Anti-Corruption and Promotion of Ethics Project

Working Group on Criminality

THE CRIMINAL LAW RELATING TO CORRUPTION

Legal Assistance Centre
&
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SUMMARY AND RECOMMENDATIONS

PART I: INTRODUCTION

This Working Paper is the product of the Working Group on Criminality, which is one of six Working Groups established as part of the anti-corruption and Promotion of Ethics Project launched in March 1997. It draws on legislation and commentary from numerous countries -- including South Africa, Botswana, Zimbabwe, England, Canada, Australia, Malaysia, Singapore, Hong Kong and the USA -- to make recommendations for a new criminal statute on corruption for Namibia.

PART II: THE SCOPE AND THEORY OF CRIMINAL LAWS ON CORRUPTION

The meaning of corruption

Corruption has been defined as "the perversion of the integrity or fidelity of a person in relationship to the discharge of his duties". This Working Group has taken a similar view by approaching corruption as the abuse of power or position.

Statute law on corruption in Namibia and in many other jurisdictions has traditionally focused on the offer and acceptance of bribes. Bribery is not the only form of corruption, however. A number of other countries have supplemented bribery offences with offences aimed at other forms of abuse of power and position. This Working Group takes the view that a criminal statute on corruption should cover the broadest possible range of corrupt behaviour.

Corruption and breach of duty

The UK Law Commission analyses corruption in terms of the types of actions which can lead to a breach of duty. It places these actions into three broad categories: (1) inducements, (2) threats and (3) deception. Statutes on bribery are aimed primarily at inducements, but a comprehensive anti-corruption statute should attempt to cover all the types of actions and pressures which tend to pervert the integrity of positions of power or authority. The criminal provisions proposed by this Working Group cover corrupt actions from all three of these categories.

There are three broad approaches which can be taken in an effort to prevent corrupt breaches of duty: (1) punishing knowing breaches of duty regardless of inducements; (2) punishing the acceptance of benefits, regardless of whether this is accompanied by a breach of duty; and (3) focusing on the nexus between the temptation and the breach of duty. We feel that there should be many strings to the bow, particularly since corruption is a crime which is notoriously hard to prove. The proposals put forward in this paper suggest a broadly-formulated offence of bribery (as in many other jurisdictions), along with additional offences aimed at abuse of power for the purposes of showing favour or disfavour to any person (as in Zimbabwe) and the improper receipt of benefits (as in Canada).

While the idea of breach of duty is a useful framework for analysis, a person in a position of responsibility can act corruptly without necessarily breaching his or her

duty. This can occur, for example, in a situation where a person uses confidential information acquired in his or her position for personal profit, or makes use of the office computer outside of working hours for personal advantage. The person in question may be performing his or her job properly, without causing a loss to the principal or to any member of the public, whilst still abusing the position for personal gain. The offences proposed will most often relate to breaches of duty in practice, but need not be strictly limited to breaches of duty in their formulation. Self-dealing, conflicts of interest and improper use of information are all covered in the offences proposed in this paper.

Public sector versus private sector

One question which must be addressed is whether a modern law on corruption should draw any distinction between the public sector and the private sector, either in the formulation of offences or in the severity of the punishment which can be imposed.

Integrity in government is arguably of greater importance to the overall functioning of society than integrity in the private sector and thus deserving of greater protection. Public bodies are more vulnerable to corruption than private bodies, which are better able to look after themselves; it has been said that "in the case of a public body what is everybody's business is nobody's business." It can also be argued that higher standards of conduct should be expected of public servants, given the trust and responsibility entailed in the holding of a public office or employment.

On the other hand, the boundaries between the public sector and the private sector are becoming increasingly blurred. Functions which were once performed by public bodies are sub-contracted to private companies, there is an increasing trend towards joint public-private ventures, and many functions which were once performed by the public sector (such as utilities) have been completely privatised in many countries. It can be argued that the public should be able to have confidence in the integrity of both the public sector and the private sector. Commercial bribery also undermines fair competition, leads to increased consumer prices, and can have an adverse effect on the entire economy of a country, thus retarding development.

This Working Group recommends that a modern anti-corruption statute should in its essentials apply without distinction to the public sector, the private sector and hybrids such as parastatal enterprises. However, we feel that the statute should include some additional provisions aimed at the public sector (including parastatals) and at elected officials, on the grounds that these people owe a special form of duty to the public at large which warrants particularly stringent expectations of integrity.

PART III: THE PRESENT LAW IN NAMIBIA

This paper includes a discussion of the laws already in force which can used to combat corruption. Because of the piecemeal approach taken up to now, the list of laws in force on this topic is probably not comprehensive, but it is broad enough to give an indication of the present state of affairs.

There is only one statute in force which is aimed specifically at corruption -- the Prevention of Corruption Ordinance 1 of 1928, which is aimed at bribery in both public and private sectors. This statute supplements the common law offence of

bribery which applies only to state officials. Because this statute is seriously flawed, this Working Group proposes that an entirely new criminal statute on corruption be drafted on the basis of international examples, with reference to the present statute where it is helpful. This new statute should attempt to generalise the key provisions on specific forms of corruption in other Namibian legislation, without necessarily replacing all such provisions. It should not, however, attempt to reach evasions of taxes and duties or election fraud, as these specialised problems are best dealt with in the statutes already pertaining to these areas.

A comprehensive corruption statute will contain elements which overlap with the common-law crimes of bribery, fraud and extortion. It will raise the question of the disposition of any benefits improperly accrued by means of the corrupt act, but will not otherwise conceptualise corruption as theft. There is no need for any of the common-law crimes in question to be explicitly repealed. Fraud and extortion will certainly occur in contexts which do not constitute corruption. If the common-law crime of bribery is completely superseded by the new corruption statute, then it will fall away from disuse. But the new statute should first be tested in practice to allow an opportunity for unanticipated gaps to be discovered before it will be safe to assume that it applies to all situations which are covered by the common-law crime of bribery.

PART IV: FORMULATING A MODERN CORRUPTION STATUTE

Overview

After considering the existing law in Namibia and the general approaches taken by other jurisdictions, the Working Group is of the opinion that a new criminal statute on corruption should cover the following topics in its substantive provisions:
bribery (public and private sectors)
corruption by means of threats (public and private sectors)
corruption by means of fraud or deception (public and private sectors)
“influence-peddling” (certain persons in both public and private sectors)
abuse of office to show undue favour or disfavour (public sector)
acceptance of unauthorised benefits (public sector)
tenders and auctions (public sector)
self-dealing and conflicts of interest (public sector)
improper use of information and public property (public sector)
wrongful disposal of public property (public sector)
loss to state revenue (public and private sector)

We propose that the new anti-corruption statute be entitled the Combating of Corruption Act to give the most accurate description of its purpose.

Agents and principals

One issue which must be addressed in respect of the scope of the criminal law is what relationships will be covered by a set of anti-corruption offences. The terminology of “agent” and “principal” is commonly used in corruption statutes, even though these terms are intended to capture a larger group of relationships than those implied by the strict law of agency.

There seem to be two common approaches to defining the relationship of "agent" and "principal" for the purposes of an anti-corruption statute: (1) a broad and simple definition; (2) a definition supplemented by a list.

We believe that the Namibian statute should use the general definition in South Africa's Corruption Act 94 of 1992 as a model. The South African Act applies to "any person upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law."

A definition based on the South African model will cover the following categories of persons, all of whom should in our opinion be brought under the coverage of an anti-corruption statute:
all members of the public service, Members of Parliament, local and regional councillors, Ministers and Deputy Ministers, the Attorney-General and Prosecutor-General, judges and the Judicial Service Commission, the Ombudsman and the staff of the Ombudsman's Office, police officers, and members of the Namibian Defence Force and the Prisons Service
employees, officials and members of any boards or bodies, parastatals or commissions established in terms of a statute
employees and officials of corporations, close corporations, co-operatives, trusts, welfare organisations, societies, non-profit companies and voluntary associations
trustees, assignees, executors, liquidators and curators
legal practitioners and other professionals
traditional authorities such as chiefs and headmen.

The South African definition excludes persons who acquire powers by virtue of marriage or parenthood. It also excludes persons who derive powers and duties from a contract or other agreement, on the grounds that this would give rise to an excessively wide liability, as well as encroaching on the sphere of private law. The Namibian provision should perhaps depart from the South African model somewhat in this respect, by extending only to certain contractual relationships. The Working Group believes that the statute should apply to contractors and subcontractors who carry out work on behalf of the government (as in the notorious NHE corruption case), as well as to cases in which a government service is contracted out to private parties. This could be done by means of a broad definition of "employment", or by extending the definition to cover all persons who have power or duties by virtue of contracts in which a central, regional or local government authority is one of the contracting parties. The choice between the two possible approaches to broadening the coverage of the statute should be examined in more detail at the technical drafting stage.

Defining the public sector
If certain corruption offences are limited to the public sector, then it will be necessary to define what is meant by this. Terms such as "state" and "government" do not bear any fixed meaning, but depend upon their context. The Working Group is of the opinion that the public sector for this purpose should include:
Members of Parliament
officials and employees of the Office of the Ombudsman
judges

members, officials and employees of regional and local government
traditional leaders
officials and employees of parastatals
government-controlled companies.
We propose that certain additional offences apply only to public bodies, defined (as in Botswana) as any office, organisation, establishment or body created by or under the Namibian Constitution or any statute, or exercising powers conferred by the Namibian Constitution or by any statute; and includes any company in which 51 per cent or more of the equity shares are owned by the Government of the Republic of Namibia.

Bribery
The Working Group makes the following recommendations in respect of a bribery offence:

The offence should punish both the "corrupter" and the "corruptee" with provisions which are precise mirror images of each other.

The "quid pro quo" which constitutes the bribe should be limited to money or things, but should be broadly defined as any advantage or favour of any sort whatsoever, whether real or feigned, and including protection from a real or apprehended disadvantage and the expectation of a benefit, advantage or favour.

The bribe should not have to induce or reward a breach of duty in technical terms. It should be sufficient that it be intended or accepted with the understanding that it will influence or tend to influence the exercise of a power or the performance of a duty.

The offence of bribery should explicitly indicate that a third party or an intermediary who knowingly participates in the bribery is also criminally liable, rather than relying on prosecution as an accomplice.

It should be an offence to give or receive a benefit in advance for a future favour, or to give or receive a reward for a favour after the fact.

The criminal offence of bribery should extend to persons who are have been, or are about to become, agents. This is necessary to prevent people from escaping liability by means of the timing of the bribe.

The use of the term "corruptly" is largely superfluous, but it gives does give a certain character and tone to the crime in the public eye as well as providing space for judicial development of the crime. The Working Group recommends that this term be retained to characterise the offence.

For purposes of clarity, The offence of bribery should state explicitly (a) that the state of mind of the recipient of the bribe does not depend on the actual intention of the giver; and (b) that neither the giver nor the recipient can escape liability on the grounds that the agent did not actually have the power to carry out the act or omission or favour in question, or that the agent did not in fact perform the quid pro quo which was promised.

The statute should not set forth any particular defences. These should rather be dealt with on a case-by-case basis, in the context of determining whether or not the basic elements of the offence are satisfied.

(1) Any person who corruptly gives or offers or agrees to give a benefit, directly or indirectly, to any other person with the express or implied intention of -
(a) influencing an agent to commit or omit to do any act or to show favour or disfavour to any person; or
(b) rewarding an agent for committing or omitting to do any act or showing favour or disfavour to any person
in relation to any power or duty of that agent shall be guilty of an offence.

(2) Any agent who corruptly demands or solicits or receives or obtains or agrees to receive or obtain a benefit, directly or indirectly, from any person, for himself or herself or anyone else, with the express or implied intention that the agent shall
(a) commit or omit to do any act or to show favour or disfavour to any person; or
(b) be rewarded for committing or omitting to do any act or showing favour or disfavour to any person
in relation to any power or duty of that agent shall be guilty of an offence.

(3) Any person who corruptly demands or solicits or receives or obtains or agrees to receive or obtain a benefit which is intended to influence the conduct of an agent, or corruptly transfers such a benefit to an agent or another person, shall be guilty of an offence.

(4) In determining whether or not an offence has been committed in terms of subsections (1), (2) or (3), it shall be irrelevant
(a) whether or not the agent is in fact authorised or empowered to do or omit to do what is proposed or agreed upon, or to show favour or disfavour in the manner contemplated or understood;
(b) whether or not the action or omission or showing of favour or disfavour constitutes a breach of duty on the part of the agent; or
(c) whether or not the agent actually carried out the act or omission, or showed the favour or disfavour in question.

(5) In determining whether or not an offence has been committed in terms of subsection (2) or (3), the actual intention of the person who offers or gives or agrees to give a benefit shall not be relevant to the state of mind of the agent, but only the reasonable belief of the agent or the person liable to an offence under subsection (3) regarding the intention of such person.

(5) For the purposes of this section—
(a) a person shall be deemed to be an agent if the person is, or has been, or intends to be an agent.
(b) “benefit” means any advantage or favour of any sort whatsoever which is not legally due, whether real or feigned, and includes
protection from a real or apprehended disadvantage;
the expectation of any benefit, advantage or favour; or

all or any part of a benefit or the proceeds of a benefit or any gain resulting from a benefit.

Corruption by means of threats

A new anti-corruption statute should include a provision on corruption by means of threats, which applies to all members or employees of a public body. There are already statutory provisions in force concerning intimidation of police officers and immigration officials. We believe that a similar provision should be generalised to apply to any agent who is carrying out powers or duties on behalf of a principal.

Any person who in order to compel any agent to do or to abstain from doing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such agent having done or abstained from doing such an act, threatens or suggests the use of violence to, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants shall be guilty of an offence.

Corruption by means of fraud or deception

We recommend a general provision modelled on the existing provision in Namibia's Posts and Telecommunications Act, making it an offence for any person to use fraudulent means to induce any agent to act in violation of his or her duty, or to influence the exercise of a lawful power or duty. It should also be a criminal offence for a person to give to an agent, or for an agent to knowingly use, a false receipt, account or other document with intent to deceive the principal.

(1) Any person who by false pretence or intentional misstatement induces an agent to commit or omit to do any act or to show favour or disfavour to any person in relation to any power or duty of that agent shall be guilty of an offence.

(2) Any person who knowingly gives to any agent or, in the case of any agent, knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal shall be guilty of an offence.

It should also be a criminal offence for any agent to commit "fraud" in connection with the duties of his or her position, or for an agent to fail to fully disclose the nature of a transaction to the principal.

Any agent, with intent to deceive his principal or to obtain any benefit for himself or herself or any other person, makes an intentional misrepresentation in connection with his or her duties or fails to disclose to his principal the full nature of any transaction carried out in connection with his principal's affairs or business shall be guilty of an offence.

Influence-peddling

We recommend a offence of influence-peddling which is aimed at those in the private sector and the private sector who hold themselves out to the public as providing impartial assessments.

(1) It shall be an offence for any person who holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services to [corruptly?] demand, solicit, receive or agree to receive, directly or indirectly, a benefit for himself, herself or another as an inducement or reward aimed at influencing his or her selection, examination or opinion.

(2) It shall be an offence for any person to [corruptly?] offer, give or agree to give, directly or indirectly, any person a benefit as an inducement or reward with the intention of influencing a person described in subsection (1) in his or her selection, examination or opinion.

Criminalising breach of duty and abuse of office in the absence of bribes, threats or deception

We propose a qualified offence relating to breach of duty based on the Zimbabwean model, as a way to capture nepotism, tribalism, and other forms of "favours to friends" which may not be accompanied by any tangible benefit. This offence should be applied to the public sector (and parastatals) only, on the grounds that a higher standard of impartiality is expected where a duty is owed to the public at large. In the private sector, for example, one can envisage a family-owned enterprise which employs only family members. This would be favouritism, but it would not be viewed by most people as corrupt. Yet such favours take on a different complexion in the public service precisely because public officials have a unique duty to treat all members of the public equally. Such an offence could be particularly important given the difficulty of proving corruption. It should be noted, however, that such a provision would be workable only in a context of open and transparent government. It would be particularly important for the success of such a provision that public officials be required to give reasons for decisions made within the exercise of their discretion so that improper favours and prejudices could be discerned.

A member or employee of a public body who in connection with his or her official powers or duties -
(a) does anything that is contrary to or inconsistent with such powers or duties;
(b) omits to carry out any aspect of his or her duties; or
(c) exercises any influence that he or she has by virtue of such powers or duties;
for the purpose of showing undue favour or disfavour to any person shall be guilty of an offence.

Acceptance of benefits without authorisation

Criminalising the unauthorised acceptance of gifts can be a helpful way to combat the problem of proving corruption. It may be possible to prove that a benefit has been offered or accepted without being able to prove an intention to influence. However, we believe that this is another type of offence which should be applied to the public sector (and parastatals) only. Our reasoning is that the appearance of integrity is

particularly important in a sector which has powers and duties relevant to the public at large. If a company doing business in the private sector appears to lack integrity, it may reap the consequences in the form of lost business. But members of the public do not have a choice about whether or not to deal with the private sector. We feel that this warrants a higher standard of integrity, both in appearance and substance. We recommend a qualified offence modelled along the lines of a similar offence in force in Canada.

Because concerns about the difficulty of administering such an offence have been raised, the Working Group would like to emphasis three aspects of the proposed crime. Firstly, it would not apply to all gifts, but only to gifts received from a person who has current business or contractual dealings with the government. This limitation narrows the offence in order to make it more practically workable. Secondly, it would be possible for responsible officials to issue blanket consents exempting certain categories of gifts -- such as gifts below a monetary value of N$100, or free meals -- to reduce the administrative burden entailed. Thirdly, part of the purpose of the offence would be to encourage a climate of openness. A person who received an unsolicited gift would be expected to disclose the gift immediately to the appropriate official and seek guidance on whether or not acceptance of the gift is appropriate. The Working Group believes that this sort of openness will contribute to both an increased sense of responsibility on the part of public officials and to an increased appearance of integrity in the eyes of the public.

It shall be an offence for
(a) any member or employee of a public body to solicit, demand, accept or agree to accept from any person who has current business or contractual dealings with such body; or
(b) any person who has current business or contractual dealings with a public body to offer, give or agree to give to any member or employee of such body-
any benefit of any kind, directly or indirectly, without the written consent of the head of the public body or the relevant branch of the public body in question.

Tenders and auctions
This Working Group would like to draw attention to the fact that many of the jurisdictions examined have found it useful to include specific criminal offences in their anti-corruption statutes relating to the corrupt withdrawal or failure to submit public tenders. Offences on this topic for Namibia should be considered in light of the recommendations of the Working Group on Procurement.

Self-dealing and conflicts of interests
We suggest that a generalised provision along the lines of section 16 of the Regional Authorities Act 22 of 1992 be included in the new anti-corruption statute, making it a criminal offence for any member or employee of a public body to fail to disclose conflicts of interest on the part of the member or employee, a spouse under civil or customary law, a family member, a member of the household, or a partner, agent or business associate.

The focus on public bodies here is based in part on their unique responsibility to the public at large. Furthermore, the detailed provisions on conflicts of interest in the Companies Act 61 of 1973 give protection to a large portion of the private sector. However, with respect to the public sector, there is a strong need to bring all public bodies and parastatals under the same basic standard. We assume that more detailed aspects of conflicts of interest would be dealt with in individualised codes of conduct. This topic should be revisited at a later date in light of the recommendations of the Working Group on Codes of Conduct.

In addition, we provisionally suggest that it should also be a criminal offence for any member or employee of a public body to use any property of such body for personal benefit or to promote or prejudice the interests of any person or private business or private agency, except in the proper performance of his or her official duties. This prohibition should be based on section 25(1) of the Public Service Act 13 of 1995. Such an offence could be extended to cover the improper use of information as well as property, although members of the Working Group had differing views on the practical workability of an offence covering "information" because of its intangibility.

Improper use of information

The Working Group recommends making it a criminal offence for a member or employee of a public body to use information gained from his or her position for personal benefit, or the benefit of any other person (except in the proper exercise of official duties). However, as already noted, some members of Working Group have expressed doubts about the enforceability of such an offence.

This offence should apply to the public sector only, because of the higher degree of responsibility to the public inherent in a public body. With respect to the private sector, insider trading is covered by the Companies Act. In South Africa, the relevant sections of the Companies Act have been considerably strengthened in recent years, and Namibia's Companies Act should be re-examined in this light.

Unauthorised disclosure of information may be wrongful in some circumstances, but it is not necessarily corruption and should be dealt with in another context.

Causing loss to state revenue

The Working Group considered the possibility of an additional anti-corruption offence based on loss of state revenue as a result of corrupt activities, but concluded that this might constitute "double jeopardy". We suggest that the concept of loss to state revenue as a result of a corruption offence rather be a basis for an additional penalty, such as a fine based on the amount of loss suffered by the State.

What is excluded

Buying and selling of public office and political support

These evils would appear to be covered by the broadly-formulated bribery offence which has been suggested. They would warrant a special criminal provision only if

they were to be punishable by more severe penalties in consequence of the fact that they strike at the core of democratic representation.

Abuse of public position to promote or prejudice a political party
This issue is already covered in the section of the Public Service Act 13 of 1995 on misconduct. We suggest that this is the appropriate treatment of the problem, as it is potentially too broad to serve as a reasonable basis for criminal prosecution. For example, a public servant who writes a party-related letter on government stationery may have done something wrong, but does not really deserve criminal prosecution.

Wrongful disposal of public property
Theft would probably be an appropriate criminal charge in many cases under this heading.

Evasion of taxes and duties
We feel that the specialised approach to this topic in existing legislation is probably best.

Election fraud
We similarly recommend that corruption in respect of elections, as another specialised topic, should remain in the context of the Electoral Act.

Harmonisation of laws
The proposed offences would necessitate some repeals and adjustments to existing statutes. In general, where an existing offence is completely covered by a more generalised offence in the new anti-corruption statute, we recommend that the old and more restrictive offence be repealed. However, there may be additional remedies contained in some the other statutory provisions which are specific to the context and which would not be completely replaced by a general anti-corruption statute. The Working Group therefore feels that the question of overlapping statutory offences is a matter to be deal with at the technical drafting stage.

Extra-territorial jurisdiction
The Working Group feels that the jurisdiction of Namibia's anti-corruption statute should extend to all cases where there is a harmful effect inside Namibia, or where some part of the transaction is committed in Namibia. We are aware that there is an international trend towards criminalising bribery with respect to foreign principals even where it takes place wholly outside the country. However a large majority of the Working Group members are of the opinion that Namibia is yet ready to reach so far. We base this conclusion primarily on the opinion that, given Namibia's limited resources, corruption closer to home should be our highest priority. The costs of investigating and prosecuting corruption farther afield would be unrealistic for Namibia at this stage. In any event, Namibia is simply not a home base for large multi-nationals that are likely to resort to bribery to secure favourable investments abroad, which is one of the major scenarios for foreign bribery. The possibility of broadening the extra-territorial reach of an anti-corruption statute could be revisited at

a later stage, once Namibia has some experience with the statute's practical functioning.

PART V: PROVING CORRUPTION

There are currently no statutory presumptions in Namibian law that may facilitate the proof of corrupt activities. Other countries, such as the United Kingdom, Botswana, Zimbabwe and Hong Kong, do have such provisions. A presumption usually assists one party in discharging an onus, or else places an onus or duty to present evidence upon his/her opponent. The use of presumptions in criminal cases gives rise to Constitutional issues, with the rights which are particularly relevant being the right to a fair trial, the presumption of innocence and the right not to be compelled to give testimony against oneself or one's spouse.

On the basis of a survey of Namibian judgments and judgments from other jurisdictions, it can be stated with near certainty that a reverse onus provision that places an onus on an accused to be discharged by proof on a balance of probabilities, will be in violation in particular of the right to be presumed innocent, which is guaranteed in article 12(1)(d) of the Constitution. This is so whether the onus is created by a presumption, defence, exemption, exception etc. Provisions that do not place a reverse onus on an accused are generally constitutional. It is therefore necessary to draft any presumptions relating to corruption in such a way that the accused is either given a statutory defence or so that the offence places only an evidentiary burden on an accused.

Similarly, a useful device in combating corruption would be an offence which criminalises the possession of unexplained wealth or the maintenance of a standard of living above the level which could be achieved from lawful sources. Corruption in such a case is proved not on the basis of the actual corrupt act, which tends to be difficult, but rather by the existence of the results of corruption. The first instance of this kind of offence was section 10 of the Prevention of Bribery Ordinance, Chapter 201 of the Laws of Hong Kong. According to various commentators, section 10 has resulted in the actual prosecution of corrupt officials who would not have been successfully prosecuted under bribery laws and has had a deterrent effect.

However, a provision such as Hong Kong's section 10 places a reverse onus on the accused and would in the opinion of the Working Group be unconstitutional in Namibia. However, such an approach could probably withstand constitutional scrutiny if it were drafted in the same way as an acceptable presumption, by either giving the accused a statutory defence or by making the incommensurate income or disproportionate pecuniary resources only prima facie proof that the income or wealth was obtained corruptly and thus placing only an evidentiary burden on the accused.

PART VI: INVESTIGATION OF CORRUPTION

General

While we are aware that there is a Working Group devoted to the consideration of investigatory bodies, we would like to offer a few comments on this topic as well. We are of the view that a small, but highly specialised office, should be established by Act of Parliament in order to investigate and prosecute corruption cases. The office should be headed by a legal practitioner, preferably with criminal and/or commercial law experience, or by a public prosecutor. At least one member of staff should be an experienced accountant, preferably a chartered accountant. Investigative staff should be drawn mainly from the ranks of the Namibian Police force, preferably from members of the Commercial Branch. The office established under Act of Parliament should be independent and accountable only to Parliament. The office shall be required to submit an annual report to Parliament on its activities, including all complaints/charges laid and the outcome of its investigations. A possible legislative model for the establishment of such an office is the Ombudsman Act, No. 7 of 1990.

Constitutional issues

The right not to be compelled to testify against oneself

An important and necessary tool in the hands of corruption investigators is the power to compel a person suspected of being involved in corruption or having knowledge of such activities to attend an inquiry for the purpose of examining the person. At such an inquiry, the person would also be required to produce any books, documents or records that are required by the investigator.

However it is likely that our courts would rule as unconstitutional any provision which compels a person to answer any question, where the answer may incriminate that person and where the provision also makes such testimony admissible in subsequent criminal proceedings. Any evidence obtained following such an inquiry would most probably be inadmissible in its entirety. Our conclusion is therefore that no person should be under statutory compulsion at a corruption inquiry to incriminate himself/herself.

The right to privacy

While investigators would need the power to conduct searches of homes and places of business, the right to privacy should be taken into account when drafting legislation. Legislation authorising searches of homes, individuals or business premises (although the latter would not appear to be protected under article 13(2))), should closely follow the wording of Article 13(2) of the Namibian Constitution. If any form of communication interception is envisaged, such as “telephone tapping”, then specific legislative provision should be made for this. It may be advisable for such a drastic invasion of privacy to be authorised by a judge of the High Court, rather than by a magistrate.

PART VII: ANCILLARY MATTERS

Sentences

In our view, appropriate sentences should seek to punish offenders both financially and through imprisonment. Offenders should not believe that the only penalty is likely to be financial, because this will be of limited deterrent effect. We do not however advocate minimum sentences. The imposition of the actual sentence should be left to the discretion of the court, with the upper limits being set only by the jurisdictional limits of the court in question.

Forfeiture of proceeds of crime

In our view, it is unlikely that any person could successfully assert a right to acquire, own and dispose of property under article 16 of the Constitution, in order to defeat a confiscation or forfeiture of the proceeds or profits from crime. This issue should be dealt with in a re-drafted criminal Procedure Act, or in a general statute on the proceeds of crime rather than being confined to the topic of corruption alone.

Freezing of assets

There is already a precedent in Namibian law for the forfeiture of goods related to a criminal offence, and the seizure of goods liable to forfeiture, in the Customs and Excise Act 91 of 1964 (sections 87-88). There has been no legal challenge to these provisions in terms of the new Namibian Constitution. We believe that a provision regarding the pre-trial freezing of assets in a corruption case would pass Constitutional muster. However, as in the case of the forfeiture of the proceeds of crimes, we recommend that this issue be dealt with as a matter of general criminal procedure, rather than being confined to the corruption context alone.

PART I
INTRODUCTION

1.1 BACKGROUND

On 5 March 1997, the Rt. Hon Prime Minister, at the behest of Cabinet, officially launched the Ad Hoc Committee on the Promotion of Ethics and Combating of Corruption in Namibia. The Ad Hoc Committee is to be assisted by a Technical Committee which consist of several heads of Government departments, all heads of parastatals, and representatives of non-governmental organisations. The Ad Hoc Committee is chaired by the Prime Minister whilst the Technical Committee is chaired by the Secretary to Cabinet.

During 6-7 June 1997, a seminar on the Promotion of Ethics and Combating of Corruption was held at Midgard in Windhoek. The purpose of this seminar was to identify the issues to be tackled in the promotion of ethics and the combating of corruption as well as the methods which could be employed in exploring these issues.

Six critical areas needing attention were identified and consequently six technical Working Groups were formed for the purposes of reviewing the adequacy of both the legal and administrative measures currently available in each area, and making recommendations for change if necessary. These six areas are (1) criminality; (2) procurement; (3)granting of licences; (4) codes of conduct; (5) whistle-blowing, freedom of information and open meetings; and (6) agencies or units for the prevention of corruption, enforcement of anti-corruption laws and promotion of ethical conduct.

This Working Group was given the responsibility of reviewing the adequacy of existing criminal and evidentiary law (common law and statutes) relating to corrupt behaviour and fraud and making recommendations for new laws. The full terms of reference are annexed to this paper.

1.2 SCOPE OF THE PAPER

Part I of this paper provides a brief background and introduction to the topic.

Part II discusses the meaning and scope of “corruption” as well as various conceptual approaches which may be taken to the problem. This section also includes a brief overview of what is covered in the anti-corruption statutes in a sampling of other jurisdictions, to provide a basis for comparing the scope of such statutes. It also considers the question of whether there is any need to draw a distinction between corruption in the public sector and corruption in the private sector.

Part III examines the present law in Namibia. This section of the paper discusses the Prevention of Corruption Ordinance 2 of 1928. It also groups and discusses other statutory provisions topic by topic. This section of the paper also looks at common-

law crimes which overlap with the concept of corruption and considers their potential interaction with a new and more comprehensive corruption statute.

Part IV examines examples from various jurisdictions in detail, topic by topic, and makes recommendations for the substantive components of a new anti-corruption statute in Namibia.

Part V looks at questions relating to the difficulties of proving corruption.

Part VII offers some observations on the investigation of corruption, while recognising that a detailed examination of this issue is the task of another Working Group.

Part VIII deals briefly with ancillary matters, including sentencing, forfeiture of the proceeds of the crime and the possibility of freezing the assets of persons accused of corruption.

1.3 METHOD OF WORKING

Since our task is to produce a working paper, it has not been necessary for us to solicit views or opinions from the public at this stage. Broader input on the working papers will be invited when the National Consultative Conference on the Promotion of Ethics and Combating of Corruption is convened.

This paper draws on legislation and commentary from numerous countries, including South Africa, Botswana, Zimbabwe, England, Canada, Australia, Malaysia, Singapore, Hong Kong and the USA. The following documents have been particularly helpful:
UK Law Commission, Corruption: a Consultation Paper, 1997
Australian Model Criminal Code Officers Committee Report, Chapter 3: Theft, Fraud, Bribery and Related Offences (December 1995)
South African Law Commission, Project 75, Working Paper 32: Bribery (March 1990) and Report on Bribery (June 1991).

The principal researchers for the document were Dianne Hubbard and Clinton Light from the Legal Assistance Centre and Free Zenda from the Ministry of Justice, and the Working Group expresses its great gratitude and appreciation to them.

PART II
SCOPE AND THEORY OF CRIMINAL LAWS ON CORRUPTION

2.1 THE MEANING OF CORRUPTION

The concept of "corruption" (along with its derivatives "corrupt" and "corruptly") has different meanings and interpretations. The following definitions are among those given in the Shorter Oxford English Dictionary (Third Edition): "1. To turn from a sound into an unsound impure condition; ... 3. To render morally unsound, to pervert (a good quality); to debase, defile; 4. To induce to act dishonestly or unfaithfully; to make venal, to bribe".

In discussing South Africa's Corruption Act 1992, Milton states that the term "corruption" used in this context "denotes the perversion of the integrity or fidelity of a person in relation to the discharge of his duties. In other words, it contemplates an activity aimed at inducing a person to act dishonestly or unfaithfully". ┐

The concept of corruption is closely related to that of "conflict of interest", which has been defined as a situation where someone allows a personal interest to interfere with duties owed to another. Canadian political scientists Ken Kernaghan and John Langford identify seven categories of conflicts of interest in the book The Responsible Public Servant (1990). ┐ A question which must be addressed is which of these kinds of behaviour a criminal law on corruption should attempt to capture:

Self-dealing: For example, a government employee uses his position to obtain a contract for a private company which he owns. Another example would be a government employee who uses her position to get a holiday job for her daughter.

Accepting benefits: This refers to bribery or the offer or acceptance of gifts, such as a case of liquor from a supplier who is hoping to get a contract with the recipient's company or government ministry.

Influence peddling: This refers to situation where an employee or other agent solicits benefits in exchange for using her influence to unfairly advance the interests of a particular party.

Using property of employer (or principal) for private advantage: This includes blatant wrongs such as stealing office supplies for home use. It can also cover more subtle problems such as using computer software licensed to the employer (or principal) for private consulting work.

Using confidential information: For example, suppose that an employee who learns that his employer is planning to buy land in a certain area rushes out to buy land there in his wife's name.

Outside employment: An example would be setting up a business that is in direct competition with an employer. Another example would be an employee who takes on so many outside jobs that she does not have time or energy for her primary work.

Post-employment: Suppose a government employee who previously evaluated environmental impact assessments leaves government to set up a private consultancy which carries out environmental assessments to fulfil government requirements.

In a 1993 report, the Law Commission of British Columbia compiled a list of "conflict of interest guidelines" drawn from those adopted by various government agencies in Canada. Not all of these behaviours would be appropriate for specific criminal law sanctions, nor would all of them comport with intuitive understandings of "corruption", but the guidelines provide a good overview of kinds of wrong behaviour which may occur. The wrongful behaviours in question would apply equally to non-government agencies and businesses. ┐

An employee (or any other person acting on behalf of the principal)--
must be loyal to the agency
must be honest
must be competent
must not act or make a decision without adequate information
must act ethically and with integrity
must not be abusive
must not sexually harass a fellow employee
must not act fraudulently
must not engage in criminal activity
must not seek or accept a bribe
must not seek or accept a gift, favour or service from, or be placed under obligation to, or under the influence of, someone who has, may or will deal with the agency
may not employ personally a person who has, may or will deal with the agency
may not work with a family member
may not use the office, position or affiliation with the agency to lend weight to the expression of personal views or to obtain other advantages or personal benefits
may not purport to speak on behalf of an agency, unless it is his or her job to do so
may not have access to agency information except to the extent that it is necessary to carry out his or her job
may not use agency information for personal or non-agency purposes
may not divulge agency information to an outsider (with exceptions for matters involving contraventions of law, waste of funds or assets or danger to public health or safety)
may not use the agency's premises for personal purposes
may not use the agency's property for personal purposes (noting that information can qualify as property)
may not purchase agency property (with exceptions for cases where the person in question is not involved in the public sale of the property)
may not sell property to the agency
may not enter into a transaction with the agency
may not derive a personal benefit from a transaction between the agency and another
may not take advantage of an opportunity initially offered to the agency

may not solicit clients through the agency for a personal business.

Other forms of conduct may be morally "corrupt", but will not fall within the ambit of the criminal law of corruption dealt with here. For example, section 19 of the Children's Act 33 of 1960 concerns the criminal offence of "corruption of children", which makes it an offence for a child's parent, guardian or other custodian—
to allow the child to reside in or frequent a brothel;
to cause or conduce to the seduction, abduction or prostitution of the child or to the commission of immoral acts by the child; or
to knowingly allow the child to consort with persons of immoral character.
Other examples would include paying a sum of money to a young child to induce him or her to have sexual intercourse with someone, or exhibiting pornographic material to children of a tender age. Such activities would be commonly understood to involve the "corruption" of morals, and they might well constitute criminal offences, depending on the circumstances.

The term corruption was used in a broader political sense by South Africa's Minister of Water Affairs and Forestry Kadar Asmal at Namibia's June 1997 conference on corruption at Midgard. He pointed out that apartheid was "a corruption of the notion of democratic governance, of the responsibility of a government to its citizens" so appalling that the passing of a new Constitution which guarantees the right of all citizens to equality before the law "was the greatest anti-corruption act of the new South Africa". ¬

These forms of "corruption" are not the subject of this paper. For our purposes, "corruption" will focus on abuse of power or position.

Statute law on corruption in Namibia and in many other jurisdictions has traditionally focused on the offer and acceptance of bribes. For example, the UK Law Commission describes the classic paradigm of corruption as the offence of paying, receiving, offering and soliciting bribes. ¬ This is the situation where A offers an inducement to B, who is the agent of C, to breach the duty owed to C and to act in the interests of A instead. It also applies to the converse situation where the corrupt transaction is initiated by the agent – where B offers to breach the duty owed to C, to the advantage of A, in exchange for some benefit or reward from A. A crime is generally committed whether or not the breach of duty actually takes place, if the requisite intention is present on the part of the party who is offering or soliciting the bribe. ¬ Namibia's only existing statute on corruption, the Prevention of Corruption Ordinance 2 of 1928 (as amended by Act 21 of 1985) is limited to this basic paradigm – a limitation which has been identified as one of its weaknesses. ¬

Bribery is not the only form of corruption, however. The following is a brief overview of the kinds of corrupt behaviour which other jurisdictions have tried to capture in statute law on corruption (which are in some cases supplemented by common law crimes).

RSA: The Corruption Act 94 of 1992 includes a broadly-formulated bribery offence which applies to both the public and private sectors. The common-law crime of

bribery has been repealed, but the statute on corruption continues to be supplemented by the common-law crimes of extortion and fraud.

BOTSWANA: Botswana has a broad range of criminal offences relating to corruption in its Corruption and Economic Crimes Act 13 of 1994. There are several variations on the concept of bribery, with bribery offences which apply to both the public and the private sector, as well as specific offences for bribery related to tenders and auctions by public bodies. There are two other offences relating to the public sector:
failure by a member or employee of a public body to disclose a conflict of interest, or voting or participating in a proceeding in which the conflict of interest is relevant
"cheating the public revenue", in the form of diverting money from the public coffers through fraudulent conduct.

ZIMBABWE: Zimbabwe's Prevention of Corruption Act 34 of 1985, which was most recently amended in 1994, contains a broad range of offences which apply to both the public and the private sectors. In addition to a wide concept of bribery -- which includes bribery in connection with the issue of a false documentation by an agent with intent to deceive the principal -- the following offences apply to both public and private sectors:
offences which cover what is commonly known as "kickbacks" or "influence-peddling", where an agent accepts benefits from anyone who provides goods or services in connection with the principal's affairs or business, with intent to deceive or to profit personally (along with corresponding offences for the other party to the bribery)
failure to disclose the full nature of any transaction carried out in connection with the principal's affairs or business
There is an additional offence which applies to the public sector only:
It is an offence for any public officer in the course of his or her employment to commit a breach of duty for the purpose of showing favour or disfavour to anyone. It is not relevant to this offence whether or not any benefit was received or promised for the breach of duty.

UK: The Public Bodies Corrupt Practices Act 1889 covers the offence of bribery in respect of public officials, whilst the Prevention of Corruption Act 1906 covers the bribery of agents, including bribery in connection with the falsification of receipts, accounts or other documents by agents with intent to deceive the principal. A 1997 report of the UK Law Commission on corruption recommends the replacement of these statutes with a new law, but the focus of the recommended new statute would continue to be bribery. The statutory law is supplemented by the common law offences of bribery of a public officer and misconduct in a public office.

CANADA: The chapter of the Criminal Code on Offences Against the Administration of Law and Justice contains a subsection entitled "Corruption and Disobedience". This section contains a range of offences relating to corruption in the public sector. In addition to several offences relating to bribery, there are several other corruption offences which apply to the public sector:
The offence of "frauds on the government" includes bribery, "influence-peddling" and bribery in connection with tenders. This portion of the criminal code also makes it an offence for a government official or employee to accept a benefit from anyone who

has dealings with the government, without the written consent of the head of the relevant branch of government. It is conversely an offence for anyone who has dealings with the government to offer such a benefit without written consent. This is a particularly wide provision, because it does not require that there be any actual or intended breach of duty, or even a corrupt intent.
The offence of "election fraud" makes it illegal for any one seeking to get or retain a government contract to give a valuable consideration for the promotion of a candidate or a political party, or with an intent to influence the outcome of an election.
Another offence is "breach of trust" by a public official which means the use of a public office to further private ends. The crux of this offence seems to be the non-disclosure of financial conflicts of interest.
It is an offence to improperly influence a municipal official through bribery, suppression of the truth, threats or deceit, to vote for or against something, to abstain from voting, to adopt or prevent some measure or to do or omit to do any official act.
It is an offence to buy or sell an appointment or a resignation from office, or to use bribery to influence these processes.
The offence of accepting "secret commissions", which covers bribery with respect to the private sector, is dealt with separately in the chapter of the Criminal Code on Fraudulent Transactions Relating to Contracts and Trade.

AUSTRALIA: The most recent recommendations of the Model Criminal Code Officers Committee (MCCOC) suggest bribery offences which would apply to both the public and the private sector. The Committee proposes one additional offence which would apply to both sectors:
"payola", in which a person receives a dishonest benefit for influencing selections or assessments of goods (such as someone who recommends a particular company for a government contract and then receives a kickback).
Another proposed offence is aimed at the public sector alone:
"abuse of public office", which is designed to cover improper use of a public position that is unilateral on the part of the office-holder (with examples being nepotism and the improper use of official information).

MALAYSIA: The Prevention of Corruption Act, 1961 (as revised in 1971) contains broad offences of bribery which apply to both the public and the private sector. The offence of bribery includes the giving of false receipts, accounts or other documents. There is also a specific offence for bribery which relates to tenders for contracts with public bodies. There are additional bribery-related offences which apply to bribery of members of Parliament, state legislatures, or other public bodies for the purpose of obtaining a broadly-worded range of favours or for influencing a vote.

SINGAPORE: The Prevention of Corruption Act 27 of 1966 (most recently amended in 1991) contains offences similar to those in Malaysia.

HONG KONG: The Prevention of Bribery Ordinance 102 of 1970 (most recently amended in 1995) has a range of bribery offences which apply to both public and private sectors, including bribery in connection with false documentation, tenders and auctions by public bodies. In addition, public servants are prohibited from soliciting or accepting any "advantage" without permission. A separate Corrupt and Illegal Practices Ordinance 20 of 1955 deals with corruption in respect of elections.

Several members of the Namibian legal profession have already pointed to the need for a comprehensive law on corruption. In a paper giving an overview of the issues relevant to the topic of corruption, Attorney-General Rukoro suggests that the various laws relating to corrupt behaviour should be put under the umbrella of a single anti-corruption statute. "Such an approach could serve to identify what the society considers to be corrupt practices, thereby serving an educational function and to create greater consistency in sentencing for such offences." ┐ Similarly, Adv PJ Miller of the Prosecutor-General's Office recommends that "a composite law be passed which will be applicable to all organs of state including parastatals [and] agencies to deal with the matter uniformly and at the same time to make the law more accessible". ┐

Recommendation for Namibia

In general, this Working Group takes the view that a criminal statute on corruption should cover the broadest possible range of corrupt behaviour. Those who are corrupt may also be creative, and may well find increasingly inventive ways to circumvent narrowly-drawn offences. An anti-corruption statute should be broadly-formulated, so long as it is not unconstitutionally overbroad. The following section will attempt to analyse different basic approaches to the problem of corruption, as a preliminary to making recommendations on the approach which should be taken by a modern statute on corruption in Namibia.

2.2 CORRUPTION AND BREACH OF DUTY

The Types of Actions Which Can Lead to a Breach Of Duty

There are a variety of actions which can inspire corruption in the form of a breach of duty. The UK Law Commission places these into three broad categories:

INDUCEMENTS: The offer of benefits to the agent B (or another party, such as a spouse of a relative or a business interest of B), or the converse solicitation of benefits by the agent B. This category is partially covered at present by the common-law crimes of bribery and extortion, and by the Prevention of Corruption Ordinance 2 of 1928.

THREATS: This would apply to a situation where A threatens B with some form of harm if B does not breach his or her duty. For example, A might threaten to make a false allegation of bribery against B if B does not agree to give some favour to A in the course of his or her duty. This would also apply to a situation where B threatens A with some harm if no benefit is forthcoming. An example would be a police roadblock where "fees" are demanded at gunpoint. Such threats might be covered by existing offences such as assault, depending on the nature of the threat.

DECEPTION: This applies to a situation where A misleads B into thinking that the action or omission in question is B's duty, for example by the presentation of false documents to B. Conversely, it could apply to an action by B which misleads A into

thinking that the exchange of some consideration is properly required -- for example, a police officer who misleads a member of the public into believing that there is a fee for laying a charge, which fee is then pocketed by the police officer. Another form of deception would be a conspiracy between A and B which works against the interests of the principal C (such as conspiring to issue false invoices). Some of these forms of corruption would be covered by the existing common-law offence of fraud, which will be discussed in detail below. ¬

The laws in the jurisdictions examined are aimed primarily, but not exclusively, at inducements through broadly-formulated statutes on bribery. Because the statutes on bribery focus very generally on the transfer of benefits, some instances where benefits are demanded by threats or obtained by means of deception would fall within the coverage of these criminal provisions. Nevertheless, this Working Group recommends that a new anti-corruption statute should attempt to cover all the types of actions and pressures which tend to pervert the integrity of positions of power or authority.¬

Approaches to Preventing Corrupt Breaches of Duty

There are three broad approaches which can be taken in an effort to prevent corrupt breaches of duty: (1) punishing knowing breaches of duty, regardless of inducements; (2) punishing the acceptance of benefits, regardless of whether this is accompanied by a breach of duty; and (3) focusing on the nexus between the temptation and the breach of duty.

Punishing the Breach of Duty Itself

The UK Law Commission draws a distinction between the "fundamental mischief", which is the actual breach of duty, and the "temptation" which is intended to cause the breach of duty. They point out that it would be possible to take the radical approach of simply criminalising all breaches of duty, regardless of the cause. Thus, B would be committing a criminal offence whenever he or she acted contrary to his or her duty as an agent, including situations where the duty was breached of his or her own volition, and regardless of whether the reason for the breach of duty was morally good or bad. As will be discussed in more detail below, Zimbabwe takes a qualified version of this approach with respect to the public sector which might serve as a useful model for Namibia.

Punishing the Receipt of Benefits Regardless of Breach Of Duty

It would be possible in theory to make it a criminal offence for an agent to receive gifts from individuals or organisations who are dealing with their principals, regardless of the intention of the giver and regardless of whether or not the gift inspires any breach of duty. As will be discussed in detail below, Canada has had an instructive experience with this approach, and Australia's MCCOC has recommended a qualified version of this concept. Hong Kong's statute on corruption also uses a variation of this concept. All of these examples concern offences which apply only to the public sector. This option warrants consideration for Namibia. As the Canadian

Supreme Court has pointed out, offences such as these can be instrumental in maintaining the appearance of integrity in government. ¬

Focusing on the nexus

The UK Law Commission recommended that a law on corruption should focus on the "mischief of temptation", by which it means the nexus between the inducement (or threat or deception) which inspires the breach of duty and the breach of duty itself.

It is true that offences relating to bribery seem to be central to many modern anti-corruption statutes, and bribery by its nature relates to the nexus between an inducement and a breach of duty. However, this Working Group feels that there is no need to focus on the nexus between inducements and breaches of duty to the exclusion of elements from the other two approaches discussed above. There can be many strings to the bow, particularly since corruption is a crime which is notoriously hard to prove. The proposals put forward below will suggest a broadly-formulated offence of bribery (as in many other jurisdictions), along with additional offences aimed at abuse of power for the purposes of showing favour or disfavour to any person (as in Zimbabwe) and the improper receipt of benefits (as in Canada).

Corruption which does not involve a breach of duty

The idea of breach of duty is a useful framework for analysis, but it must be kept in mind that a person in a position of responsibility can act corruptly without necessarily breaching his or her duty.

This can occur, for example, in a situation where a person uses confidential information acquired in his or her position for personal profit, or makes use of the office computer outside of working hours for personal advantage. The person in question may be performing his or her job properly, without causing a loss to the principal or to any member of the public, whilst still abusing the position for personal gain.

This may also arguably occur where an agent demands to be "paid" for performing his or her duty. However, this is also in some senses a breach of duty, for the agent in question may be said to have a duty to provide his or her services without collecting secret "fees" for personal profit. However, there may also be "grey areas" where A may pay B because of an unspoken understanding that only then will B perform his or her duty. ¬

Even though the UK Law Commission organised its analysis of corruption around the concept of temptations to breach of duty on the part of an agent, it also noted that this approach is somewhat too simple even in the case of bribery. The Commission provisionally proposed that it should not be an element of a newly-drafted offence of bribery that the act procured or rewarded with an improper benefit must necessarily be a breach of duty. ¬

This paper will propose offences based on a broad view of corruption, in the sense of abuse of power or position. The offences proposed will most often relate to breaches of duty in practice, but need not be strictly limited to breaches of duty in their formulation. Self-dealing, conflicts of interest and improper use of information will all be covered in the proposed offences.

2.4 PUBLIC SECTOR VERSUS PRIVATE SECTOR

One question which must be addressed is whether a modern law on corruption should draw any distinction between the public sector and the private sector, either in the formulation of offences or in the severity of the punishment which can be imposed. The common law of bribery inherited by Namibia from South Africa applied only with respect to state officials, whilst the statutory offences in the Corruption Ordinance 2 of 1928 apply to both sectors without distinction.

Arguments for making a distinction

Integrity in government is arguably of greater importance to the overall functioning of society than integrity in the private sector and thus deserving of greater protection. The fact that common-law bribery in many jurisdictions applies only to public officials is a reflection of this attitude.

Agents in the private sector do not owe a duty to the public in general.

Public bodies are more vulnerable to corruption than private bodies, which are better able to look after themselves. The UK Law Commission quotes Lord Randolph Churchill on this point: “There is an essential difference between a private body and a public one. A private body has a direct interest in looking after its servants, but in the case of a public body what is everybody’s business is nobody’s business.” ┐

Higher standards of conduct should be expected of public servants. In a recent case decided by the Canadian Supreme Court, Justice L’Heureux-Dubé stated that “given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.” ┐

Corruption by state officials deserves greater punishment than corruption in the private sector because of their special position of responsibility. For example Kadar Asmal asserts that “because of the duty of the state to set an example to the people, because of the responsibility given to the state by the people to handle public matters with integrity and in good faith, corrupt senior public officials and holders of public office should be subject to more stringent penalties than those found guilty of corruption in the private sector”. ┐

The private sector does not have the same duty to act impartially as the public sector. For example, Jan du Toit of Stocks & Stocks asserted at the Midgard Conference that while a private tender adjudicator should not be entitled to accept a bribe, it would be

justifiable for a private tender process to show preference to a specific contractor if this were consistent with the interests of the company or organisation in question. ¬

Arguments against making a distinction

The boundaries between the public sector and the private sector are becoming increasingly blurred. Functions which were once performed by public bodies are sub-contracted to private companies, there is an increasing trend towards joint public-private ventures, and many functions which were once performed by the public sector (such as utilities) have been completely privatised in many countries. The Lima Declaration on Corruption states that "there must be a sustained campaign against corruption within the private sector as, with greater privatisation and deregulation, it assumes a greater role in activities traditionally performed by the state". ¬

The public should be able to have confidence in the integrity of both the public sector and the private sector.

Commercial bribery undermines fair competition, leads to increased consumer prices, and can have an adverse effect on the entire economy of a country, thus retarding development.

Compromises

The report of the Australian MCCOC considered the possibility of drawing a distinction based not on the nature of the body involved, but on the nature of the function – so that corruption related to public functions could be treated differently from those related to private functions. But it concluded that this approach was an impractical one, saying that "the public has an interest in a variety of people who might be taking corrupt payments, from the jockeys who ride in the horse races on which the public wagers to the employees of companies in which the public invests."¬

Approaches in other jurisdictions

There seems to be an increasing trend towards treating the public and private sectors without distinction in respect of bribery. Recent reports on law reform in Australia and the UK recommend that no distinction should be made in principle between public and private bodies. ¬ Most of the other jurisdictions surveyed have either unified or parallel offences pertaining to bribery which do not differ materially with respect to public and private sectors.

The UK has corruption-related offences which apply to both the public and the private sector, but draws a distinction with respect to the burden of proof. Section 2 of the Prevention of Corruption Act 1916 provides that where it is proved that money, a gift or consideration was received by or given to a public officer or employee by a person seeking to secure a contract with the Government, then the benefit which changed

hands shall be deemed to have been given corruptly as an inducement or a reward until the contrary is proven. In essence, this shifts the burden of proof of one element of the offence from the prosecution to the accused in cases where public officials and government contracts are concerned. There is no similar presumption for agents in the private sector. ┐

Distinctions in other jurisdictions seem to be made primarily to apply with clarity to government processes and duties which may not have parallels in the private sector – such as criminal law provisions relating to the purchase and sale of offices or votes. The other jurisdictions examined generally apply criminal provisions dealing with tenders and auctions only to the public sector, although there are more analogous private sector parallels here. ┐

There are also jurisdictions – such as Canada, Zimbabwe and Hong Kong – with special offences aimed at the public sector which indicate a belief that the public sector must be held to higher standards than the private sector, or perhaps a belief that there is a higher level of public interest in integrity in public administration than in private transactions.

Recommendation for Namibia

One of the obvious motivations behind the enactment of Namibia's existing Corruption Ordinance 2 of 1928 was the need to extend the scope of the criminal law of bribery beyond the public sector, which was already covered (with some exceptions) by the common-law crime of bribery. ┐

In general, we believe that a modern anti-corruption statute should in its essentials apply without distinction to the public sector, the private sector and hybrids such as parastatal enterprises. However, we feel that the statute should include some additional provisions aimed at the public sector (including parastatals) and at elected officials, on the grounds that these people owe a special form of duty to the public at large which warrants particularly stringent expectations of integrity.

PART III
THE PRESENT LAW IN NAMBIA

3.1 CORRUPTION AND THE CONSTITUTION

The Namibian Constitution contains several provisions which concern corruption.

Article 42 deals with conflicts of interest on the part of Cabinet members:

(1) During their tenure of office as members of the Cabinet, Ministers may not take up any other paid employment, engage in activities inconsistent with their positions as Ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interests as Ministers and their private interests.

(2) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the Cabinet, directly or indirectly to enrich themselves.

Article 60(1)(b) states that members of the National Assembly shall "regard themselves as servants of the people of Namibia and desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people".

No sanctions are provided for the failure to observe these prohibitions.

Corruption is also explicitly mentioned in respect of the functions of the Ombudsman, who is charged by Article 91(a) with the duty to investigate corruption on the part of any official in the employ of any organ of Government (whether central or local).

3.2 STATUTORY OFFENCES DEALING WITH CORRUPTION

Prevention Of Corruption Ordinance 1 of 1928

Namibia's Prevention of Corruption Ordinance 1 of 1928 is the only statute in force which is aimed specifically at corruption. The statute, as amended, is quoted below in full. The amendments made by the sole amending Act (Act 21 of 1985) were minor ones, with the main difference being the change in punishment from a maximum of two year's imprisonment or a £500 fine or both, to "the penalties which by law may be imposed for bribery". ┐

Prevention of Corruption Ordinance 1 of 1928
(as amended by Act 21 of 1985)
For the better prevention of corruption

1. For the purposes of this Ordinance—

the expression “agent” includes any person employed by or acting for another, any person employed by or serving under the Administration of the Territory or the Government of the Union or any municipality, village management board, roads board or any other local authority at present existing in the Territory or which may hereafter be created, or employed by or acting for any company, society or voluntary association, and also includes the trustee of an insolvent estate, the assignee of an estate assigned for the benefit of or with the consent of creditors, the liquidator of a company which is being wound up, an executor of the estate of a deceased person, the administrator of a trust, and the legal representative of any person who is of unsound mind or is a minor or is otherwise under disability;

the expression “consideration” includes valuable consideration of any kind;

the expression “principal” includes an employer and a master as contemplated in any law governing the relations of masters and servants, and, in relation to a trustee, assignee, liquidator, executor, administrator or such legal representative aforesaid, means the general body of creditors, shareholders, or the heirs or beneficiaries or person represented by such legal representative, as the case may be.

2. Any person who—

(a) in the case of an agent, corruptly accepts or obtains or agrees to accept or attempts to obtain from any person, either for himself or for any other person, any gift or consideration as an inducement or reward for doing or omitting to do or for having done or omitted to do any act in relation to his principal’s affairs or business, or for showing favour or disfavour to any person in relation to his principal’s affairs or business; or

(b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to he principal’s affairs of business; or

(c) knowingly gives to any agent or, in the case of any agent, knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal,

shall be guilty of an offence and liable on conviction to the penalties which may by la be imposed for the crime of bribery.

3. This Ordinance may be cited for all purposes as the Prevention of Corruption Ordinance, 1928.

The Attorney-General reports that this statute is infrequently used. ┐ This Working Group has not been able to locate any reported cases citing the Ordinance.

With the exception of some minor differences in the definition of agent, Namibia’s statute as amended is virtually identical to the South African Prevention of Corruption

Act 6 of 1958, which closely follows the preceding Prevention of Corruption Act 4 of 1918 in its main points. The 1958 Act was the subject of a detailed study by the South African Law Commission in a Working Paper on Bribery published in March 1990 ┐, followed by a Report on Bribery published in June 1991 which incorporated comments received from the public on the working paper. ┐ The cases interpreting the South African Prevention of Corruption Act 6 of 1958 and the South African Prevention of Corruption Act 4 of 1918 are discussed in detail in the SA Law Commission Working Paper and Report on Bribery, with a view to identifying the shortcomings of the 1958 Act. This analysis is obviously directly useful to an assessment of the current Namibian statute. (The 1958 Act was replaced in South Africa by the Corruption Act 94 of 1992, based on the recommendations of the SA Law Commission.)

Both the South African and the Namibian statutes appear to be modelled on England's Prevention of Corruption Act 1906. The wording of section 2(a)-(c) of Namibia's Prevention of Corruption Ordinance 1 of 1928 was (prior to the minor amendments made by Act 21 of 1985) an exact replica of the corresponding sections of the English statute. The English law was extensively analysed by the UK Law Commission in a consultation paper on corruption published in 1997. ┐ This analysis is also extremely useful for our purposes.

A preliminary analysis of the shortcomings of the present Namibian statute is provided below, based on the analysis in the law commission publications cited above, as well as on papers by The Hon. Adv RK Rukoro, Attorney-General, and Adv PJ Miller from the Prosecutor-General's Office: ┐

The title of the Act is arguably inappropriate because the statute does not prevent corruption, but rather makes it punishable. However, many other jurisdictions use the concept of "prevention" in the titles of similar statutes ┐, and punishing corruption as a criminal offence is certainly aimed at deterring others from similar activity. (A better title might be the Combating of Corruption Act.)

The definitions of "agent" and "principal" are inadequate, whilst the definition of "consideration" is redundant. This criticism is a crucial one, and is discussed in detail in the following section with respect to the formulation of a new statute.

The meaning of "corruptly" in the act is not clear. This factor points to a fundamental concern which has arisen in several jurisdictions and will be discussed in detail in the following section.

There is a lack of clarity as to whether the culpability of the agent depends on the culpability of the giver. This issue is also discussed in detail below.

The statute as currently formulated focuses on bribery and fails to cover other forms of corruption.

The current statute does not appear to cover the situation where the benefit is given to a third party rather than to the agent, unless the agent has personally solicited the benefit. For example, the statute would not reach the situation where a fishing

company decided on its own initiative to give free shares in the company to the wife of a high-ranking official in the Ministry of Fisheries and Marine Resources after receiving a fishing quota, even though such an action might well be considered corrupt.

The statute does not cover abuse of office in situations where no consideration changes hands, or where the agent abuses his or her position unilaterally without any inducements. For example, an agent may show improper favours to friends, even if no quid pro quo is offered. Similarly, the existing statute does not make it illegal for an agent to accept benefits from persons who have dealings with the principal if no breach of duty is involved.

The statute likewise does not address the situation where threats are made by or to the agent in connection with the performance of a duty.

Specific suggestions for additional prohibitions which should be included in a modern corruption statute will be discussed in detail below.

The statute should give more explicit attention to the various kinds of corruption as a means of educating the public about the concept of corruption.

Corruption is particularly difficult to prove, since the parties to the act are often partners in crime who have no reason to implicate one another. Bribery is seldom straightforward, being more typically approached through circumlocution and innuendo aimed at determining the susceptibility of the other party. Even if one of the parties to the transaction is innocent, exposure involves publicity and discomfort which most people will be anxious to avoid. As a result, the existing statute is seldom used. The possibility of introducing presumptions to assist in proving corruption offences raises constitutional questions and is canvassed in detail in Part V below.

The present law is silent on the question of extraterritorial jurisdiction.

It has been suggested that the law should prescribe specific and heavy penalties for corruption offences, to make the law a stronger deterrent.

Forfeiture of the proceeds of the offence must also be considered. This issue is also addressed in Part VI concerning ancillary issues.

Given this fairly long list of flaws, this Working Group proposes that an entirely new criminal statute on corruption be drafted. The following section of the working paper will make detailed proposals for the formulation of a new and more comprehensive set of corruption offences. The existing statute will not be used as a starting point, with the elements of the proposed offences rather being drawn from appropriate international examples, with reference to the present statute where this is helpful.

Other statutes dealing with bribery

The following provisions have been located. However, given the piecemeal nature of the approach taken up to now, the list may not be a comprehensive one.

Insolvency Act 24 of 1936: Section 137 makes it an offence for any person to grant, promise or offer consideration to anyone else in an attempt to induce various wrongful acts connected with insolvency (including inducements to keep another from disclosing relevant information). Section 141 (as substituted by section 20 of Act 14 of 1985) makes it an offence to offer or accept consideration or rewards for various acts or omissions relating to the sequestration of insolvent estates.

Agricultural Bank Act 13 of 1944: This Act contains broadly-formulated prohibitions against bribery. Section 73(1) makes it an offence for a list of persons carrying out duties or responsibilities related to advances by the bank to receive any unauthorised fee or reward in connection with an advance or an application for an advance. It does not appear to be necessary to show that the person in question was actually influenced by the fee or the reward. Conversely, it is an offence in terms of section 73(2) for any person to bribe, "corruptly influence" or "attempt to corruptly influence" any of the members of the list of identified persons in connection with any advance or an application for an advance from the bank.

Defence Act 44 of 1957: It is an offence in terms of section 121 to agree with or induce or attempt to induce any defence force member to "neglect or act in conflict with his duty", or to incite a member to evade or infringe a duty or an order. (These offences, although generally worded, were apparently aimed primarily at attempts to influence persons not to do military service, as indicated by the title of the section - "Prohibition of certain acts in connection with liability to render service".)

Customs and Excise Act 91 of 1964: Sections 80(k) and (l) of this Act prohibit the offer or acceptance by public officials or employees of any inducement or reward in respect of the performance or non-performance of duties in terms of the Customs and Excise Act. Section 80(m) renders those who attempt to commit any such offence and those who assist others with such an offence criminally liable in so doing.

Regional Councils Act 22 of 1992: Section 17 makes it an offence for a member of a regional council "to accept any commission, remuneration or reward from any person other than the regional council for or in connection with the performance or non-performance of his or her powers, duties and functions as such a member or in connection with any transaction to which the regional council is a party.

Local Authorities Act 23 of 1992: Section 20 duplicates section 16 of the Regional Authorities Act 22 of 1992.

Sea Fisheries Act 29 of 1992: Sections 33(1)(s) and (t) are virtually identical to section 2(a) and (b) of the Prevention of Corruption Ordinance 1 of 1928 with respect to fishery control officers.

Public Service Act 13 of 1995: Section 25(1)(l) states that it constitutes misconduct for any member of the public service "to accept or demand in respect of the performance of his or her duties any commission, fee or reward, pecuniary or

otherwise, to which he or she is not entitled by virtue of his or her office", or to fail to report forthwith to the permanent secretary concerned the offer of any such commission, fee or reward. Such misconduct is not a criminal offence in terms of this Act, but rather grounds for disciplinary action.

Tender Board of Namibia Act 16 of 1996: The regulations issued in terms of this Act specify certain remedies in cases where a tenderer has been involved in bribery with respect to a tender, or where a contractor has been involved in bribery with respect to the conclusion of an agreement. The Board is given the authority to withdraw acceptance of the tender or to cancel the agreement and recover any losses suffered (Regulation 13, Government Gazette 1403 of 12 September 1996).

There is another statutory penal provision which covers "persuasion" rather than just benefits.

Police Act 19 of 1990: Section 33(b)(i) states that any person who "persuades any member [officer or non-officer of the Police Force] to omit to carry out his or her duty or to do any act in conflict with his or her duty… shall be guilty of an offence and liable on conviction to a fine not exceeding R4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."

Corruption by means of threats

There are several statutes which make it an offence for any person to use threats to deter certain officials from carrying out their duties.

Police Act 19 of 1990: Section 35(2)(b) states that any person who "in order to compel any such member [an officer or non-officer of the Police Force] to do or to abstain from doing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence to, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants shall be guilty of an offence and liable on conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."

Immigration Control Act 7 of 1993: Section 54(d) is virtually identical to the quoted provision of the Police Act, with respect to immigration officers. The maximum penalty here is R8000 or imprisonment for up to 2 years, or both.

Corruption by means of fraud or deception

There are a variety of offences relating to fraud and deception in the Posts and Telecommunications Act 10 of 1992. One of these falls squarely within the concept of using fraud or deception to effect a breach of duty by an agent:

Any person who… by false pretence or misstatement induces any employee of the postal company to deliver to him or her or any other person any postal article not addressed to or intended for either of them shall be guilty of an offence and liable on conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment. (section 34(1)(f))

The Public Service Act 13 of 1995 includes the following provision in the section on misconduct. This is not a criminal offence, but rather grounds for disciplinary action:

Any staff member shall be guilty of misconduct if he or she… with a view to obtain any privilege or advantage in relation to his or her official position or his or her duties, or to cause prejudice or injury to the Government or any office, ministry or agency or any member of the Public Service, makes a false or incorrect statement, knowing it to be false or incorrect (section 25 (1)(p)).

In terms of the regulations issued under the Tender Board of Namibia Act 16 of 1996, where a tenderer or a contractor has, in relation to the acceptance of a tender or the conclusion of an agreement, "acted in a fraudulent manner or in bad faith or in any other improper manner (such as the furnishing of incorrect information)", the Board is empowered to withdraw acceptance of the tender or to cancel the agreement and recover any losses suffered (Regulation 13, Government Gazette 1403 of 12 September 1996). No criminal sanction is available in terms of this law.

There are many statutes which make it an offence for a person to submit false or misleading documents in terms of that Act, or to furnish false or misleading information to a person performing duties in terms of that act. The Co-operatives Act 23 of 1996 (section 103) and the Labour Act 6 of 1992 (section 105(d)) are just two of a long list of examples which could be cited. Whilst the purpose of such false information will often be to corrupt an interaction with the agent of some principal, it is submitted that these offences are best left in place as they stand. These offences have stood side-by-side in the past with section 2(c) of the Prevention of Corruption Ordinance 1 of 1928 which combines the concept of agent and principal with the idea of false documentation, and there is no reason to be concerned about potential overlap with any similar offences in the new anti-corruption statute.

There are also several statutes which make it an offence for a person to falsely hold himself or herself out as a public official. Examples include the Posts and Telecommunications Act 10 of 1992 (section 41), the Labour Act 6 of 1992 (section 105(e)) and the Police Act 19 of 1990 (sections 32 and 33(a)). This type of offence does not seem to fall within the ambit of corruption as it has been discussed here, for there is no abuse of power or position involved. The evil these offences are aimed at is that of impostors who pretend to hold a power or a position which they do not.

Self-dealing and conflicts of interest

Namibia has several criminal provisions relating to this topic, in a number of otherwise unrelated statutes. The following have been located, although the list may not be comprehensive:

Insolvency Act 24 of 1936: Section 137(c) read together with section 23(3) makes it an offence for any insolvent to carry on, or be employed in any capacity in, or have a direct interest in, the business of a trader who is a general dealer or manufacturer during the sequestration of the insolvent's estate.

Agricultural Bank Act 13 of 1944: Section 73(3) prohibits conflict of interest on the part of valuators, advisers and board members. The provision applies to anyone who has any pecuniary interest in land offered as security; to anyone who is a partner, creditor or debtor of an loan applicant; and to anyone who is a director or a shareholder of a company which applies for a loan, or who is related to such a director or shareholder within the third degree of affinity or consanguinity.

Companies Act 61 of 1973: In terms of sections 234-241, a director of a company has a duty to disclose a direct or indirect interest in a proposed contract with the company or a contract already entered into by the company. Failure to do so constitutes a criminal offence. The same is true for officers of the company who have been authorised to enter into a contract on behalf of the company.

Close Corporations Act 26 of 1988: Section 42(2)(b) obligates a member to "avoid any material conflict between his own interests and those of the corporation". A breach of this duty is not a criminal offence, but it does make the member in question liable to the corporation for any losses suffered, and liable to pay over to the corporation any economic benefit which accrued to the member from the breach (section 42(3)(a)).

National Transport Corporation Act 21 of 1987: Section 19(1) of this Act makes sections 234(1)(2), (3) and (5), 235 and 237 of the Companies Act applicable to the directors of the National Transport Corporation. These sections relate to the disclosure of any interest on the part of a director or an officer in a contract involving the corporation, and make failure to disclose such conflicts a criminal offence.

Namibian Broadcasting Act 9 of 1991: Section 10 places a duty on members of the board to disclose conflicts of interest on the part of such members or their spouses. Section 11 makes sections 234(1)(2), (3) and (5), 235 and 237 of the Companies Act relating to conflicts of interest applicable to directors, board members, officers and employees of NBC and extends those provisions to conflicts of interest on the part of spouses. The penalty for failure to comply with any of these imported provisions of the Companies Act is R4000 or imprisonment for a period not exceeding 12 months, or both.

Regional Authorities Act 22 of 1992: Section 16 requires the disclosure of conflicts of interest on the part of a member of a regional council, a spouse under civil or customary law, a family member, a member of the household, or a partner, agent or business associate of the member. Failure to make such a disclosure is an offence punishable by a fine of R4000 or imprisonment for a period not exceeding 12 months, or both.

Local Authorities Act 23 of 1992: Section 19 duplicates section 16 of the Regional Authorities Act 22 of 1992.

National Housing Enterprise Act 5 of 1993: Section 13 requires the disclosure of conflicts of interest on the part of a director with respect to any contract entered into or proposed to be entered into by NHE. No sanction for a failure to disclose such conflicts of interest is provided.

Public Service Act 13 of 1995: Section 25(1) articulates several kinds of conflicts of interest which constitute misconduct for any member of the public service. A staff member is guilty of misconduct and open to disciplinary action if he or she -
operates or undertakes, without the approval of the Prime Minister, any private agency or private work in regard to any matter directly or indirectly related to the performance of his or her official functions or any matter directly or indirectly related to the field of operations of the office, ministry or agency in which he or she is employed or fails to declare that any member of his or her household operates or undertakes any such private agency or private work.
uses his or her position in the Public Service or utilises any property of the State to promote or prejudice the interests of any private business or private agency, except in the performance of his or her official duties (regardless of whether or not the public servant in question has a personal interest in the matter)
misappropriates or improperly uses any property of the State (even where this does not constitute a criminal offence).
Section 17 of the Act also forbids public servants from engaging in other remunerative work without permission and requires that public servants place the whole of their time at the disposal of the government.

Tender Board of Namibia Act 16 of 1996: In terms of section 6, members of the Tender Board have a duty to disclose any "direct or indirect personal interest" in a tender or an agreement in writing to the Board, and may not take part in any deliberation of a matter in which they have such an interest. There is no penalty for failure to disclose, but improperly taking part in deliberations where there is a conflict of interest is punishable by a fine of up to N$500 000 or imprisonment for up to 10 years, or both. The same rules apply to officials who are involved in drafting submissions to the Tender Board.

Powers, Privileges and Immunities Act of Parliament Act 17 of 1996: Section 22 states that a Member of Parliament shall not take part "in any proceedings in which such member has any interest, whether direct or indirect, which precludes him or her from performing his or her functions in a fair, unbiased and proper manner." MPs are also required to fully disclose the nature of any personal interest as soon as it appears

that there is the possibility of a conflict. (This section goes on to state that these prohibitions are not to be interpreted to prevent MPs from deliberating and voting on their own salaries and benefits!) Failure to comply with the rules on conflicts of interest is grounds for disciplinary action.

Improper use of information

Three statutory provisions dealing with the improper use of information in specific contexts have been located:

Defence Act 44 of 1957: Section 118 makes it an offence to disclose confidential information about the defence force without authorisation, a prohibition which is clearly aimed more at national security interests than at the possibility of improper personal profit. Section 118(5) establishes a presumption that any information relating to the defence force is confidential and that such information became available to a member charged with this offence by reason of his or her employment.

Companies Act 61 of 1973: Section 233 covers the offence of insider trading, which is the practice of directly or indirectly dealing in securities of a company with the intent of profiting on the strength of information not yet disclosed to other shareholders or to the outside world. The offence is committed whenever a person with knowledge of company affairs that have not yet been publicly announced deals in the company's securities to his or her own advantage, directly or indirectly.

Public Service Act 13 of 1995: Section 25(1)(k) states that it constitutes misconduct whenever any member of the public service "without having first obtained the permission of the permanent secretary concerned, discloses otherwise than in the performance of his or her official duties any information gained by or conveyed to him or her by virtue of his or her employment in the public service, or uses such information for any purpose other than the performance of his or her official duties, whether or not he or she discloses such information." This is not a criminal offence, but rather grounds for disciplinary action.

It is submitted that these provisions could be supplemented by a broader and more general prohibition on the improper use of information by persons who acquired the information by means of a public position.

Wrongful disposal of property of principal

Section 125(1) of the Defence Act 44 of 1957 (as amended by Act 20 of 1990) makes it a criminal offence for any member of the Defence Force to dispose of items wrongfully:

Any member of the Defence Force or any person permitted under section 76(2)(f) to participate in training exercises with members of the Defence Force, or any auxiliary or medical service established under this act, who without authority gives away, sells, pledges, lends or otherwise disposes of any moneys, animals, arms, ammunition,

accoutrements, clothing, supplies or any other articles entrusted to or held by him or her for the service of such defence force or auxiliary or medical service, or who as a result of his or her negligence loses any such articles so entrusted to or held by him or her, shall be guilty of an offence, and may, apart form any penalty imposed under this Act, be ordered by the court or other competent authority which imposes that penalty, to make good any loss or deficiency caused by the commission of such offence, and every such gift, sale, pledge, loan or other disposition shall be null and void.

Section 125(2) contains a presumption in respect of this offence: when a person is charged with the loss of any article as a result of negligence, once it is proved that the article was entrusted to him or her and that he or she has failed to produce the article in question, the accused bears the onus of proving that the loss is not due to his or her negligence.

Causing loss to state revenue

A corrupt act may result in a loss to the state revenue, when a public official conspires with someone else to assist them to evade taxes or duties, or when money due to the state is corruptly diverted elsewhere.

The State Finance Act 31 of 1991 makes provision for the recovery of loss or damage to State property from a public servant or from any other person responsible for the loss. Section 11(1) reads as follows:

(1) Whenever-
(a) any person who is or was employed in an office, a ministry or an agency caused any loss or damage to the State in that he or she-
(i) incurred an unauthorised expenditure or was responsible for incurring it;
(ii) failed to collect State moneys for the collection of which he or she was responsible;
(iii) is or was responsible for a deficiency in, or a destruction of or damage to, State moneys, stamps, securities, forms having a face or potential value, equipment, stores or other movable goods owned or leased by the State;
(iv) due to an omission to carry out his or her duties properly, is or was responsible for fruitless expenditure of State moneys or for a claim against the State;
(b) any person-
(i) in any manner caused any loss or damage to the State;
(ii) has as a result of unauthorised expenditure been unjustly enriched,
the accounting officer concerned or, in a case where an accounting officer has caused such loss or damage or has been so unjustly enriched, the Treasury, shall determine the amount of such loss, damage or enrichment and, subject to the provisions of subsection (3), by notice in writing order such person to pay the amount so determined within thirty days as from the date of such notice.

Provision is further made for recovery of the loss through deductions from the salary of a public servant, or through court action in the case of other people. The Act does not, however, appear to make provision for forcing a public servant to turn a bribe over to the State.

There is no provision in the State Finance Act for criminal prosecution on the basis of the loss or damage to the State. This would depend on whether or not the conduct which caused the loss or damage constituted a crime under some other statute or at common law.

Evasion of tax and duties

One important function of the State is the levying and collection of various taxes and duties which comprise the public revenue. It is vital that the State possess sufficient mechanisms to enable it to collect taxes and duties as well as adequate measures to deal with those who evade the payment of such levies.

In Namibia as in most other jurisdictions, the law on taxation and duties is statutory. The main sources of public revenue are income tax, stamp duty, transfer duty, customs and excise duty, sales tax and other levies which are collected against the issue of various licences and permits. The later category can best be regarded as administrative fees which go to finance particular schemes as opposed to sources of general state revenue.

The following statutes contain mechanisms for dealing with the evasion of taxes and duties:

Income Tax Act 24 of 1981: This Act makes provision for the payment of income tax by individuals and companies. It is administered by the Minister of Finance who is given wide powers to facilitate the collection of income tax. Chapter III of the Act makes provision for the annual completion of income tax return forms by persons who are liable to pay income tax. Section 65 contains numerous offences in connection with failure to complete and submit tax returns, including failure to submit returns in time, failure to produce information when required to do so by the Minister, failure to disclose material information in a return form, obstruction of staff members involved in collection of tax, failure to keep records for specified periods where this is required and submission of false certificates or statements. A person who fails to comply with this section after conviction commits further offences for which he or she is liable to pay a fine calculated on a daily basis and (in terms of section 66) liable to pay additional tax. By virtue of section 79, interest at the rate of 20% per annum calculated on a daily basis is due on outstanding tax. Section 96 prescribes penalties for a person who “with intent to evade assessment or taxation” makes false entries in returns, supplies the Minister with false information, prepares falsifies books of account, or commits any fraud. In addition, section 35 of the second schedule to the Act creates numerous offences which can be committed by employers in respect of their obligations to collect tax from their employees. The penalty provisions referred to contain presumptions which cast the onus on the accused to prove certain facts once the prosecution has established certain facts.

Customs and Excise Act. 91 of 1964: This Act makes provision for the levying of customs, excise and sales duties, surcharge and a fuel levy. It is administered by the Minister of Finance who acts through the Commissioner of Customs and Excise. The

Commissioner is assisted by customs officers who are given extensive powers by section 4 of the Act. including the power to enter premises and to the production of documents. In addition, customs officers may break into premises, search suspected persons, question any suspect or do any other act to facilitate investigations. Sections 78 to 96 are penal provisions, which cover a wide range of offences. There is provision for seizure and forfeiture of goods in respect of which an offence has been committed contrary to the Act (sections 87 to 90). This Act is fairly self-contained, in the sense that it contains detailed enforcement measures.

Stamp Duties Act 15 of 1993: This Act makes provision for the payment of duty on the execution or registration of certain documents. Documents for which duty is payable include bills of exchange, bonds, antenuptial contracts, customs and excise documents and hire purchase agreements. Section 26 contains offences relating to forgery of documents and false statements in relation to payment of duty. Section 27 covers the offences of falsification of stamps and dies whilst section 28 contains offences relating to adhesive stamps. Section 29 gives powers to police officers or staff members of the public service acting under the authority of a judicial warrant to enter premises, to search premises and to search any person where it is suspected that an offence under the Act has been committed.

Transfer Duty Act 14 of 1993: This Act makes provision for the payment of transfer duty in respect of immovable property. Section 17 makes it an offence for a person to fail to comply with a directive from the Permanent Secretary for Finance or to make a false declaration when required to give information under the Act.

Sales Tax Act 5 of 1992: Section 5 of this Act makes provision for the levying of sales tax on the sale of goods, lease of property, rentals, supply of taxable services, provision of board and lodging and importation of goods. Section 25 of the Act provides for payment of an additional penalty of 10% of the amount of tax not paid when due and the Permanent Secretary of the Ministry of Finance is authorised by section 26 to take legal action to recover unpaid tax. Section 43 of the Act authorises the Permanent Secretary to demand information from any person where the information is required for the purposes of the Act. Section 44 gives officers engaged in administering the Act powers of entry into premises, search of premises, seizure of documents, making copies of documents and the stopping and searching of vehicles. Section 46 contains offences which are similar to those found in the Income Tax Act 24 of 981.

Additional Sales Duties Act 11 of 1993: This Act, which deals with payment of additional sales tax by certain importers of goods and manufacturers of goods, is modelled on the Sales Tax Act And contains similar enforcement provisions.

From this brief survey, it is evident that the individual statutes which provide for the collection of revenue contain specific and detailed provisions for facilitating enforcement and prosecuting those who try to evade payment. It therefore appears unnecessary for a new anti-corruption law to attempt to accommodate provisions pertaining specifically to the evasion of taxes and duties.

Corruption in connection with elections

The Electoral Act 24 of 1992 devotes an entire section to "Corrupt and Illegal Practices" and contains offences relating to undue influence, bribery, impersonation, corrupt procurement or withdrawal of candidature and "treating" (sections 103-108).

Many of these offences are aimed at the application of threats, frauds ("any fraudulent device or contrivance") or inducements in an attempt to influence a voter to vote, to refrain from voting or to vote for a particular political party or candidate. In the case of inducements, both the voter and the person who has provided the improper inducement are guilty of offences.

The prohibition on the use of threats is very broadly formulated. Section 104 states:

Any person who, directly or indirectly, by himself or herself or by any other person makes use or threatens to make use of any violence, force or restraint, or inflicts or threatens to inflict any bodily or psychological injury, damage, hazard or loss, upon or against, or does or threatens to do anything to the disadvantage of, any person in order to induce or compel any person to vote or to refrain from voting at any election, or on account of any person having voted or refrained from voting at the election.

A person also commits an offence if by such means he or she "induces, compels or prevails upon any voter to vote or refrain from voting at any election in question or to vote in favour of a particular political party or candidate, or impedes, hinders or prevents the free exercise of the franchise by any voter at any election in question".

The prohibition on fraud refers to the use of "any fraudulent device or contrivance" for the same purposes (section 104(b)). It is also an offence for a voter to use fraud in connection with voting, by applying for a ballot paper in the name of some other person (living or dead), by voting or attempting to vote more than once, or by giving any false information in terms of the Electoral Act (section 106).

The prohibitions on inducements in section 105 cover gifts, loans and offers or promises of money or "any other thing" given to the voter or any other person. This section also makes it an offence for any person to advance or pay money knowing that it is to be spent on election bribery. The offences do not appear to cover benefits which are not in the form of money or "things" – such as the offer of a service or a sexual favour as an inducement to a voter. The prohibitions apply to bribes given in advance of the election in an attempt to influence the voter, as well as to rewards given after the fact. Section 108 on "treating" applies to the corrupt supply of payments, food, drink, entertainment lodging or other "provisions" to voters as inducements or rewards for voting or not voting, and to the corrupt acceptance of such provisions by the voter.

There is a specific prohibition against corruptly inducing or procuring any other person to become a candidate, or to withdraw as a candidate – and conversely, for a candidate to stand or withdraw as a result of such inducement or procurement. It is also an offence to promote or secure the election of a particular party or candidate by

publishing a false statement of the withdrawal of a political party, or the death or withdrawal of a candidate (section 107).

It is submitted that the provisions on election fraud should remain in the Electoral Act rather than being incorporated into a broad anti-corruption statute. Voters and candidates do not fit within the concept of “agents” and “principals” which is a suitable framework for other forms of corruption. Therefore, corruption in connections with elections would require special provisions even if it were included in an anti-corruption statute.

However, we would suggest that the corruption provisions in the Electoral Act be re-considered at some stage, to see whether or not they are sufficiently comprehensive. For example, the issue of election contributions made by persons seeking to obtain or retain government contracts (as covered by the Canadian Criminal Code, section 121(2)) should perhaps be incorporated into the Electoral Act.

A related form of misbehaviour is contained in the Public Service Act 13 of 1995, which forbids any public servant to use his or her position or State property "to promote or prejudice the interests of any political party". To do so is not a criminal offence, but it is grounds for disciplinary action.

3.3 CORRUPTION AND RELATED COMMON-LAW CRIMES

Corruption and bribery

The common law crime of bribery overlaps with the Prevention of Corruption Ordinance 1 of 1928 to some extent, but continues to co-exist with the statute.

The present common-law of bribery has its origins in the Roman law. The most notable enactment of those times is the lex Julia repetundarum of Julius Caesar which made bribery punishable as a crime as far back as 59 BC. The crime of bribery was committed by officials who accepted consideration in return for the performance or omission of an official duty. The term official was given a wide meaning so as to include "magistrates, persons vested with some degree of power or administration, or with the office of deputy, or any other public employment or occupation whatsoever .....and the attendants of the above mentioned dignitaries" ┐

Bribery was also a crime under Roman-Dutch law, with the two most important enactments being the Placaaten of the States-General of the United Netherlands of 1 July 1651 and 10 December 1715. The Placaaten were meant to protect community interest in an honourable public administration. As in the case of Roman law, the bribee had to be a public officer or State official. The recipient of the bribe could be a relative of the official. The consideration given could be anything of value , and what the official was bribed to do did not have to be within the scope of the official's duty or in conflict with his or her duty. These two Placaaten were influential in the development of the common-law crime of bribery as it applies in Namibia today.

The current common-law crime of bribery has been defined as follows in Hunt:

Bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a State official to give any consideration in return for action or inaction by him in an official capacity. ┐
Bribery (as a bribee) is committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity. ┐

Snyman describes the two forms of the offence as active and passive bribery:

Active bribery consists in unlawfully and intentionally giving, agreeing to give or offering to give to a state official any consideration in return for either future or past action or inaction by that state official in an official capacity.

Passive bribery, on the other hand, is committed when a state official unlawfully and intentionally receives or agrees to receive any consideration in return for return for either future or past action or inaction in his official capacity. ┐

The essential elements of the crime are: (a) unlawfulness (b) intention (c) a state official (d) offering or accepting consideration (e) in return for certain conduct by the state official in an official capacity.

The common-law crime of bribery applies only to state officials. The courts have never given a precise definition of "state official" but have instead taken a case-by-case approach to determining who is covered. Several criteria have been developed through the case law. A state official need not be a judicial officer, nor must he or she be a member of the public service. He or she need not be in the permanent employment of the State; a temporary appointment suffices. In each case the nature of the person's duties must be scrutinised before a decision is made. The mere fact that the person is paid from state funds is not decisive, but is a factor which can be taken into account. A policeman, a customs and excise officer, a court interpreter and a government headman are among the persons who have been found to be state officials for the purposes of common law bribery. ┐

The statutes in both Namibia and South Africa have cast the net wider by formulating similar offences which apply to agents in both the public and the private sectors.

In South Africa, the Corruption Act 94 of 1992 took the unusual step of repealing the common-law crime of bribery. This is the first time that a common-law crime has ever been explicitly repealed by the South African legislature. ┐ The SA Law Commission had actually recommended that the common-law crime of bribery should be retained, on the basis of submissions which emphasised that common-law crimes should be replaced with great circumspection, particularly when the courts have not yet had a chance to interpret the new statute in question. The Commission suggested that common-law bribery be retained and treated as a competent verdict on a conviction for a charge of corruption under the new act. ┐ The decision to repeal the common-law crime of bribery was made by the Parliamentary Joint Committee on Justice, but the Parliamentary debate on the report of this Committee does not reveal the reasons for the decision. ┐

This Working Group sees no need to repeal the common-law of bribery in a new anti-corruption statute. The bribery offence created by the new statute will almost certainly be wider than the common-law concept of bribery. However just as the common-law crime has continued to exist alongside the Corruption Ordinance 2 of 1928, it can continue to exist alongside a new corruption statute which replaces the 1928 Ordinance. If the common-law crime of bribery is thereby rendered irrelevant, it will die a natural death from disuse.

Corruption and theft

There is some relationship between corruption and theft. The gist of theft is the unlawful appropriation of another person's property with the intention of permanently

depriving that person of it. ¬ The related crime of theft by false pretences is essentially theft by means of an intentional misrepresentation. ¬ In a corrupt transaction, an agent B may receive money or property from A as an inducement to do an action in relation to the business of the principal C, or as a reward for having done some such action. B is not authorised by C to receive the inducement or reward. B has not committed theft with respect to A by accepting a bribe from A, because A has consented to the taking and handed over the bribe voluntarily. (If A were coerced or deceived by B into paying the bribe, then extortion or fraud or theft by false pretences might be appropriate offences, but the action does not seem to fall within the ambit of the crime of theft.) However, it is arguable that the acceptance of the bribe by B constitutes theft (or theft by false pretences) with respect to the principal C.

In the strict law of agency it seems to be settled law that a secret profit which is received by an agent belongs to the principal. Kerr¬ and Silke¬ both agree that a secret profit obtained by an agent during the duration of the agency belongs to the principal. If the secret bribe belongs in law to the principal C but is appropriated by the agent B, then B could be understood to have committed theft. However, the term "agent" as used in the present (and proposed) statutes on corruption has a wider meaning than that understood in the strict law of agency.

In practice, the question of who is the rightful owner of the property is most likely to arise in connection with the question of what is to happen to the money or property in question. For example, in the case of Attorney-General for Hong Kong v Reid ¬ , a public prosecutor (Reid) took bribes which were intended to induce him to obstruct certain criminal prosecutions. He invested the money received in property in New Zealand. The Attorney General of Hong-Kong attempted to freeze these assets and to claim them in specie. On appeal, the Privy Council held that Reid held the bribe monies in constructive trust for the Crown from the moment he received them, meaning that the Crown had an equitable interest in the money which extended to its proceeds.

In Botswana, there is an offence entitled "cheating of public revenue" which is somewhat analogous to theft by false pretences:

A person is guilty of cheating the public revenue if as a result of his fraudulent conduct, money is diverted from the revenue and thereby depriving the revenue of money to which it is entitled. (Corruption and Economic Crime Act, 1994, section 33).

However, this offence would appear on its face to apply only to situations where money which was lawfully due to the government is channelled elsewhere, and not to bribes which might be collected by public officials. It is aimed at a specific form of corruption and does not really import the concept of theft into the statute.

None of the laws from the other jurisdictions which have been examined appear to incorporate the concept of theft in statutes aimed at corruption.

It is submitted that a modern corruption statute should not attempt to conceptualise the acceptance of a bribe as theft, for the following reasons:

Firstly, the fit between theft and bribery is an imperfect one. For example, there may be cases in which the benefit received is not transferable – such as a case where B demands a sexual favour from A in exchange for the performance or non-performance of a duty.
Secondly, the fact that the bribe belongs in law to C does not go to the heart of the mischief contemplated in the term "corruption", which is the perversion of the integrity of the transaction in question.
Finally, a criminal statute on corruption (or a general law on the proceeds of crime) should deal directly with the question of forfeiture of the proceeds of corrupt transactions, to eliminate any questions on this point and to provide a quick and straightforward process by which to ensure that the wrongdoer does not profit from the wrong. Addressing this question head-on should obviate any need to cast the offence of bribery or corruption as one of theft.

This Working Group recommends that corruption be conceptualised as a completely separate offence from theft. However, nothing in a new statute on corruption need foreclose the option of charging an agent who accepts bribes with the common-law crime of theft or theft by false pretences in appropriate circumstances.

Corruption and fraud

There is also an overlap between some forms of corruption and fraud. Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice to another or is potentially prejudicial to another. ┐ Corruption will in many cases involve the defrauding of the principal by the agent. For example, the principal may have to pay more for a service because the agent has corruptly accepted a tender which is overpriced. A corrupt transaction may also involve defrauding a member of the public, such as a case where a police officer falsely tells a person that there is an official fee for laying a charge.

The UK Law Commission analyses the relationship between corruption and fraud by noting that one cannot act fraudulently in the abstract: one can only defraud people (or bodies with legal personality). To exploit a position of trust for one's own benefit is not fraud unless someone's else's interests are thereby damaged or endangered. The acceptance of a bribe by an agent is not necessarily a fraud on the agent's principal, because the principal may not suffer a loss even though the agent is unduly enriched. The Commission goes on to say:

Corruption, we believe, is a kind of conduct which may or may not involve loss to others; and even where loss is caused, that factor is not in our view central to the criminality of what is done. The agent's conduct is criminal in two distinct respects, and for two distinct reasons. On the one hand, it is a fraud on the principal, because the principal's private interests are improperly put at risk. On the other hand, it is contrary to the public interest because of the damaging consequences if such conduct becomes widespread. It is in the public interest that people should refrain from conduct which might encourage agents to act in breach of their duty – whether or not anyone would be defrauded by such conduct. In many cases, these justifications overlap. But, just as there can be fraud without corruption, so there can be corruption

without fraud. it follows that fraud, though a common feature of corruption, is not an essential element of it. ┐

Hunt remarks on the relationship between fraud and bribery as follows:

The line between fraud and bribery is sometimes a fine one, An official (Y) who solicits money from a member of the public (X) is guilty of bribery only if he thinks that X intends a bribe; if Y knows that X has been misled into thinking the payment to be a lawfully exigible fee, Y is guilty of fraud and not of bribery. ┐

A number of modern statutes on corruption make it an offence for an agent, or any person who is dealing with an agent, to provide false documentation with intent to deceive the principal. ┐ While such an act might also satisfy definitions of fraud, this form of misconduct is highlighted in the statutes on corruption when it occurs within the context of a relationship between an agent and a principal (broadly-defined).

It should be noted that in Canada, a number of forms of corruption are grouped under the heading "frauds on the government". The provision so entitled includes bribery, "influence-peddling", bribery in connection with tenders and the unauthorised offer or acceptance of any commission, reward, advantage or benefit regardless of whether or not there was any intent to induce a breach of duty. ┐

In Canada, the chapter of the criminal code on corruption also makes it an offence to improperly influence a municipal official by means of deceit to vote for or against something, to abstain from voting, to adopt or prevent some measure or to do or omit to do any official act. ┐ Such an offence might in some circumstances satisfy the definition of the common-law crime of fraud in Namibia, although there may be many cases in which such conduct would not result in prejudice or potential prejudice to another.

The Canadian Criminal Code also includes the offence of "contractor subscribing to election fraud" in the chapter on corruption. This offence applies to a situation where someone seeking to obtain or retain a contract with the government directly or indirectly gives any valuable consideration to promote the election of a candidate or a party, or with the intent to influence the outcome of an election. This set of circumstances seems to depart from the Namibian common-law concept of fraud, since there may not necessarily be a misrepresentation or a loss to any of the parties involved.

There is also a more general Canadian offence pertaining to fraud by public officials in connection with the duties of office. ┐

As in the discussion of theft, our recommendation here is that fraud and corruption be dealt with as separate although sometimes overlapping crimes. A new statute on corruption could include offences which cover situations where an agent misleads another in connection with the business of the principal, or vice versa, as well as offences targeted at fraud by public officials in the course of their duties. These could sit side-by-side with the common law on fraud. We believe that a modern statute on corruption should be as comprehensive as possible, regardless of whether it overlaps

to some extent with existing common-law crimes. In appropriate cases, prosecutors can utilise fraud as an additional or alternate charge along with the relevant statutory provision.

Corruption and extortion

The common-law crime of extortion consists in obtaining from another some advantage by unlawfully and intentionally subjecting him to pressure which induces him to submit to the taking. ┐

The pressure which is applied may not necessarily be unlawful in and of itself. For example, X may threaten to reveal that Y is having an extramarital affair unless Y provides him with employment. It is not unlawful to reveal the existence of extramarital affairs, nor to solicit employment. But the situation which is described would constitute the crime of extortion. Commentators also now generally agree that the crime of extortion does not necessarily require that the benefit which is extorted is not otherwise due. For example, it would be extortion if X threatened to assault Y unless Y paid a debt legitimately owing to X. To avoid the crime of extortion, both the threat and the purpose for making the threat must be legitimate.

Extortion and corruption overlap when a person threatens to use the power of his or her office or position to obtain some advantage. As explained in Hunt, "Thus it is perfectly lawful for a police officer to threaten a person who has committed an offence with arrest. But it is unlawful for him to make that threat dependent on that person's failure to grease his palm. So too it is lawful for a person to threaten a strike or boycott if this is for the benefit of the workers that the actor represents. A threat to call a strike unless the actor is paid a sum of money or appointed to a position or given a job would be unlawful." ┐

In Canada, the chapter of the criminal code on corruption makes it an offence to improperly influence a municipal official by means of threats to vote for or against something, to abstain from voting, to adopt or prevent some measure or to do or omit to do any official act. ┐ Such an action might in some cases constitute extortion, but not necessarily, as the "advantage" accruing to the person who made the threats might not always be clear.

Here again, the Working Group feels that a new corruption statue should be broad and comprehensive. There may be some overlap with the common-law crime of extortion in some sets of facts covered by the statute, but this should not be cause for concern. There is no reason to try to eliminate such overlaps. As in the case of the common-law crime of fraud, prosecutors can utilise extortion as an additional or alternative charge along with the relevant statutory provision where appropriate.

3.4 SUMMARY

A new anti-corruption statute should go beyond bribery to cover a range of corruption behaviour as comprehensively as possible. Thus, it will go far beyond the existing

Corruption Ordinance, which is aimed primarily at bribery. The new statute should attempt to generalise the key provisions on corruption already contained in other Namibian legislation, without necessarily replacing all such provisions. It should not, however, attempt to reach evasions of taxes and duties or election fraud, as these specialised problems are best dealt with in the statutes already pertaining to these areas.

A comprehensive corruption statute will contain elements which overlap with the common-law crimes of bribery, fraud and extortion. It will raise the question of the disposition of any benefits improperly accrued by means of the corrupt act, but will not otherwise conceptualise corruption as theft. There is no need for any of the common-law crimes in question to be explicitly repealed. Fraud and extortion will certainly occur in contexts which do not constitute corruption. If the common-law crime of bribery is completely superseded by the new corruption statute, then it will fall away from disuse. But the new statute should first be tested in practice to allow an opportunity for unanticipated gaps to be discovered before it will be safe to assume that it applies to all situations which are covered by the common-law crime of bribery.

PART IV
FORMULATING A MODERN CORRUPTION STATUTE

4.1 OVERVIEW

After considering the existing law in Namibia and the general approaches taken by other jurisdictions, the Working Group is of the opinion that a new criminal statute on corruption should cover the following topics in its substantive provisions:
bribery (public and private sectors)
corruption by means of threats (public and private sectors)
corruption by means of fraud or deception (public and private sectors)
"influence-peddling" (certain persons in both public and private sectors)
abuse of office to show undue favour or disfavour (public sector)
acceptance of unauthorised benefits (public sector)
tenders and auctions (public sector)
self-dealing and conflicts of interest (public sector)
improper use of information and public property (public sector)
wrongful disposal of public property (public sector)
loss to state revenue (public and private sector)

We propose that the new anti-corruption statute be entitled the Combating of Corruption Act to give the most accurate description of its purpose.

Working drafts of proposed criminal provisions are included in the shaded boxes in this section. These are provided primarily as summaries of the recommendations contained herein and should not be viewed as firm or final proposals.

4.2 THE CONCEPT OF AGENTS AND PRINCIPALS

Corruption as it has been discussed here can be understood in part as conduct on the part of A which tempts an agent B to act disloyally by putting his or her own interests before those of the principal C – or conversely as conduct where the agent B abuses his or her position by acting disloyally in exchange for some benefit or reward. According to the UK Law Commission, it is the agency relationship which lies at the crux of the whole question of corruption: "The purpose of criminalising conduct which gives rise to such a temptation rests in the importance to society of maintaining and protecting the core relationship of loyalty or trust which subsists between B and C." ┐ This concept of agent and principal is not limited to the technical law of agency, but applies in the broader sense to one party (the "agent") who is acting for or on behalf of another party (the "principal"), who may be an individual, an organisation or even an abstraction (such as the "public").

One issue which must be addressed in respect of the scope of the criminal law is what relationships will be covered by a set of anti-corruption offences. The terminology of "agent" and "principal" is commonly used in corruption statutes, even though these

terms are intended to capture a larger group of relationships than those implied by the strict law of agency. ┐

The UK Law Commission describes the relationship which corruption law should capture as one of trust and loyalty – in other words, a fiduciary relationship involving "someone who has 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" ┐ or " a relationship in which the parties are not free to pursue their own interests." ┐ Persons who are public officials or who otherwise perform public functions can be viewed as being in a relationship of trust with the public as well as with their direct principals. ┐

The Australian MCCOC Report describes the core of the concept as being the fact that an agent acts on behalf of another person, and refers to the desire to catch "a pool of relationships where there may be said to be a relationship of trust". ┐

There seem to be two common approaches to defining the relationship of "agent" and "principal" for the purposes of an anti-corruption statute: (1) a broad and simple definition; (2) a definition supplemented by a list.

Definitional approach

Technically speaking, the South African Corruption Act 94 of 1992 contains no definitions at all. The policy behind this approach was the desire to avoid "extensive definitions in order to avoid restricting the categories of persons who may be bribed". ┐ The wording of the crime itself creates its own definitions, however. It refers to bribery in respect of :

any person upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law. ┐

The Botswana Corruption and Economic Crimes Act states that "agent includes any person employed by or acting for another", and "principal includes an employer".

The Hong Kong Prevention of Bribery Ordinance states that "agent includes a public servant and any person employed by or acting for another", but gives a list of what is included in the concept of "principal" without attempting a general definition.

The Canadian Criminal Code simply defines agent as including an employee and principal as including an employer for the purposes of the offences relating to "secret commissions". However, there are other offences which apply to specific classes of public officials which are listed by category.

The UK Law Commission suggests the following definition based on the concept of a fiduciary relationship:

A person (B) should be regarded as an "agent", and another person (C) as B's "principal", if B has undertaken (expressly or impliedly) to act on behalf of C, and that undertaking involves one of more of the following features:
(a) B exercising a discretion on B's behalf;
(b) B having access to C's assets (irrespective of whether B has been given a discretion by C to act in regard to those assets); or
(c) B having influence over C's decisions (as regards C's assets or any other interest of C's).

Additionally-

A person (B) should be regarded as an "agent" (acting on behalf of the public) if B has undertaken to discharge a public duty (whether appointed as public office-holder or to perform a specified public function).¬

However, the UK Law Commission also points out that, whilst it is important to identify the essential characteristics of the agency relationship, it would be unnecessarily burdensome for the prosecution, on every occasion, to be required to prove that a person charged with a corruption offence falls within the definition. Therefore, it proposes that a revised corruption statute should list a number of categories of individuals who are clearly agents, reserving the definition for "residual cases". ¬

Definition supplemented by a list

The existing Corruption Ordinance 2 of 1928 includes a broad definition of an agent ("any person employed by or acting for another"), followed by a list of persons who are included in the concept of agent. It should be noted that there may be some dispute on whether the term "includes" as used in the definition of agent and principal is intended to be exhaustive of all the persons covered by the definition, or whether it is intended to be a term of extension. ¬ The definition is presented in list format here, to make its various components clearer.

(a) any person employed by or acting for another,
(b) any person employed by or serving under the Administration of the Territory or the Union Government (which by virtue of the Constitution would now refer to the Government of the Republic of Namibia.¬),
(c) any person employed by or serving under any municipality, village management board, roads board or any other local authority at present existing in the Territory {Namibia} or which may hereafter be created,
(d) any person employed or acting for any company, society or voluntary association, and
(e) the trustee of an insolvent estate, the assignee of an estate assigned for the benefit of or with the consent of creditors, the liquidator of a company which is being wound up, an executor of the estate of a deceased person, the administrator of a trust

and the legal representative of any person who is of unsound mind or is a minor or is otherwise under a disability.

Another example of the definition-plus-list approach is contained in the bill proposed by the Australian MCCOC:

"Agent" includes the following:
(a) A person who acts on behalf of another person with that person's actual or implied authority (in which case the other person is the principal).
(b) A public official (in which case the Government or Government agency for which the official acts is the principal).
(c) An employee (in which case the employer is the principal).
(d) A legal practitioner (in which case the client is the principal).
(e) A partner (in which case the partnership is the principal).
(f) An officer of a corporation or other organisation, whether or not employed by it (in which case the corporation or other organisation is the principal).
(g) A consultant to any person (in which case that person is the principal).

This definition is supplemented by a definition of "public official"

"Public official" means any official having public official functions or acting in a public official capacity, and includes the following:
(a) A member of Parliament or of a local government authority.
(b) A Minister of the Crown.
(b) A judicial officer. ┐

The commentary on these definitions explains that the lists include categories of people who clearly fall within the notion of agency, while the general provision which heads the list is meant to capture people who may or may not be agents, depending on the circumstances. ┐

The definition of the agency relationship formulated by the UK Law Commission has already been quoted above. The Commission provisionally recommended that the definition be supplemented by the following lists:

A person (B) should be regarded as an "agent", and another person (C) as B's "principal", if B and C are respectively,
(a) trustee and beneficiary,
(b) agent and principal (in the strict sense),
(c) partner and co-partner,
(d) director and company,
(e) employee and employer, or
(f) legal practitioner and client.

A person (B) should be regarded as an "agent" (acting on behalf of the public) if B is
(a) a judge
(b) a local councillor, or
(c) a police officer. ┐

Zimbabwe's Prevention of Corruption Act defines "agent" and "principal" as follows:

"agent" means a person employed by or acting for another in any capacity whatsoever, and includes—
(a) the trustees of an insolvent estate;
(b) the assignee of an estate that has been assigned for the benefit or with the consent of creditors;
(c) the liquidator of a company or other body corporate that it being wound up or dissolved;
(d) the executor of the estate of a deceased person;
(e) the legal representative of a person who is a minor or of unsound mine or who is otherwise under legal disability;
(f) a public officer;
(g) a member of a board, committee or other authority which is responsible for administering the affairs or business of a body corporate or association other than a statutory body or local authority.

This definition is supplemented by the definition of "public officer":

"public officer" means—
(a) a Vice-President, Minister or Deputy Minister; or
(b) a governor appointed in terms of an Act referred to in section IIIA of the Constitution; or
(c) a member of a council, board, committee or other authority which is a statutory body or local authority or which is responsible for administering the affairs or business of a statutory body or local authority; or
(d) a person holding or acting in a paid office in the service of the state, a statutory body or a local authority

"Principal" is then defined as follows:

"principal" means the employer or other person for whom an agent acts and, in relation to—
(a) a trustee, assignee, liquidator, executor or legal representative referred to in the definition of "agent", includes all persons represented by the trustee, assignee, liquidator, executor or legal representative, as the case may be, or in relation to whom he stands in a position of trust;
(b) a public officer who is a Vice-President and a Minister who is a member of the Cabinet, includes both the State and the Cabinet;
(c) a member of a council, board, committee or authority which is a statutory body or local authority or which is responsible for administering the affairs of a statutory body, local authority, body corporate or association, includes both such council, board, committee or authority and the statutory body, local authority, body corporate or association for whose affairs it is responsible.

Malaysia's Prevention of Corruption Act has simpler lists to supplement its definitions:

“agent” means any person employed by or acting for another, and includes a trustee, administrator and executor, and a person serving under any public body, and for the purposes of section 14 [on presumptions] includes a sub-contractor and any person employed by or acting for such sub-contractor

“principal” includes any employer, any beneficiary under a trust, and any trust estate (as though it were a person), any person beneficially interested in the estate of a deceased person, the estate of a deceased person (as though it were a person) and, in the case of any person serving under a public body, the public body.

The definitions in Singapore’s Prevention of Corruption Act are virtually identical to those in Malaysia.

List alone

In respect of the offences which apply only to the public sector, Canada lists the classes of person who are covered by each offence. For example, there is one offence dealing with bribery in respect of judicial officers and members of Parliament or provincial legislatures. Another deals with justices, police commissioners, peace officers, public officers and officers of a juvenile court. Several offences apply to municipal officials, and several more broadly to government officials and employees. ┐ This approach appears to be an atypical one, and the Law Reform Commission of Canada has suggested replacing these various offences with a more general one aimed at anyone who confers or accepts a benefit for the purpose of “corruptly influencing the course of public administration”. Under this approach, “public administration” would be defined as (a) the administration of justice; (b) the administration of federal, provincial or local government; (c) the proceedings in Parliament or in a provincial legislature or in the council of a local authority. ┐

Recommendation for Namibia

We believe that the general definition incorporated into the formulation of the offences in South Africa’s Corruption Act 94 of 1992 is particularly well-formulated and inclusive.

The most common formulation (“a person employed by or acting on behalf of another”) might not apply to judges (who may be viewed as paid appointees rather than employees and who act independently rather than on behalf of anyone else) or to elected officials (as political representatives who act on behalf of the entire public). And yet it is particularly important to combat corruption in these spheres.

We believe that a definition based on the South African model will cover the following categories of persons, all of whom should in our opinion be brought under the coverage of an anti-corruption statute:
all members of the public service, Members of Parliament, local and regional councillors, Ministers and Deputy Ministers, the Attorney-General and Prosecutor-General, judges and the Judicial Service Commission, the Ombudsman and the staff

of the Ombudsman's Office, police officers, and members of the Namibian Defence Force and the Prisons Service
employees, officials and members of any boards or bodies, parastatals or commissions established in terms of a statute
employees and officials of corporations, close corporations, co-operatives, trusts, welfare organisations, societies, non-profit companies and voluntary associations
trustees, assignees, executors, liquidators and curators
legal practitioners and other professionals
traditional authorities such as chiefs and headmen.

The South African definition is also a useful model because it does not appear to be overly broad. For example, it excludes persons who acquire powers by virtue of marriage or parenthood. ¬

The South African definition also excludes persons who derive powers and duties from a contract or other agreement, on the grounds that this would give rise to an excessively wide liability, as well as encroaching on the sphere of private law. ¬ The Namibian provision should perhaps depart somewhat from the South African model in this respect, by extending to certain contractual relationships. The Working Group believes that the statute should apply to contractors and subcontractors who carry out work on behalf of the government (as in the notorious NHE corruption case), as well as to cases in which a government service is contracted out to private parties. However, we feel that it would not be necessary or desirable to extend the statute to all contractual relationships, since the private law of contract has its own remedies for breaches of duty.

One approach to this issue would be to define "employment" broadly, along the lines of the draft Social Security Act 1997 (second draft, 14 July 1997). There, "employed person" is defined as "a person who is gainfully employed in Namibia whether under a contract of service, as a director of a limited liability company or as a holder of an office, and includes any person, though not bound by a formal contract of service, who is subject to the control of another person, group of persons or body corporate as to the manner and method in which he or she carries out his duties". Another approach would be to extend the definition to cover all persons who have power or duties by virtue of contracts in which a central, regional or local government authority is one of the contracting parties. The choice between the two possible approaches to broadening the coverage of the statute should be examined in more detail at the technical drafting stage.

There may be some debate as to whether or not the term "person" in the phrase used in South Africa's current Corruption Act 94 of 1992 is limited to natural persons. ¬ In order to avoid any question on this point, we suggest that the phrase "natural or legal person" be utilised. This would mean that the corruption law could, for example, impose fines for bribery on companies, even where the individual persons responsible for the wrong could not be located.

We would avoid incorporating a list if possible, to emphasise the fact that the definition is intended to be very broad rather than being limited to a few categories of persons. However, if it should be decided that the proffered definition should be

combined with a list to make life simpler for prosecutors, such a list should be presented in a way which clearly indicates that it is not meant to be inclusive – perhaps introduced by the working “includes without being limited to…”.

If a provision concerning the forfeiture of proceeds to the principal is included in the statute, then it may be necessary to further clarify who will be considered as the principal in cases where this is not obvious.

For the purposes of this Act--

“agent” means any person upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any office or any relationship of agency or any law [or any contract in which a central, regional or local government body is one of the contracting parties];

[“employment” includes any relationship in which one person receives or is entitled to receive any remuneration from another, any relationship arising from contracts of service and any relationship where one person is subject to the control of another person or group of persons as to the manner and method in which he or she or it carries out his or her or its duties;]

“person” includes both natural and legal persons ;

“principal” means the person or persons on whose behalf the agent is entitled to exercise such power or perform such duty.

4.3 DEFINING THE PUBLIC SECTOR

If certain corruption offences are limited to the public sector, then it will be necessary to define what is meant by this. Terms such as “state” and “government” do not bear any fixed meaning, but depend upon their context. ┐ As already noted above, the meaning of “state official” for the purposes of applying common-law bribery lacks a clear meaning and has been decided on a case-by-case basis.

The Law Reform Commission of Canada suggested a focus on the concept of “public administration”, defined as
(a) the administration of justice
(b) the administration of federal, provincial or local government
(c) the proceedings in Parliament or in a provincial legislature or in the council of a local authority. ┐

Botswana focuses on members or employees of a “public body”, defined as follows: any office, organisation, establishment or body created by or under any enactment or under powers conferred by any enactment; and includes any company in which 51 per cent or more of the equity shares are owned by the Government of Botswana (Corruption and Economic Crimes Act 1 of 1994, section 1)

The United States Code provides a useful definition of "public official" :
member of Congress… or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof… in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.¬

We suggest a provision modelled on that of Botswana, which should include the following:
Members of Parliament
officials and employees of the Office of the Ombudsman
judges
members, officials and employees of regional and local government
traditional leaders
officials and employees of parastatals
government-controlled companies.

For the purposes of this Act-
"public body" shall mean any office, organisation, establishment or body created by or under the Namibian Constitution or any statute, or exercising powers conferred by the Namibian Constitution or by any statute; and includes any company in which 51 per cent or more of the equity shares are owned by the Government of the Republic of Namibia.

4.4 BRIBERY

After surveying the laws in other jurisdictions, we offer the following recommendations in respect of prohibited acts concerning bribery.

Punishing both the "corrupter" and the "corruptee"

The criminal law in all the jurisdictions for which information was obtained have criminal offences which are applicable to both the "corrupter" and the "corruptee". In other words, both the person who corruptly offers or gives the benefit and the person who corruptly solicits or receives it, are subject to criminal sanctions. (The requisite state of mind of the two parties will be discussed below.)

In the existing Corruption Ordinance 2 of 1928, there is a curious lack of symmetry between the wording of the provision aimed at the agent who is bribed, and the provision aimed at the person who does the bribing. The briber is guilty of an offence only if the inducement or reward is aimed at getting the agent to do or forbear to do any act, while the agent can be additionally held liable for accepting an inducement or reward for showing or refraining to show favour or disfavour. The similar wording of the South African Prevention of Corruption Act 6 of 1958 was replaced by precisely parallel offences for the briber and the bribee in the Corruption Act 94 of 1992. In the 1992 Act, the reference to showing favour or disfavour is omitted altogether, so that

either party can be found guilty only on a showing that the inducement or reward was related to an act or an omission.

We recommend that the punishable acts of the briber and the bribee be formulated as precise mirror images of each other.

The concept of "benefit"

A bribery law must describe or define the quid pro quo which will give rise to criminal liability. The present statute refers to "gift or consideration", with "consideration" being rather circularly defined as including "valuable consideration of any kind". ¬ The English case of Braithwaite held that the provision of any property or services must be either a "consideration" or a "gift", since it would be a consideration if exchanged for some other benefit, and a gift if not part of such a bargain. ¬ However, the UK Law Commission suggested that the phrase "gift or consideration" may be too narrow, since the term "gift" is more apt to describe the provision of property than services – particularly services which may be hard to quantify in financial terms, such as sexual favours. ¬

The following is a sampling of analogous concepts from other jurisdictions and law reform proposals:

South Africa: "any benefit of whatever nature which is not legally due", with no further definitions. The SA Law Commission recommended avoiding a definition out of a desire to avoid a restrictive interpretation. ¬

Australian MCCOC Report: "benefit", defined as including "any advantage" and as not being limited to "property".

Canada: Various provisions of the Criminal Code use a variety of terms, with the phrase "reward, advantage or benefit" being one of the broadest. The Law Reform Commission of Canada described the concept of a benefit in its report as follows: "Benefit" covers any kind of favour. It covers the usual sort of benefit which will clearly be financial. It will obviously also cover non-pecuniary alternatives – promotion, additional vacation, nomination to a prestigious club and so forth. But it will not cover the common courtesies of ordinary civilised behaviour – offering the visiting official a cup of coffee, giving the judge a ride from the court to the airport and so on. ¬

UK: "gift, loan, fee, reward or advantage". "Advantage"' is currently defined in the Public Bodies Corrupt Practices Act 1889 as follows:
"Advantage" includes any office or dignity, and any forbearance to demand any money or money's worth of 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.
The UK Law Commission recommended that it should also be understood that A has conferred an advantage on B if A does something that B wants A to do, or which is

otherwise of benefit to B, or if A has a right to act to B's disadvantage but forbears to do so. ┐

New Zealand: Section 99 of the Crimes Act 1961 defines "bribe" as "any money, valuable consideration, office or employment, or any benefit, whether direct or indirect". Section 2 of the Secret Commissions Act 1910 defines "consideration" as follows:
"Consideration" means valuable consideration of any kind; and particularly includes discounts, commissions, rebates, bonuses, deductions, percentages, employment, payment of money (whether by way of loan, gift, or otherwise howsoever), and forbearance to demand any money or valuable thing. ┐

Botswana: The definition of "valuable consideration" in the Corruption and Economic Crime Act attempts to enumerate the various kinds of benefits which can be exchanged for a favour as follows:
"valuable consideration" means-
(a) any gift, benefit, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;
(b) any office, employment or contract;
(c) any payment, release, discharge or liquidation of any loan obligation or other liability, whether in whole or in part;
(d) any other service, or favour including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;
(e) the exercise or forbearance from the exercise of any right or any power or duty; and
(f) any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of any of the proceeding paragraphs. (section 23).
One of the most interesting aspects of this definition is the fact that it includes protection from an apprehended penalty or disability which may not exist in actuality.

Malaysia: The term used in the Prevention of Corruption Act is "gratification", defined as follows:
"gratification" includes-
(a) money or any gift, loan, fee, reward, valuable security or other property or interest in property of any description, whether movable or immovable;
(b) any office, dignity, employment, contract or services, and any agreement to give employment or render services in any capacity;
(c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
(e) any forbearance to demand any money or money's worth or valuable thing;
(f) any aid, vote, consent or influence, or pretended aid, vote, consent or influence, and any promise or procurement of, or agreement or endeavour to procure, or the holding out of any expectation of, any gift, loan fee, reward, consideration or gratification within the meaning of this paragraph;

(g) any other service, favour or advantage or any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
(h) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a) to (g). (section 2)
This list is noteworthy for its inclusion of a pretended vote, aid, consent or influence as well as actual benefits of this type.

US Model Penal Code: In a provision which makes it an offence to offer any pecuniary benefit to a political office-holder as consideration for the recipient's decision or vote, the concept of "benefit" excludes an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose. ¬ This exception is necessary to allow for the type of campaign financing which is common in the US, where a interest group offers money and support to candidates in exchange for promises of political support on particular issues.

We recommend that the operative concept should be any advantage or favour of any sort whatsoever, whether real or feigned, and including protection from a real or apprehended disadvantage and the expectation of a benefit, advantage or favour.

Breach of duty

The bribe should not have to induce or reward a breach of duty in technical terms. It should be sufficient that it be intended or accepted with the understanding that it will influence or tend to influence the exercise of a power or the performance of a duty. For example, bribes may be offered simply to expedite procedures rather than to induce an irregularity in how they are carried out. Furthermore, as the UK Law Commission points out, even a simple reward for a job well done may have a corrupting influence:

Suppose, for example, that Ms B's job involves awarding contracts on behalf of her employer Mr C. In good faith, and in accordance with the appropriate criteria, she awards a contract to Mr A. A shows his gratitude by offering B a substantial sum of money, which she accepts. Our provisional view is that such a payment would be potentially corruptive, since the recollection of it is likely to influence B in any future dealings with A; indeed, that may well be one of A's purposes in making it. … Moreover, the corruptive quality of such a payment would lie not only in its possible influence on B's future conduct, but also in the possibility that other agents might be influenced in their dealings with A or with others from whom they might hope to receive similar rewards. ¬

Also, if B is free to accept such payments then there will be an obvious incentive to act in breach of duty in future if such payments are not forthcoming. ¬

The existing Corruption Ordinance 2 of 1928 does not require that a breach of duty take place, but refers instead to "doing or omitting to do, or for having done or omitted to do any act in relation to" the principal's affairs or business, or for "showing or refraining from showing favour or disfavour to any person in relation to" the principal's affairs or business. All of the jurisdictions examined take a similar approach. ┐ We believe this to be the correct conception of the concept of bribery.

Payments to third parties and intermediaries

One of the major weaknesses of the existing Corruption Ordinance 2 of 1928 is that applies only to situations where the bribe is offered directly to, or accepted directly by, the agent. Most of the jurisdictions examined have broadened their laws to capture situations in which payments are made to third parties instead of being made directly to the agent, as well as situations in which an agent purports to have accepted the benefit in question on behalf of someone else.

The UK Law Commission offers a useful discussion of such situations. In a case where the bribe is actually paid to a third party (D) other than the agent (B), it proposes that the agent B should be criminally liable where he or she
aids, abets, counsels or procures the receipt of a bribe by the third party D;
conspires with D with a view to D's receiving the bribe; or
receives-
some or all of the bribe itself
some or all of the proceeds of the bribe
a benefit resulting form the bribe. ┐

An example of a situation in which the agent receives a benefit from an indirect bribe would be where A pays a sum of money to D and D releases the agent B from a debt. This is the sort of arrangement which might be utilised to circumvent a statute which is not carefully drafted. In the example, both A and B could be found guilty if the requisite state of mind were present. The intermediary D could also be prosecuted, depending on his or her knowledge of the transaction and state of mind. There could be cases in which D is an innocent conduit, as well as cases in which D is fully involved and implicated.

The new provisions on bribery should make it an offence for a bribe to be given to "any person" with the intention of influencing an agent, and conversely make it an offence for an agent to accept all or any part of a bribe or the proceeds of a bribe or any benefit resulting from a bribe, directly or indirectly, on behalf of himself or herself, or on behalf of anyone else.

We also suggest that the new statute should clearly state that third parties or intermediaries who knowingly participate in the act of bribery can be held criminally liable. This would be possible in most cases in any event, by means of prosecution as accomplices or co-conspirators or by virtue of the common purpose doctrine, but we believe that a more straightforward approach will play an useful educational function.

Past and future conduct

It should be an offence to give or receive a benefit in advance for a future favour, or to give or receive a reward for a favour after the fact. This is the basic approach taken by Namibia's Prevention of Corruption Ordinance 2 of 1928, and in all the other jurisdictions examined and should be retained.

Persons who have been or are about to become agents

One loophole in some legislation on bribery concerns another aspect of timing. Suppose that someone gives a large sum of money to an incumbent public official as payment for a favour just before the official assumes office. Or suppose that the benefit is transferred after the agent in question retires or is dismissed. The law should not allow corrupt people to use such ruses to avoid liability.

The UK Public Bodies Corrupt Practices Act 1889 extends the offence of bribery to circumstances when the public officer has not yet assumed office, or is no longer in office, at the time the bribe is received (by the officer himself or herself or by any other person). ┐ The UK Law Commission recommends the general application of this approach in new laws on corruption, on the grounds that "limiting criminality on the basis of when a bribe is offered or received is unnecessarily restrictive and artificial." ┐

The Australian MCCOC Report takes the same line, stating that a person should obviously not be able to avoid liability simply because he or she sought the corrupt benefit just before being appointed to a position or was paid a reward just after resignation. ┐ The draft provision offered by the MCCOC to deal with this concern is contained in the definition section of the proposed law and reads as follows:

(2) For the purposes of this Part, a person is an agent or principal if the person is, or has been or intends to be, an agent or principal. ┐

We recommend the inclusion of a similar provision in the new Namibian legislation.

The “corruptness” of the act

The Australian MCCOC asserts that some additional fault element must be added to the concept of a transfer of a benefit, to avoid capturing truly innocent benefits as bribery. For example, the payment of a salary arguably rewards an agent for carrying out acts in relation to his or her duty. The performance of a duty might also be influenced by the principal’s response to a demand for a salary increase. Yet these exchanges and demands should obviously not be captured under the law on bribery.

The meaning of the term “corruptly”

The Corruption Ordinance 2 of 1928 uses the word “corruptly” to characterise the forbidden conduct, as did the previous South African Prevention of Corruption Act 6 of 1958. This wording has given rise to considerable difficulties of interpretation, producing to a lack of unanimity about its meaning. ¬ Some interpretations of the meaning of the qualifier “corruptly” are circular; for example, Schreiner (JA) made the following statement on the meaning of the term:

The provision really stigmatises as corrupt the conduct it penalises. It says, in effect, that whenever an agent accepts or obtains or agrees to accept or attempts to obtain a gift or consideration for doing or forbearing from doing something which has to do with the affairs or business of his principal, the conduct is corrupt and in breach of his duty to his principal…. ¬

Hunt argues that this interpretation renders the term “corruptly” superfluous, and suggests that it should rather be understood as referring to the requirement of unlawfulness. ¬

Similar problems have been experienced in other jurisdictions. For example, in England, the term “corruptly” as used in the Public Bodies Corrupt Practices Act 1889 has been narrowly interpreted to denote (with respect to the briber) that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain, as opposed to requiring that the corrupt transaction must actually be carried through to completion. ¬ However, it has been conceded that this interpretation of “corruptly” really adds nothing to the elements of the offence which are already present on the basis of the other terms in the relevant statutory provision. ¬

In Canada, the provisions of the Criminal Code dealing with the acceptance of “secret commissions” (which apply to agents and principals in the strict sense) contain the qualifier “corruptly”. In R v Brown ¬ , a majority decision held that the term did not require a superadded dishonest intention, with a bare intent to do the act which is forbidden by the section being sufficient to allow it to be characterised as “corruptly”. This decision was criticised on the grounds that it rendered the term superfluous. ¬ It was relied upon, however, in R v Morris ¬ for the proposition that “the act of doing the very thing which the statute forbids is a corrupt act within the meaning of the word ‘corruptly’ ”. ¬ But a recent Supreme Court case draws a distinction between the concept of corruption of public officials and the concept of corruption as it relates to

secret commissions, holding that "corruptly" in respect of secret commissions refers to the agent's failure to disclose the receipt of the benefit in question to the principal. ¬

There has also been disagreement about the meaning of the term in Australian cases, with some judges holding it to be a synonym for dishonesty and other disagreeing. ¬ As in Canada, Australia places more emphasis on the element of non-disclosure of the payment in question as being the essence of "corruptly" in the context of secret commissions than in bribery provisions aimed specifically at public officials. But the MCCOC argues that this approach is unsatisfactory: "lack of knowledge by the principal or secrecy does not necessarily indicate corruption, although it may raise a strong inference that the payment was corrupt". ¬

In the US, "corruptly" has been understood to imply a "heightened criminal intent" or a "higher degree of criminal knowledge and purpose" than is required for offences which omit this term. ¬

Zimbabwe, Malaysia and Singapore all retain the term "corruptly" in the bribery offences contained in their corruption statutes, with no attempt at definition.

Substituting other terms for "corruptly"

The Australian MCCOC Report recommends the use of the term "dishonestly" rather than the term "corruptly" to describe the fault element in respect of bribery, on the grounds that "dishonestly" is a more accessible concept than "corruptly" for juries. They suggest that no definition of "dishonestly" should be attempted, arguing that the concept should be left flexible to allow an assessment of the transaction against the standards of ordinary people. ¬

The UK Law Commission rejected this suggestion on the grounds that dishonesty is a broader concept than corruption, and therefore not an appropriate substitute. As an example, the Commission noted that an offence characterised by dishonesty might cover the obtaining of property from an agent by means of deception, a wrong which is removed from the common understanding of corruption. The Commission also suggested that dishonesty requires an identifiable victim, whereas this is not necessarily true of corruption. ¬

In any event, it is not clear that the use of the qualifier "dishonestly" would result in any greater clarity of interpretation than the use of the qualifier "corruptly".

Hong Kong's Prevention of Bribery Ordinance uses the phrase "without lawful authority or reasonable excuse" as a substitute for the concept of "corruptly".

Omitting the qualifier "corruptly"

The SA Law Commission recommended that the term "corruptly" be avoided in statutory crimes, with the elements of unlawfulness and intention being otherwise articulated in the relevant provisions. ¬ However the omission of the word in the proposal aroused concern among the business community in South Africa, who felt

that the offence would in consequence penalise business lunches, incentive schemes and other normal and accepted business practices. As a result the term "corruptly" was included in the new South African Corruption Act. Milton made the following comment on the debate:

In some respects the businessmen's point is well taken. By eschewing definition, the legislature has also failed to provide any clear indication as to when the acceptance of gifts by public servants and employees ceases to be a legitimate reciprocity and becomes corruption. The point revolves around the question of unlawfulness. The fact is that the inclusion of the word "corruptly" in the section does not help in this regard (though no doubt the member for Houghton was correct when he observed soothingly that "like chicken soup, it will probably do no harm"). As matters now stand, the answer to this question will be found only in the case-by-case pronouncements of the Supreme Court. For the rest, it does seem that the Corruption Act, as enacted, reflects less than due respect for the principle of legality. ┐

The Botswana Corruption and Economic Crimes Act omits the term "corruptly" in respect of public officers, but applies it in the case of offences aimed more broadly at "agents".┐

A further point to consider is that even the deletion of the term "corruptly" may not resolve the issue completely. In Canada, the recent Supreme Court case of R v Cogger ┐ considered the question of whether one of the bribery provisions of the Canadian Criminal Code (section 121(1)(a)) which does not make any reference to the concept of "corruptly" required a "corrupt state of mind" for conviction. The court unanimously concluded that "corruption" is not a required element of either the actus rea or the mens rea of the offence in question. "What is required is that the accused intentionally commit the prohibited act with a knowledge of the circumstances which are necessary elements of the offence". ┐

Recommendation for Namibia

There does seem to be a need for some qualifier to a generally-worded bribery offence. Consider the following examples:

A new company takes over the provision of accommodation in Etosha and invites local journalists to come on a free overnight visit to the game park to see the alterations. The journalists, as employees of their respective newspapers and journals, fall within the concept of agent. The free food and accommodation is a benefit, and it is intended to inspire the journalists to give the venture a favourable report. Yet this is a common practice and would not be viewed by most persons as constituting corruption.

The government offers drinks and snacks at the launch of a new Woman and Child Protection Unit. It invites representatives of the business community and donor agencies in the hopes that they will be inspired to contribute computers and supplies to the unit. Again, this might fall within the concept of offering a benefit with the intention of influencing an agent in the performance of his or her functions as an agent, but it would not be commonly thought of as corruption.

Political trade-offs are a somewhat greyer area. Suppose that a party leader promises a ministerial post to a member of the National Assembly in exchange for political support on a contentious matter. Some would call that corruption, whilst some would call it the normal give-and-take of politics. ¬

One possibility for separating innocent exchanges from truly corrupt ones would be to allow for a defence based on normal practice and custom. However, as the UK Law Commission points out, this is an unsatisfactory approach because "if the normality of the conduct were a complete defence it would follow that, once corrupt practices have taken root in a given environment, they could no longer be regarded as corrupt" ¬ There is force in this argument, as it would be possible to cite countries where bribery in respect of certain forms of transactions has become the accepted order of the day.

The UK Law Commission suggests that the key factor is not the ordinariness of the conduct, but whether or not it creates a substantial conflict of interest between the agent's interests and duties. However, no suggestion is made for embodying such a test in a statutory formulation, as the Commission concedes that such conflicts of interest are a matter of degree which would have to be inferred from the totality of the circumstances in individual cases. ¬

None of the approaches of the other jurisdictions examined appear to be entirely satisfactory solutions to the conundrum of dealing with corrupt intent. The use of the term "corruptly" is largely superfluous, and substitutes such as "dishonestly" or "improperly" or even "unlawfully" do not in our view give any clearer idea of what is allowed and what is forbidden than the term "corruptly". On the other hand, an open-ended statute based on intent to influence might lose its force if it were perceived as capturing too many innocent exchanges in its net.

The Hong Kong approach - "without lawful authority or reasonable excuse" – seems to be a clearer one, but this would place a heavier burden on the prosecution by forcing the state to prove the absence of lawful authority or reasonable excuse, unless the burden of proof were shifted onto the accused in respect of this point. The idea of authorisation is also problematic. For one thing, it may not be clear who in a large corporation or ministry has the power to approve the receipt of a benefit. It may also be the case that a principal is willing to authorise a corrupt transaction. "Reasonable excuse" is less problematic, as this concept could draw on normal business and political custom, while still leaving room to ask if what is normal is also reasonable in the context of an open and democratic society.

After considering the alternatives, we recommend that the term "corruptly" be retained in the new anti-corruption statute.. Whilst this term may not add a separate legal element to the offence, it gives does give a certain character and tone to the crime in the public eye as well as providing space for judicial development of the crime.

Separate consideration of the culpability of the respective parties

One flaw with Namibia's existing Prevention of Bribery Ordinance 2 of 1928 is the possibility that the criminal liability of the recipient of a bribe may be understood as depending on the state of mind of the giver. The liability of the recipient is independent of the liability of the giver with respect to common-law bribery. ¬ But the cases interpreting the succession of South African corruption statutes which were similar to Namibia's Ordinance have taken differing views on whether or not the recipient can have the requisite state of mind if the giver does not in fact have corrupt motives. ¬

It is possible to imagine sets of facts where a bribe is corruptly offered but innocently received, or vice versa. There is a clear trend for the state of mind of the two parties to be assessed independently, so that the culpability of the receiver is not dependent on the culpability of the giver. This is the case, for example, in Canada, England, the USA and the Netherlands. ¬ In South Africa, the wording of the Corruption Act 94 of 1992 now makes it clear that the recipient's guilt does not depend on the actual intention of the giver, but only on the state of mind of the recipient. ¬ The relevant provisions of the statute provide that the recipient of an inducement or reward can be guilty of an offence "whether the giver or offerer of the benefit has the intention to influence [or reward] the person… or not". ¬

The UK Law Commission offers a helpful analysis of the possible permutations where the giver and the recipient have contradictory states of mind: ¬

The recipient mistakenly believes that the giver is acting corruptly: A pays money to B. A regards the payment as gratuitous, or as relating to some innocent consideration, while B wrongly believes it to be intended as a bribe. Clearly, A is not guilty of an offence, but the UK Law Commission takes the view that B has acted corruptly and can be found guilty of the offence of bribery. ¬ South Africa's Corruption Act 94 of 1992 follows the same approach, with the person who accepts the benefit being guilty if he or she believes that it is offered with a corrupt intention, regardless of whether or not that intention was actually present.¬

The recipient accepts the benefit knowing that the giver has no corrupt intent: A pays money to B. A regards the payment as gratuitous, or as relating to some innocent consideration. B knows this, but privately regards it as an inducement or reward for some action on B's part. Clearly, A is not guilty of an offence. But what about B? In the South African case of S v Gouws, it was suggested that A could be offering the gift as a innocent consideration for work done in an official capacity, while B realises this but is also aware that he is not permitted to accept gifts for work which is part of his official duties. ¬ The UK Law Commission takes the view that a putative bribee who does not believe that advantage to be offered with corrupt intent cannot be guilty of bribery. This is consistent with the approach taken by South Africa, where the recipient must believe that the giver had a corrupt intention in order to be guilty of an offence under the Corruption Act 94 of 1992. ¬ If such behaviour is going to be criminalised, it should rather be dealt with in terms of a general prohibition on the receipt of benefits by an agent from persons or organisations with whom the principal has dealings, in order to avoid appearances of impropriety which might contribute to corruption in other quarters. This point is further discussed in section 4.9 below.

The giver acts corruptly but the recipient is unaware of the corrupt intent: A gives B money, intending it as an inducement or a reward for a favour from B. B accepts the money, thinking that A intends it as an innocent gratuity or consideration. In the opinion of the UK Law Commission, A should be found guilty of bribery because A's intention is to tempt B into a breach of duty, regardless of whether or not the temptation is successful. But B should not be found guilty of bribery. As in the previous case, this set of actions with respect to B would be more straightforwardly addressed under a general prohibition on the receipt of benefits by an agent from persons or organisation with whom the principal has dealings.

The recipient accepts the benefit knowing that the giver has a corrupt intent, but does not allow his behaviour to be influenced: A gives B money, intending it as an inducement or a reward for a favour from B. B accepts the money knowing of A's intent, but resolving not to allow his or her conduct to be influenced. B would be found guilty under the existing laws on bribery in many jurisdictions, including the UK and South Africa. It is the position of the UK Law Commission that this is correct, since by accepting the money knowing that it is a bribe, B is knowingly encouraging A to act corruptly in future. Similarly, under many of the laws examined, B would clearly be committing a crime by accepting a bribe, even if B knows that he or she lacks the power to carry out the promised favour. ¬

Purported agency: What if B solicits a bribe from A by purporting to be an agent when he or she is actually not? The UK Law Commission takes the view that A can be found guilty of offering or giving a bribe in such circumstances, if A believes that he or she is bribing an agent. But B, while perhaps guilty of fraud, should not be found guilty of corruption.

Entrapment: Suppose that A offers a bribe to B in order to expose B as being corrupt – or that B accepts an offered bribe from A with plans to expose A? A spurious claim of such a motive after the fact might be hard to disprove. The UK Law Commission asserts that a motive of entrapment should not be a defence, as the proper course of action if one suspects corruption is to bring the matter to the attention of the appropriate authorities.

We concur with the conclusions drawn by the UK Law Commission on the basis of its analysis of these points. For purposes of clarity, we suggest that the provision on bribery should state explicitly (a) that the state of mind of the recipient of the bribe does not depend on the actual intention of the giver; and (b) that neither the giver nor the recipient can escape liability on the grounds that the agent did not actually have the power to carry out the act or omission or favour in question, or that the agent did not in fact perform the quid pro quo which was promised. South Africa's Corruption Act 94 of 1992 provides a useful model for the first point, and Malaysia's Prevention of Corruption Act, 1961 (section 9) is a good precedent for the second.

Defences

The UK Law Commission considered the following potential defences: ¬

Openness: Just because a transaction is disclosed does not necessarily mean that it is not corrupt, even though corrupt transactions are most likely to take place in secret. The openness of the transaction in question may be a factor going to the question of the parties' state of mind, but it is not conclusive. (Openness is furthermore not equivalent to lawful authorisation.)

Consent of the principal: The UK Law Commission takes the view that the consent of the principal should not be viewed as a complete defence. since it is possible that the principal may consent to practices that are commonly regarded as corrupt, thus contributing to the spread and acceptance of "corrupt" behaviour as the norm. A further difficulty is that it may not be clear who has the authority to give consent on behalf of the principal – for example, in a large corporation, the appropriate authority might be anyone from the agent's direct supervisor to the board of directors.

Absence of obligation to account for the benefit: This potential defence is based on the idea that there can be situations where an agent receives a benefit which in terms of civil law belongs to him or her personally, in circumstances where he or she has no obligation to report the benefit to the principal. A tip for good service is given as an example. In the view of the UK Law Commission, this factor should not be decisive, since the existence of a duty to account to the principal may be based on factors which are completely irrelevant to the question of whether the payment in question is likely to inspire a breach of duty. The concept also makes no sense in respect of public servants, who owe a duty to the public at large, but not a direct obligation to account to the public for particular receipts.

Normal practice: As already noted above, the complete acceptance of such a defence might allow forms of corruption which have become so widespread as to appear normal to escape punishment.

Trivial value: It might be possible to assert the insubstantial value of a benefit as a defence to a charge that it was intended as a bribe. One problem with this approach is that it is subjective. A gift which appears trivial to a large corporation or a big spender could seem significant to someone with a different point of view. The UK Law Commission asserts that this issue is best dealt with in determining whether or not the benefit in question was intended as an inducement or a reward, rather than as a defence. ┐

We do not feel that the provision on bribery should set forth any particular defences. These should rather be dealt with on a case-by-case basis, in the context of determining whether or not the basic elements of the offence are satisfied.

(1) Any person who corruptly gives or offers or agrees to give a benefit, directly or indirectly, to any other person with the express or implied intention of -
(a) influencing an agent to commit or omit to do any act or to show favour or disfavour to any person; or
(b) rewarding an agent for committing or omitting to do any act or showing favour or disfavour to any person
in relation to any power or duty of that agent shall be guilty of an offence.

(2) Any agent who corruptly demands or solicits or receives or obtains or agrees to receive or obtain a benefit, directly or indirectly, from any person, for himself or herself or anyone else, with the express or implied intention that the agent shall
(a) commit or omit to do any act or to show favour or disfavour to any person; or
(b) be rewarded for committing or omitting to do any act or showing favour or disfavour to any person
in relation to any power or duty of that agent shall be guilty of an offence.

(3) Any person who corruptly demands or solicits or receives or obtains or agrees to receive or obtain a benefit which is intended to influence the conduct of an agent, or corruptly transfers such a benefit to an agent or another person, shall be guilty of an offence.

(4) In determining whether or not an offence has been committed in terms of subsections (1), (2) or (3), it shall be irrelevant
(a) whether or not the agent is in fact authorised or empowered to do or omit to do what is proposed or agreed upon, or to show favour or disfavour in the manner contemplated or understood;
(b) whether or not the action or omission or showing of favour or disfavour constitutes a breach of duty on the part of the agent; or
(c) whether or not the agent actually carried out the act or omission, or showed the favour or disfavour in question.

(5) In determining whether or not an offence has been committed in terms of subsection (2) or (3), the actual intention of the person who offers or gives or agrees to give a benefit shall not be relevant to the state of mind of the agent, but only the reasonable belief of the agent or the person liable to an offence under subsection (3) regarding the intention of such person.

(5) For the purposes of this section—
(a) a person shall be deemed to be an agent if the person is, or has been, or intends to be an agent.
(b) "benefit" means any advantage or favour of any sort whatsoever which is not legally due, whether real or feigned, and includes
protection from a real or apprehended disadvantage;
the expectation of any benefit, advantage or favour; or
all or any part of a benefit or the proceeds of a benefit or any gain resulting from a benefit.

4.5 CORRUPTION BY MEANS OF THREATS

We submit that a new anti-corruption statute should include a provision on corruption by means of threats, which applies to all members or employees of a public body.

We have located one international example of such a provision. The Canadian Criminal Code states that every one who "by threat or deceit" (or through other listed techniques) influences or attempts to influence a municipal official to abstain from

voting; to vote for or against any measure, motion or resolution; to aid in procuring or preventing the adoption of any measure, motion or resolution; or to perform or to fail to perform an official act commits an offence (Criminal Code, section 123(2)). (We have no information on why this offence is limited to municipal officers, rather than being extended to all public officials.)

In Namibia, the provisions concerning intimidation of police officers and immigration officials (cited above in section 3.2) are good examples of prohibitions on the use of threats to influence public officials. We believe that a similar provision should be applied to any agent who is carrying out powers or duties on behalf of a principal.

Threats made by an agent for the purpose of extorting a bribe are dealt with by the inclusion of the term "demand" in the provision on bribery. These might also be punishable in terms of the common-law crime of extortion.

Any person who in order to compel any agent to do or to abstain from doing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such agent having done or abstained from doing such an act, threatens or suggests the use of violence to, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants shall be guilty of an offence.

4.6 CORRUPTION BY MEANS OF FRAUD OR DECEPTION

We recommend a general provision modelled on the existing provision in Namibia's Posts and Telecommunications Act (referred to above in section 3.2) and making it an offence for any person to use fraudulent means to induce any agent to act in violation of his or her duty, or to influence the exercise of a lawful power or duty. As already noted, the Canadian Criminal Code (section 123(2)) similarly makes it an offence to use "threats or deceit" to influence a municipal official.

In addition, many of the jurisdictions examined make it a criminal offence for a person to give to an agent, or for an agent to knowingly use, a false receipt, account or other document with intent to deceive the principal, along the lines of section 2(c) of Namibia's Prevention of Corruption Ordinance 2 of 1928. Examples include Botswana ┐, Zimbabwe ┐ and Malaysia ┐. We recommend that the existing offence be retained in a new anti-corruption act.

(1) Any person who by false pretence or intentional misstatement induces an agent to commit or omit to do any act or to show favour or disfavour to any person in relation to any power or duty of that agent shall be guilty of an offence.

(2) Any person who knowingly gives to any agent or, in the case of any agent, knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal shall be guilty of an offence.

The Canadian Criminal Code contains a more general fraud offence aimed at public officers in the section of the Criminal Code on corruption. This provision makes it a criminal offence for an official to commit "fraud" (or a "breach of trust") in connection with the duties of his or her office. It also specifies that the offence can be committed even if it would not have constituted an actionable fraud or breach of trust in respect of a private person. ┐ There are several court cases construing this provision which were unfortunately not available to the Working Group.

A statutory crime aimed at fraudulent misrepresentations might differ from the common-law crime of fraud if it were cast in such a way as to eliminate the need to show actual or potential prejudice to another, with the relevant harm being damage to the honesty and integrity of public administration and commerce. If the goal were to establish an offence which is broader in its coverage than the common-law crime of fraud, then different terminology should be used. We suggest a formulation aimed at misrepresentations and concealment of information.

This conceptualisation overlaps with the failure by an agent to fully disclose the nature of a transaction to the principal. Of the various jurisdictions examined, only Zimbabwe has an offence aimed specifically at this issue. It reads as follows:

Any agent, with intent to deceive his principal or to obtain any gift or consideration for himself or herself or any other person, fails to disclose to his principal the full nature of any transaction carried out in connection with his principal's affairs or business… shall be guilty of an offence. (Prevention of Corruption Act 34 of 1985, section 3(f))

We recommend a similar approach for Namibia which combines misrepresentations with the failure to disclose relevant information. We also suggest that such an offence should be aimed at all agents, whether in the public or private sector, since the behaviour in question strikes at the heart of the trust which is inherent in the broadly-conceived agent-principal relationship as described above.

Such an offence would dovetail with section 25(1)(p) of the Public Service Act 13 of 1995 (discussed in section 3.2 above), which makes it misconduct for a public servant to make an intentionally false or incorrect statement in the course of his or her duties.

Any agent, with intent to deceive his principal or to obtain any benefit for himself or herself or any other person, makes an intentional misrepresentation in connection with his or her duties or fails to disclose to his principal the full nature of any transaction carried out in connection with his principal's affairs or business shall be guilty of an offence.

4.7 INFLUENCE-PEDDLING

Canada makes it an offence for any person who

having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with -
the transaction of business with or any matter of business relating to the government; a claim against Her Majesty or any benefit that Her Majesty is authorised or is entitled to bestow; or
the appointment of any person, including himself, to an office. (Canadian Criminal Code, section 121(1)(d), with cross-references stated in full)

This offence applies not just to public officials, but to anyone who has or claims to have influence with public officials, regardless of the status of that person.

Zimbabwe's version of influence-peddling is limited to bribery of a public official for the purpose of assistance or influence in "promoting, administering, executing or procuring (including any amendment, suspension or cancellation) of any contract (including a subcontract)" (Prevention of Corruption Act 34 of 1985, section 29). Both the briber and the bribee can be found guilty of the offence.

The Australian MCCOC proposes two offences to address the concept of influence-peddling – one aimed at both the public and the private sectors, and one aimed at the public sector alone. The proposed offence called "payola" reads as follows:

A person who:
(a) holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services; and
(b) dishonestly asks for, or receives or agrees to receive, a benefit for himself, herself or another in order to influence his or her selection, examination or opinion,
is guilty of an offence. (proposed section 20.4) ┐

This would cover, for example, the supposedly disinterested financial advisor who is receiving a kickback from a certain company for getting clients to invest in its stock. ┐ The MCCOC's rationale was that persons covered by this provision (such as financial advisers, theatre and restaurant reviewers and television presenters) may not fall into even a broadly-defined category of "agents" since the duty in question is a duty owed to the public at large rather than to some principal, yet the culpability involved merits a punishment similar to that for bribery of an agent. ┐ It should be noted that the proposed offence does not extend to the person who gives the benefit.

The second offence proposed for Australia punishes any public official who dishonestly exercises any influence that the official has because of his or her public office. ┐

We recommend a simple offence of influence-peddling which is aimed at those in the private sector and the private sector who hold themselves out to the public as providing impartial assessments. We also suggest that the offence be symmetrical, placing liability on the "briber" as well. The form of influence-peddling aimed at by

the Canadian provision cited above would be essentially covered by the broad wording of the proposed provision on bribery, with the possible exception of persons who purport to be agents (and who could be charged with fraud).

(1) It shall be an offence for any person who holds himself or herself out to the public as being engaged in any business or activity of making disinterested selections or examinations, or expressing disinterested opinions in respect of property or services to [corruptly?] demand, solicit, receive or agree to receive, directly or indirectly, a benefit for himself, herself or another as an inducement or reward aimed at influencing his or her selection, examination or opinion.

(2) It shall be an offence for any person to [corruptly?] offer, give or agree to give, directly or indirectly, any person a benefit as an inducement or reward with the intention of influencing a person described in subsection (1) in his or her selection, examination or opinion.

4.8 CRIMINALISING BREACH OF DUTY AND ABUSE OF OFFICE IN THE ABSENCE OF BRIBES, THREATS OR DECEPTION

Zimbabwe includes an offence aimed at corrupt breaches of duty by public officers in its Prevention of Corruption Act. The offence is worded as follows:

If a public officer, in the course of his employment as such-
(a) does anything that is contrary to or inconsistent with his duty as a public officer; or
(b) omits to do anything which it is his duty as a public officer to do;
for the purpose of showing favour or disfavour to any person, he shall be guilty of an offence and liable to a fine not exceeding three thousand dollars or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment. (Prevention of Corruption Act 34 of 1985, section 4)

Another approach to more general breaches of duty by public officials is suggested in the Australian MCCOC Report:

A public official who dishonestly:
(a) exercises any function or influence that the official has because of his or her public office; or
(b) refuses or fails to exercise any function the official has because of his or her public office; or
(c) uses any information the official has gained because of his or her public office,
with the intention of obtaining a benefit for the official or another person or causing a detriment to another person, is guilty of an offence. (proposed section 20.5)

The UK Law Commission rejected the idea of such approaches on the grounds that criminalising all breaches of duty by an agent would be “unduly draconian”, while criminalising some breaches of duty but not others would require elusive and controversial definitions. It takes the view that corruption is more usually understood as focusing on the temptation or the threat – the act which perverts the integrity of the person or the process. As the Commission put it, “although we have described breach

of duty as the fundamental mischief of the corruption offences, to criminalise breach of duty rather than the conduct which is likely to result in a breach of duty would, arguably, fail to reflect what is widely understood to be the meaning of what is corrupt". ┐

Namibia's Public Service Act 13 of 1995 has a long list of forms of misconduct on the part of members of the public service. Misconduct is not a criminal offence, but can lead to disciplinary action against the public servant in question. Among the forms of misconduct listed are "any act prejudicial to the administration, discipline or efficiency of any office, ministry of agency or any organisational component thereof", "wilful default in carrying out any lawful order" and contravention of "any provision relating to his or her employment or conditions of service".

It is submitted that breach of duty in its broadest sense should rightly be a disciplinary matter rather than a criminal matter, as there can a broad range of reasons for failure to carry out duties – from corrupt motives to simple laziness. However, a qualified offence relating to breach of duty such as that in force in Zimbabwe can be a helpful way to capture "favours to friends" which may not be accompanied by any tangible benefit. The provisions proposed for Australia would capture a range of behaviours, including "favours to friends" and self-dealing. We propose separating these strands into separate offences, keeping in mind the fact that the offences in an omnibus anti-corruption statute should be cast in such a way that they can be easily explained in simple terms for educational purposes.

We propose an offence modelled on the Zimbabwean example, applied to the public sector (and parastatals) only, on the grounds that a higher standard of impartiality is expected where a duty is owed to the public at large. In the private sector, for example, one can envisage a family-owned enterprise which employs only family members. This would be favouritism, but it would not be viewed by most people as corrupt. Yet such favours take on a different complexion in the public service precisely because public officials have a unique duty to treat all members of the public equally.

Such an offence could be particularly important given the difficulty of proving corruption. It may be possible to prove the wrongful act without finding the inspiration or the temptation for it. Corruption may also happen in more subtle ways. Friends and relatives may operate out of an implicit understanding that they will "scratch each other's backs" with no tangible benefit ever being exchanged.

It should be noted, however, that such a provision would be workable only in a context of open and transparent government. It would be particularly important for the success of such a provision that public officials be required to give reasons for decisions made within the exercise of their discretion so that improper favours and prejudices could be discerned.

The offence suggested here would cover nepotism and tribalism as well as other forms of favours to friends. It should perhaps invoke a lesser penalty than that for bribery, where the favour is associated with the receipt of a benefit.

A member or employee of a public body who in connection with his or her official powers or duties -
(a) does anything that is contrary to or inconsistent with such powers or duties;
(b) omits to carry out any aspect of his or her duties; or
(c) exercises any influence that he or she has by virtue of such powers or duties;
for the purpose of showing undue favour or disfavour to any person shall be guilty of an offence.

4.9 ACCEPTANCE OF BENEFITS WITHOUT AUTHORISATION

The Hong Kong Prevention of Bribery Ordinance incorporates a broad and general prohibition on the receipt of benefits by public officials:
Any Crown servant who, without the general or special permission of the Governor, solicits or accepts any advantage shall be guilty of an offence. (section 3)
A long list of exceptions to the general rule is contained in the Acceptance of Advantages (Governor's Permission) Notice, 1992. For example, gifts from family members are excluded, as well as the acceptance (but not the solicitation) of gifts below a set value from close personal friends on occasions when gifts are traditionally exchanged (such as birthdays, weddings and baptisms).

Canada's Criminal Code includes a more limited offence based on the unauthorised receipt of benefits with respect to the public sector. The offence is worded as follows:
Every one commits an offence who… being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him. (Criminal Code, Part IV, section 121(1)(c))

There is a corresponding offence for any person who pays such a commission or reward or confers such an advantage or benefit without written consent (section 121(1)(b)). It is not necessary for there to be any other actual misconduct on the part of the government employee – the damage sought to be prevented is done once the benefit is conferred. ┐

The fundamental purpose of these Canadian provisions is to preserve, not just integrity in government, but the appearance of integrity as well. In the course of interpreting this provision, the Canadian courts have expanded on the law's purposes:

The government's business must be free from any suggestion of "under-the-table" rewards of benefits made to those who conduct business on behalf of the government by those who stand to gain from those dealings. ┐

[I]ntegrity is compromised not only by bribery and corruption in their crassest forms, but by other insidious arrangements whereby a government employee profits from his or her position or employment by way of a private benefit or advantage received from a person having dealings with the government. Such advantages or benefits can create

the appearance of impropriety and suggest that the loyalty of the employee has been divided between his or her government employer and the private benefactor. ┐

In the 1996 case of R v Hinchey ┐ , the majority of the members of the Canadian Supreme Court held that section 121(1)(c) lies properly within the power of Parliament to make criminal laws. It found that Parliament has the power to criminalise activities which were not previously illegal in order to prevent some undesirable or injurious effect upon the public.

The Court also considered whether the statutory provision in question is impermissibly overbroad. For example, every person in modern society has dealings with the government in some way, and the provision is drafted in such a way that it covers even trivial favours – such as buying a government employee a cup of coffee or offering him or her a lift. But the Court held that the statute must be properly interpreted to apply only to (a) benefits accepted from person who have current business dealings or business relations with the government and (b) to "benefits" which confer a "material economic advantage" on the recipient. This interpretation excludes trivial "benefits" such as a cup of coffee, as well as cases where a company seeking business with the government offers free accommodation to a government employee whose expenses would otherwise have been paid out of government coffers and not out of the employee's own pocket (provided that the relevant government authorities are aware of the situation).

In addition, the Court found that the mens rea of the crime in question – which constitutes (a) the government employee's conscious decision to accept the benefit and (b) knowledge (or wilful blindness) at the time of receipt that the giver was having dealings with the government and that no consent for the receipt of the benefit had been given by the employee's superior – was valid for criminal culpability. The question of whether or not there was some further corrupt intention may be relevant to the severity of punishment, but is not necessary for a conviction. (The minority opinion would have limited the application of the statute by interpreting it to require that the recipient knew that he or she received the benefit at least in part because of his or her position in government, to exclude the innocent exchange of benefits flowing from social relations.)

The MCCOC report in Australia recommended a two-tier offence of "bribery" and "other corrupting benefits" in which the lesser offence of "other corrupting benefits" is somewhat similar to the Canadian provision discussed above. This offence weakens the link between the benefit offered or accepted and the resulting action or inaction. A crime is committed by the giver and the recipient "in any case where the receipt, or expectation of the receipt, of the benefit would in any way tend to influence the agent to provide a favour". ┐ In other words, it is not necessary to prove an explicit or even an implied understanding between giver and recipient; the fact that the benefit had the tendency of corrupting would suffice. ┐

The UK Law Commission, without discussing any of the examples referred to above, rejected the criminalisation of the mere receipt of benefits as being "too draconian". The Commission points out that there may be many circumstances in which the acceptance of a gift would be proper, such as the acceptance of a "tip" for good

service. It accordingly recommends that the acceptance of gifts should be penalised only where there is a corrupt intention on the part of at least one of the parties. ┐

There are already at least two penal provisions in Namibia which take the approach of punishing the transfer of a benefit regardless of a breach of duty.

Prisons Act 8 of 1959: Section 45 (as substituted by section 24 of Act 13 of 1981) makes it offence for anyone to give or offer any consideration to any member of the Prison Service on behalf of a prisoner, and for any member to demand or to accept such payment. There is no requirement that the consideration be related in any way to the member's duties.

State Finance Act 31 of 1991: Section 19(1) states that "no gifts to the State shall be accepted without the authorisation of the Treasury". However, this appears on its face to apply to gifts intended for the nation, as opposed to benefits intended for specific individuals in the service of the state.

This is another approach which can be a helpful way to combat the problem of proving corruption. It may be possible to prove that a benefit has been offered or accepted without being able to prove an intention to influence. However, we believe that this is another type of offence which should be applied to the public sector (and parastatals) only. Our reasoning is that the appearance of integrity is particularly important in a sector which has powers and duties relevant to the public at large. If a company doing business in the private sector appears to lack integrity, it may reap the consequences in the form of lost business. But members of the public do not have a choice about whether or not to deal with the private sector. We feel that this warrants a higher standard of integrity, both in appearance and substance.

We feel that the Hong Kong approach of enacting a general prohibition and then making long lists of exceptions is a cumbersome one which would be difficult to explain and enforce. We recommend an offence modelled along the lines of the Canadian one. The limitations contained in the Canadian formulation, as expounded in R v Hinchey, help to ensure that the provision is not overly broad or impossible to administer.

The offence suggested here should perhaps invoke a lesser penalty than that for bribery, where the benefit which changes hands is more directly connected with an improper exercise of power or duty.

Because concerns about the difficulty of administering this offence have been raised, the Working Group would like to emphasis three aspects of the proposed crime. Firstly, it would not apply to all gifts, but only to gifts received from a person who has current business or contractual dealings with the government. This limitation narrows the offence in order to make it more practically workable. Secondly, it would be possible for responsible officials to issue blanket consents exempting certain categories of gifts -- such as gifts below a monetary value of N$100, or free meals -- to reduce the administrative burden entailed. Thirdly, part of the purpose of the offence would be to encourage a climate of openness. A person who received an unsolicited gift would be expected to disclose the gift immediately to the appropriate

official and seek guidance on whether or not acceptance of the gift is appropriate. The Working Group believes that this sort of openness will contribute to both an increased sense of responsibility on the part of public officials and to an increased appearance of integrity in the eyes of the public.

It shall be an offence for
(a) any member or employee of a public body to solicit, demand, accept or agree to accept from any person who has current business or contractual dealings with such body; or
(b) any person who has current business or contractual dealings with a public body to offer, give or agree to give to any member or employee of such body-
any benefit of any kind, directly or indirectly, without the written consent of the head of the public body or the relevant branch of the public body in question.

4.10 TENDERS AND AUCTIONS

This issue will not be addressed in detail, since there is a separate Working Group dealing with the topic of procurement. This Working Group would simply like to draw attention to the fact that many of the jurisdictions examined have found it useful to include specific criminal offences in their anti-corruption statutes relating to the corrupt withdrawal or failure to submit public tenders (such as in Canada, Botswana, Malaysia, Singapore and Hong Kong).

Hong Kong also has a separate offence aimed at corrupt refraining from bidding at auctions by public bodies.

These are specialised wrongs which should perhaps be dealt with in other pieces of legislation. This issue should be considered at a later stage, in light of the recommendations of the Working Group on Procurement.

4.11 SELF-DEALING AND CONFLICTS OF INTERESTS

Botswana and Canada are examples of jurisdictions which include criminal provisions on self-dealing and conflicts of interest by members of public bodies in general laws aimed at corruption.

Botswana's provision on conflicts of interest reads as follows:
A member or an employee of a public body is guilty of corruption if he or an immediate member of his family has a direct or indirect interest in any company or undertaking with which such body proposes to deal, or he has a personal interest in any decision which such body is to make, and he, knowingly, fails to disclose the nature of such interest, or votes or participates in the proceedings of such body relating to such dealing or decision. (Corruption and Economic Crimes Act, 1994, section 31(1).
Family is defined to include a "paramour". Full disclosure followed by permission to take part in the relevant proceedings is a defence.

The offence in the Canadian Criminal Code is more generally formulated as a "breach of trust" (section 122). Although we have not been able to examine the court cases which have construed this concept in Canada, one commentary elaborates on the offence as follows:

The words ‘breach of trust” ordinarily suggest misusing trust property, but it is clear that section 122 deals with a broader idea than that. It relates to an abuse of public trust. A person may not use a public office to further private ends. At the heart of this section is the policy that to avoid any possibility of bias, the work of a public servant must not conceal a pecuniary self-interest. ┐

The examples already embedded in Namibian law, most of which relate to public bodies, provide the most useful precedents (see section 3.2 above). We suggest that a generalised provision along the lines of section 16 of the Regional Authorities Act 22 of 1992 be included in the new anti-corruption statute, making it a criminal offence for any member or employee of a public body to fail to disclose conflicts of interest on the part of the member or employee, a spouse under civil or customary law, a family member, a member of the household, or a partner, agent or business associate. The focus on public bodies here is based in part on their unique responsibility to the public at large. Furthermore, the detailed provisions on conflicts of interest in the Companies Act 61 of 1973 give protection to a large portion of the private sector. However, with respect to the public sector, there is a strong need to bring all public bodies and parastatals under the same basic standard. We assume that more detailed aspects of conflicts of interest would be dealt with in individualised codes of conduct. This topic should be revisited at a later date in light of the recommendations of the Working Group on Codes of Conduct.

In addition, we provisionally suggest that it should also be a criminal offence for any member or employee of a public body to use any property of such body for personal benefit or to promote or prejudice the interests of any person or private business or private agency, except in the proper performance of his or her official duties. This prohibition should be based on section 25(1) of the Public Service Act 13 of 1995.

Such an offence could be extended to cover the improper use of information as well as property, although members of the Working Group had different views on the practical workability of an offence covering “information” because of its intangibility.

4.12 IMPROPER USE OF INFORMATION

One component of the proposed Australian MCCOC offence on abuse of public office would make it an offence for a public official to dishonestly use any information the official has gained because of his or her public office "with the intention of obtaining an benefit for the official or another person or causing a detriment to another person". ┐

As noted above, this problem is also covered in the grounds for misconduct contained in section 25 of Namibia's Public Service Act 13 of 1995 (the use of information gained by virtue of employment in the public service for any purpose other than the performance of his or her official duties without official permission), although this is not a criminal offence. ┐

Insider trading is covered by the Companies Act, as discussed above in section 3.2. In South Africa, the relevant sections of the Companies Act have been considerably strengthened in recent years, and Namibia's Companies Act should be re-examined in this light. However this Working Group is of the opinion that an offence relating to improper use of information for personal profit should be included in an anti-corruption statute with respect to the public sector only, because of the higher degree of responsibility to the public inherent in a public body. Such a move is also necessary to give teeth to the misconduct provision, and to bring parastatals onto the same footing as government bodies.

Such a provision should, however, be limited to the use of information gained from the position in the public body for personal benefit, or the benefit of any other person (except in the proper exercise of official duties). Unauthorised disclosure of information may be wrongful in some circumstances, but it is not necessarily corruption and should be dealt with in another context. The provisions proposed by the Australian MCCOC are a good model on this point. As noted in the previous section, however, some members of the Working Group have expressed doubts about the enforceability of such an offence.

4.13 CAUSING LOSS TO STATE REVENUE

Botswana's anti-corruption law includes the offence of causing loss to State revenue by means of fraudulent conduct. It reads as follows:
A person is guilty of cheating the public revenue if as a result of his fraudulent conduct money is diverted from the revenue and thereby depriving the revenue of money to which it is entitled. (Corruption and Economic Crime, 1994; section 33)

Such an offence goes beyond the concept of corruption. For example, an offence along these lines would overlap with existing offences relating to the evasion of taxes and duties (discussed in section 3.2 above) and existing offences relating to the submission of false documentation under a variety of statutes (some of which might result in a loss to the state coffers). At the same time, a loss might be incurred by the

state from forms of corruption which do not involve “fraudulent conduct”, depending on how such conduct is defined.

The Working Group considered the possibility of an additional anti-corruption offence based on loss of state revenue as a result of corrupt activities, but concluded that this might constitute “double jeopardy”. We suggest that the concept of loss to state revenue as a result of a corruption offence rather be a basis for an additional penalty, such as a fine based on the amount of loss suffered by the State.

Such an offence would overlap in some respects with section 11(1) of the State Finance Act 31 of 1991, meaning that the older offence might require some adjustment if this suggestion is adopted.

4.14 WHAT IS EXCLUDED

Buying and selling of public office and political support

Canada provides useful models on the buying and selling of appointments or resignations to public office and bribery for the purposes of influencing political support (such as a vote for or against a certain measure or an abstention). ┐ These evils would appear to be covered by the broadly-formulated bribery offence which has been suggested. They would warrant a special criminal provision only if they were to be punishable by more severe penalties in consequence of the fact that they strike at the core of democratic representation.

Abuse of public position to promote or prejudice a political party

This issue is already covered in the section of the Public Service Act 13 of 1995 on misconduct. We suggest that this is the appropriate treatment of the problem, as it is potentially too broad to serve as a reasonable basis for criminal prosecution. (For example, a public servant who writes a party-related letter on government stationery may have done something wrong, but does not really deserve criminal prosecution.)

Wrongful disposal of public property

A provision modelled on section 125(1) of the Defence Act 44 of 1957 could be an appropriate subject for a new anti-corruption statute. However, we suggest excluding this item from the statute to avoid going overboard in an attempt to be comprehensive. Furthermore, theft would probably be an appropriate criminal charge in many cases under this heading.

Evasion of taxes and duties

As noted above, we feel that the existing specialised approach to this topic is probably best.

Election fraud

We have also suggested that corruption in respect of elections, as another specialised topic, remain in the context of the Electoral Act.

4.15 HARMONISATION OF LAWS

The proposed offences would necessitate some repeals and adjustments to existing statutes. In general, where an existing offence is completely covered by a more generalised offence in the new anti-corruption statute, we recommend that the old and more restrictive offence be repealed. However, there may be additional remedies contained in some the other statutory provisions which are specific to the context and which would not be completely replaced by a general anti-corruption statute. For example, failure to disclose a conflict of interest might be grounds for dismissal from a public body as well as being a crime in terms of the anti-corruption statute, and it might be necessary for a specific provisions relating to that body to specify whether or not a decision carried out under such circumstances is valid. The Working Group therefore feels that the questions of overlapping statutory offences is a matter to be deal with at the technical drafting stage.

4.16 EXTRA-TERRITORIAL JURISDICTION

Extraterritorial jurisdiction in general

A country's criminal jurisdiction is generally limited to crimes committed at least in some part inside the country, although there appears to be nothing to prevent the legislature from extending the jurisdictions of the courts beyond the country's borders.
¬ .

The South African Law Commission quotes a statement by Mr Justice Gubbay of the Zimbabwean Appellate Division in S v Mharapara in support of the need to think internationally:

The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of territoriality could create injustice. ┐

Types of extraterritorial offences

There are a number of ways in which corruption can involve foreigners and foreign interests. Conceptually, these can most usefully be divided into two broad categories, depending on the nationality of the principal involved.

(1) CORRUPTION AFFECTING FOREIGN PRINCIPALS:
Transactions involving foreigners and foreign interests which take place inside Namibia: An example here would be where a French citizen bribes a German representative of the German government while the two happen to be on holiday in Etosha.
Attempt by Namibian to influence agent of foreign principal: An example would be where a Namibian attempts to bribe an official of a foreign embassy in Namibia to obtain a visa more quickly, or where a Namibian in another country bribes an official of a foreign government to avoid arrest or to receive some business favour.

(2) CORRUPTION AFFECTING LOCAL PRINCIPALS:
Involvement of foreign intermediary: This would be the case where a Namibian gives a benefit to a foreigner or a foreign body in an attempt to influence a Namibian agent into acting improperly – such as a case where a bribe is given to foreign friend to hold for a Namibian agent in an attempt to avoid detection. Such a transaction could take place either inside or outside Namibia.
Corrupt transactions involving Namibians which take place abroad: An example is a situation where a Namibian citizen pays a bribe into the Swiss bank account of a government official while outside the country in order to secure improper influence.
Attempt by foreigner to influence agent of Namibian principal: An example would be where a foreigner such as a prospective investor attempts to secure special treatment by improper means. The corrupt transaction could take place either inside or outside Namibia.

In the United States, the Foreign Corrupt Practices Act 1977 makes it an offence for any US concern (which includes US citizens, residents and legal persons, partnerships, associations or bodies of persons which primarily conduct business in the US) to bribe or attempt to bribe a foreign official with intent to influence him or

her in an official act or to induce the foreign official to use his or her influence to assist the domestic concern to get business for itself or for others. This prohibition also applies with respect to attempts to influence foreign political parties, party officials or candidates for foreign political office. ¬

This law was justified with the argument that foreign bribery worked against the foreign policy interests of the US, caused strains in international relations and led to deterioration of the international investment climate. It has been criticised on the grounds that it is an effort by the US to impose its moral standards on other countries, and on the grounds that it disadvantages American businesses who are subject to constraints not faced by competitors from other countries. ¬

The South African Law Commission, after considering the US approach, recommended that South African law should not attempt to protect the affairs or business of a principal where such affairs or business have no connection with South Africa. It suggested that local courts should have jurisdiction if a substantial element of the offence or the harmful effect of the crime occurred inside the country ¬ The provision adopted in South Africa's Corruption Act 94 of 1992, which closely followed the Commission's original recommendations, reads as follows:

If any offence referred to in subsection (1) or any part thereof is committed or done outside the Republic, it shall be deemed to have been committed or done in the Republic if the power or duty referred to in that subsection is connected with any person or any institution or government body in the Republic. (section 1(2)). ¬

The South African Law Commission drew on useful models from New Zealand: ¬

Every person is guilty of an offence who aids, abets, counsels, or procures, or is in any way directly or indirectly knowingly concerned in or privy to… the commission outside New Zealand of any act in relation to the affairs or business of a principal residing in or carrying on business in New Zealand which if committed in New Zealand would be an offence against this Act. (Secret Commissions Act 1910, section 9, pertaining to corruption involving agents).

Every official is liable to imprisonment… who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe… (Crimes Act 1961, section 105(1), pertaining to corruption in respect of public officials).

A more conservative approach was recommended by the UK Law Commission, which proposed limiting extraterritorial jurisdiction to instances where some communication relating to the offence is sent from elsewhere to the UK, or vice versa.¬

Recommendation for Namibia

It is submitted that Namibia should follow the general approach of South African and New Zealand on this point. The Working Group feels that the jurisdiction of Namibia's anti-corruption statute should extend to all cases where there is a harmful

effect inside Namibia, or where some part of the transaction is committed in Namibia. We are aware that there is an international trend towards criminalising bribery with respect to foreign principals even where it takes place wholly outside the country. However a large majority of the Working Group members are of the opinion that Namibia is yet ready to reach so far. We base this conclusion primarily on the opinion that, given Namibia's limited resources, corruption closer to home should be our highest priority. The costs of investigating and prosecuting corruption farther afield would be unrealistic for Namibia at this stage. In any event, Namibia is simply not a home base for large multi-nationals that are likely to resort to bribery to secure favourable investments abroad, which is one of the major scenarios for foreign bribery. The possibility of broadening the extra-territorial reach of an anti-corruption statute could be revisited at a later stage, once Namibia has some experience with the statute's practical functioning.

PART V
PROVING CORRUPTION

5.1 INTRODUCTION

There are currently no statutory presumptions in Namibian law that may facilitate the proof of corrupt activities. Other countries, such as the United Kingdom, Botswana, Zimbabwe and Hong Kong, do have such provisions.

As observed in the report of the South African Law Commission on bribery, it is usually only where one of the partners in crime decides to give evidence against the other that convictions for bribery are successful.¬ Yet, notwithstanding this, the Commission was of the view that:

"… creating a statutory presumption which casts a burden of proof on the accused is a drastic step which should be approached with great circumspection. Consequently the Commission does not see its way clear to supporting such a proposal at a stage where only preliminary comments have been obtained."¬

A question that will first have to be addressed is whether it is necessary and desirable to include any presumptions in a corruption statute. The conclusion may be that any presumption, no matter how necessary to ensure successful prosecution or restrictively phrased, will be a draconian invasion of the rights and freedom of the accused.

We are however of the view that it is necessary to strengthen the armour of the prosecution so that prosecutions are successful. For example, a presumption that places an evidentiary burden (see below) on an accused to rebut a presumption by leading evidence to show that money received was not received corruptly, will be a useful device to require some evidence from the accused. This topic will be discussed in greater detail below.

It would also be necessary to include a statutory defence in any offence which criminalises the possession of unexplained wealth or the maintenance of a standard of living above the level which could be achieved from lawful sources. It would be a fundamental invasion of liberty to criminalise as such all instances of unexplained wealth. An example of such a provision, with such a statutory defence, is section 10(1) of the Prevention of Bribery Ordinance, Chapter 201 of the Laws of Hong Kong (discussed below).

As will be seen below, it will not be possible to enact statutory provisions drawn from other jurisdictions, without first considering whether these provisions could be challenged as violating an accused's rights under the Namibian Constitution. Following an introduction to presumptions, we will then proceed to consider the constitutionality of various forms of presumptions and conclude with an evaluation of the formulations that will be effective, but should also hopefully withstand a constitutional challenge.

While the focus will be on presumptions, the placing of an onus on an accused by formulating an offence in such a way as to require the accused to prove a defence, exception or exemption, may also infringe a person's right to be presumed innocent (see below). The discussion will therefore include any kind of provision that requires an accused to adduce evidence in a criminal prosecution.

5.2 THE USE OF PRESUMPTIONS AND OTHER PROVISIONS AS AN AID IN PROVING CORRUPTION

Introduction

A presumption is defined by Schmidt as:

"… an assumption, and in a technical legal sense, it is an assumption that a court makes about a fact that is not proved by direct evidence of that fact. It is therefore a device by which proof is provided without evidence being given of such fact."

A presumption usually assists one party in discharging an onus, or else places an onus or duty to present evidence upon his/her opponent."

Presumptions can be divided into the following categories:

(a) Irrebuttable presumptions of law. An example of this kind of presumption is that a child under the age of seven, is doli incapax. Despite the name, this form of "presumption" is neither a presumption nor forms part of the law of evidence, but is in fact a rule of substantive law expressed as a presumption.

(b) Presumptions of fact. A factual presumption is not a rule of law. "It is a mere inference of probability which the court may draw if on all the evidence it appears to be appropriate." An example is res ipsa loquitur, meaning that the "matter speaks for itself." For example, this presumption may arise where a vehicle collides with an oncoming vehicle travelling on the wrong side of the road. It will be presumed that the driver of the oncoming vehicle was negligent;

(c) Rebuttable presumptions of law. A rebuttable presumption of law is a rule of law compelling the trier of fact to accept that a contested fact exists, until evidence is led that denies or negates such fact. Only this kind of presumption is relevant to our inquiry.

A rebuttable presumption of law may either place an onus (also referred to as the burden of proof or the persuasive burden) or an evidentiary burden (or weerleggingslas) on the other party to disprove the fact. The distinction between an onus and an evidentiary burden is clearly expressed by Corbett JA in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A):

The use, without proper definition, of the term onus in this context has, I believe, been a source of some confusion. As was pointed out by DAVIS, A.J.A., in Pillay v

Krishna and Another, 1946 AD 946 at pp. 952 - 3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In Brand v Minister of Justice and Another, 1959 (4) SA 712 (A.D.) at p. 715, OGILVIE THOMPSON, J.A., called it "the overall onus ". In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also Tregea and Another v Godart and Another, 1939 AD 16 at p. 28; Marine and Trade Insurance Co. Ltd. v Van der Schyff, 1972 (1) SA 26 (A.D.) at pp. 37 - 9.) ¬

For example, section 212 of the Criminal Procedure Act 51 of 1977 (“the Criminal Procedure Act”), contains a number of provisions that make certain kinds of evidence prima facie proof of a fact. This formulation casts an evidentiary burden on the other party to adduce contrary evidence i.e. it is an evidentiary burden and is not an onus. If the accused establishes a reasonable doubt he/she must be acquitted.¬ “In the absence of evidence to the contrary” has a similar effect.¬

By contrast, a phrase in a statute such as "it shall be presumed until the contrary is proved" would usually cast an onus on a party to rebut the presumption.¬ A deeming provision usually has a similar effect.¬ In a criminal case, the accused must discharge this onus on the civil standard i.e. on a balance of probabilities (preponderance of probability or preponderance of evidence) and not on the criminal standard i.e. beyond a reasonable doubt.¬ This form of presumption in a criminal prosecution, where it has the effect of placing an onus on an accused is referred to particularly in Canadian law (as adopted in recent South African cases) as a reverse onus.

A third alternative formulation is the requirement that an accused give a “satisfactory account”, usually of possession of an object. For example, section 2 of the Stock Theft Act12 of 1990, provides that:

Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence.

The State must prove beyond a reasonable doubt that::

(a) the accused was in possession of the goods;

(b) the person finding the goods had a reasonable suspicion that the goods were stolen;

(c) the accused was unable to give a satisfactory account of the possession.

Once this is proved, then an accused need only show that his/her explanation is reasonably possibly true, and which if true would give a satisfactory account of his/her possession. The account may be given at any time, even at the trial. It does not create an onus to be discharged on a balance of probabilities by the accused. The State must prove beyond a reasonable doubt that the account given by the accused could not be reasonably possibly true.¬

Even if the accused does not give any account of possession, the court might still find itself unable to say that his/her failure to give an account proves beyond reasonable doubt that he/she was unable to give a satisfactory account of possession,. For example, the accused's failure to give an account may have been due to stubbornness or ignorance. Or, the accused may lead sufficient evidence to show that he/she acquired the property legally. ¬

The constitutionality of presumptions

Introduction

Bearing in mind that the wording of a presumption gives rise to differing evidentiary results, the question arises whether the inclusion of any form of a presumption in a statutory provision may infringe a person's rights under Chapter Three of the Constitution? Similarly, could a presumption be worded in such a way that it falls within the provisions of the Constitution?

The rights which are particularly relevant are the right to a fair trial (article 12(1)(a)), the presumption of innocence (article 12(1)(d)) and the right not to be compelled to give testimony against oneself or one's spouse (article 12(1)(f)). The relevant provisions of article 12 provide that:

"(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

…

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

…

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof."

In addition, it is possible that a statute, which does not rely on a presumption, but is formulated in such a way that conviction results in a fundamental invasion of personal liberty or is an arbitrary arrest and detention, may violate articles 7 and 11(1). These articles provide that:

"7 No persons shall be deprived of personal liberty except according to procedures established by law.

11(1) No persons shall be subject to arbitrary arrest and detention."

Erica-Irene A Daes, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in a consideration of the meaning of "arbitrary" writes that:

160. Does the word ‘arbitrary’ mean ‘illegal’ or does it mean ‘unjust’?

161. If it means merely ‘illegal’ all oppressive acts of the Administration would be unassailable so long as they were in accordance with national laws.

...

169. In the opinion of the Special Rapporteur, which is based mainly on the preparatory work of the relevant articles of the Universal Declaration and the International Covenant on Civil and Political Rights, the reason for the use of the words ‘arbitrary’ or ‘arbitrarily’ was to protect individuals from both ‘illegal’ and ‘unjust’ acts.”┐

The Human Rights Committee in the communication of Womah Mukong v Cameroon, decision of 21 July 1994, held in paragraph 9.8 of its views (i.e. in terms of the First Optional Protocol to the International Covenant on Civil and Political Rights, to which Namibia has acceded):

The Committee notes that the State party has dismissed the author’s claim under article 9 by indicating that he was arrested and detained in application of the rules of criminal procedure, and that the police detention and preliminary enquiries by the examining magistrate were compatible with article 9. It remains however to be determined whether other factors may render an otherwise lawful arrest and lawful detention ‘arbitrary’ within the meaning of article 9. The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. ┐

It should be noted that unlike the constitutions of some countries, such as Canada or South Africa, the infringement of any of these rights (with the exception of article 7) cannot be justified as a reasonable limitation of the right. Once the High Court finds an infringement of the right, it will declare the section invalid or the court may refer the section to Parliament to correct the defect.

Namibia

The judgments of the Namibian courts on the constitutionality of presumptions, until the judgment of the Supreme Court in S v Shikunga and Another 1997 (2) SACR 470 (Nm SC); 1997 (9) BCLR 1321 (Nm S), were all delivered before the seminal judgment of the South African Constitutional Court in S v Zuma and Others 1995 (2) SA 642 (CC). It is noteworthy that when the Supreme Court was called upon to decide on the constitutionality of a presumption for the first time, it did so simply by following Zuma’s case and overruling the earlier High Court judgment in S v Titus 1991 NR 318 (HC). All three of these cases concerned the constitutionality of the presumption in section 217(b)(ii) of the Criminal Procedure Act. Section 217 regulates the admission of confessions.

In Titus' case, Frank J (O'Linn J concurring) had upheld the constitutionality of section 217(b)(ii) of the Criminal Procedure Act. Section 217(b) provides that:

"(b) … where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question -

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.'

It was argued that in placing an onus on the accused, the section violated article 12(1)(d) i.e. the right to be presumed innocent and article 12(1)(f) of the Constitution i.e. the right not to be compelled to give evidence against oneself.

The court relied on a South African decision, S v Marwane 1982 (3) SA 717 (A) (relying on the Boputhatswana Bill of Rights) and a decision of the U S Supreme Court, Tot v United States 319 US 453 (1943) in reaching its conclusion. Frank J referred to the following passage in the Tot case, apparently with approval (at 321E):

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Frank J concluded (at 321I - 322A):

In my view the onus placed upon an accused person in section 217 of the Criminal Procedure Act does not 'impose upon the defendant the burden of proving his innocence' nor is there 'no rational connection between the fact proved and the ultimate fact presumed.' For the presumption to operate the requirements set out above in (a)-(c) must be met, ie the prosecution must make out a prima facie case.

The court went on to hold that there was a rational connection between the confession and the crime perpetrated because of the provisions of section 209 of the Criminal Procedure Act. Section 209 provides that a confession is admissible if it is confirmed in a material respect, or if the offence is proved by evidence, other than the confession, to have been actually committed.¬

In S v Pineiro 1993 (2) SACR 412 (Nm); 1991 NR 424 (HC) (Levy J; Strydom JP concurring), the constitutionality of presumptions under sections 18(2) and (3) of the Sea Fisheries Act 58 of 1973, was challenged on the grounds that the provisions violated the presumption of innocence in article 12(1)(d). The presumption in section 18(2) deemed any person on board a fishing boat at the time the offence was committed to be guilty of an offence, unless he/she proves that he/she did not commit an offence under the Act and did not take part in and could not prevent the commission of the offence. The presumption in section 18(3)(a) required a person to prove that any act did not take place in the area where it was alleged to have taken place. The presumption in section 18(3)(b) deemed as correct "any information obtained by means of any instrument or chart used to determine any distance or depth."

The court had little hesitation in striking down section 18(3)(a) as unconstitutional because it was in direct conflict with article 12(1)(d).¬

In respect of the presumption in section 18(2), Levy J concluded after an analysis of South African, Namibian and US decisions:

If the 'rational connection' test is applicable, inasmuch as the facts proven, namely that an offence has already been committed and that the persons concerned were all on board the vessel at the time of commission, the presumed fact, ie the guilt of all concerned, is a fact sufficiently closely connected with the proven facts, that is, rationally connected, to justify the presumption. If the test in the Marwane case is applicable, the presumption is a factor which is only invoked after many other factors have been proven beyond reasonable doubt, in this instance particularly that the person in charge of the vessel has committed the offence on a vessel on which the person concerned is at the relevant time. The fact that the accused is therefore required to prove that he did not commit the offence or take part therein does not mean that he is when charged with the offence presumed guilty of the offence and must prove his innocence. However, he must prove in addition to the other requirements that he could not prevent the commission of the crime.'"¬

The court went on to consider the constitutionality of the words in italics i.e. "he could not prevent the commission of the crime." The court held that the ambit of the provision was too wide and accordingly held that the phrase in section 18(2) reading "and could not prevent the" was unconstitutional and was therefore struck out. The objection to the rest of the presumption was dismissed.

With respect, this conclusion is not particularly convincing when measured against the Canadian decisions, or the decisions of the South African Constitutional Court (discussed below). Any presumption which requires a person to prove or disprove a fact on a balance of probabilities places a reverse onus on an accused. The question is whether that reverse onus is constitutional. While the presumption itself does not mean that the person is automatically guilty, it does require the accused to prove an element of the offence, which if he/she fails to do so may result in his/her conviction, despite the existence of a reasonable doubt as to his/her guilt.

In Freiremar SA v Prosecutor-General of Namibia and Another 1994 (6) BCLR 73 (NmH), application was made for the setting aside of a confiscation order in respect of a fishing vessel, following the conviction of the master of the vessel, one Carlos Redondo. The application was based on the main ground that the second part of the proviso to section 17(1) of the Sea Fisheries Act 58 of 1973, was in conflict with article 12(1)(d) of the Constitution. Section 17(1) provides that:

The Court convicting any person of any offence in terms of this Act may, in addition to any other penalty it may impose declare any fish, seaweed, shells or implement or any fishing boat or other vessel or vehicle in respect of which the offence was committed or which was used in connection with the commission thereof, or any rights of the convicted person thereto, to be forfeited to the State ... Provided that such a declaration of forfeiture shall not affect any rights which any person other than the convicted person may have to such implement, boat, vessel or vehicle, if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence.

The proviso therefore means that any person, other than the convicted person, who held any rights in the vessel, could retain his/her rights if he/she could prove that he/she "took all reasonable steps to prevent the use thereof in connection with the offence." The offence of which Redondo was convicted was wrongfully and unlawfully fishing within the Namibian exclusive economic zone (EEZ).

Interestingly, although the court was not concerned with a criminal conviction, it accepted that the proceedings were quasi-criminal because a penalty in the form of the confiscation of the vessel applied and that therefore the presumption of innocence guaranteed by article 12(1)(d) of the Constitution applied.¬

The court then went on to consider Namibian, US and the Canadian jurisprudence in the area of reverse onus provisions, most notably R v Oakes 26 DLR (4th) 200 (1986). Strydom JP concluded at (at 79F - G) that:

In my opinion the test as applied in these cases is a practical one which would require an accused to speak up in circumstances where an explanation would be required because of the presumption raised by the proved facts and because of the personal knowledge of the accused. However where the proven facts are not such that an explanation is readily required the placing, in those circumstances, of an inverted onus on an accused will require an accused to prove his innocence which will be contrary to the Constitution containing a provision as that set out in Article 12(1)(d) of the Namibian Constitution.

The presumption would have been saved if it referred only to owners of fishing vessels. There would have then been a rational connection between the fact of fishing in Namibian waters and the fact that the employees were ostensibly acting in the interests of the owner of the vessel or on the owner's instructions. The presumption was however phrased too broadly, affecting all persons with an interest in the vessel, such as a lien holder. Strydom JP held at 82B - E:

Looking at the rights which may attach to a boat or vessel, and I have only set out the examples above, it is immediately clear that any of those right holders will also be subject to the provisions of section 17(1). Consequently if a boat or vessel in which such a lien holder has a real right, is forfeited by a court in terms of the provisions of section 17(1) the proviso to the section will require of such a lien holder to prove that he took all reasonable steps to prevent the use thereof in connection with the offence in order to avoid or set aside the forfeiture order. A lien holder in respect of damage caused by the vessel, or for salvage or master's disbursements, has nothing to do with illegal fishing and usually has no control over the boat. There is in my opinion no rational connection between such fact, that is the illegal fishing, and the presumed fact, that is the complicity of such a right holder in the illegal fishing, so as to tend to prove the existence of such presumed fact in order to cast an onus on him to explain. The proved fact of illegal fishing simply does, in these instances, not raise a presumption that those holders of real rights in the vessel knew or could have taken reasonable steps to prevent it. In the case of such holders of rights the statutory inroad made into the presumption of innocence is arbitrary and unreasonable and therefore unconstitutional. To saddle them in these circumstances with a reverse onus will require of them to prove their innocence.

The court effectively ruled the presumption unconstitutional, by striking out the phrase “if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence”, in the proviso to section 17(1).

In S v Van den Berg 1996 (1) SACR 19 (Nm), the court dealt with a challenge to the validity of the presumptions in section 35A of the Diamond Industry Proclamation, Proclamation 17 of 1939. The section provides that:

Whenever in any proceedings for a contravention of any provision of this proclamation -

(a) it is necessary to ascertain whether the person charged is or was the holder of any licence, permit or authority or otherwise entitled to be in possession of or authorised to buy, receive, sell, offer for sale, deal in, barter, pledge, or otherwise dispose of or deliver, or to import or export any diamond; or

(b) the person charged contends that any article or substance the subject of the charge, is not a rough or uncut diamond, the burden of proving that he is or was the holder of such licence, permit or authority or that he is or was otherwise entitled or authorised as aforesaid, or that such article or substance is not a rough or uncut diamond, as the case may be shall lie upon the person charged.

After a lengthy examination of Canadian, US and Namibian decisions, O’Linn J concluded at 62e - j:

When such approach, tests and guidelines are applied to the presumption contained in s 35A of Proc 17 of 1939, the result is a foregone conclusion. The said presumption cannot survive the rational connection test because the presumption fails to mount the first leg in that there is no provision for a fact to be proved by the State with which the presumed fact can be connected. There is therefore no rational connection. The

provision places the onus squarely on the accused to prove an element of the offence, being that the diamonds bought, sold or possessed, are rough and uncut diamonds.

This provision also violates subart (a) of art 22, in that it negates the essential content of the presumption of innocence contained in art 11(1)(d) [Note: this should be 12(1)(d)].

The provision in s 35A is also ambiguous, arbitrary, unreasonable and unnecessary. It cannot be read, as Mr Small contends, as merely placing an evidentiary burden' on an accused.

…

The presumption contained in subpara (b) of s 35A of Proc 17 of 1939 is therefore declared unconstitutional and, as such, of no force and effect.

In my view, however, the presumption contained in subpara (a), placing a burden on the person charged to prove that he or she was the holder of such licence, permit or authority or that he or she was otherwise entitled or authorised, as aforesaid, to be in possession of or authorised to buy, receive, sell, offer for sale, deal in, barter, pledge or otherwise dispose of or deliver, or to import or export any diamond, is not unconstitutional and is valid.

It may be noted that article 22 cannot apply to article 12(1)(d) because no limitation of the right by law is authorised in article 12(1)(d) i.e. article 22 only applies where in terms of the Constitution a right may be limited by law. The court relied essentially on the US decisions for its conclusion that the presumption in section 35A(b) was unconstitutional i.e. the rational connection test.

In S v Shikunga 1997 (2) SACR 470 (Nm SC), the Supreme Court made no mention of the rational connection test. Instead the court referred to articles 7 (although article 7 is not mentioned in Mahomed CJ's conclusion), 12(1)(a), 12(1)(d) and 12(1)(f) of the Constitution and concluded that:

… section 217(1)(b)(ii) of Act 51 of 1977 offends these provisions of the Constitution because it permits a court, in certain circumstances, to convict an accused person whose guilt has not been established beyond reasonable doubt. A person convicted of an offence in these circumstances cannot be said to have had a 'fair trial' in which he or she was 'presumed innocent until proven guilty'.

At common law, a confession made by an accused person is not admissible against him or her unless it is established that it was freely and voluntarily made, and that he or she was in sound and sober senses and not unduly influenced thereto. This is a crucial requirement in a fair system of justice. It goes to the heart of the rights expressly protected by art 12 of the Constitution. A statute which invades that right subverts the very essence of the right to a 'fair trial' and the incidents of that right articulated in art 12(1)(a), (d) and (f). Section 217(1)(b)(ii) constitutes such an invasion. (S v Zuma and Others 1995 (2) SA 642 (CC) at para [33] at 659.)

…

The objection to which I have previously referred [i.e. that an accused person can be convicted without guilt being established beyond a reasonable doubt] remains intact: the only evidence connecting the accused person with the offence involved could be the confession, and if the prosecution had failed to establish that that confession was freely and voluntarily made, a conviction of the accused could result notwithstanding the fact that his or her guilt was not established beyond a reasonable doubt. In my view such an accused could not be said to have received a fair hearing within the meaning of art 12 of the Constitution. The accused has the right to require the State to prove his or her guilt beyond a reasonable doubt. The effect of s 217(1) (b) (ii) is to imperil that right. ┐

As will be seen in the discussion of Zuma's case below, the conclusion that by relying on the presumption an accused could be convicted "notwithstanding the fact that his or her guilt was not established beyond a reasonable doubt"┐ is based on the Canadian jurisprudence and not on the US rational connection test, which was hitherto the dominant approach in the High Court.

Unfortunately, the Supreme Court apparently believed that such a complete answer had been given to the validity of the presumption in section 217(b)(ii) by Kentridge AJ in Zuma's case, that it was content to rely on a reference to paragraph 33 in the Zuma judgment, where that court held that:

[33] The conclusion which I reach, as a result of this survey, is that the common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (Woolmington's case supra). Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common-law rule on the burden of proof is inherent in the rights specifically mentioned in s 25(2) and (3)(c) and (d), and forms part of the right to a fair trial. In so interpreting these provisions of the Constitution I have taken account of the historical background, and comparable foreign case law. I believe too that this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of s 25. It follows that s 217(1)(b)(ii) violates these provisions of the Constitution.

We conclude on this limited evidence that our courts are more likely to favour the stricter Canadian test than the US rational connection test (see below). As shown above, a number of presumptions were not ruled unconstitutional by the High Court, because the weaker rational connection test was adopted. The conclusions reached may very well have been different if the Canadian approach was used instead, as is graphically demonstrated by the Supreme Court overruling Titus' case, where the rational connection test was used in conjunction with the test used in Marwane's case. This has important implications when considering what form of presumption (if any) should be adopted. It also means that it would be safer to rely on Canadian or South

African precedents (also because the relevant constitutional provisions are similar), or on decisions from countries that have reached similar conclusions, rather than on decisions from other jurisdictions, such as the United States of America.

South Africa

S v Zuma and Others 1995 (2) SA 642 (CC) has already been referred to above, and it is suggested that it is likely that our courts will now follow it, after the endorsement of the decision by the Supreme Court in Shikunga. In Zuma, the Constitutional Court held that section 217(b)(ii) of the Criminal Procedure Act was unconstitutional.¬ After examining US decisions and the rational connection test, the court quoted¬ the following passages in the judgment of Dickson CJC in R v Oakes at 222 that:

If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

…

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

It is suggested that this shows convincingly that the rational connection test will not always be helpful and that its application may result in a person being convicted because he/she cannot discharge the onus despite a reasonable doubt that he/she is guilty. Kentridge AJ's conclusion was quoted above in the discussion of Shikunga's case.

Section 5(b) of the Drugs and Drugs Trafficking Act 140 of 1992, was struck down as unconstitutional by the Constitutional Court in S v Bhulwana; S v Gadiso 1996 (1) SA 388 (CC), per O' Regan J. The section required an accused proved to have been in possession of more than 115 grams of dagga, to prove that he/she was not dealing in dagga.

In S v Julies 1996 (4) SA 313 (CC), Kriegler J declared unconstitutional the presumption in section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act140 of 1992, that possession of any quantity of an undesirable dependence producing substance, shall be presumed to be dealing in the substance. The presumption is the same as section 10(1)(a)(ii) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971, which applies in Namibia.

The accused was found in possession of three Mandrax tablets. The court contrasted the situation with the possession of dagga as in Bhulwana's case, where a minimum quantity of 115 grams was required, before the presumption came into operation. In Kriegler J's view:

The possession of, for example, half a Mandrax tablet cannot by any conceivable logic be in itself any indication to a rational person that the possessor had any particular intention in regard thereto. It is certainly no indication of dealing therein, actual or intended, rather than of personal use. ┐

Section 40(1) of the Arms and Ammunition Act 75 of 1969, requiring any person on or in or in charge of, present at or occupying any premises, including any buildings or vehicles or vessels, to prove that they were not in possession of the particular item, was struck down as unconstitutional in S v Mbatha; S v Prinsloo 1996 (2) SA 464 (CC), per Langa J.

The decision of the Constitutional Court in Scagell and others v the Attorney-General of the Western Cape and others, 1997 (2) SA 368 (CC) is particularly interesting. The validity of sections 6(3), (4) and (6) of the Gambling Act 51 of 1965 ("the Gambling Act"), were in issue. These sections provide that:

"(3) When any playing-cards, dice, balls, counters, tables, equipment, gambling devices or other instruments or requisites used or capable of being used for playing any gambling game are found at any place or on the person of anyone found at any place, it shall be prima facie evidence in any prosecution for a contravention of ss (1) that the person in control or in charge of such place permitted the playing of such game at such place and that any person found at such place was playing such game at such place and was visiting such place with the object of playing such game.

(4) If any policeman authorised to enter any place is wilfully prevented from or obstructed or delayed in entering such place, the person in control or in charge of such place shall on being charged with permitting the playing of any gambling game, be presumed, until the contrary is proved, to have permitted the playing of such gambling game at such place.

(5) Upon proof at the trial of any person charged with contravention of ss (1), that any gambling game was played or intended to be played, it shall be presumed, until the contrary is proved, that such game was played or intended to be played for stakes.

(6) Any person supervising or directing or assisting at or acting as banker, dealer, croupier or in any like capacity at the playing of any gambling game at any place and any person acting as porter, doorkeeper or servant or holding any other office at any place where any gambling game is played, shall be deemed to be in control or in charge of such place.

Section 6(4) is a reverse onus provision and the court following its previous decisions held that it was in violation of the rights to be presumed innocent and to remain silent. The court further held that the section could not be saved under section 33(1) of the interim Constitution.

Section 6(3) does not impose an onus on the accused i.e. a reverse onus, but only gives rise to an evidentiary burden. The effect of the section was however very broad:

A person could be charged in terms of s 6(1), and required to produce evidence to dislodge the effect of s 6(3), simply on the basis that a police officer found a pack of cards in his or her home. The relationship between the presumed facts and the proven facts is, at best, only tenuous. It cannot be said that a person found in possession of a pack of playing cards or a pair of dice, in the absence of any other evidence, is likely to have been engaged in the conduct prohibited by s 6(1). Nevertheless the effect of the subsection is that any person found to be in possession of such materials may be arrested, prosecuted and required to produce evidence to avoid conviction. ┐

The court approached the question of the constitutionality of the section, not as a violation of the right to be presumed innocent (as it had in previous cases, such as Zuma) or the right to silence, but rather as a violation of the right to a fair trial. O'Regan J dealt with counsel for the applicants argument that the section firstly, breached the presumption of innocence and secondly, that it breached an accused's right to silence as follows:

It is clear from the language of s 25(3) that the presumption of innocence and the right to silence are incidents of the overarching right to a fair trial which is enshrined in the opening words of the subsection.

[16] In my view, it is not necessary in this case to consider whether the provisions of s 6(3) constitute a breach of the presumption of innocence or the right to silence. Section 6(3) of the Act is an evidential device created by the Legislature which may result in persons being charged with an offence and put on their defence merely upon proof of a fact which itself is not suggestive of any criminal behaviour. The effect of such a device is that innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence. Such a provision is in breach of the right to a fair trial, entrenched in s 25(3).

…

[18] The constitutional complaint lies in requiring innocent persons, against whom there is no evidence suggestive of criminal conduct at all, to come to court to defend themselves. The fact that it may be relatively easy for such an accused to do so does not deprive the provision of its sting. Even if an accused person is acquitted, there can be no doubt that the fact of standing trial itself has serious implications for an accused. It may cause damage to the dignity and reputation of the accused. It will require the accused to be present at court which may be time-consuming and inconvenient and, if the accused appoints a legal representative, it may give rise to considerable expense. All of these implications would of course be legitimate if the charge is based on facts which suggest criminality, but in terms of s 6(3) such a requirement is effectively dispensed with by the Legislature."┐

The court therefore held that the section was in violation of the general right to a fair trial. The possibility that the section was also in violation of the section 11(1)┐ was raised, but not considered.┐

Regarding the validity of section 6(6), the court considered it to be an irrebutable presumption, which is not a rule of evidence but rather of substantive law. The section is in fact an extensive definition of the category of persons, which are deemed to be in control or in charge of a place where any gambling game was played. The State would have to prove beyond a reasonable doubt that a gambling game was played and that the accused permitted the playing of the game. The provision did not violate the right to a fair trial. It could not result in the conviction of a person despite a reasonable doubt as to his or her guilt.¬

The legislature will not however be allowed to criminalise any activity. In an obiter dictum, O'Regan J held:¬

[32] It may be in certain circumstances that the elements necessary to establish a statutory or common-law offence could be challenged on constitutional grounds. For example, a statutory offence which criminalises behaviour which chap 3 specifically protects, such as the right to freedom of movement or assembly, could well be the subject of a successful constitutional challenge. In addition, s 11(1) of the Constitution provides that:

'Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.'

It may be that, in certain circumstances, the elements of a particular criminal offence are so invasive of freedom that the offence could be challenged as an unjustifiable infringement of s 11. It is not necessary for the purposes of this case to decide whether such a challenge could be sustained for it is clear that there is no basis for such a challenge in this case.

In S v Coetzee and Others 1997 (3) SA 527 (CC); 1997 (1) SACR 379 (CC); 1997 (4) BCLR 437 (CC), the validity of sections 245 and 332(5) of the Criminal Procedure Act were attacked as unconstitutional. Section 245 provides that:

If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

Section 332(5) provides that:

When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

Analysis of this judgment is made difficult because ten out of the eleven judges delivered separate judgments. The court was unanimous in holding that section 245 was unconstitutional because it placed a reverse onus on the accused to prove his innocence. This violated the accused's right to be presumed innocent and could not be saved under the limitation section (section 33(1)).

The interpretation of section 332(5) however raised the question whether the section created a statutory liability, but subject to a special defence. The Government contended that the section did not create an onus on the accused to disprove an element of the offence, but rather to prove an exemption, exception or excuse.¬ The question whether such a provision violated the right to be presumed innocent, had expressly been left open by the Constitutional Court in previous decisions (Zuma, Bhulwana and Mbatha). In these cases the court had ruled the particular statutory presumptions unconstitutional. Nevertheless, a majority of the court concluded that section 322(5) was similarly unconstitutional and could not be justified under section 33(1).

The majority of the members of the court who held that section 322(5) was unconstitutional, even though the reverse onus was formulated as a statutory defence and not as a presumption, appear to have followed the Canadian decisions, particularly R v Whyte (1989) 51 DLR (4th) 481. For example, Langa J referred to the following passage in the judgment of Dickson CJC with approval:

The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. ¬

Langa J concluded:

[Section 332(5)] imposes an onus on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether or not an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same facts an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.

[39] The fact that section 332(5) requires that the accused director should, on pain of conviction, prove that he or she did not take part in the commission of the offence and could not have prevented others from doing so, even if it is formulated as an

exception, has the same consequence as a reverse onus provision which relates to an essential element of the offence. Such accused will be convicted unless he or she discharges the onus; this despite the existence of a reasonable doubt with regard to such accused's participation in the offence and the ability to have prevented it.

[40] In the final analysis, whether section 332(5) creates a form of statutory liability, with a shift in onus in respect of a part thereof or a new crime with a special defence, the proof of which rests on the defence, the final effect is the same. The objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused. In either event, the right of the accused to be presumed innocent is breached. ┐

Mahomed CJ concurred with Langa's conclusion that section 332(5) was unconstitutional, holding that:

[60] Section 332(5) achieves this by requiring the accused to prove that he or she did not participate in the offence and could not have prevented it. The result is this: if at the end of the case the court has a reasonable doubt as to whether or not the accused took part in the commission of the offence by the corporate body, or a reasonable doubt as to whether or not the accused could have prevented the commission of that offence, the court would nevertheless be required to convict such an accused. Prima facie this seems to me to be a breach of the presumption of innocence contained in s 25(3) of the Constitution. ┐

Kentridge AJ agreed that section 245 was unconstitutional, but dissented from the majority in respect of section 332(5), holding that it did not violate any constitutional right, because it only created a form of vicarious liability and not a reverse onus.

Zimbabwe

Zimbabwe has a similar constitutional provision guaranteeing the presumption of innocence. There is however a notable difference between the Namibian and Zimbabwean constitutions in that section 18(3)(b) of the Zimbabwean Constitution provides that a law may impose upon a person charged with an offence, "the burden of proving particular facts." In S v Chogugudza 1996 (1) SACR 477 (ZS), the accused was charged with contravening section 4(a) of the Prevention of Corruption Act of 1985, which provides that:

If a public officer, in the course of his employment as such-

(a) does anything that is contrary to or inconsistent with his duty as a public officer;

…

for the purpose of showing favour or disfavour to any person, he shall be guilty of an offence and liable to a fine not exceeding three thousand dollars or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

Section 15(2) contains a number of presumptions, the relevant presumption being section 15(2)(e), which provides that:

(2) If it is proved in any prosecution for an offence in terms of section three or four that-

…

(e) any public officer, in breach of his duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.

The accused argued on appeal to the Supreme Court that unless the presumption in section 15(2)(e) was relied on for the conviction, he could not properly have been convicted. It was further argued that the presumption was unconstitutional because it placed upon him the burden of proving his innocence. After an analysis of decisions in various jurisdictions, the court concluded:

Viewed against the common law limits and guide-lines previously set out, as well as the features referred to in Attorney-General of Hong Kong v Lee Kwong-kut supra (which respectfully are approved as applicable to ss 18(3)(a) and 18(13)(b)), I am satisfied that the presumption in s 15(1)(e) of the Prevention of Corruption Act falls easily within constitutional limits. It is a reasonable and natural presumption flowing from the facts proved. It impairs the rights of the accused as little as possible and relates to a fact peculiarly within his own knowledge.

In my opinion, it would be a perfectly reasonable inference, even without the presumption created by s 15(2)(e) of the Act, to conclude that if the State proved that the accused, in breach of his duty as a public officer, did or omitted to do something that was to the favour or prejudice of any person, he would have a case to answer. Only he could say that he did not do the act for the purpose, or with the intention, of showing favour or disfavour. ┐

In our view, and while the judgment is otherwise directly applicable to our inquiry, sections 18(3)(a) and (b) of the Zimbabwean Constitution are fundamentally different from article 12(1)(d), which guarantees without qualification and limitation the right to be presumed innocent. It is suggested that for this reason alone our courts would be inclined not to follow it.

It may also be noted that the presumption in section 245 of the CPA, which was considered to be unconstitutional by the entire Constitutional Court in Coetzee's case, also placed the onus on the accused in respect of his/her state of mind at the time of making a representation i.e. a fact only within his/her own knowledge. For example, Langa J held:

[15] The rationale for the provision is that it deals with matters which are peculiarly within the knowledge of the accused. Indeed, the accused is in the best position to

know why he or she made a representation. It may well be that proving the state of mind of the accused in the context of a false representation presents the State with more difficulties than in other cases. However, the touchstone for justification, where s 33(1) of the Constitution requires the prevailing State interest to render a provision not only reasonable but necessary as well, is not simply the fact that an obligation to prove an element of an offence which falls peculiarly within the knowledge of the accused makes it more difficult for the prosecution to secure a conviction. The question is whether it makes it so difficult as to justify the infringement of the accused's right to be presumed innocent on the grounds of necessity. I am not persuaded that this difficulty is, in itself, sufficient to outweigh the importance of the right infringed and to justify the reversal of the onus. It is a difficulty, moreover, which is not peculiar to offences in respect of which s 245 is applicable. Discharging the burden of proof is a function which the criminal justice system requires the prosecution to perform in the normal course with regard to many common-law and statutory offences. * It was not claimed that if all the circumstances surrounding the false representation are fully and properly investigated and presented in evidence the prosecution cannot obtain the conviction to which it might be entitled.

[16] It has not been contended that other open and democratic societies based on freedom and equality have found it necessary to resort to such an unqualified presumption for the proper enforcement of the criminal law in relation to all offences of which a false representation is an element. I am not aware of, nor have we been referred to any examples in comparable jurisdictions, where a general provision in the same context is employed. No good reason suggests itself why it should be necessary in this country to have such a provision if, in general, crimes involving misrepresentations are adequately dealt with in other jurisdictions without the expedient of a reverse onus provision. ┐

Other jurisdictions

The leading case under the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") is Salabiaku v France (1988) 13 EHRR 379; judgment of 7 October 1988, where the European Court of Human Rights held in considering article 6(2) of the European Convention, which is virtually identical to article 12(1)(d) of the Namibian Constitution:

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law … Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. ┐

It is suggested that this test provides very little guidance as to which presumptions or reverse onus provisions may be constitutional or not. The finding that presumptions of facts or law must be confined within "reasonable limits which take into account the

importance of what is at stake and maintain the rights of the defence," is not a very useful test.

The Privy Council considered whether the presumptions in two different statutes infringed article 11(1) of the Hong Kong Bill of Rights (virtually identical to article 12(1)(d)) in Attorney General of Hong Kong v Lee Kwong-kut; Attorney General of Hong Kong v Lo Chak-man and Another [1993] 3 All ER 939 (PC). Lord Woolf, who delivered the judgment of the Board, referred to the Salabiaku case and various Canadian decisions, the most recent being Whyte's case. What appears to have influenced the Board not to adopt the stricter Canadian approach was that the infringement of the right to be presumed innocent could be justified under section 1 of the Canadian Charter of Rights and Freedoms, while this was not possible under the Hong Kong Bill of Rights. The limitation of the right to be presumed innocent is also not possible under the Namibian Constitution.

Lord Woolf concluded his analysis by formulating as a test of constitutionality the following. A presumption will not infringe the right to be presumed innocent if the prosecution is given the burden of proving the important elements of the offence (whatever that may mean in theory or practice), while the accused is reasonably given the burden of establishing a proviso, exception, exemption etc. Only if there is real difficulty in a case "close to the borderline", should the Canadian approach be adopted and even then the Canadian tests should not be applied "rigidly or cumulatively, nor need the results achieved be regarded as conclusive."¬

Conclusion

In the next section we will consider possible formulations that will probably not violate the Constitutional guarantees, particularly the right to be presumed innocent. It will therefore be useful at this point to draw some conclusions from the above survey of Namibian judgments and judgments from other jurisdictions. Our conclusions are as follows:

1. The "rational connection" test applied in most of the earlier High Court decisions was not applied by the Supreme Court in Shikunga's case, when determining the constitutionality of a presumption placing an onus on an accused (reverse onus provision).

2. The Supreme Court instead adopted the stricter Canadian test, as applied in Zuma's case and subsequent South African decisions.

3. In terms of this test, a statutory provision violates the presumption of innocence if it permits the conviction of an accused, despite a reasonable doubt as to the guilt of the accused.

4. The right to be presumed innocent may be violated regardless of whether the offence is formulated as creating a presumption, or requiring an accused to prove a defence, exemption, exception, excuse etc. See Coetzee's case, above.

5. The infringement of a person's rights under articles 12(1)(a), (d) or (f) by a law, cannot be justified as a reasonable limitation under the Constitution. The position in Canada and South Africa, for example, is different, because these countries' constitutions contain general limitation clauses.

6. The placing of an evidentiary burden by a presumption may not infringe an accused's right to be presumed innocent. The facts giving rise to the presumption should however be suggestive of criminality, otherwise the accused's right to a fair trial may be infringed. See Scagell's case, above.

7. Elements of a particular criminal offence may violate a person's right not to be deprived of personal liberty (article 7) and the right not to be subjected to arbitrary arrest or detention (article 11(1)). Conviction in respect of such an offence may be unconstitutional. In other words, a criminal provision may be so draconian or invasive of personal liberty, that it would violate these rights and possibly other constitutional rights. See Scagell's case, above.

Formulating an intra-constitutional presumption or evidentiary provision

Possible formulations

What can be stated with near certainty is that a reverse onus provision that places an onus on an accused to be discharged by proof on a balance of probabilities, will be in violation in particular of the right to be presumed innocent, which is guaranteed in article 12(1)(d) of the Constitution. This is so whether the onus is created by a presumption, defence, exemption, exception etc.

Accepting that this is the position, we proceed to consider a number of possible formulations of presumptions or statutory defences, exemptions etc. that may withstand attack on the basis that it violates the accused's rights, particularly the right to be presumed innocent.

Firstly, the position in Canada is that a statute which is formulated in such a way that the accused can only be convicted if he/she does not raise a reasonable doubt as to his/her innocence, does not violate the right to be presumed innocent. In R v Laba [1994] 3 SCR 965¬ the Supreme Court held that the presumption in the following section was unconstitutional, because it placed a reverse onus on the accused to prove his innocence:

"Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who
. . .

(b) sells or purchases any rock, mineral or other substance that contains precious metals or unsmelted, untreated, unmanufactured or partly smelted, partly treated or partly manufactured precious metals, unless he establishes that he is the owner or agent of the owner or is acting under lawful authority; ¬

As a remedy, the court struck down the words "unless he establishes" and read-in the words "in the absence of evidence which raises a reasonable doubt", so that the section instead read:

Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who
. . .

(b) sells or purchases any rock, mineral or other substance that contains precious metals or unsmelted, untreated, unmanufactured or partly smelted, partly treated or partly manufactured precious metals, in the absence of evidence which raises a reasonable doubt that he is the owner or agent of the owner or is acting under lawful authority;

As Sopinka J noted, under the previous wording, the accused was required to adduce evidence and would bear the burden of non-persuasion. Under the version with the reading-in, the accused would only be required to adduce evidence.¬ This in itself is

a worthwhile result, because it will mean that an accused will not be in a position to apply for a discharge at the end of the prosecution's case, but will have to place some evidence before the court. An evidentiary burden is therefore placed on the accused to adduce evidence, but it is unequivocally clear that the accused must be acquitted if there is reasonable doubt as to his/her guilt.

Laba's case was followed in R v Pratt 35 CRR (2d) 293 (1966), a decision of the British Columbia Supreme Court. The court in this case also struck down a reverse onus provision ("unless he proves, on the balance of probabilities that he did not know of he prohibition or suspension") in a statute, and read-in the words "in the absence of evidence which raises a reasonable doubt that he knew of the prohibition or suspension."

Secondly, there is the presumption referred to above that requires an accused to give a "satisfactory account", usually of possession. It is fairly well-established in South African law, which will no doubt be followed by Namibian courts, that such a presumption does not result in a reverse onus. An accused need only show that his/her explanation is reasonably possibly true, and which if true would give a satisfactory account of his/her possession. The State must still prove beyond a reasonable doubt that the account given by the accused could not be reasonably possibly true.¬

In Osman and Another v Attorney-General of Transvaal 1998 (1) SACR 28 (T), McCreath J held that section 36 of the General Law Amendment Act 62 of 1955 ¬ , which is similar to the evidentiary provision in section 2 of the Stock Theft Act used as an example above, was not in violation of an accused's right not to be compelled to incriminate himself/herself. ¬ In the light of the Court's analysis of the offence (see above), the offence does not require the accused to make a statement, but in certain cases where there is a case to answer and the accused exercise his right to silence, he/she remains at his/her own peril. ¬ The court further held that the section does not violate the accused's right to silence. ¬ Obiter, the Court held that if the offence did violate these rights, it could be justified under section 33 of the south African Constitution as a reasonable limitation of the rights. It is not possible to limit there rights under the Namibian Constitution.

In order to remove all doubt as to what the accused is required to prove, it may be desirable to formulate the presumption as including the concept of only requiring the accused to adduce such evidence as raises a reasonable doubt.

Thirdly, a presumption could place only an evidentiary burden on an accused by making certain facts prima facie proof of a further fact. As Scagell's case however demonstrates, the facts that give rise to the presumption should be suggestive of criminality. In our view, for example, proof of a gift to a public servant would be a sufficient indication of possible criminality and a presumption making the giving of the gift prima facie proof that it was given corruptly, would not be unconstitutional.

The constitutionality of an offence criminalising the possession of unexplained wealth or the maintenance of a standard of living above the level which could be achieved from lawful sources

An interesting example of the creation of new crimes in order to combat corruption is an offence which criminalises the possession of unexplained wealth or the maintenance of a standard of living above the level which could be achieved from lawful sources. Corruption is therefore proved not by the actual act, which tends to be difficult, but rather by the existence of the results of corruption. The first instance of this kind of offence was section 10 of the Prevention of Bribery Ordinance, Chapter 201 of the Laws of Hong Kong, which provides that:

(1) Any person who, being or having been a Crown servant-

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall until the contrary is proved, be presumed to have been in the control of the accused.

(5) In this section, 'official emoluments" includes a pension or gratuity payable under the Pensions Ordinance (Cap. 89), the Pension Benefits Ordinance (Cap. 99) or the Pension Benefits (Judicial Officers) Ordinance (Cap. 401).¬

Sub-section 1 therefore makes it an offence for a Crown servant to maintain a standard of living above that commensurate with his/her present or past official emoluments or for him/her to be in control of pecuniary resources or property disproportionate to his/her present or past official emoluments. Sub-section 2 is directed at persons hiding their assets by nominally transferring or donating their property to other persons.

According to various commentators, section 10 has resulted in both the actual prosecution of corrupt officials who would not have been successfully prosecuted under bribery laws and has had a deterrent effect. Since the Ordinance came into operation in 1971, about fifty cases have been prosecuted. This is not a great number, but some of these were major cases of corruption.¬ Robert Klitgaard writes that section 10 has had an enormously positive effect in reducing police corruption in Hong Kong, which was previously endemic.¬ As Bokhary JA remarked in Attorney General v Hui Kin Hong, judgment of the Court of Appeal (Hong Kong) of 3 April 1995, under the heading “Section 10’s worth”¬ :

As the Privy Council observed in Mok Wei Tak v. The Queen [1990] 2 AC 333 at p. 343 E-F, there is "notorious evidential difficulty" in proving that a Crown servant had solicited or accepted a bribe. And in case after case over the years, section 10 has proved its effectiveness in the fight against corruption. Although less visible, its deterrent effect must have been even greater. Chapter 201 of the Laws of Hong Kong is rightly named the Prevention of Bribery Ordinance. Section 10's worth is well-established."

Sub-section 2 is of course a reverse onus provision and in its present form is almost certainly unconstitutional. The sub-section could be redrafted so that the presumption rather casts an evidentiary burden on the accused.

Turning to sub-section 1, a useful exposition of what has to be proved by the prosecution and the defence respectively is given by Bokhary JA in Hui Kin Hong's case, with reference to decisions of the Privy Council and the Hong Kong courts. The prosecution must allege and prove that the accused is maintaining an incommensurate standard of living or is in control of disproportionate assets, when compared to his/her official emoluments. The accused must prove facts on a balance of probabilities that would amount to a satisfactory explanation as to how he/she was able to maintain such a standard of living. Examples of these facts could be the existence of capital or income independent of his/her official emoluments.¬ The court must then decide whether these facts might reasonably account for the incommensurate standard of living or the disproportionate pecuniary resources or property.¬

According to the decided cases referred to Hui Kin Hong's case, section 10(1) also contains a reverse onus provision.¬ If this is so, it would our view most probably be held to be unconstitutional.

Consideration should therefore be given to redrafting the presumptions in section 10 either along the lines of the Canadian Supreme Court in Laba's case or so that only an evidentiary burden is placed on the accused, for example by making the incommensurate income or disproportionate pecuniary resources prima facie proof that the income or wealth was obtained corruptly.

5.3 CONCLUSION

In our view, presumptions and other evidentiary devices can perform a useful function in the prosecution of corruption and corruption related offences. Care should however be taken in drafting a statutory provision, so that it does not violate the accused's fundamental rights and freedoms under the Constitution. Provisions that do not place a reverse onus on an accused are generally constitutional. A useful device in combating corruption such as section 10 of the Prevention of Bribery Ordinance, Chapter 201 of the Laws of Hong Kong, would be unconstitutional if it criminalised all instances of unofficially obtained wealth. It is therefore necessary to draft the section in such a way that the accused is either given a statutory defence or that the offence places only an evidentiary burden on an accused.

PART VI
INVESTIGATION OF CORRUPTION

6.1 General recommendations

While we are aware that there is a Working Group devoted to the consideration of investigatory bodies, we would like to offer a few comments on this topic as well.

We are of the view that a small, but highly specialised office, should be established by Act of Parliament in order to investigate and prosecute corruption cases. The office should be headed by a legal practitioner, preferably with criminal and/or commercial law experience, or by a public prosecutor. At least one member of staff should be an experienced accountant, preferably a chartered accountant. Investigative staff should be drawn mainly from the ranks of the Namibian Police force, preferably from members of the Commercial Branch.

The office established under Act of Parliament should be independent and accountable only to Parliament. The office shall be required to submit an annual report to Parliament on its activities, including all complaints/charges laid and the outcome of its investigations. A possible legislative model for the establishment of such an office is the Ombudsman Act, No. 7 of 1990.

6.2 Constitutional issues

The right not to be compelled to testify against oneself

An important and necessary tool in the hands of corruption investigators is the power to compel a person suspected of being involved in corruption or having knowledge of such activities to attend an inquiry for the purpose of examining the person. At such an inquiry, the person would also be required to produce any books, documents or records that are required by the investigator.

As will be seen from the discussion of cases decided by the Constitutional Court of South Africa and the European Court of Human Rights, to compel a person to answer questions at an inquiry and then to use any evidence obtained, particularly testimony, is in violation of the person's right (and common law privilege) not to be compelled to incriminate himself/herself. These courts have tended to view such evidence as inadmissible.

This gives rise to the following quandary for the lawmaker. Either the person should not be compelled to answer particular questions at the inquiry (on the grounds that answering the questions may incriminate himself/herself) or evidence obtained from the inquiry may not be used in a subsequent prosecution against the person or other persons. We are of the view that the first alternative is the best solution under the circumstances, because it best preserves a balance between the rights of the individual and the interests of society.

Articles 12(1)(a) and 12(1)(f) of the Constitution are particularly relevant, and provide that:

(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established law …

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

Article 8(2)(b) is not relevant, because it refers to testimony obtained from persons using torture or cruel, inhuman or degrading treatment or punishment.

In Saunders v United Kingdom (judgment of 17 December 1996), the European Court of Human Rights held that statements obtained from the accused (Saunders) under legal compulsion during a statutory investigation into corporate fraud by inspectors of the Department of Trade and Industry, should not have been admitted into evidence in his subsequent criminal trial. Saunders was required by law to answer all the inspectors' questions. If he refused to do so, he could be punished for contempt of court. The statements were extensively used at the trial, despite the defence's objections.

The European Court held that Saunders' right not to be compelled to incriminate himself had been violated. This right was principally based on the right to silence, which is internationally recognised. The European Court concluded that Saunders had therefore not received a fair trial.

In the Constitutional Court judgment of Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC), the two applicants were both witnesses in an examination under section 417 of the Companies Act, Act No. 68 of 1973 ("the Companies Act"). The applicants attacked the constitutionality of section 417(2)(b) of the Companies Act, which provides that:

Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to such question may thereafter be used in evidence against him.

The applicants refused to answer certain questions on the grounds that the answers may incriminate them. Section 417(2)(b) therefore effectively does away with a witness' common law privilege to refuse to answer self-incriminating questions.

The majority judgment was delivered by Chaskalson P (Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ concurring). He based his finding that section 417(2)(b) was unconstitutional on section 25(3) of the interim constitution which secures to every accused the right to a fair trial. This finding was based on the fact that section 417(2)(b) infringes the rule against self-incrimination (at 1080C -F):

The rule against self-incrimination is not simply a rule of evidence. It is a right which by virtue of the provisions of s 25(3) is, as far as an accused person is concerned, entitled to the status of a constitutional right. It is inextricably linked to the right of an accused person to a fair trial. The rule exists to protect that right.

…

A challenge to the constitutionality of s 417(2)(b) should therefore, in my view, be characterised and dealt with as a challenge founded on the right to a fair criminal trial. It is precisely because s 417(2)(b) is inconsistent with that right, that its validity can be impugned.

It may be noted here that Chaskalson P based his finding that section 25(3) was implicated on the view that despite the fact that the section 417 enquiry was not a criminal proceeding i.e. that the applicants were not accused, the answers which they gave at the enquiry might be used in evidence against them (at 1080F and 1082A).

Despite the fact that the majority judgment was delivered by Chaskalson P, he appeared to concur with the reasons given by Ackermann J in a lengthy minority judgment, in which he also held that section 417(2)(b) was unconstitutional, but based his finding on a violation of section 11(1) of the interim constitution, which secures to all persons the right to freedom and security of the person (i.e. analogous to the Namibian article 7 - "no persons shall be deprived of personal liberty except according to procedures established by law"). Chaskalson P held at 1091H - 1092A):

Ackermann J has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by s 25(3). Because he held that the applicants could not rely on s 25(3) he analysed the issues in the present case in terms of s 11(1). The reasoning that led him to conclude that s 417(2)(b) is inconsistent with s 11(1) would also have led him to conclude that it is inconsistent with s 25(3). It seems to me to be clear that this is so. To some extent his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a s 25(3) analysis and I have nothing to add to them, nor to his reasons for the conclusion that the issue of derivative evidence is one that ought properly to be decided by a trial Court. I agree, therefore, with the order proposed by him. [our emphasis].

It is therefore also necessary to analyse Ackermann J's judgment. Ackermann J deals at length with the content of the right under section 11(1) to freedom and security of the person (at 1012D - 1024D) and then specifically with the right not to incriminate oneself by reference to Canadian authority in particular (at 1024D ff.). The right (or privilege) against self-incrimination is discussed at 1037C - 1043F, in which Ackermann J reviews English, South African, Australian, Canadian and US authorities. Ackermann J then turns to consider how US and Canadian courts (both countries have bills of rights, although the Canadian Charter is more similar to the Namibian and South African bills of rights) have tried to resolve "the tension between the privilege against self-incrimination and the interest of the state in investigative procedures of various kinds" (1043F - 1051E).

After concluding that section 417(2)(b) infringes an examinee's section 11(1) rights, and that this infringement cannot be justified under section 33(1) of the constitution, Ackermann J rules the sub-section to be inconsistent with section 11(1) at 1062E-F. He makes this finding because the section fails to give either a "direct or both a direct and a derivative use immunity" to an examinee. A direct use immunity is that the testimony given directly by a witness, for example oral testimony, cannot be used in subsequent proceedings. A derivative use immunity is that evidence obtained as a result of the testimony given by a witness, rather than the testimony itself, cannot be used at any subsequent criminal trial. For example, physical objects found as a result of the testimony, would be evidence derived from the testimony. The meaning of use immunity is discussed at 1044C-E:

Both in the United States and Canada, and also elsewhere, legislatures have sought a legislative solution to the tension between the privilege against self-incrimination and the interest of the State in investigative procedures of various kinds This has been achieved by compelling examinees to answer questions even though the answers thereto might tend to incriminate them and, at the same time, protecting the interests of the examinees by granting them either an indemnity against prosecution or conferring some form of use immunity in respect of compelled testimony. What is important to note is that the privilege has not, in most cases, simply been abolished by statute without providing some form of protection to the examinee. [our emphasis].

A distinction is also drawn between compelled testimony and derivative use in Canadian decisions, particularly in Thomson Newspapers Ltd et al v Canada (Director of Investigation and Research, Restrictive Practices Commission) et al [1990] 67 DLR (4th) 161. Ackermann J refers to the judgment of La Forest J at 1049E-1051B with approval:

The fact that derivative evidence exists independently of the compelled testimony means, as I have explained, that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused. If it were otherwise, it would not, in fact, be derivative evidence at all, but part of the actual testimony itself. Taken together, these aspects of derivative evidence indicate that it is self-sufficient, in the sense that its status and quality as evidence is not dependent on its relation to the testimony used to find it. In this regard, the very phrase "derivative evidence" is somewhat misleading.

Seen from this light, it becomes apparent that those parts of derivative evidence which are incriminatory are only self-incriminatory by virtue of the circumstances of their discovery in a particular case. They differ in this respect from incriminatory portions of the compelled testimony itself, which are by definition self-incriminatory, since testimony is a form of evidence necessarily unique to the party who gives it.

I would think that this, without more, raises doubts as to whether we should be as wary of prosecutorial use of derivative evidence as we undoubtedly must be of such use of pre-trial testimonial evidence. What prejudice can an accused be said to suffer from being forced to confront evidence "derived" from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? I do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself; once the derivative evidence is found or identified, its relevance and probative weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact. In this respect, if reference to its origins was not precluded by an immunity such as that presently found in s 5 of the Canada Evidence Act, it would in most cases be precluded by simple irrelevance.'

And:

This raises a question of crucial importance in understanding the Collins line of cases and their relevance to a determination of the scope of testimonial immunity required by the principles of fundamental justice; why is the prior existence of evidence regarded as relevant to the fairness of the trial in which it is introduced?

There can be only one answer to this question. A breach of the Charter that forces the eventual accused to create evidence necessarily has the effect of providing the Crown with evidence it would not otherwise have had. It follows that the strength of its case against the accused is necessarily enhanced as a result of the breach. This is the very kind of prejudice that the right against self-incrimination, as well as rights such as that to counsel, are intended to prevent. In contrast, where the effect of a breach of the Charter is merely to locate or identify already existing evidence, the case of the ultimate strength of the Crown's case is not necessarily strengthened in this way. The fact that the evidence already existed means that it could have been discovered anyway. Where this is the case, the accused is not forced to confront any evidence at trial that he would not have been forced to confront if his Charter rights had been respected. In such circumstances, it would be the exclusion rather than the admission of evidence that would bring the administration of justice into disrepute.

Ackermann concluded at (1077G-1078B):

[153] A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the s 11(1) right to freedom or the s 25(3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a 'negation' of its essential content. As far as s 25(3) is concerned, the trial Judge is obliged to ensure a 'fair trial', if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial Judge is the person best placed to take that decision. The development of the law of evidence in this regard is a matter for the Supreme Court. The essential content of the right is therefore not even touched.

The order subsequently made by Ackermann J, and concurred in by the majority of the court, was that the following part of section 417(2)(b) be declared invalid:

and any answer given to any such question may thereafter be used in evidence against him'.

In Parbhoo and Others v Getz NO and Another 1997 (4) SA 1095 (CC), the Constitutional Court reached a similar conclusion in respect of section 415(3), read with section 415(5) of the Companies Act, which effectively provide that no person at an inquiry may refuse to answer questions on the grounds that such questions may incriminate the person and that the answers to such questions are admissible in evidence in any proceedings instituted against that person.

It is suggested that our courts would reach a similar conclusion and would similarly rule as unconstitutional any provision which compels a person to answer any question, where the answer may incriminate that person and where the provision also makes such testimony admissible in subsequent criminal proceedings. Any evidence obtained following such an inquiry would most probably be inadmissible in its entirety.┐

Our conclusion is therefore that no person should be under statutory compulsion at an inquiry to incriminate himself/herself.

The right to privacy

While investigators would need the power to conduct searches of homes and places of business, the right to privacy should be taken into account when drafting legislation. Article 13 of the Constitution provides that:

(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

(2) Searches of the person or the homes of individuals shall only be justified:

(a) where these are authorised by a competent judicial officer;

(b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied."

Legislation authorising searches of homes, individuals or business premises (although the latter would not appear to be protected under article 13(2))), should closely follow the wording of article 13(2). If any form of communication interception is envisaged, such as "telephone tapping", then specific legislative provision should be made for this. It may be advisable for such a drastic invasion of privacy to be authorised by a judge of the High Court, rather than by a magistrate.

PART VII
ANCILLARY MATTERS

7.1 SENTENCES

In our view, appropriate sentences should seek to punish offenders both financially and through imprisonment. Offenders should not believe that the only penalty is likely to be financial, because this will be of limited deterrent effect.

We do not however advocate minimum sentences. The imposition of the actual sentence should be left to the discretion of the court, with the upper limit being set only by the jurisdictional limits of the court in question. As Smalberger JA held in S v Toms; S v Bruce 1990 (2) SA 802 (A).

The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf R v Mapumulo and Others 1920 AD 56 at 57). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (S v Rabie 1975 (4) SA 855 (A) at 861D; S v Scheepers 1977 (2) SA 154 (A) at 158F - G).

A mandatory sentence runs counter to these principles. (I use the term `mandatory sentence' in the sense of sentence prescribed by the Legislature which leaves the court with no discretion at all - either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. As Holmes JA pointed out in S v Gibson 1974 (4) SA 478 (A) at 482A, a mandatory sentence

`unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person'.

Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences (cf S v Mpetha 1985 (3) SA 702 (A) at 710E), as they are detrimental to the proper administration of justice and the image and standing of the courts. ┐

Zimbabwe takes an interesting approach to the concept of fines for offences involving various sorts of bribery by tying the maximum fine to the wrongful benefit, referring to a fine of “three times the value of the gift or consideration concerned or one hundred thousand dollars, whichever is the greater”. ┐

7.2 FORFEITURE OF PROCEEDS OF CRIME

In our view, it is unlikely that any person could successfully assert a right to acquire, own and dispose of property under article 16 of the Constitution, in order to defeat a confiscation or forfeiture of the proceeds or profits from crime. A forfeiture order should form part of any sentence, in which event article 16 would probably not be applicable.

The Zimbabwean Serious Offences (Confiscation of Profits) Act [Chapter 9:17], would appear to be a useful example of such legislation with a very wide ambit.

It is our opinion that this issue should be dealt with in a re-drafted criminal Procedure Act, or in a general statute on the proceeds of crime rather than being confined to the topic of corruption alone.

7.3 FREEZING OF ASSETS

Canada

The Canadian Criminal Code makes provision for orders for forfeiture of property, and prior restraint orders in respect of such property, in connection with enterprise crimes, which are deemed for the purposes of these provisions to refer to "designated substance offences". ┐ . The most relevant provisions are listed below:

462.37(1) Order of forfeiture of property on conviction

Subject to this section and sections 462.39 to 462.41, where an offender is convicted, or discharged under section 730, of an enterprise crime offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

462.37(2) Proceeds of crime derived from other offences

(2) Where the evidence does not establish to the satisfaction of the court that the enterprise crime offence of which the offender is convicted, or discharged under section 730, was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

462.38(2) Order of forfeiture of property

(2) Subject to sections 462.39 to 462.41, where an application is made to a judge under subsection(1), the judge shall, if the judge is satisfied that
(a) any property is, beyond a reasonable doubt, proceeds of crime,
(b) proceedings in respect of an enterprise crime offence committed in relation to that property were commenced, and
(c) the accused charged with the offence referred to in paragraph (b) has died or absconded, order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.
462.33 (1) The Attorney General may make an application in accordance with subsection (2) for a restraint order under subsection (3) in respect of any property.

462.33(2) Procedure

(2) An application made under subsection (1) for a restraint order under subsection (3) in respect of any property may be made ex parte and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters, namely,
(a) the offence or matter under investigation;
(b) the person who is believed to be in possession of the property;
(c) the grounds for the belief that an order of forfeiture may be made under subsection 462.37(1) or 462.38(2) in respect of the property; and
(d) a description of the property.

…

462.33(3) Restraint order

(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), make an order
(a) prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in such manner as may be specified in the order; and
(b) at the request of the Attorney General, where the judge is of the opinion that the circumstances so require,
(i) appointing a person to take control of and to manage or otherwise deal with all or part of that property in accordance with the directions of the judge, which power to manage or otherwise deal with all or part of that property includes, in the case of perishable or rapidly depreciating property, the power to make an interlocutory sale of that property, and
(ii) requiring any person having possession of that property to give possession of the property to the person appointed under subparagraph (i).

…

462.33(5) Notice

(5) Before making an order under subsection (3) in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under subsection 462.37(1) or 462.38(2).

Although we have not located any cases directly challenging this regime on constitutional grounds, it sits side-by-side with the right of the individual to "enjoyment of property" and "the right not to be deprived thereof except by due process of law". (Canadian Bill of Rights, Article 1(a))

United States

There are numerous precedents in US law for freezing the assets of an accused which may be forfeited upon conviction before the criminal trial takes place.

One such example is the US Comprehensive Forfeiture Act of 1984 (21 USC 853), which makes provisions for restraining orders freezing the assets of persons who have been indicted on charges of certain crimes (related to racketeering and creation of a continuing criminal enterprise) pending trial.

853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law -

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other

proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

…

853(e):

(1) Upon application of the United States, the court may enter a restraining order or injunction, or take any other action to preserve the availability of property described in subsection (a) of [853] for forfeiture under this section -

(A) upon the filing of an indictment or information charging a violation . . . for which criminal forfeiture may be ordered under [853] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section.

The US Supreme Court discussed this provision in United States v Monsanto 491 US 600 (1989), a case which was primarily concerned with the issue of whether the restraining order in question violated the accused's constitutional right to due process or to the counsel of his choice if no exemption was made to allow the use of a portion of the assets for legal fees. The Court briefly summarised its position with respect to the broader constitutional issue of the accused's property rights:

We have previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable. See, e. g., United States v. $8,850, 461 U.S. 555 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). Here, where respondent was not ousted from his property, but merely restrained from disposing of it, the governmental intrusion was even less severe than those permitted by our prior decisions.

Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense. See United States v. Salerno, 481 U.S. 739 (1987). Given the gravity of the offenses charged in the indictment, respondent himself could have been subjected to pretrial restraint if deemed necessary to "reasonably assure [his] appearance [at trial] and the safety of . . . the community," 18 U.S.C. 3142(e) (1982 ed., Supp. V); we find no constitutional infirmity in 853(e)'s authorization of a similar restraint on respondent's property to protect its "appearance" at trial and protect the community's interest in full recovery of any ill-gotten gains. ┐

Tracing this position backwards through the cases, the following statement comes from United States v. $8,850 461 U.S. 555 (1983):

The general rule, of course, is that absent an "extraordinary situation" a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971). See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601

(1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); cf. Mitchell v. W. T. Grant Co. 416 U.S. 600 (1974). But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), the Court upheld a Puerto Rico statute modeled after a federal forfeiture statute, 21 U.S.C. 881(a), which allowed Puerto Rican authorities to seize, without prior notice or hearing, a yacht suspected of importing marihuana. Pearson Yacht clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture. Such a requirement would make customs processing entirely unworkable. The government interests found decisive in Pearson Yacht are equally present in this situation: the seizure serves important governmental purposes; a preseizure notice might frustrate the statutory purpose; and the seizure was made by government officials rather than self-motivated private parties. ┐

The case of Calero-Toledo v. Pearson Yacht Leasing Co. 416 U.S. 663 (1974) concerned a Puerto Rican statute providing for seizure and forfeiture of vessels used for unlawful purposes. A pleasure yacht allegedly being used by a lessee for the unlawful purpose of transporting marijuana was seized without prior notice or hearing, whilst the yacht's owner was neither involved in nor aware of the act of the lessee which resulted in the forfeiture. The yacht owner challenged the law in question on the grounds that it had (1) unconstitutionally denied it due process of law insofar as the statutes authorised seizure of the yacht without notice or a prior adversary hearing, and (2) unconstitutionally deprived the yacht owner of its property without just compensation. (The relevant provisions of the US Constitution are the Fifth and Fourteenth Amendments.)

Seizure of a property interest without a prior hearing in the US is constitutionally permissible under circumstances where :

the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. ┐

Examples of situations which have been found to satisfy this test have been seizure to protect the public from contaminated food ┐ and from misbranded drugs ┐ , and to aid the collection of taxes. ┐ The Court held that the instant case similarly satisfied the requisite test because of the public interest in preventing the illicit use of property and in enforcing criminal sanctions. ┐

The Court also held that such a taking did not amount to an unconstitutional deprivation of property without just compensation, even though the actual owners were innocent of any criminal wrongdoing. The legal history of this position has its roots in English common law, and forfeiture statutes have been common in the US since the early days of the Constitution. The innocence of the owner has been considered irrelevant, with the thing itself being treated as the "offender". l┐

In the Puerto Rican yacht case, the Court speculated that there might be cases where the constitutional claims of an innocent property owner regarding forfeiture would prevail – such as in a case where the property had been forcibly taken from the owner, or a case in which an owner was not only not involved in the criminal activity at hand but had also taken all reasonable steps to prevent the illegal use of the property. In such cases it might be hard to prove that forfeiture served a legitimate purpose and was not unduly oppressive. ┐ One dissenter in the case (Douglas, J) thought that the owner's complete innocence should entitle it to just compensation. ┐

Clearly, there is considerable leeway under the US Constitution for the freezing of assets of an accused person, since there is no bar to the permanent forfeiture of assets owned by someone who is completely innocent of any wrongdoing. The relevant US Constitutional provisions are similar to the Namibian ones, containing no explicitly stated grounds for the limitation of the rights in question.

It is probably too early in Namibia's Constitutional jurisprudence to determine if Article 12(1)(a) (the right to a fair and public hearing in the determination of civil rights and obligations as well as criminal charges) and 16(2) (the protection of property rights) would be interpreted along US lines, particularly given the fact that English law is a less dominant thread in our legal system than in that of the US.

Conclusion

There is already a precedent in Namibian law for the forfeiture of goods related to a criminal offence, and the seizure of goods liable to forfeiture, in the Customs and Excise Act 91 of 1964 (sections 87-88). It appears that property can be liable to forfeiture in terms of this statute even in the absence of a conviction for a criminal offence. For example, any ship or vehicle use n the removal or carriage of any goods liable to forfeiture under this Act are likewise liable to forfeiture unless it can be shown that the owner had no knowledge of the situation, or did not consent to it. (section 87(2)(a)). Any customs officer, magistrate or police officer may detain any item of property at any place for the purpose of establishing whether or not the property is liable to forfeiture in terms of the Act (section 88(1)(a)). There has been no legal challenge to these provisions in terms of the new Namibian Constitution.

Suffice it to speculate at this stage that there is a strong possibility that a provision regarding the pre-trial freezing of assets in a corruption case would pass Constitutional muster. However, as in the case of the forfeiture of the proceeds of crimes, we recommend that this issue be dealt with as a matter of general criminal procedure, rather than being confined to the corruption context alone.

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TERMS OF REFERENCE

0verall responsibility: Review of adequacy existing criminal and evidentiary law (common law and statutes) relating to corrupt behaviour and fraud and make recommendations for new laws.

1. What types of corrupt behaviour should be subject to criminal sanctions? Behaviour to be considered includes: fraud on the part of office-bearers and employees in the public, semi-public and private sectors; briberv and kickbacks or commissions; evasion of customs and excise or income tax obligations; abuse of office through self-dealing (benefiting directly or indirectly from the award of contracts and consultancies); improper use of official information for private gain.
2. Should Namibia enact a criminal statute similar to those of Hong Kong and Botswana that requires public servants and employees of parastatals to account for assets disproportionate to their declared income?
3. Should there be a general statutory crime of abuse of office for private gain?
4. Should there be an umbrella anti-corruption statute that includes all laws relating, to "corrupt" behaviour by an agent in relation to a principal or by a third party in relation to the agent, including common law crimes such as fraud and theft.?
5. Is there a need to harmonise the provisions of existing statutes which address acceptance of improper commissions, remuneration or reward?
6. What evidentiary rules need to be strengthened or introduced in order to facilitate the successful prosecution of crimes of corruption?
7. Should a law be enacted that provides for forfeiture of the proceeds of crime?
8. Review of existing penalties for crimes of corruption from the point of view of adequacy and consistency. Should there be mandatory minimum sentences for such crimes?
9. Consider the necessity for and constitutionality of additional statutory powers for the investigation of serious fraud and corruption offences, such as the power to require witnesses to furnish information during an investigation without the need to apply for a subpoena.
10 Consider recommendations for legislation to permit the freezing of bank accounts and the restraint of the sale of assets of persons accused of crimes involving corruption and fraud.

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¬ The authors were unfortunately not able to examine the primary source. The information attributed to this book is paraphrased in Law Reform Commission of British Columbia, Consultation Paper in Conflicts of Interest: Directors and Societies (1993) at 3; M McDonald, "Ethics and Conflicts of Interest" (www.ethics.ubc.ca/mcdonald.htm) and D R Hancox, "Ethics and You" (www.members.global2000.net/davehancox/articles/article2.htm)

¬ Law Reform Commission of British Columbia (n2) at Appendix E, Section C.2.

¬ Prof. Kader Asmal, MP, Overview on the Promotion of Ethics and the Combating of Corruption: A South African Experience (paper prepared for the Midgard Promotion of Ethics and Combating of Corruption Seminar, June 1997) at 2.

¬ UK Law Commission, Corruption: a Consultation Paper, 1997 at 4 (para.1.12-ff) (hereinafter "UK Law Commission").

¬ Id.

¬ See, for example, Adv PJ Miller, The Existing Criminal Law Relevant to an Ethics Regime (paper prepared for the Midgard Promotion of Ethics and Combating of Corruption Seminar, June 1997).

¬ Adv RV Rukoro, MP, The Laws Relating to Corruption and Ethical Conduct - What is Missing (paper prepared for the Midgard Promotion of Ethics and Combating of Corruption Seminar, June 1997) at 7.

¬ Miller (n7) at 12.

¬ This categorisation draws on the discussion in UK Law Commission (n5) at Part V.

¬ As will be discussed below, Namibia's Electoral Act 24 of 1992 already takes a comprehensive approach to outlawing corruption in connection with elections by including offences dealing with corruption by means of inducements, threats and fraud.
¬ R v Hinchey [1996] 3 S.C.R. 1128.
¬ UK Law Commission at 76 (para 8.13).
¬ Id.
¬ UK Law Commission at 48 (para. 6.22).
¬ R v Hinchey [1996] 3 S.C.R. 1128 at para. 18.
¬ Asmal (n4) at 5.
¬ As an example, he expressed the opinion that it would be justified for the German club to grant a substantial preference to a German contractor who also happens to be a long-standing member of the club. Jan du Toit, Ethics and Corruption in the Award of Tenders (paper prepared for the Midgard Promotion of Ethics and Combating of Corruption Seminar, June 1997) at 1.
¬ Eighth International Anti-Corruption Conference, 7-11 September 1997.
¬ Australian Model Criminal Code Officers Committee Report, Chapter 3: Theft, Fraud, Bribery and Related Offences (December 1995) at 271 (hereinafter "MCCOC").
¬ MCCOC at 275; UK Law Commission at 51.
¬ See UK Law Commission at 20.
¬ One topic which has received special attention in a number of US jurisdictions is sports bribery, in the form of bribing players or officials to influence the outcome of the sporting event. This form of private sector corruption is addressed by specific offences in some jurisdictions, such as the State of Alabama.
¬ This was the motivation for similar legislation to supplement a similar common-law concept of bribery in the UK and in South Africa. See South African Law Commission, Project 75, Working Paper 32: Bribery (March 1990) at 9-10 (hereinafter "SALC Working Paper on Bribery").
¬ Act 21 of 1985 also made minor changes in wording to section 2(a), by adding the word "either" before the phrase "for himself or for any other person", and replacing the words "forbearing and forborne" with the words "omitting" and "omitted" (whilst the words "forbearing and forborne" are retained in section 2(b)).
¬ Rukoro (n8) at 4.
¬ SALC Working Paper on Bribery. (See note 24.)
¬ South African Law Commission, Project 75, Report on Bribery (June 1991) (hereinafter "SALC Report on Bribery").
¬ UK Law Commission. (See note 5.)
¬ Rukoro (n8); Miller (n7).
¬ The following are examples: UK - Prevention of Corruption Act; Zimbabwe - Prevention of Corruption Act; Malaysia - Prevention of Corruption Act; Singapore - Prevention of Corruption Act; Hong Kong - Prevention of Bribery Ordinance.
¬ PMA Hunt, South African Criminal Law & Procedure, Common-Law Crimes, Volume II, (Second Edition by JRL Milton), 1982 at 206. The Second Edition was followed by a Third Edition by JRL Milton in 1996, but the common-law crime of bribery is omitted in this edition because it was repealed in South Africa by the Corruption Act 94 of 1992.

See also CR Snyman Criminal Law, Second Edition, 1989 at 361. The most recent edition of Snyman comes after the repeal of the common-law crime of bribery in South Africa.

¬ Hunt (2d edition) at 219.

¬ Ibid. at 227.

¬ . Snyman (2d edition) at 361.

¬ See SALC Working Paper on Bribery at 46-ff for case citations.

¬ J Milton, Law reform: bribery and the Corruption Act 1992 (1993) 6 SACJ 90. It was held in S v Kruger 1976 (3) SA 290 (O) and S v Collop 1979 (4) SA 381 (C) that the Abortion and Sterilization Act 2 of 1975 has in effect repealed the common-law crime of abortion, but this was not done explicitly by the legislature.

¬ SALC Report on Bribery at 116-7.

¬ Milton (n37).

¬ CR Snyman, Criminal Law (Third Edition), 1995 at 445.

¬ PMA Hunt, South African Criminal Law & Procedure, Common-Law Crimes, Volume II, (Third Edition by JRL Milton), 1996 at 754; Snyman (3rd edition) at 499.

¬ AJ Kerr, The Law of Agency, Second Edition (1979) at 140-41.

¬ JM Silke, The Law of Agency in South Africa, Third Edition (1981) at 341.

¬ [1994] 1 AC 324.

¬ Snyman (3rd edition) at 487; Hunt (3rd edition) at 702.

¬ UK Law Commission at 6-7 (paras 1.24-1.25).

¬ Hunt (2nd edition) at 754.

¬ Such provisions are contained in the statues of Zimbabwe, the UK, Malaysia, Singapore and Hong Kong, for example.

¬ Canadian Criminal Code, section 121(1).

¬ Canadian Criminal Code, section 123(2).

¬ Section 122, which is discussed further below in section 4.6.

¬ Hunt (3rd edition) at 681. Snyman's definition is similar: "The crime of extortion is committed when a person unlawfully and intentionally obtains some advantage which may be either of a patrimonial or non-patrimonial nature, from another by subjecting the latter to pressure which induces him to hand over the advantage." Snyman (3rd edition) at 372.

¬ Hunt (3rd edition) at 688.

¬ Canadian Criminal Code, section 123(2).

¬ UK Law Commission at 54 (para 7.2).

¬ In the strict law of agency, an agent is a person who has authority to place the principal in legal relations with third persons. D Hutchinson et al, Wille's Principles of South African Law (Eighth Edition) (1991) at 592.

¬ UK Law Commission at 57, quoting an analysis of fiduciary duty in Bristol & West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698.

¬ Id, based on a description of the distinguishing characteristics of a fiduciary relationship in Hospital Products Ltd v United States Surgical Corporation (1984-5) 156 CLR 41 (High Court of Australia).

¬ The UK Law Commission refers to such persons as "quasi-fiduciaries". UK Law Commission at 59-ff.

¬ MCCOC at 299.

¬ J Milton (n37) at 92, quoting the Memorandum on the Objects of the Corruption Bill 1992 [W/B 1-92]; SALC Report on Bribery at 118.

¬ Corruption Act 94 of 1992, section 1(1).

¬ UK Law Commission at 59-ff.
¬ Ibid at 61-62.
¬ See SALC Report on Bribery at 28-ff. The South African Law Commission came to the conclusion that a similar wording in the Prevention of Corruption Act 6 of 1958 should probably be interpreted as an exhaustive list.
¬ Constitution of the Republic of Namibia, Article 140.
¬ MCCOC at 276.
¬ Ibid at 299.
¬ UK Law Commission at 63-ff. The UK Law Commission recommended that corruption of witnesses, jurors and electors should be excluded from a modern offence of bribery on the grounds that there are other and more obvious offences in the UKJ to deal with corruption involving such person. The Commission refrained from making any recommendation on whether or not members of Parliament should be covered by a new corruption statute, no the grounds that this topic was being investigated in other channels. UK Law Commission at 65-69.
¬ Canadian Criminal Code, sections 119-ff.
¬ SALC Working Paper on Bribery at 51, discussing Law Reform Commission of Canada, Report on recodifying criminal law, Report No. 31 (1987).
¬ Milton (n37) at 95, who writes with approval of the parameters which delineate the coverage of the statute.
¬ SALC Report on Bribery at 111. According to the Commission all of the parties who commented on its proposals approved of the exclusion of this category of person.
¬ See the discussion of this issue in respect of the previous corruption statute which parallels Namibia's present statute at SALC Working Paper on Bribery at 40-43.
¬ See SALC Working Paper on Bribery at 43-ff, relying on LG Baxter, Administrative Law (First Edition), 1984.
¬ See SALC Working Paper on Bribery at 51.
¬ 18 USCA § 201(a).
¬ The case of S v W 1991 (2) SACR 642 interpreted the identical phrase in the South African Prevention of Corruption Act, 1958, as including a request for sexual intercourse by a traffic policeman in return for not prosecuting a woman for a traffic offence.
¬ [1983] 1 WLR 385.
¬ UK Law Commission at 90.
¬ SALC Report on Bribery at 105-107.
¬ Ibid at 34, quoting Law Reform Commission of Canada, Report on recodifying criminal law, Report No. 31 (1987) at 110.
¬ If A attempts to influence B by refraining from doing something which A has no right to do in the first place, this is more in the nature of a threat than a benefit. UK Law Commission at 90-91.
¬ As quoted in SALC Report on Bribery at 37.
¬ US Model Penal Code Article 240.1 and Commentary at 10, as paraphrased in MCCOC at 279.
¬ UK Law Commission at 77.
¬ Ibid at 76-77.
¬ With respect to common-law bribery, it has been held that the relevant act or omission need not be a breach of some rule or obligation which is owed to the

principal, nor within the scope of the agency. R v Roets 1954 (3) SA 512 (AD); R v Sesing 1940 OPD 78.
Zimbabwe contains an additional offence in which liability is based on a breach of duty by public officials (discussed further below), but breach of duty is not a requirement for the basic offence of "corrupt practices" which encompasses bribery. It should also be noted that the bill originally proposed by the South African Law Commission referred to acts and omissions "contrary to his [the agent's] powers and obligations", but altered this recommendation after comments were received pointing out that this formulation was too narrow. SALC Report on Bribery at 107-109.
¬ UK Law Commission at 93-4.
¬ The fact that these situation are covered is not immediately apparent from the wording of the 1889 Act, but commentators have asserted that it does not require that the beneficiary of the bribe be a public officer at the time the benefit changes hands. See UK Law Commission at 95.
¬ UK Law Commission at 95
¬ MCCOC at 297-98.
¬ MCCOC at 278.
¬ See R v Lotzoff 137 AD 196; R v Sesing 1940 OPD 78; R v Kemp 1942 AD 147; R v Roets 1954 (3) SA 512 (A); SALC Report on Bribery at 53-57.
¬ R v Roets 1954 (3) SA 512 (A) at 515.
¬ Hunt (2nd edition) at 234.
¬ R v Smith [1960] 1 All ER 256 (CCA), as described in SALC Report on Bribery at 59.
¬ Id.
¬ (1956) 24 CR 404 (Ont CA).
¬ See SALC Report on Bribery at 58.
¬ (1988) 64 Sask. R. 98 at 154.
¬ See also R v Gallagher (1985) 16 A. Crim. R. 215 (Vict.C.C.A.).
¬ R v Kelly [1992] 2 S.C.R. 170.
¬ MCCOC at 281-ff.
¬ Ibid at 287.
¬ SALC Report on Bribery at 60, quoting 18 USCA § 201, note 38.
¬ MCCOC at 289-291.
¬ UK Law Commission at 81-ff.
¬ SALC Report on Bribery at 103.
¬ Milton (n37) at 92-93.(citations omitted).
¬ Compare sections 24-27 with section 28.
¬ [1997] 2 S.C.R. 845.
¬ Ibid at para. 24.
¬ See MCCOC at 277-79.
¬ UK Law Commission at 87.
¬ Ibid at 87-88.
¬ S v Gouws 1975 (1) SA 1 (A) at 12 -13.
¬ The cases on this point are discussed in detail in SALC Working paper on Bribery at 63-ff. For example, it has been stated (in respect of section 2(a) of the Prevention of Corruption Act 4 of 1918) in R v Sesing 1940 OPD 78 at 88 that "the legislature could have meant nothing more than this: If you accept, knowing that the giver meant to seduce" and in R v Durga 1952 (4) SA 619 (N) at 620 that "if the giver is innocent of any motive to induce or reward the agent, it cannot be said that the latter

had accepted or obtained a gift or a consideration as an inducement or reward." On the other hand, it was suggested in R v Geel 1953 (2) SA 398 (A) with regard to the same statutory provision (but without deciding the question) that it is "possible to conceive of a case in which the giver had no intention of bribery and the agent nevertheless erroneously believed that he had such an intention. In such a case it may be that the agent would be guilty of contravening the section even if the giver had no intention of bribing." Both of these two lines of thought have continued to appear in more recent cases.

¬ SALC Report on Bribery at 76-78.

¬ SALC Report on Bribery at 61-ff and 119-120; Corruption Act 94 of 1992, section 1(1)(b).

¬ Section (1)(b)(i) and (ii).

¬ UK Law Commission at 96-ff.

¬ The UK Law Commission cites the American case of Sims v State (1917) 198 SW 883 and the South African case of S v Du Preez [1968] 2 SALR 731 (T) in support of it approach.

¬ Corruption Act 94 of 1992, section 1(1)(b).

¬ [1975] 1 SALR 1 (A).

¬ Corruption Act 94 of 1992, section 1(1)(b).

¬ See, for example, Canada's Criminal Code, section 121(1)(a) and Malaysia's Prevention of Corruption Act, 1961, section 9(1). Malaysia's statute also makes it clear that the giver of the bribe cannot escape liability by the mere fact of being mistaken about the real extent of the agent's powers and duties, or the nature of the principal's affairs or business. It is the state of mind of the accused which is relevant. Prevention of Corruption Act, 1961, section 9(2).

¬ UK Law Commission at 84-ff.

¬ The Commission cites the cases of Woodward v Maltby [1959] VR 794, in which a gift of a book of matches containing an exhortation to vote for a particular candidate did not constitute bribery because the value was so small that it could not be inferred that it was given in order to influence the recipient.

¬ Corruption and Economic Crime Act, 1994, section 28(3).

¬ Prevention of Corruption Act, 1985, section 3 (c).

¬ Prevention of Corruption Act, 1961, section 4(c).

¬ Section 122.

¬ MCCOC at 308.

¬ The Canadian case of R v Kelly [1992] 2 S.C.R 170 illustrates some of the difficulties of attempting to fit an examples such as this into general provisions on bribery.

¬ MCCOC at 309.

¬ This is one component of the multi-layered offence of "abuse of office (proposed section 20.5, MCCOC at 310).

¬ UK Law Commission at 37 (paras 5.2-5.3).o

¬ R v Hinchey [1996] 3 S.C.R. 1128 at para.19.

¬ Doherty JA in R v Greenwood (1991) 8 C.R. (4th) 235 (Ont. C.A.) at 250-51, quoted with approval in R v Hinchey [1996] 3 S.C.R. 1128 at para.16.

¬ R v Hinchey [1996] 3 S.C.R. 1128 at para.16.

¬ [1996] 3 S.C.R. 1128.

¬ MCCOC at 302.

¬ Ibid at 303.

¬ UK Law Commission at 73 (para 8.2-8.3).
¬ Law Reform Commission of British Columbia (n2) at 18. This paper cites the following cases: R v Campbell [1967] 3 C.C.C. 250, 50 C.R. 270 (Ont. C.A.), aff.d 2 C.R.N.S. 403 (S.C.C.); R v Cyr (1985) 44 C.R. (3d) 87 (Que.S.C.); R v McKitka (1982) 66 C.C.C. (2d) 164, 35 B.C.L.R. 116 (C.A.); R v Power (1993) 82 C.C.C. (3d) 73 (N.S.C.A.); R v Vander Zalm (June 25, 1992) Van. Reg. No. CC920084 (B.C.S.C.). The provision is also discussed in R v van Rassel [1990] 1 S.C.R. 225 with respect to the improper use of information for personal profit.
¬ MCCOC at 310, proposed section 20.5.
¬ Section 25(1)(k).
¬ Canadian Criminal Code, sections 123-24.
¬ See SALC Working Paper on Bribery at 96-97; UK Law Commission at 102. The Namibian Constitution does not appear to limit jurisdiction of the courts in this respect.
¬ 1986 (1) SA 556 (ZSC) at 563-4, quoted in SALC Working Paper on Bribery at 97.
¬ 15 USC sections 78dd1-78dd2, 78ff and 78m.
¬ See for example SALC Working Paper on Bribery at 95.
¬ SALC Working Paper on Bribery at 99.
¬ Some concerns were raised about the potential problems of concurrent jurisdiction. The Commission found these points to have merit. SALC Report on Bribery at 112-13. In the final law this problem was addressed by making the jurisdictional provisions of the law more specific, tying jurisdiction to the place where the person or institution or government body referred to in section 1(2) in question is domiciled or seated. Section 2(1)
¬ Quoted at SALC Report on Bribery at 97.
¬ UK Law Commission at 105.
¬ SALC Working Paper on Bribery at 83-84.
¬ Ibid at 84-5.
¬ C W H Schmidt, Bewysreg, 132, our translation.
¬ L H Hoffmann and D T Zeffert, The South African Law of Evidence, 530.
¬ Ibid at 531.
¬ Schmidt (n160) at 134.
¬ At 547H-548C.
¬ Hoffmann and Zeffertt (n161) at 562.
¬ Ibid at 561-564.
¬ Ibid at 564.
¬ Schmidt (n160) at 63 - 64.
¬ Hoffmann and Zeffertt (n161) at 529.
¬ The most recent case is S v Mojaki 1993 (1) SACR 591 (O) at 493h, which follows S v Kajee 1965 (4) SA 274 (T) at 275H-276D, which in turn follows S v Khumalo 1964 (1) SA 498 (N) at 500-501. See also R v Armugan 1956 (4) SA 43 (N) at 46E, following R v Zulu 1951 (3) SA 44 (N). See also Hoffmann and Zeffert (n161) at 564 - 565 and Schmidt (n160) at 167-168. At 64, Schmidt writes that this formulation does not place an onus on the accused. In S v Elliot 1963 (1) SA 371 (GW) at 374B-375B, the court held to the contrary in interpreting a similarly worded section that the accused was required to give a satisfactory account of his possession of diamonds, and that he must do this on a balance of probabilities.

¬ See Khumalo's case, and the useful analysis of the law by McCreath J in Osman and Another v Attorney-General of Transvaal 1998 (1) SACR 28 (T).

¬ E I Daes, Freedom of the Individual under Law, 116.

¬ See also Hugo van Alphen v The Netherlands, decision of the Human Rights Committee, 23 July 1990.

¬ Mahomed CJ criticised this conclusion in Shikunga at 478b-e:
"Section 209 simply provides that an accused could only be convicted on the basis of a confession if the confession was confirmed in a material respect or if the offence was proved by evidence other than the confession to have been actually committed. In my view s 209 cannot assist the prosecution to rescue s 217(1)(b)(ii). Section 209 does not necessarily require any evidence to support any admission in the confession to the effect that the relevant offence was committed by the person making the confession."

¬ At 415g. The objection to the constitutional validity of section 18(3)(b) was abandoned by the accused, at 414e.

¬ At 418e-g.

¬ At 78E-G.

¬ At 477h-478e.

¬ At 478d.

¬ There are useful discussions of the Zuma case by D Zeffertt (and of S v Bhulwana; S v Gadiso 1996 (1) SA 388 (CC)) in Annual Survey of South African Law 1995, 661-667; Karthy Govender, Determining the constitutionality of presumptions, SACJ (1995) Vol 8, No. 2, 205 and Malan, Die konstitusionele bestaanbaarheid van bewysregtelike vermoedens na aanleiding van S v Zuma, SACJ (1995) Vol 8, No. 2, 214. Malan criticises Titus' case on the basis that the implication of Frank J's holding is that the only way in which the right to be presumed innocent can be infringed is if a presumption negates the right to innocence in respect of every element of a crime, and not only in respect of one or more elements of a crime. Frank J's approach therefore allows the legislature to evade the right to be presumed innocent (at 218). Following the Shikunga judgment, this criticism is purely academic.

¬ At 655D-F.

¬ At 317C.

¬ At 375I-376B.

¬ At 376D-378B.

¬ Section 11(1) provides that "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial." The provision is similar to articles 7 and 11(1) of the Namibian Constitution.

¬ O'Regan J does not refer to any authority that is directly in point for the conclusion that the right to a fair trial had been violated by the section. It may be noted that the European Court of Human Rights in interpreting the right to a fair hearing in article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (not a fair trial as in South Africa), has tended to only consider the fairness of the actual court proceedings, not the legislation giving rise to a prosecution. See for example, D J Harris, M O'Boyle and C Warbrick, Law of the European Convention on Human Rights, 202-203. The right to a fair hearing is guaranteed in article 12(1) of the Namibian Constitution. The European Court of Human Rights has tended to review legislation for arbitrariness under article 5(1),

which is similar to article 7 of the Namibian Constitution and 11(1) of the South African Constitution. See Harris et al (n185) at 104-107.

¬ At 380G-381B.

¬ At 381C-E.

¬ At 540E-G.

¬ At 544C-E.

¬ At 545B-545G.

¬ At 552A-C.

¬ At 483i-484b.

¬ At 536E-537D.

¬ At 388 (paragraph 28). See also Pham Hoang v France, A-243, judgment of the European Court of Human Rights of 25 September 1992, particularly paragraphs 32-36, the court finding no violation of articles 6(1) and 6(2) of the European Convention.

¬ Attorney General of Hong Kong v Lee Kwong-kut; Attorney General of Hong Kong v Lo Chak-man and Another at 952j-953a.

¬ Obtained from the Internet, so reference cannot be made to the page numbers in the original.

¬ 394(1) of the Criminal Code, R.S.C., 1985, c. C-46.

¬ Paragraph 98 of the judgment.

¬ See the discussion in note 170 above.

¬ Section 36 provides that:

Any person who is found in possession of any good, other than stock or produce as defined in section 13 of the Stock Theft Act, 1923 (Act 26 of 1923), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

¬ Section 25(2)(c) of the South African Interim Constitution, Act 200 of 1993, provides that "every person arrested for the alleged commission of an offence shall... have the right not to be compelled to make a confession or admission which could be used in evidence against him or her." This differs in form, but not, it is suggested, in substance from Article 12(1)(f) of the Namibian Constitution.

¬ At 31g-32b.

¬ At 32b-e.

¬ Sub-sections (3) and (4) have been repealed. See Attorney General v Hui Kin Hong, judgment of the Court of Appeal (Hong Kong) of 3 April 1995, 2 - 3. The case is reported at [1991] 1 HKCLR 227.

¬ B de Speville, Reversing the Onus of Proof: Is it compatible with respect for human rights norms?, 8th International Anti-Corruption Conference, Lima, September 1997, 8-9.

¬ R Klitgaard, Overcoming Police Corruption in Hong Kong, Kennedy School of Government, 1985, 164-167.

¬ At 4 of the original judgment.

¬ At 12 of the original judgment.

¬ At 13 of the original judgment.

¬ Of perhaps more academic interest is the fact that in the South African decisions referred to in note 170 above, it was held that the words "satisfactory account" did not mean that the accused must therefore discharge an onus on a balance of probabilities. A different conclusion was reached in Hong Kong where the words

"satisfactory explanation" is used in section 10(1). It would appear that there is no material difference between the two expressions.

¬ In paragraphs 71 and 72 of the Saunders' case, the European Court of Human Rights dismissed the argument advanced on behalf of the United Kingdom that Saunders said nothing that was self-incriminating at the inquiry and that only statements that are self-incriminating fall within the privilege against self-incrimination. The European Court of Human Rights preferred to examine the use that was made of the transcript as a whole and the fact that it was before the jury and extensive use of it was made by the prosecution. Even exculpatory statements may be used to cast doubt on the version of the accused.

¬ At 806H-807D.

¬ Prevention of Corruption Act 34 of 1985, section 3(2).

¬ Canadian Criminal Code, section 23(2).

¬ At 615-16.

¬ At footnote 12.

¬ Fuentes v Shevin 407 US 67 (1972) at 91.

¬ North American Storage Co. v. Chicago 211 U.S. 306 (1908).

¬ Ewing v. Mytinger & Casselberry, Inc. 339 U.S. 594 (1950).

¬ Phillips v. Commissioner 283 U.S. 589 (1931).

¬ 416 US at 681.

¬ See Dobbins's Distillery v. United States 96 U.S. 395 (1878). This concept has its basis in the in rem jurisdiction adopted from English law.

¬ 416 US at 689-690.

¬ Ibid at 692-ff.