. Denied, 409 U.S. 949 (1972)
United States v Gorman, 807 F.2d 1299, 1304 – 05 (6th Cir. 1986), cert. Denied, 484 U.S. 815 (1987).
United States v Hilton Hotel Corporation, (1972) 467 F.2d 1000 at 1006
United States v Loftus, 992 F.2d 1014 (8th Cir. 1993)
United States v Mazzei 521 F.2d 639 (3d Cir. 1975)
United States v Poindexter 951 F.2d 369 (D.C. Cir. 1991)
United States v Rabbitt 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979)

SECONDARY SOURCES

BOOKS

Adshead, Mary and Millar, Michelle, *Public Administration and Public Policy in Ireland: theory and methods*, (Routledge, 2003)
Amnesty International, *Universal Jurisdiction: The duty of States to enact and implement legislation* (London, September 2001)
Anderson, Helen (ed), *Directors Personal Liability for Corporate Fault A Comparative Analysis*, (Kluwer Law International, 2008)
Arlidge, Tony and Perry, Jacque, *Arlidge and Perry on Fraud,* 3rd ed. (Sweet and Maxwell, 2011)
Ashworth, Andrew, *Principles of Criminal Law,* 5th ed., (Oxford University Press, 2006)
Baker, Dennis J. *The Right not to be Criminalized*, (Ashgate, 2011)
Black's Law Dictionary, 3rd ed., (West Publishing Co., 1968)
Blackstone, *Commentaries on the Law of England* (1769) Volume 1
Blackstone's *Criminal Practice,* (Oxford University Press, 2012)
Brody, David C, Actor, James R., Logan, Wayne A. *Criminal Law*, (Aspen Publishers, 2001)
Brownlie, Ian, *Principles of Public International Law,* 6th ed., (Oxford University Press, 2003)
Carswell, Simon, *Something Rotten; Irish Banking Scandals,* (Gill and MacMillan Ltd, 2006)
Cassesse, Antonio, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009)
Charleton, Peter, McDermot, Paul A., and Bolger, Marguerite, *Criminal Law*, (Butterworths, 1999)
Clarkson, C. M. V., *Understanding Criminal Law,* 4th ed., (Thomson Sweet and Maxwell, 2005)

Coakley, John and Gallagher, Michael (eds) *Politics in the Republic of Ireland*, 3rd ed., (Routledge, 1999)
Coakley, John and Gallagher, Michael, *Politics in the Republic of Ireland,* 4th ed., (Routledge, 2006)
Collins English Dictionary, Millenium Edition, (HarperCollins Publishers, 2000)
Collins, Neill and Cradden, Terry (eds) *Irish Politics Today,* 4th ed., (Manchester University Press, 2000)
Crew, Albert, *Bribes and Bribery in Business,* (Jordan & Sons Ltd., 1916)
Crew, Albert, *The Law Relating to Secret Commission and Bribes, Christmas boxes, Gratuities, Tips etc,* (Sir I. Pitman & Sons Ltd., 1913)
Cullen, Paul, *With a Little help from my Friends*, (Gill and Macmillan, 2002)
Devlin, Patrick, *Enforcement of Morals,* (Oxford University Press, 1965)
Duff, R.A. and Green, Stuart P., *Defining Crimes: Essays on the Special Part of the Criminal Law,* (Oxford University Press, 2005)
Dwyer, T. Ryle, *Fallen Idol: Haughey's Controversial Career*, (Mercier Press, 1997)
Eser, Albin, Heine Günther, and Huber, Barbara(eds) *Criminal Liability of Legal and Collective Entities* International Colloqium, (Edition Iuscrim)
Feinberg, Joel, *Offense to Others (The Moral Limits of the Criminal Law, Volume Two),* (Oxford University Press, 1985)
Fijnaut, Cyrille and Huberts, Leo (eds), *Corruption, Integrity and Law Enforcement*, (Kluwer, 2002)
Finn, Paul D., (ed), *Fiduciary Obligations,* (Law Book Company Ltd, 1977)
Finnin, Sarah, *Elements of Accessorial Modes of Liability Article 25 3(b) and (c) of the Rome Statute of the International Criminal Court,* (Martinus Nijhoff Publishers, 2012),
Fisse, Brent and Braithwaite, John, *Corporations, Crime and Accountability (Theories of Institutional Design),* (Cambridge University Press, 1994)
Fowler, H.W., Foley, FG., and Sykes, JB, *The Concise Oxford Dictionary of Current English,* 7th edition, (Oxford University Press, 1982)
Garrard, John and Newell, James, (eds), *Scandals in Past and Contemporary Politics*, (Manchester University Press, 2006)
Gower, L.C.B., *Principles of Modern Company Law*, 4th ed., (Stevens, 1979)
Greay, Roger, *Essentials on Criminal Law*, 2nd ed., (Cavendish Publishing Ltd., 1998)
Hall, Jerome, *General Principles of Criminal Law*, 2nd ed., (The Lawbook Exchange Ltd, 2008)
Halsbury's Laws of England, vol 1(2), edited by the Right Honourable Lord MacKay of Clashfern, 4th ed., (LexisNexis Butterworths, 1990)
Hart, H.L.A. Autor, *Law, Liberty and Morality,* (Stanford University Press, 1963)
Hatchard, John, Nicholls, Colin, Daniel, Tim, Polaine, Martin, *Corruption and Misuse of Public Office,* (Oxford University Press, 2006)
Hawkins, *Please of the Crown* vol. i., 8th ed. (Curwood)
Heffernan, William C., and Kleinig, John, (eds), *Private and Public Corruption,* (Rowman & Littlefield, 2004)
Heidenheimer, Arnold J. & Johnston, Michael (eds) *Political Corruption: Concepts and Context,* (Transaction Publishers, 2002)

Heidenheimer, Arnold J., (ed), *Political Corruption: Readings in Comparative Analysis* (Holt, Reinhart and Winston, 1970)
Higgins, Imelda, *Corruption Law* (Roundhall, 2012)
Hogan, Gerard and Whyte, Gerry, *JM Kelly; the Irish Constitution* 4th ed., (Butterworths, Lexis Nexis, 2003)
Horan, Shelley, *Corporate Crime,* (Bloomsbury Professional, 2011)
Horder, Jeremy and Alldridge, Peter (eds), *Modern Bribery Law,* (Cambridge University Press, 2013)
Hughes, Geoffrey, *Words in Time: A Social History of the English Language,* (Basil Blackwell, 1989)
Huntington, Samuel P. *Political Order in Changing Societies* (Yale University Press, 1969)
Judge, Stephen, *Q&A Company Law 2008 and 2009,* (Oxford University Press, 2008)
Keane, Ronan, *Company Law*, 3rd ed (Bloomsbury Professional, 2000)
Klip, André (ed) *Substantive Criminal Law of the European Union,* (Maklu Publishers, 2011)
Lacey, Nicola, Wells, Celia, A. Quick, Oliver, *Reconstructing Criminal Law: Texts and Materials*, (Cambridge University Press, 2003)
Lambsdorff, Johann Graf, Taube, Markus, and Schramm, Mathias (eds), *The New Institutional Economics of Corruption,* (Routledge, 2005)
Lee, Joe, *Ireland 1912 - 1985: Politics and Society*, (Cambridge University Press, 1989)
Leigh, LH., *The Criminal Liability of Corporations in English Law,* (Weidenfeld & Nicholson, 1969)
Leonard, Robert Maynard and Fry, Edward, *The War Against Bribery,* (Secret Commissions and Bribery Prevention League, London, 1913)
Marsh, George P., *Lectures on the English Language, (*Charles Scribner, 1860)
McCauley, Finbar, and McCutcheon, Paul, *Criminal Liability*, (Roundhall, 2000).
McDonald, Frank, *The Destruction of Dublin*, (Gill and Macmillan, 1985)
McIntyre, TJ., McMullen, Sinead, O Toghda, Sean, *Criminal Law*, (Roundhall, 2012)
McKay, William, *Erskine May Parliamentary Practice,* 23rd ed., (LexisNexis Butterworths, 2004)
Mill, John Stuart, *On Liberty 9,* (Elizabeth Rapaport ed. 1978) (1859)
Morris, Herbert, (ed), *Freedom and Responsibility Readings in Philosophy and Law,* (Stanford University Press, 1961)
Murtagh, Peter and Joyce, Joe, *The Boss; Charles J. Haughey in Government*, (Poolbeg Press, Dublin, 1983)
Myteenaere, Robert, *The Immunities of Members of Parliament,* (Inter-Parliamentary Union, 1998)
Nichols, Collin, Daniel, Timothy, Bacarese, Ian, Hatchard, John *Corruption and Misuse of Public Office*, 2nd ed., (Oxford University Press, 2012)
Noonan, John T., Jr., *Bribes*, (Macmillan Publishing Company, 1984)
O'Mahony, Paul (ed) *Criminal Justice in Ireland*, (Institute of Public Administration, 2002)
O'Toole, Fintan, *Meanwhile Back at the Ranch – the Politics of Irish Beef*, (Random House, 1995)
OECD (ed.,) *No Longer Business as Usual*, (OECD 2000).
OECD, *Corruption: Glossary of International Criminal Standards,* (OECD, 2008)
OECD, *Criminalising Bribery and Ensuring Enforcement,* (OECD, 2012)

Oldnall Russell, William, *Russell on Crime*, edited by JW Cecil Turner, 12th ed., (Stevens, 1964)
Organisation for Security and Cooperation in Europe, *Best practices in combating corruption*, (OSCE, 2004)
Ormerod, David and Hooper, Anthony, *Blackstone's Criminal Law Practice 2013* (Oxford University Press, 2013)
Ormerod, David, *Smith & Hogan's Criminal Law,* 11th ed., (Oxford University Press, 2005)
Parry, Jacques, Arlidge, Anthony, Hacking, Joanne, and Jacobson, Josepha, *Arlidge and Parry on Fraud,* 3rd ed., (Sweet and Maxwell, 2007)
Pearce, Frank and Snider, Lauren (eds) *Corporate Crime: Contemporary Debates*, (University of Toronto Press Incorporated, 1996)
Pieth, Mark, Low, Lucinda A., and Cullen, Peter J. (eds) *The OECD Convention on Bribery A Commentary*, (Cambridge University Press, 2007)
Rose-Ackermann, Susan, *Corruption: A Study in Political Economy,* (Academic Press, 1978)
Rowbottom, Jacob, *Democracy Distorted: Wealth, Influence and Democratic Politics,* (Cambridge University Press, 2010)
Shute, Stephen, Simester, A.P. (eds), *Criminal Law Theory: doctrines of the general part,* (Oxford University Press, 2002)
Singer, Richard G., La Fond, John Q., *Criminal Law*, 5th ed., (Aspen Publishers, 2010)
Smith, A.T.H. *Property Offences*, (Sweet and Maxwell, 1994)
Smith, P., (ed) *Criminal Law: Essays in Honour of JC Smith,* (Butterworths, 1987)
Stephen, James Fitzjames, *Liberty, Equality, Fraternity*, (1873) (R.J. White ed., Cambridge Univ. Press 1967)
Thompson, Dennis F., *Ethics in Congress: From Individual to Institutional Corruption,* (The Brookings Institute 1995)
Van der Hulst, Marc *The Parliamentary Mandate. A Global Comparative Study,* (Inter-Parliamentary Union, 2000)
Wigmore, John, *Panorama of the World's Legal systems,* (Washington Law Book Company Binding, 1936)
Williams, Robert, Moran, Johnathan, and Flanary, Rachel(eds) *Corruption in the Developed World, (The Politics of Corruption)(No. 3),* (Edward Elgar Publishing, 2000)
World Bank, *Helping Countries Combat Corruption: The Role of the World Bank,* (September 1997)

CHAPTERS IN BOOKS

Aiolfi, Gemma, and Pieth, Mark, "How to Make a Convention Work: the Organisation for Economic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law" in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement*, (Kluwer, 2002)
Blomsna, Jeroen, "Fault Elements in EU Criminal Law: The Case for Recklessness" in André Klip (ed) *Substantive Criminal Law of the European Union,* (Maklu Publishers, 2011)

Bray, John "The use of intermediaries" in Johann Graf Lambsdorff, Markus Taube and Matthias Schramm (eds) *The New Institutional Economics of Corruption,* (Routledge, 2005)
Coffee, John C., "Corporate Criminal Liability: An Introduction and Comparative Survey" in Albin Eser, Günther Heine and Barbara Huber(eds) *Criminal Liability of Legal and Collective Entities* International Colloqium, (Edition Iuscrim)
Collins, Neil and O'Shea, Mary, "Clientelism: facilitating rights and favours" in Mary Adshead and Michelle Millar, *Public Administration and Public Policy in Ireland: theory and methods*, (Routledge 2003)
Collins, Niall, "Corruption in Ireland: a review of recent cases" in Robert Williams, Johnathan Moran and Rachel Flanary(eds) *Corruption in the Developed World, (The Politics of Corruption 3)(No. 3),* (Edward Elgar Publishing, 2000)
Collins, Niall, and O'Shea, Mary "Political Corruption in Ireland", in Neil Collins and Terry Cradden (eds) *Irish Politics Today,* 4th ed., (Manchester University Press, 2000).
Cullen, Peter J., "Article 6. Statute of Limitations", in Mark Pieth, Lucinda A. Low and Peter J. Cullen (eds), *TheOECD Convention on Bribery: A Commentary,* (Cambridge University Press, 2007)
Della Porta, Donatella, and Vannucci, Alberto, "The governance mechanisms of corrupt transactions", in Johann Graf Lambsdorff, Markus Taube and Matthias Schramm (eds) *The New Institutional Economics of Corruption,* (Routledge, 2005)
Garvin, Tom "Democratic politics in Independent Ireland', in John Coakley and Michael Gallagher (eds) *Politics in the Republic of Ireland*, 3rd ed., (Routledge, 1999),
Geis, Gilbert and Dimento, Joesph "Should we Prosecute the Corporation and/or individual", in Frank Pearce and Lauren Snider (eds) *Corporate Crime: Contemporary Debates*, (University of Toronto Press Incorporated, 1996)
Génaux, Maryvonne "Early Modern Corruption in English and French Fields of Vision", in Arnold J. Heidenheimer & Michael Johnston, (eds), *Political Corruption: Concepts and Contexts*, (Transaction Publishers, 2002)
Green, Stuart P., "What's Wrong with Bribery" in R. A. Duff and Stuart P. Green, *Defining Crimes: Essays on the Special Part of the Criminal Law,* (Oxford University Press, 2005).
Green, Stuart P., "Official and Commercial Bribery: should they be distinguished?" in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law,* (Cambridge University Press, 2013)
Heidenheimer, Arnold J., "Introduction to Part I, The Context of Analysis", in Arnold J. Heidenheimer (ed), *Political Corruption: Readings in Comparative Analysis,* (Holt, Reinhart and Winston, 1970)
Johnston, Michael "Political Finance Policy, Parties and Democratic Development" in *Political Parties and Democracies in Theoretical and Practical Perspectives,* (National Democratic Institute for International Affairs, 2005)
Lanham, David, "Bribery and Corruption" in P. Smith (ed), *Criminal Law: Essays in Honour of JC Smith,* (Butterworths, 1987)
Lowenstein, Daniel, "When is a Campaign Contribution a Bribe?" in William C. Heffernan and John Kleinig (eds) *Private and Public Corruption* (Rowman & Littlefield, 2004)

Mitsilegas, Valsamis, "The aims and limits of European Union anti-corruption law" in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law,* (Cambridge University Press, 2013)
Model Criminal Code Officers Committee, *Model Criminal Code Chapt 3: Theft, Fraud, Bribery and Related Offences,* (December, 1995) available at http://www.sclj.gov.au/sclj/standing_council_crimelaw/standing_council_model/standing_council_chapter3.html, last accessed on June 25, 2013
Murphy, Gary, "Payments for no political response? Political corruption and tribunals of inquiry in Ireland, 1991 – 2003", in John Garrard and James Newell (eds), *Scandals in Past and Contemporary politics*, (Manchester University Press, 2006)
Pieth, Mark "Introduction" in Mark Pieth, Lucinda A. Low, and Peter J. Cullen (eds), *The OECD Convention on Bribery A Commentary*, (Cambridge University Press, 2007)
Sacerdoti, Giorgio "To Bribe or not to Bribe?" in OECD (ed.) *No Longer Business as Usual*, (OECD 2000)
Tadros, Victor., "Recklessness and the Duty to take Care" in Stephen Shute, A.P. Simester (eds) *Criminal Law Theory: doctrines of the general part,* (Oxford University Press, 2002),
Williams, Robert, "Aspects of Party Finance and Political Corruption" in Robert William (ed) *Party Finance and Political Corruption,* (Macmillan Press, 2000)
Zerbes, Ingeborg, "Article 1. The Offence of Bribery of Foreign Public Officials" in Mark Pieth, Lucinda A. Low, and Peter J. Cullen (eds) *The OECD Convention on Bribery A Commentary*, (Cambridge University Press, 2007)

ARTICLES

Ackermann, Susan Rose, "The Economics of Corruption" (1975) 4 Journal of Public Economics 187
Adlestein, Alan, "Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial" (1995) 37 WM & Mary L. Rev 199
Alldridge, Peter "Reforming Bribery: Law Commission Consultation Paper 185: (1) Bribery Reform and the Law – Again" [2008] Crim. L.R. 671
Alldridge, Peter, "The Law Relating to Free Lunches" (2002) 23 Comp. Law. 264
Anonymous, "Campaign Contributions and Federal Bribery Law" (1978) 92(2) Harvard Law Review 451
Anonymous, "Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution" (1954) 102 U. PA L. Rev. 630
Arlen, Jennifer, and Kraakman, Reinier H., "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes", (1997) 72 New York University Law Review 687.
Ballentine, Henry, "Separate Entity of Parent and Subsidiary Corporation" [1925] 14(1) California Law Review 12
Boles, Jeffrey, "Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine", (2012) 7(2) Northwestern Journal of Law and Social Policy, 219
Boles, Jeffrey, "Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine" (2012) 7(2) Northwestern Journal of

Law and Social Policy 219
Bontrager Unzicker, Andrea D., Note, "From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery" (2000) 7 Indiana Journal of Global Legal Studies 655
Bradley, Curtis A., "Universal Jurisdiction and U.S. Law" [2001] The University of Chicago Legal Forum 323
Breslin, John,"Banks as Fiduciaries" (1998) 5(2) CLP 47
Brown, George D., "The Gratuities Debate and Campaign Reform: How Strong is the Link" (2006) 52 Wayne Law Review 1371
Burke, Thomas F., "The Concept of Corruption in Campaign Finance Law" (1997) 14 Constitutional Commentary 137
Canfield, G., "Corporate Responsiblity and Crime" (1914) 14 Columbia Law Review 469
Carson, Thomas, "Bribery, Extortion and the Foreign Corrupt Practices Act" (1985) 14(1) Philosophy and Public Affairs 66
Coffee, John C., "'No soul to damn: no body to kick' an unscandalized enquiry into the problem of corporate punishment" (1981) 79 Michigan Law Review 386
Coffey, Gerard, "Codifying the meaning of intention in the criminal law" (2009) Journal of Criminal Law 394
Collins, Niall and O Raghallaigh, Colm "Political Sleaze in the Republic of Ireland" 48(4) Parliamentary Affairs 697
Colvin, E.,"Corporate personality and criminal liability" (1995) 6 Criminal Law Forum 1
Corr, Christopher F., & Lawler, Judd, "Damned if You Do, Damned if You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures" (1999) 32 Vanderbilt Journal of Transnational Law 1249
Cowan, A., "Scarlet letters for corporations? Punishment by publicity under the new sentencingguidelines" (1992) 65 Southern California Law Review 2387
Cranor, Carl F. ,"Legal Moralism Reconsidered" (1979) 89(2) Ethics 147
D'Andrade, Kendrall, "Bribery" (1985) 4 Journal of Business Ethics 239
Danley, John, "Toward a Theory of Bribery" (1983) Business and Professional Ethics 19
Davis, Kevin E. "Self Interest and Altruism in the Deterrence of Transnational Bribery" (2002) 4(2) American Law and Economics Review 314
De Maglie, Christina "Models of Corporate Criminal Liability in Comparative Law" (2005) 4(3) Washington University Global Studies Law Review 547
Dripps, Donald A., "The Constitutional Status of the Reasonable Doubt Rule" (1987) 75 Calif L Rev 1665
Driscoll, Lois Regent "The Illegality of Bribery: Its Roots, Essence, and Universality" (1984) 14 Cap. U.L. Rev 1
Dworkin, Gerard, "Paternalism" (1972) 56(1) The Monist 64
Eliasberg, Wladimir "Corruption and Bribery" (1951) 42(3) Journal of Criminal Law, Criminology, and Police Science 317
Epstein, Richard, "The Harm Principle – And How it Grew" (1995) 45(4) University of Toronto Law Journal 369
Fennell, Phil and Thomas, Philip A., "Corruption in England and Wales; An Historical Analysis" (1983) 11 International Journal of the Sociology of Law 167
Fisse, Brent "The attribution of criminal liability to corporations: a statutory model" (1991) 13 Sydney Law Review 277

Fisse, Brent, "Sentencing options against corporations" (1990) 1 Criminal Law Forum 211
Friedman, L., "In defense of corporate criminal liability" (2000) 23 Harvard Journal of Law and Public Policy 833
Gawey, John S., "The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes" (2011) 87 Notre Dame L. Rev. 383
Gayed, Jeremy N., Note, "Paved with Good Intentions" (2003) 78 Notre Dame L. Rev. 1731
Gayed, Jeremy N., Note, "Why Corrupt State of Mind is an Essential Element for Hobbs Act Extortion Under Color of Official Right" (2003) 78 Notre Dame L. Review 1731
Gobert, James, "Controlling Corporate Criminality: Penal Sanctions and Beyond" (1998) 2 Web Journal of Current Legal Issues
Gobert, James "Corporate Criminality: four models of fault" (1994) 14 Legal Studies 393
Gold, Ilissa, B., "Explicit, Express and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s" [2011] 26 Wash U.J.L. & Pol'y 261
Goodin, Robert E., "An Epistemic Case for Legal Moralism" (2010) 30(4) Oxford Journal of Legal Studies 615
Green, Stuart P. and Kugler, Matthew, "Public Perceptions of White Collar Crime Seriousness: Bribery, Perjury and Fraud" (2012) 75 Law and Contemporary Problems 33
Greenawalt, Kent "Legal Enforcement of Morality" (1995) 85 J. Criminal Law & Criminology 710
Groenendijk, Nico, "A principal-agent model of corruption", (1997) 27 Crime, Law & Social Change 207
Hamdani, Assaf & Klement, Alon, "Corporate Crime and Deterrence" (2008) 61 Stan L. Rev. 271
Hamilton, C., "The Presumption of Innocence in Irish Criminal Law: Recent Trends and Possible Exceptions" [2011] 2(1) I.J.L.S. 3
Harcourt, Bernard "The Collapse of the Harm Principle" (1999) 90 J. Crim. L. & Criminology 109
Hardy, Peter D. "The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions under the Hobbs Act" [1994] 28 U.Mich J.L. Reform 409
Hasnas, John, "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" available at http://ssrn.com/abstract=1457771 last accessed August 20, 2013
Henning, Peter J. "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law" (2001) 18(3) Arizona Journal of International and Comparative Law 793
Hess, David and Dunfee, Thomas W. "Fighting Corruption: A Principled Approach: The C2 Principles (Combating Corruption)" (2000) 33 Cornell International Law Journal 593
Higgins, Imelda "Parliamentary Privilege and Free Speech in the Oireachtas" (2010) 17(1) Dublin University Law Journal 94
Higgins, Imelda "The Lengthening Arm of Bribery Law" [2011] 18(5) Commercial Law Practitioner 104
Higgins, Imelda "The Prevention of Corruption (Amendment) Act 2010, Things Done but Things Left to Do – Part 1" [2011] 21(4) Irish Journal of Criminal Law 86

Higgins, Imelda "The Prevention of Corruption (Amendment) Act 2010, Things Done but Things Left to Do – Part 2" [2012] 22(1) Irish Journal of Criminal Law 2
Higgins, Imelda, "Developments in Corruption Law and Commercial Entities", [2012] 4(4) Irish Business Law Quarterly 14
Holtung, Nils "The Harm Principle" (2002) 5(4) Ethical Theory and Moral Practice 357, 360.
Horder, Jeremy, "Bribery as a Form of Criminal Wrongdoing" (2011) Law Quarterly Review 37
Horgan, "Fate of Public Funding Act Text for New Dáil", Irish Times, June 19, 1997
James Jr, Harvey, S. "When is a Bribe a Bribe? Teaching a Workable Definition of Bribery" (2002) 6 Teaching Business Ethics 199
Jefferson, M., "Corporate Criminal Liability in the 1990's", (2000) 64 Journal of Criminal Law 106
Jennings, Robert, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) 33 Brit YB of Int'l L 146
Khana, V.S., "Corporate Criminal Liability: What Purpose Does it Serve?" (1996) 109(7) Harvard Law Review 1477
Kuflik, A., "Liberalism, Legal Moralism and Moral Disagreement" (2005) 22(2) Journal of Applied Philosophy 185
Lancaster, Thomas D. & Montionola, Gabriella R., "Towards a methodology for the comparative study of political corruption" (1997) 27 Crime, Law & Social Change 185
Lederman, E., "Models for imposing corporate criminal liability: from adaptation and imitation towards aggregation and the search for self-identity" (2000) 4 Buffalo Criminal Law Review 641
Leff, Nathanial, "Economic Development through Bureaucratic Corruption", (1964) 8(3) American Behavioral Scientist 8
Lindgren, James "The Elusive Distinction between Bribery and Extortion: From the Common Law to the Hobbs Act" (1988) 35 UCLA L. Rev. 815
Lindgren, James "The Theory, History, and Practice of the Bribery-Extortion Distinction" (1992) 141 U.Pa.L.Rev 1695
Lokan, Keith, "The OECD Anti-Bribery Convention: Coverage of Foreign Subsidiaries" (2001) 33 Geo. Wash. Int'l L. Rev. 325
Lowenstein, Daniel "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted" 18 Hofstra L. Rev. 301
Lowenstein, Daniel, "Political Bribery and the Intermediate Theory of Politics", 32 U.C.L.A. L. Rev. 784
Lowenstein, Daniel, "For God, for Country or for Me?" (1986) 74 Calif. L. Rev. 1479
Marshall, S.E., and Duff, R.A., "Criminalization and Sharing Wrongs" (1998) 11 Canadian Journal of Law and Jurisprudence 7
Martin, Timothy A., "The Development of International Bribery Law" (1999) 14(2) Natural Resources & Environment 95
Mauro, Paul, "Corruption and Growth" (1995) 110(3) Quarterly Journal of Economics 681
McGee, David, "The scope of parliamentary privilege" [2004] NZLJ 84
Mills, David and Weisberg, Robert, "Corrupting the Harm Requirement in White Collar Crime" (2008) 60 Stan. L. Rev. 1371
Moore Dickerson, Claire, "Political Corruption: Free-Flowing Opportunism" (1999) 14 Connecticut Journal. International Law 393
Nagel, Ernest, "The Enforcement of Morals" (1968) 28(3) The Humanist 20

Ní Raifeartaigh, Una, "Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence" (1995) 5 I.C.L.J. 135
Noonan, John T., "Bribery" (1985-1987) 2 Notre Dame J.L. Ethics & Pub. Pol'y 741
Nye, Joesph S., "Corruption and Political Development: A Cost-Benefit Analysis", (1967) 61(2) American Political Science Review 417
O'Haplin, Eunan, "'Ah, they've given us a good bit of stuff...' tribunals and Irish political life at the turn of the century" (2000) 15(1) Irish Political Studies 183
Ochoa, Tyler, & Wistrich, Andrew, (1997) "The Puzzling Purpose of Statutes of Limitations" 28 Pac L.J. 453
Ozbudun, Ergon, "Constitutional Debates on Parliamentary Inviolability in Turkey" (2005) 1 European Constitutional Law Review 272
Pacini, Carl, Swingen, Judyth A., Rogers, Hudson, "The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public officials" (2002) 37(4) Journal of Business Ethics 385
Phillips, Michael, "Bribery" (1984) 94(4) Ethics 621
Powell, Lindsay, "Unraveling Criminal Statutes of Limitations" (2008) 45 Am Crim. L. Rev. 115
Ring, Sinead, "Beyond the Reach of Justice? Complainant Delay in Historic Child Sex Abuse Cases and the Right to a Fair Trial" [2009] 2 Judicial Studies Institute Journal, 162
Salbu, Steven R., "Battling Global Corruption in the New Millenium" (1999) 31 Law and Policy in International Business 47
Sayre, Francis Bowes, "Mens Rea" (1932) 45 Harvard Law Review 974
Sherriff, Andrew M., O'Brien, Gary, Punch, Eddie, and Cannon, Matthew, "The Dunnes payments scandal, Charles Haughey and contemporary Irish Political culture" (1998) 30 Crime, Law & Social Change, 43
Sope, William, "The Mandatory Exclusions for Corruption in the New EC Procurement Directives" (2006) 31(5) E.L. Rev. 711
Sullivan, G.R., "Proscribing Corruption – Some Comments on the Law Commission's Report" [1998] Crim L.R. 547
Tamashasky, Eric J., "The Lewis Carroll Offense: The Ever-Changing Meaning of 'Corruptly' within the Federal Criminal Law", (2004 – 2005) 31 J. Legis 129
Tanzi, Vito, "Corruption Around the World, Causes, Consequences, Scope, and Cures" 45 IMF Staff papers, (December, 1988), No. 4
Thompson, Dennis F., "Paradoxes of Government Ethics" (1992) 52(3) Public Administration Review 254
Turow, Scott, "What's wrong with Bribery" (1985) 4 Journal of Business Ethics 249
Van Der Vyner, John D., "The International Criminal Court and the Concept of Mens Rea in International Criminal Law" [2004] 12 University of Miami International and Comparative Law Review, 57
Weissman, Andrew "Rethinking Criminal Corporate Liability" (2007) 82(2) Indiana Law Journal 411
Wells, Celia, "Corporate Criminal Developments in Europe" (2001) 39 Law Society Journal 62
Whitaker, Charles N., "Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach" (1992) 78 Va. L. Rev. 1617
Wigley, Simon, "Parliamentary Immunity in Democratizing Countries. The Case of Turkey" (2009) 31 Human Rights Quarterly 567

Wigley, Simon, "Parliamentary Immunity: Protecting Democracy or Protecting Corruption" (2003) 11(1) Journal of Political Philosophy 23
Wilton, G. W., "The Prevention of Corruption Act, 1906" (1906-1097) 18 Juridical Review 370
Winckler, James L., "Drafting an Effective Bribery Statute" (1972) 1 Am. J. Crim L, 210
Yarbrough, Stephen C., "The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials" (1995) 31 Tulsa Law Journal 781
Yu, Gaoneng, "The 'Trading Model' of Bribery: Power, Interest and Trilateral Structure" (2008) 72 Journal of Criminal Law 441
Zimring, Franklin E. and Johnson, David T., "On the Comparative Study of Corruption" (2007) 20 Pac. McGeorge Global Business and Development Law Journal 243

PAPERS

Abbink, Klaus and Serra, Danila, *Anti-Corruption Policies: Lessons from the Lab* (October 13, 2011). Available at SSRN: http://ssrn.com/abstract=1971779 or http://dx.doi.org/10.2139/ssrn.1971779,
Csonka, Peter, *The Council of Europe's Anti-Corruption Treaties*, a paper given at the 9th International Anti-Corruption Conference, Durban (1999)
Drughov, Mikhail, Hamman, John and Serra, Danila, *Intermediaries in Corruption, An Experiment* (April 17, 2012). Available at SSRN: http://ssrn.com/abstract=1838591 or http://dx.doi.org/10.2139/ssrn.1838591
Engel, Christoph, Georg, Sebastian J., and Yu, Gaoneng, *Symmetric v Asymmetric Punishment Regimes for Bribery*, Preprints of the Max Planck Institute for Research on Collective Goods, Bonn, 2012/1
Faure, Michael, Goodwin, Morag, Weber, Franziska, *The lex certa principle in criminal law: reconciling economics and human rights,* available at http://www.eale.org/conference/eale2012/paper/view/170, last downloaded on August, 26, 2013
Gounari, Zoe, *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Theory and Practice*, available at www.dundee.ac.uk/cepml/car.html/CAR9_ARTICLE 2.pdf, last accessed on June 19, 2013
Graf Lambsdorff, Johann, and Nell, Mathias, *Fighting Corruption with Asymmetric Penalties and Leniency*, Center for Globalization and Europeanization of the Economy, Discussion Paper 59 (2007). http://www.eale.org/conference/eale2012/paper/view/170/68, last accessed July 11, 2013
Low, Lucinda A., *The United Nations Convention Against Corruption: The Globalization of Anti-Corruption Standards*, prepared for the IBA/ICC/OECD Conference on "The Awakening Giant of Anti-Corruption Enforcement," Paris 22-23 April 2004
OECD, *Typologies on the Role of Intermediaries in International Business Transactions*, Final Report, (9 October 2009).
Petersen, Thomas, S. *What is Legal Moralism.* (2011) 12(1) SATS 80, available at http://philpapers.org/archive/PETWIL, last accessed August

1, 2013.
Smith, Steven D., *The Hallowness of the Harm Principle*, (2004) University of San Diego School of Law Public Law and Legal Theory Research Paper Series, Paper 17,
Submission of New South Wales Lawyers, *Personal Liability for Corporate Fault* (2005) available at www.lawsociety.com.au
Tanzi, Vito, *Corruption Around the World, Causes, Consequences, Scope and Cures*, Vol. 45, IMF Staff Papers, (December 1998), No. 4, p. 578
Yolcu, Serkan, *Parliamentary Inviolability v. Right to a Fair Trial*, http://wwrn.com/abstract=1912200.

CONSULTATION PAPERS AND REPORTS

Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution.* (Stationery Office, London, 1957)
Expert Group Report, *Corporate Homicide*, (Scotland, 2005)
House of Commons, *Parliamentary Privilege* (April, 2012)
IMF Policy Development and Review Department, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Sept 18, 2001)
International Bar Association, *Report of the IBA, 'Report of the Task Force on Extraterritorical Jurisdiction'* (February 6, 2009)
Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First Report*, Joint Commitee Reports, Session 1998-99, 9 April 1999, HC 214-I.
Joint Committee on the Draft Corruption Bill, Session 2002-2003 HL Paper 157, HC 705 (2003)
Law Commission, *Fiduciary Duties and Regulatory Rules* Consultation Paper No 124, (Stationary Office, London, 1995)
Law Commission, *Legislating the Criminal Code Corruption* Consultation Paper No 145 (Stationary Office, London, 1997)
Law Commission, *Legislating the Criminal Code Corruption*, Report (Law Com No. 248) (Stationary Office, London, 1998)
Law Commission, *Reforming Bribery*, Consultation Paper 185 (Stationary Office, London, 2007)
Law Commission, *Reforming Bribery*, Report (Law Com No. 313) (Stationary Office, London, 2008)
Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement,* Report (No 102 1980)
Law Commission, *Codification of the criminal law: general principles: inchoate offences: conspiracy, attempt and incitement* (WP No 50 1973)
Law Reform Commission *Report on Corporate Killing*, (LRC 77-2005)
Law Reform Commission, *Consultation Paper on Corporate Killing,* (LRC-CR 26-2003),
Law Reform Commission, *Consultation Paper onStatutory Drafting and Interpretation: Plain Language and the Law* (LRC-CP14-1999)
Law Reform Commission, Consultation Paper, *Inchoate Offences*, (LRC CP48-2008)
Law Reform Commission, Report, *Inchoate Offences* (LRC 99 – 2010)
Model Criminal Code Officers Committee, *Model Criminal Code Chapt 3: Theft, Fraud, Bribery and Related Offences* (December, 1995)

available at http://www.sclj.gov.au/sclj/standing_council_crimelaw/standing_council_model/standing_council_chapter3.html, last accessed on June 25, 2013
New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33, 1996
New South Wales, Law Reform Commission *Sentencing: Corporate Offenders* Report 102(2003)
OECD, Canada: Review of Implementation of the Convention and the 1997 Recommendation, (23 July 1999)
OECD UK: Phase 2 Report on the Application of the Convention on Corruption of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on the Corruption of Foreign Public Officials in International Business Transactions, (17 March, 2005)
Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (Cole Commission, Australia, 2006)
Report of the Special Committee of Secret Commissions of the London Chamber of Commerce, (1899)
Report of the Tribunal appointed by the Taoiseach on 4 July 1975 (Prl 4745) (allegations against Minister for Local Government)
Report of the Tribunal appointed by the Taoiseach on November 7 1947 (P No 8576) (sale of Locke's distillery).
Rodrigues, Mark *Cabinet Confidentiality*, Parliamentary Library, Parliament of Australia (28 May 2010)
See Gareth Griffith, *Parliamentary privilege: first principles and recent applications,* Briefing Paper No 1/09, NSW Parliamentary Library Research Service.
UK Government White Paper on Corruption, *Raising Standards and Preserving Integrity: The Prevention of Corruption* (Cm 4759, June 2000)
Zerk, Jennifer A., *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory AreasA report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights,* Working Paper No. 59 (2010)