



**Submission to the Criminal
Justice (Corruption) Bill 2012**

**Association for Criminal Justice
Research & Development Ltd**

**Submission compiled by:
Ruth Donnellan**

June 2013

Draft Scheme Criminal Justice (Corruption) Bill 2012 (the “Draft Scheme”)

Introduction and Background

The Association for Criminal Justice Research and Development Ltd (“ACJRD”) seeks to promote reform, development and effective operation of the criminal justice system. It does so mainly by providing a forum where experienced personnel can discuss ways of working in an informal setting, by promoting study and research in the field of criminal justice and by promoting the highest standards of practice by professionals associated with criminal justice.

Its activities are designed to lead to increased mutual understanding and provide insights into the problems with which all are confronted. In opening unofficial channels of communication, it improves co-operation between the different parts of the criminal justice system.

Analysis and Recommendations

1. Head 1: Definition of “Corruptly”

The definition of the term “corruptly” is complex, overly broad and some terms are ambiguous.

The definition of “Corruptly” is currently found in section 1 [presumably] of the Prevention of Corruption (Amendment) Act 2010. It reads as follows: “*corruptly* includes 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.”

The Draft Scheme defines the term “corruptly” to include doing any act or omission: a) in breach of duty; b) without due impartiality; c) without lawful authority; d) in breach of a relevant code of ethics or discipline; e) in pursuit of undue benefit; f) in a deceitful, dishonest or misleading manner, or g) with an improper purpose. This very broad definition reflects the variety of offences in the draft scheme which use this term, namely, the offences of: Active and Passive Corruption; Corruption in Office; Bribery of a Foreign Public Official; Using a Document to Deceive; and Intimidation.

Not all aspects of this definition are relevant to each of these offences. Defining the term so broadly may obscure the type of conduct which the act is in reality seeking to criminalise.

It has been held that dishonesty is not considered necessary for the purposes of section 1(1) of the Prevention of Corruption Act 1906, regardless of whether the corruption involved a private or public organisation.¹ It is submitted that the inclusion of the additional requirement of dishonesty may make this difficult to prove in practice (two *mens rea* elements).

The Draft Scheme does not expressly deal with private corruption. It is submitted that the position should be clarified. The Bribery Act 2010 in the UK clearly relates to both private and public corruption.

A number of the terms used in the definition are ambiguous including, in particular “in breach of duty” and “in breach of a relevant code of ethics or discipline”. Clarity is needed on how duties are to be identified and defined for the purposes of determining the existence of a breach.

Head 10 paragraph 7 defines “relevant code” as any code of ethics, code of discipline, disciplinary regulations or other similar instrument relating to the ethical standards of behaviour applicable to an Irish public official that has been prescribed for the purposes of this head. Is this definition intended to apply to the entire Draft Scheme?

2. Head 1: “Irish Public Official”

The term “Irish Public Official” as defined, includes directors of companies.

Under the proposed draft scheme the term “Irish Public Official” is defined so as to include “a director”. In turn, that scheme defines the term “director” as meaning “a director within the meaning of the Companies Acts, but includes in the case of a public body that is not a company (within the meaning of the Companies Acts) and is specified in subparagraph (8), (10), or (14), or stands prescribed for the purposes of subparagraph (18), of paragraph 1 of the First Schedule, a person who is a member of it or a member of any board or other board that controls, manages or administers it.”

There does not appear to be any clear basis for including directors of companies which exclusively carry out private commercial activities within the term “Irish Public Official”. The consequences of that inclusion is that such directors fall within the offences of Active and Passive Trading in Influence, Corruption in Office as well as within the scope of some of the presumptions of corruption contained in the Draft Scheme. These offences and presumptions however are, traditionally, specifically concerned with abuses of public office. In addition, directors of foreign companies are not included within the definition.

Paragraph k) states that “a judge of a court in the State” is included in the definition. It is submitted that this should include a judge of a tribunal in the State. However, paragraph l) includes “any other person employed by or acting on behalf of the public” which would include tribunal judges within the definition.

¹ Re: Dishonesty: In *R v Godden-Wood* [2001] EWCA Crim 1586

3. Head 1: “Foreign Public Official”

Under Section 2(5) (c), Prevention of Corruption (Amendment) Act 2001 the bribery of a foreign public official could be committed by an “agent”. The term “agent” covers the concept of “foreign public official” as used in the Criminal Law Convention on Corruption.²

The definition of “agent” mirrors the definition in the proposed Draft Scheme, however, in the draft scheme section there is an additional sub-clause k) which includes “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.”

4. Head 2: Active and Passive Corruption

Clarify the meaning of the term “position”

The proposed active and passive corruption offences move from the agent/principal focus of the offences contained in the Prevention of Corruption Act 1906, as amended. Therefore, the wrong criminalised by those offences is no longer framed in terms of breach of the duty of loyalty owed by an agent to his or her principal. Instead, those offences cover all improper conduct, which includes any conduct motivated by the receipt of a corrupt payment.

The offences apply to payments made or received “as an inducement to, or reward for, or otherwise on account of any person doing any act or making any omission in relation to his or her office, employment, position or business”. With the exception of the term “position”, these terms clearly relate to professional activities. However, it is not entirely clear what is meant by the term “position”.

In the explanatory memorandum to the Prevention of Corruption (Amendment) Act 2001 it seems that “positions” means positions of employment in a public body. This should be clarified in the Draft Scheme.

5. Head 3: Active and Passive Trading in Influence

The scope of the offences of Active and Passive Trading in Influence should be harmonised

The introduction of such offences has been requested by various international organisations of which Ireland is a member.³ However, given the broad scope of the active and passive corruption offences, it is not clear what additional types of behaviour is criminalised by the offences of Active and Passive Trading in Influence.

² GRECO Third Round Report on Ireland 2009

³ This enacts the GRECO Recommendations. Paragraph 71 of the Greco Third Round Report on Ireland 2009 recommended that, legislation be introduced “to clarify the law by establishing an autonomous offence of trading in influence in line with Article 12 of the Criminal Law Convention on Corruption (ETS 173).”

The active and passive trading in influence offences should be harmonised in the draft scheme. The offence of active trading in influence covers all acts or omissions of a public official while the offence of passive trading in influence only covers acts or omissions in relation to his or her office employment, position or business (reflecting the wording of the corruption offences).

6. Head 4: Corruption in Office

This appears to be a re-enactment of the common law offence of misbehaviour in public office (which was never prosecuted) and of the offence of corruption in office contained in the Prevention of Corruption (Amendment) Act 2001.

7. Head 6: Making Reckless Payments

The offence of making reckless payments should be confined to situations where the payment is made for the benefit of the person giving the gift, consideration or advantage to another person.

This appears to be a broad catch-all provision. The ACJRD notes that in its recommendations, the Mahon Tribunal only recommended the introduction of a reckless payments offence in situations where the payments received by a person were used to pay bribes to further the interests of the person who made the payments/conferred the advantage. As currently formulated this head may place an obligation on any person making payments to monitor the use that those payments are put to.

8. Head 7: Using a Document to Deceive

This offence has a double *mens rea*: corruptly and with the intention of inducing another person. This is quite an onerous burden of proof.

Section 25 Criminal Justice (Theft and Fraud Offences) Act 2001 contains a definition of forgery. The difference between the two offences appears to be the intention – the intention for forgery is that the false document be accepted as genuine, whereas the intention for “using a document to deceive” is the intention of inducing a person do something or make some omission in relation to their office/employment.

The final requirement “to the prejudice of that person or any other person” does not appear to contribute anything to the offence of using a document to deceive and it may unduly restrict its scope. Specifically, where a person is induced to do something on the basis of a materially false, erroneous or defective statement, they are effectively being induced to make a decision based on false premises. This is in and of itself sufficient prejudice.

9. Head 8: Intimidation

The definition of harm should be clarified.

The proposed offence of intimidation will apply where a person corruptly threatens loss, disadvantage or injury to another person with the intention of influencing any person to

do any act or make any omission. The definition of harm, loss or injury should be clarified.

The offence of intimidation should be confined to situations where the person threatens a loss, disadvantage or injury which is itself unlawful. Otherwise the scope of the offence may be unduly broad and could capture behaviour that is not intended to come within the scope of the Draft Scheme.

10. Head 10: Presumptions

Consideration should be given to extending the definition of a connected person to legal entities

The presumptions of corruption set out in Head 10 of the Draft Scheme arise in connection with gifts, consideration or advantages given to either an Irish public official or a connected person of the official. The term “connected persons” covers a public official’s family and close business associates. However, it does not cover legal entities.

Given the frequency with which corrupt benefits tend to be channelled through corporate entities, the ACJRD submits that consideration should be given to defining such entities themselves as “connected persons”. A corporate entity in which a public official has a controlling interest should be considered to be a connected person of that official. In addition, it may be advisable to extend the definition to include, for example, entities in which the public official is an officeholder or otherwise plays a leading role.

Consideration should be given to confining the presumption of corruption which arises in relation to benefits conferred in breach of a relevant code to the public official in receipt of the benefit

The third presumption of corruption in relation to gifts, consideration or advantages arises when the relevant benefit is conferred in breach of a relevant code of conduct and applies both in relation to the gift giver and its receiver. It may be unduly onerous to expect a gift giver to be aware of the provisions of relevant codes of conduct.

11. Head 12: Presumption of Corrupt Enrichment

The disclosure requirements under the Ethics Acts 1995 and 2001 will need to be extended to ensure the effectiveness of the presumption of corrupt enrichment. Moreover, this presumption should also arise in relation to disclosures under the Local Government Act 2001.

The proposed presumption of corrupt enrichment is intended to arise where an Irish public official has a standard of living which is not commensurate with his or her declaration of registrable interests under the Ethics Acts 1995 and 2001. Both the Mahon Tribunal and the Standards in Public Office Commission have recommended the introduction of more comprehensive disclosure requirements. Those declarations do not at present provide a comprehensive overview of a public official’s assets and liabilities. For this presumption to be effective, public officials will be required to declare all their assets and liabilities.

The ACJRD notes that the proposed presumption only applies to the disclosure requirements under the Ethics Acts 1995 and 2001. However, as corrupt enrichment may also arise at local level, therefore the presumption should also arise where a public official has a standard of living which is not commensurate with his or her declaration of interests under the Local Government Act 2001. Again, to be effective, the introduction of such a presumption would also require more complete disclosures of assets and liabilities to be made under that Act.

12. Head 13: Offences by Bodies Corporate and Unincorporated Bodies

Derivative managerial liability for offences committed by bodies corporate should arise where that offence is, inter alia, attributable to any neglect on the part of a relevant person.

Under the proposed scheme, derivative managerial liability for offences committed by bodies corporate will arise where a body corporate commits a corruption offence and that offence is attributable, inter alia, to “any wilful neglect” on the part of an officer of that body. The Prevention of Corruption (Amendment) Act 2010 amended the relevant section of the Prevention of Corruption (Amendment) Act 2001 so as to remove the requirement that the neglect be wilful. It is recommended that the draft scheme should reflect this change.

The proposed extraterritorial provisions contained in the Draft Scheme mirror comparable UK legislation and reflect the recommendations of the Mahon Tribunal.

13. Head 17: Juries

This is broader than the existing section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and provisions relating to the provision of information to juries already in the Criminal Justice Act 2011. It appears that this will replace these piecemeal provisions and apply to all indictable offences.

14. Head 18: Penalties

The existing penalties under the Prevention of Corruption Acts 1889-2010 for conviction on indictment are a term of imprisonment not exceeding 10 years and/or an unlimited fine.

The penalties under the proposed Draft Scheme are as follows: On summary conviction a Class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment a term of imprisonment not exceeding 10 years and/or a fine and/or forfeiture of the gift, consideration or advantage.

There is a new penalty of forfeiture of office, position or employment contained in head 18 for offences committed under the proposed draft scheme with the exception of an offence under head 3 (Active and Passive Trading in Influence). The following penalties may only be applied where necessary in “restoring public confidence in the public administration of the State and where it is in the interest of justice to do so”. Some guidance on the meaning of this would be useful.

Where a person is convicted on indictment of an offence under the Draft Scheme, other than an offence under head 3 in relation to an office, position or employment as a public official held by that person at the time the offence was committed, a court may, in addition to the penalties provided in subhead (1), order the forfeiture of any office, position or employment as a relevant Irish public official held by that person.

The person will be excluded from seeking or holding any office, position or employment as an Irish public official, other than membership of Dáil Éireann, for a specified period not exceeding 10 years.

It is not clear why the penalty provisions contained in the draft scheme exclude a judge or member of the Garda Síochána Ombudsman.

15. Head 19: Seizure

The proposed scheme contains specific confiscation provisions applicable to bribes. However, the Prevention of Corruption (Amendment) Act 2005 gave the Criminal Assets Bureau powers in relation to corruption in the form of the corrupt enrichment order.⁴

While the existing Prevention of Corruption Acts 1889 – 2010 contain such provisions, it seems unnecessary to provide for these in the consolidated corruption bill. Specifically, the Criminal Justice Act 1994 already contains confiscation provisions applicable to indictable offences.

16. The Active and Passive Corruption Offence set out in the Criminal Justice (Theft and Fraud) Offences Act 2001 should be repealed.

The Draft Scheme provides for a consolidated statute to replace and reform the provisions of the Prevention of Corruption Acts 1889 and 2001. However, the Criminal Justice (Theft and Fraud) Offences Act 2001 also provides for active and passive corruption offences. The OECD, in particular, has expressed concern regarding the existence of these separate corruption offences and has recommended their harmonisation. The ACJRD therefore suggests that a provision be included in the consolidated bill providing for the abolition of those offences and any consequent amendments which may be necessary to that bill, or other acts.

17. Head 25

In relation to the amendment to S 7 Criminal Procedure Act 2010: it is proposed to repeal the Prevention of Corruption Acts yet there is reference to the Prevention of Corruption Act 1906.

⁴ Under section 23 of the Proceeds of Crime Act 2005, the Criminal Assets Bureau has power to seize a suspected bribe