The Crown Prosecution Service. The CPS incorporates RCPO.

Misconduct in Public Office

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Principle

Misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

The Court of Appeal has made it clear that the offence should be strictly confined. It can raise complex and sometimes sensitive issues. Prosecutors should therefore consider seeking the advice of the Principal Legal Advisor to resolve any uncertainty as to whether it would be appropriate to bring a prosecution for such an offence.

Definition of the offence

The elements of the offence are summarised in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868 ('AG Ref No 3').

The offence is committed when:

- a public officer acting as such
- wilfully neglects to perform his duty and/or wilfully misconducts himself

- to such a degree as to amount to an abuse of the public's trust in the office holder
- without reasonable excuse or justification

Scope of the offence

Level of misconduct required

The offence is, in essence, one of abuse of the power or responsibilities of the office held.

Misconduct in public office should be used for serious examples of misconduct when there is no appropriate statutory offence that would adequately describe the nature of the misconduct or give the court adequate sentencing powers.

The third element of the definition of the offence provides an important test when deciding whether to proceed with an offence of misconduct in public office. Unless the misconduct in question amounts to such an abuse of trust, a prosecution for misconduct in public office should not be considered.

The culpability ' must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment' (R v Dytham 1979 QB 722).

The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

Examples of behaviour that have in the past fallen within the offence include:

- wilful excesses of official authority;
- 'malicious' exercises of official authority;
- wilful neglect of a public duty;
- intentional infliction of bodily harm, imprisonment, or other injury upon a person;
- frauds and deceits.

Dishonesty or corruption

There is no general requirement that the misconduct be dishonest or corrupt. Proof that the defendant was dishonest is, however, an essential ingredient when the allegation of misconduct involves the acquisition of property by theft or fraud.

See R v W [2010] EWCA 372, which involved a police officer who used a credit card that had been issued to him for personal purchases.

Bear in mind, however, the principle that where there is clear evidence of a substantive offence(s), that should form the basis of the case, with the 'public office' element being put forward as an aggravating factor.

Breaches of duty

Some of the most difficult cases involve breaches of public duty that do not involve dishonesty or corruption.

In all cases, however, the following matters should be addressed:

- Was there a breach of a duty owed to the public (not merely an employment duty or a general duty of care)?
- Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?

- Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?
- Did the defendant have a subjective awareness that the action or omission might be unlawful?
- Did the defendant have a subjective awareness of the likely consequences of the action or omission.
- Did the officer realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?
- Were those consequences 'likely' as viewed subjectively by the defendant?
- Did the officer realise that those consequences were 'likely' and yet went on to take the risk?
- Regard must be had to motive.

Elements of the offence

A public officer

The prosecution must have evidence to show that the suspect is a 'public officer'. There is no simple definition and each case must be assessed individually, taking into account the nature of the role, the duties carried out and the level of public trust involved.

The judgment of Lord Mansfield in R v Bembridge (1783) 3 Doug KB 32 refers to a public officer having:

an office of trust concerning the public, especially if attended with profit ... by whomever and in whatever way the officer is appointed.

It does not seem that the person concerned must be the holder of an 'office' in a narrow or technical sense. The authorities suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment.

In R v Whitaker [1914] KB 1283 the court said:

A public office holder is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.

This approach was followed in a series of cases from other common law jurisdictions: R v Williams (1986) 39 WIR 129; R v Sacks [1943] SALR 413; R v Boston (1923) 33 CLR 386. In R v Dytham (1979) 1 QB 723 Lord Widgery CJ talked of 'a public officer who has an obligation to perform a duty'.

Remuneration is a significant factor, but not an essential element. In R v Belton [2010] WLR (D) 283 the defendant was an unpaid voluntary member of the Independent Monitoring Board. The Court of Appeal held that remuneration was not an indispensable requirement for the holding of a public office, or for liability to prosecution for the offence of misconduct in a public office.

The fact that an individual was a volunteer might have a bearing on whether there had been

wilful misconduct, but was only indicative rather than determinative of whether an individual held a public office.

The court in AG Ref No3 referred to the unfairness that could arise where people who carry out similar duties may or may not be liable to prosecution depending on whether they can be defined as 'public officers'. What were once purely public functions are now frequently carried out by employees in private employment. (An example is the role of the court security officer).

The court declined to define a public officer, however, but said:
This potential unfairness adds weight, in our view, to the conclusion that the offence should be strictly confined but we do not propose to develop the point or to consider further the question of what, for present purposes, constitutes a public office.' (AG Ref No 3)

Acting as such

The suspect must not only be a 'public officer'; the misconduct must also occur when acting in that capacity.

It is not sufficient that the person is a public officer and has engaged in some form of misconduct. The mere fact that a person is carrying out general duties as a public officer at the time of the alleged misconduct does not mean he or she is necessarily acting as a public officer in respect of the misconduct.

There must be a direct link between the misconduct and an abuse, misuse or breach of the specific powers and duties of the office or position.

The offence would also not normally apply to the actions of a public officer outside that role, unless the misconduct involved improper use of the public officer's specific powers or duties arising from the public office.

A deliberate misuse by an off-duty police officer of the powers of a constable, for example, may mean that the officer is 'acting as such' by virtue of his or her assumption of the powers of the office. Such a situation might arise if an off-duty police officer arrested an innocent man with whom he had a personal dispute or took steps in order to prevent or frustrate an enquiry.

The principles involved apply equally to holders of all public offices. In the case of a school governor or a local authority official or other such member of a public body, for example, it will be necessary to show that the misconduct was closely connected with exercising (or failing to exercise) the relevant public function.

Wilful neglect or misconduct

Nature of the neglect or misconduct

The wilful neglect or misconduct can be the result of a positive act or a failure to act. In the case of R v Dytham [1979] QB 722, for example, a police officer was held to have been correctly convicted when he made no move to intervene during a disturbance in which a

man was kicked to death.

There must also be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. The test is a subjective one and the public officer must be aware that his/her behaviour is capable of being misconduct.

Meaning of 'wilful'

In AG Ref No 3 the court approved the definition of 'wilful' as 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.

In R v G [2003] UK HL 50 Lord Bingham said with respect to inadvertence:
It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.

Lord Steyn added:
the stronger the objective indications of risk, the more difficult it will be for defendants to repel the conclusion that they must have known. (R v G [2003] UK HL 50)

Abuse of the public's trust

Seriousness of the neglect or misconduct

Public officers carry out their duties for the benefit of the public as a whole. If they neglect or misconduct themselves in the course of those duties this may lead to a breach or abuse of the public's trust.

The behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. In R v Dytham, Lord Widgery said that the element of culpability:
must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.

In AG Ref No 3 the court said that the misconduct must amount to:
an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.

Consequences

The likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected:
It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer.' (AG Ref No 3).

Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of his behaviour, but also as to its likely consequences.

The consequences must be likely ones, as viewed subjectively by the defendant. Although the authorities do not say so, likely can probably be taken to mean at the very least 'reasonably foreseeable'; it is arguable that likely may mean 'probable' in this context.

Motive

In order to establish whether the behaviour is sufficiently serious to amount to the offence, the officer's motive is also relevant:
the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error
To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom.
(R v Borron [1820] 3 B&Ald 432: Abbott CJ, at page 434.)

At its highest the motive may be malice or bad faith but they are not prerequisites. Reckless indifference would be sufficient

Without reasonable excuse or justification

It is not necessary for the prosecution to prove the absence of a reasonable excuse or justification, although the nature of the prosecution evidence should in practice negate any such element.

The defendant may advance evidence of a reasonable excuse or justification. It is for the jury to determine whether the evidence reveals the necessary culpability.

Charging Practice

Misconduct in public office should not simply be used as a substitute for other offences without some other aggravating factor.

Misconduct by a public officer can often be adequately presented as an aggravating feature of a statutory offence. Where the misconduct can be adequately presented by a statutory offence giving the court adequate sentencing powers, that offence should be the starting point. The fact that the offender is a public officer should be treated as an aggravating feature of that offence.

An assault by a police officer committed on duty should not, for example, automatically be considered as misconduct in public office. A charge of assault would normally provide the court with adequate sentencing powers and the ability to take into account the breach of trust by the officer as an aggravating factor (R v Dunn (2003) 2 Cr.App.R.(S)).

Misconduct in public office should be considered where:

there was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;

- there is no suitable statutory offence for a piece of serious misconduct (such as a serious breach of or neglect of a public duty that is not in itself a criminal offence);
- the facts are so serious that the court's sentencing powers would otherwise be inadequate; or
- it would assist the presentation of the case as a whole (for example, where a co-defendant has been charged with an indictable offence but the statutory offence is summary only and cannot be committed or sent for trial with the co-defendant).

There may be cases in which a number of statutory offences can be more conveniently indicted as a single charge of misconduct in public office in order to make the case easier to present to the court.

Similar reasoning applies to the charging of misconduct in public office as to the offence of perverting the course of justice. (See R v Sookoo (2002) EWCA Crim 800).

Useful Links

Archbold 25-381
Attorney General's Reference No 3 of 2003 [2004] EWCA 868
R v Bembridge (1783) 3 Doug KB 32
R v Whitaker (1914) KB 1283
R v Williams (1986) 39 WIR 129
R v Sacks (1943) SALR 413;
R v Boston (1923) 33 CLR 386.
R v Dytham (1979) 1 QB 723
R v W (2010) EWCA 372
R v G (2003) UK HL 50
R v Borron (1820) 3 B&Ald 432
R v Dunn (2003) 2 Cr.App.R.(S)
R v Sookoo (2002) EWCA Crim 800

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Computer Misuse Act 1990

How to use this Legal Guidance

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Introduction

The Police and Justice Act 2006 received Royal Assent on 8 November 2006. Part 5 of this Act contains amendments to the existing Computer Misuse Act 1990.

This guidance is to assist Crown prosecutors in the use of their discretion in making decisions in computer misuse cases.

Main Changes

The Computer Misuse Act 1990 (CMA) as amended by the Police and Justice Act 2006 introduces:

- Section 3A CMA an offence which penalises the making; supplying or obtaining of articles for use in offences contrary to sections 1 or 3 CMA. (Section 37 of the Police and Justice Act 2006); and
- Increased the penalty for section 1 CMA (Section 35 of the Police and Justice Act 2006).

What is a Computer?

The CMA does not provide a definition of a computer; this is because it was feared that any definition would soon become out of date due to the rapidity with which technology develops.

Definition is therefore left to the Courts who are expected to adopt the contemporary meaning of the word. In *DPP v McKeown, DPP v Jones* [1997] 2Cr App R, 155, HL at page 163 Lord Hoffman defined a computer as a device for storing, processing and retrieving information.

Jurisdiction

There is jurisdiction to prosecute all CMA offences if there is "at least one significant link with the domestic jurisdiction" (England and Wales) in the circumstances of the case.

Section 2(5) defines "significant link" (see Archbold 23-88). In the case of *R v Waddon* 6 April 2000 the Court of Appeal held that the content of American websites could come under British jurisdiction when downloaded in the United Kingdom. See also *R v Perrin* [2002] 4 Archbold News 2, CA.

The Offences

Section 1 CMA - Unauthorised Access

As amended by section 35 Police and Justice Act 2006 and Schedule 15 of the Serious Crime Act 2007, see Archbold 23-87 .

Sections 1 and 2 of the CMA must be read in conjunction with section 17 of the CMA, which is the interpretation section. See Archbold 23-100.

A person guilty of an offence contrary to section 1 CMA shall be liable on summary conviction in England and Wales to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both. On conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both

The intent under section 1 CMA need not be directed at:

1. Any particular program or data;
2. A program or data of any particular kind; or
3. A program or data held in any particular computer

Section 17 gives the interpretation of "unauthorised access" for the purpose of section 1. The words "any computer" in section 1(1) (a) CMA does not restrict the offence to the situation where the offender uses one computer to secure unauthorised access to another. An offence is also committed where the offender causes a computer to perform a function with intent to secure unauthorised access to any program or date held in the same computer - see *Attorney-General's Reference* (No 1 of 1991) [1993] QB 94.

The offence of unauthorised access requires proof of two mens rea elements, (see section 4 CMA):

(1) there must be knowledge that the intended access was unauthorised; and

(2) there must have been an intention to obtain information about a program or data held in a computer - section 1(2) CMA.

There has to be knowledge on the part of the offender that the access is unauthorised; mere recklessness is not sufficient. This covers not only hackers but also employees who deliberately exceed their authority and access parts of a system officially denied to them.

In the case of *R v Bow Street Magistrates Court and Allison (AP) Ex parte Government of the United States of America (Allison)* [2002] 2 AC 216, where the House of Lords considered whether an employee could commit an offence of securing "unauthorised access" to a computer contrary to section 1 CMA, it was held that the employee clearly came within the provisions of section 1 CMA as she intentionally caused a computer to give her access to data which she knew she was not authorised to access. Their Lordships made it clear that an employee would only be guilty of an offence if the employer clearly defined the limits of the employee's authority to access a program or data.

In the earlier case of *DPP v Bignell* [1998] 1 Cr App R8, two police officers, who were authorised to request information from the police national computer (PNC) for policing purposes only, requested a police computer operator to obtain information from the PNC which, unbeknown to the operator, was for their own personal use. The Divisional Court held that the two officers had not committed a section 1 unauthorised access offence. The House of Lords in Allison did not over rule the decision in Bignell, but stated that the conclusion of the Divisional Court in the earlier case was probably right. The House of Lord's went on to say that:

"it was a possible view of the facts that the role of the officers in Bignell had merely been to request another to obtain information by using the computer. The computer operator did not exceed his authority. His authority permitted him to access the data on the computer for the purpose of responding to requests made to him in proper form by police officers. No offence had been committed under section 1 of the CMA."

Prosecutors dealing with CMA cases involving employees should assess carefully the employee's contract of employment together with any surrounding information (for example oral advice given or office practices amongst others) in order to determine whether the employer had clearly defined the limits of the employee's authority. Such cases normally depend on whether the evidence available demonstrates sufficiently strongly that the conduct complained of was unauthorised. This has to be assessed on a case-by-case basis applying the Code for Crown Prosecutors.

Prosecutors should remember that section 55 of the Data Protection Act 1998, which is punishable by a fine, is in some circumstances an alternative charge to a section 1 CMA offence.

Section 35 of the Police and Justice Act 2006

Section 35 of the Police and Justice Act 2006 increases the penalty for section 1 CMA offence on summary conviction to a maximum of 12 months' imprisonment or / and a fine and on indictment to a maximum of 2 years' imprisonment or / and a fine. All CMA offences are either way and no longer have a time limit. The increased penalty only applies to section 1 offences committed after section 35 Police and Justice Act 2006 comes into force (see Section 38(2) Police and Justice Act 2006).

Section 2 CMA - Unauthorised Access with Intent

See Archbold 23-88.

A person can be found guilty of a section 2 offence even if the commission of the further offence is impossible (section 2(4) CMA). A person found not guilty of a section 2 or 3 CMA offence by a jury, can be convicted of a section 1 CMA offence (section 12 CMA).

Section 2(5) states that a person guilty of an offence contrary to section 2 shall be liable:

- on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both; and
- on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both.

Section 3 CMA - Unauthorised Acts with Intent to Impair

As amended by section 36 Police and Justice Act 2006 and Schedule 15 of the Serious Crime Act 2007. http://www.opsi.gov.uk/acts/acts2006/ukpga_20060048_en_7#pt5-pb2-l1g36 (see Archbold 23-89)

Every act relied upon to prove the section 3 CMA offence must have taken place after section 36 Police and Justice Act 2006 comes into force.

Section 3 CMA should be considered in cases involving distributed denial of service attacks (DDoS);

(1) as the term "act" includes a series of acts;

(2) there is no need for any modification to have occurred, and

(3) the impairment can be temporary.

In the mail bombing case of *R v Lennon* [2006] EWCH 1201, 11 May 2006, the Divisional Court stated that, although the owner of a computer able to receive e-mails ordinarily consents to the receipt of e-mails, such consent did not extend to e-mails that had been sent not for the purpose of communicating with the owner but for the purpose of interrupting the operation of the system.

A person guilty of an offence contrary to section 3 is liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; or on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine or to both.

Section 127 Communications Act 2003 is a summary offence punishable by a maximum period of six months imprisonment that can be considered if section 3 CMA is not appropriate.

Section 3A CMA - Making, supplying or obtaining articles

As inserted by section 37 Police and Justice Act 2006 (see Archbold 23-89a).

Section 38(3) Police and Justice Act 2006. Denial of Service Attacks is aimed at specific Web sites. The attacker floods the web server with messages endlessly repeated. This ties up the system and denies access to legitimate users.

Prosecutors should be aware that there is a legitimate industry concerned with the security of computer systems that generates 'articles' (this includes any program or data held in electronic form) to test and/or audit hardware and software. Some articles will therefore have a dual use and prosecutors need to ascertain that the suspect has a criminal intent.

If the article was supplied in the course or connection with fraud then Prosecutors should consider if their case is also an offence contrary to section 7 and/or section 6 of the Fraud Act 2006. An offence of making or supplying articles for use in frauds contrary to section 7 is punishable by a maximum of 10 years' imprisonment and an offence of possession of articles for use in fraud contrary to section 6 is punishable by a maximum of 5 years' imprisonment. Each case should be considered based on its own facts. See Fraud Act 2006, elsewhere in the Legal Guidance.

Guidance

Note: Some factors to be taken into account by prosecutors when considering a prosecution under section 3A CMA.

Whilst the facts of each case will be different, the elements to prove the offence will be the same. Prosecutors dealing with dual use articles should consider the following factors in deciding whether to prosecute:

- Does the institution, company or other body have in place robust and up to date contracts, terms and conditions or acceptable use polices?
- Are students, customers and others made aware of the CMA and what is lawful and unlawful?
- Do students, customers or others have to sign a declaration that they do not intend to contravene the CMA?

Section 38(5) Police and Justice Act 2006. Dual use articles are those that can be used for a lawful or unlawful purpose.

Section 3A (2) CMA covers the supplying or offering to supply an article **likely** to be used to commit, or assist in the commission of an offence contrary to section 1 or 3 CMA. **Likely** is not defined in CMA but, in construing what is **likely**, prosecutors should look at the functionality of the article and at what, if any, thought the suspect gave to who would use it; whether for example the article was circulated to a closed and vetted list of IT security professionals or was posted openly.

In determining the **likelihood** of an article being used (or misused) to commit a criminal offence, prosecutors should consider the following:

- Has the article been developed primarily, deliberately and for the sole purpose of committing a CMA offence (i.e. unauthorised access to computer material)?
- Is the article available on a wide scale commercial basis and sold through legitimate channels?

- Is the article widely used for legitimate purposes?
- Does it have a substantial installation base?
- What was the context in which the article was used to commit the offence compared with its original intended purpose?

If prosecutors have any questions relating to the application of section 3A CMA please contact the Policy Helpdesk in the Strategy and Policy Directorate.

CPS

The Crown Prosecution Service. The CPS incorporates RCPO.

Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions

Published: 30 March 2011

How to use this Legal Guidance

PDF Information

In order to open PDF documents you need to have Adobe Reader installed on your computer. The majority of computers have this software but if not you can download Adobe Reader free of charge.

Introduction

The Bribery Act 2010 ("the Act") will come into force on a day to be notified by the Secretary of State for Justice. The Act applies to the whole of the UK and provides for wide extra-territorial jurisdiction to deal with bribery committed outside the UK.

In England and Wales, proceedings for offences under the Act require the personal consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office. They will make their decisions in accordance with the Code for Crown Prosecutors ("The Code") applying the two stage test of whether there is sufficient evidence to provide a realistic prospect of conviction and, if so, whether a prosecution is in the public interest.

The purpose of this guidance is to set out the Directors' approach to prosecutorial decision-making in respect of offences under the Act. The guidance is not intended to be exhaustive and prosecutors should be mindful of the wide range of circumstances and culpability which may arise in any particular case.

This guidance is subject to the Code for Crown Prosecutors and when considering corporate prosecutions, it should be read in conjunction with the Guidance on Corporate Prosecutions, which sets out the approach to the prosecution in England and Wales of corporate offenders.

Scotland and Northern Ireland are separate legal jurisdictions and this guidance therefore does not apply to decisions about prosecutions in those jurisdictions. However, there has been liaison with the Lord Advocate and the Director of Public Prosecutions for Northern Ireland during the development of this guidance.

The Act in its wider context

In his foreword to the 2004 United Nations Convention against Corruption (UNCAC) the then UN Secretary General (Kofi Annan) described the serious effects of corruption:

"*Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish ... Corruption is a key element in economic under-performance and a major obstacle to poverty alleviation and development.*"

The UK is a signatory to a number of international anti-corruption instruments including the UN Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials (1997) and the Council of Europe Criminal Law Convention on Corruption (1998) and additional Protocol (2005).

The Act reflects the UK's continued commitment to combat bribery and provides a modern, comprehensive scheme of bribery offences. The Act covers all forms of bribery but there is a clear focus on commercial bribery, evidenced by the fact that two of its four offences are business related. The Government intends that over time the Act will contribute to international and national efforts towards ensuring a shift away from a culture of bribery that may persist in certain sectors or markets and help ensure high ethical standards in international business transactions.

The Serious Fraud Office is the lead agency in England and Wales for investigating (jointly with the police in some cases) and prosecuting cases of overseas corruption. The SFO promotes active engagement with businesses and "self-reporting" by companies (see Approach of the SFO to dealing with overseas corruption). The Crown Prosecution Service also prosecutes bribery offences investigated by the police, committed either overseas or in England and Wales.

The statutory "adequate procedures" defence to a failure of commercial organisations to prevent bribery (section 7) encourages such bodies to put procedures in place to prevent bribery by persons associated with them. The Act is not intended to penalise ethically run companies that encounter an isolated incident of bribery. Section 7 and, to a degree, section 6 (bribery of foreign public officials) are designed to balance corporate responsibility for ensuring ethical conduct in the modern international business environment with the public interest in prosecuting where appropriate.

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The legal framework

The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.legislation.gov.uk.

In summary, the Act:

- provides a revised framework to combat bribery in the public or private sectors, removing the need to prove acts were done corruptly or dishonestly;
- abolishes the offences of bribery at common law and the statutory offences in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 (s17 and Schedule 2);
- creates two general offences of bribing another person ("active bribery") (s1) and being bribed ("passive bribery") (s2);
- creates a discrete offence of bribery of a foreign public official (s6);
- creates a new offence of failure of commercial organisations to prevent bribery by persons associated with them (s7);
- requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them (s9);
- replaces the need for Attorney General's consent (for the statutory offences abolished) with the requirement for the consent of the Director of the relevant prosecuting authority (for the new offences under the Act) (s10);
- provides a maximum penalty of 10 years' imprisonment or an unlimited fine for all the offences for individuals, and an unlimited fine only for commercial organisations (s11);
- provides jurisdiction to prosecute bribery committed abroad by any person (individual or corporate) who has a 'close connection' with the UK (s12);
- provides a limited defence for certain action taken by an intelligence service or by the armed forces (s13);
- provides that senior officers of a body corporate may be prosecuted if an offence is proved to have been committed by a corporate body with their consent or connivance

(s14);

- applies equally to individuals in the public service of the Crown as it applies to other individuals (s16) but not to Crown bodies.

Transitional provisions

Prosecutors should note that the Act does not affect any liability, investigation, legal proceeding or penalty in respect of the common law offence of bribery or the statutory offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 committed wholly or partly before the commencement of the Act (s19).

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The offences and application of the Code for Crown Prosecutors

Scope of the Act

The Act takes a robust approach to tackling commercial bribery, which is one of its principal objectives. The offences are not, however, limited to commercial bribery. There may be many examples outside the commercial sphere where individuals attempt to influence the application of rules, regulations and normal procedures. Examples would include attempts to influence decisions by local authorities, regulatory bodies or elected representatives on matters such as planning consent, school admission procedures or driving tests.

General approach to bribery prosecutions

Bribery is a serious offence. There is an inherent public interest in bribery being prosecuted in order to give practical effect to Parliament's criminalisation of such behaviour. As with other criminal offences, however, prosecutors will make their decisions in accordance with the Full Code Test as set out in the Code for Crown Prosecutors. It has two stages: (i) the evidential stage; and (ii) the public interest stage. The evidential stage must be considered before the public interest stage.

A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. Where there is sufficient evidence to justify a prosecution, prosecutors must always go on to consider whether a prosecution is required in the public interest. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. The absence of a factor does not necessarily mean that it should be taken as a factor tending in the opposite direction. Each case will have to be rigorously considered on its own facts and merits in accordance with the Code.

Prosecutors dealing with bribery cases are reminded of the UK's commitment to abide by Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:

"*Investigation and prosecution of the bribery of a foreign public official ... shall not be*

influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

Key terms used in the Act

Offers and requests

The Act uses everyday language of offering, promising or giving ("active bribery"), requesting, agreeing to receive or accepting an advantage ("passive bribery").

This language is wide enough to include cases in which an offer, promise or request can only be inferred from the circumstances. The Law Commission used the example of an interview held over an open briefcase full of money that could be seen as an implied offer. It will be a matter for the tribunal of fact to decide whether such an inference can be drawn from the evidence in each case.

It is also clear that, except where the allegation is that an advantage was given or received, there is no need for a transaction to have been completed. The Act focuses on conduct not results.

Financial or other advantage

All the offences under the Act refer either directly or indirectly to a "financial or other advantage". The Act does not define the term. It is left to be determined as a matter of common sense by the tribunal of fact.

Prosecutors should therefore approach prosecutions under the Act on the basis that "advantage" should be understood in its normal, everyday meaning.

Improper performance

The concept of improper performance (section 4) is central to the general bribery offences and also indirectly to the offence of failure of commercial organisations to prevent bribery, since an offence under section 7 requires a general bribery offence to have been committed.

Improper performance involves a breach of an expectation of "good faith", "impartiality" or "trust" (section 3(3) to (5)) in respect of the function or activity carried out. The test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned (section 5(1)).

The Law Commission (*Reforming Bribery, Law Comm No 313*) was confident of the jury's ability to apply this test on the basis of the ordinary meaning of the words rather than as something that needed to be defined in the Act:

"... *the expectation in question is that which would be had, in the circumstances by people of moral integrity ... it will be for the tribunal of fact to decide what that expectation amounted to, in the circumstances*" (paragraph 3.176).

Associated person

A commercial organisation ('C') can be liable only for bribes by an "associated person" ('A')

as defined in section 8.

Whether A is associated with C is determined by the nature of what is done (disregarding any bribe under consideration) rather than the capacity in which it is done. It is necessary to take into account all the relevant circumstances, not just the nature of the relationship. Services can be performed by one legal person on behalf of another legal person.

A may therefore, for example, be the commercial organisation's employee, agent or subsidiary of the organisation. Where A is an employee it is presumed that A is performing services for or on behalf of C unless the contrary is shown.

Section 1: Offences of bribing another person

The legal elements

The ways in which the offence of bribing another person can be committed are contained in two 'Cases' set out in section 1(2) and 1(3) of the Act. The necessary conduct element is when a person "offers, promises or gives" a "financial or other advantage", either directly or through a third party. The offence also requires a "wrongfulness element".

In Case 1, the wrongfulness element is committed where the advantage is intended to induce (or be a reward for) improper performance of a relevant function or activity.

In Case 2, the wrongfulness element is committed where the person knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

Prosecutors will need to consider any direct evidence (documentary or otherwise) there may be of actual intention (Case 1) or knowledge or belief (Case 2) as well as whether they can be inferred from the circumstances including the value of the advantage.

Prosecutors should draft separate charges or counts based on Cases 1 and 2 to avoid duplicity, as their wrongfulness elements are different; and should also make it clear if charges or counts are alternatives.

Public Interest Considerations

A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Factors tending in favour of prosecution:

The Code sets out a number of general factors tending in favour of prosecution. When applied in the context of bribery offences, the following may be particularly relevant:

- A conviction for bribery is likely to attract a significant sentence (Code 4.16a);
- Offences will often be premeditated and may include an element of corruption of the person bribed (Code 4.16e and k);
- Offences may be committed in order to facilitate more serious offending (4.16i);
- Those involved in bribery may be in positions of authority or trust and take advantage of that position (Code 4.16n).

Factors tending against prosecution:

The factors tending against prosecution may include cases where:

- The court is likely to impose only a nominal penalty (Code 4.17a);
- The harm can be described as minor and was the result of a single incident (Code 4.17e);
- There has been a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions).

Section 2: Offences relating to being bribed

The legal elements

Section 2 provides a number of ways in which the offence of being bribed can be committed and distinguishes four 'Cases', namely Case 3 to Case 6 as set out in section 2 (2) to (5). The Explanatory Notes to the Act explain in more detail how the offence may be committed. Section 2 uses the same concepts as in section 1 of "financial or other advantage"; "relevant function or activity"; and "improper performance".

Prosecutors should draft separate charges or counts based on Cases 3 to 6 to avoid duplicity, as their wrongfulness elements are different; and should also make it clear if charges or counts are alternatives.

Public Interest Considerations

The factors tending in favour of and against prosecution for section 1 (see above) are equally applicable to the offence under section 2.

Section 6: Bribery of foreign public officials

The legal elements

Section 6 creates a discrete offence of bribery of a foreign public official (as defined in section 6(5)).

The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions.

That person must also intend to obtain or retain business or an advantage in the conduct of business. The official must be neither permitted nor required by the applicable written law (section 6(7)) to be influenced by the advantage).

Bribery of foreign public officials may also be prosecuted, in appropriate cases, under section 1, making use of the extended extra-territorial jurisdiction. This may be the case, for example, if it is difficult to prove that the person bribed is a foreign public official. It should be noted, however, that under section 1 it will be necessary to prove the improper performance element.

Specific issues under section 6 (note they may also apply to section 1 offences)

Facilitation payments

Facilitation payments are unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They are sometimes referred to as 'speed' or 'grease' payments. The payer of the facilitation payment usually already has a legal or other entitlement to the relevant action.

There is no exemption in respect of facilitation payments. They were illegal under the previous legislation and the common law and remain so under the Act.

Public Interest Considerations

Prevention of bribery of foreign public officials is a significant policy aspect of the Act. In the context of facilitation payments, the following public interest factors tending in favour of and against prosecution may be relevant. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Factors tending in favour of prosecution:

- Large or repeated payments are more likely to attract a significant sentence (Code 4.16a);
- Facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated (Code 4.16e);
- Payments may indicate an element of active corruption of the official in the way the offence was committed (Code 4.16k);
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed.

Factors tending against prosecution:

- A single small payment likely to result in only a nominal penalty (Code 4.17a);
- The payment(s) came to light as a result of a genuinely proactive approach involving self-reporting and remedial action (additional factor (a) in the Guidance on Corporate Prosecutions);
- Where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed;
- The payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

Hospitality and promotional expenditure

Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business. The Act does not seek to penalise such activity.

Hospitality and promotional expenditure could, however, form the basis of offences under s1 (bribing another person) or s6 (bribing a foreign public official) and constitute a bribe for the purpose of s7 (failure to prevent bribery). Under section 1 there must be an element of "improper performance". Under section 6, it will be necessary to show that the provision of hospitality or promotional expenditure was intended to influence the foreign public official so as to obtain or retain business, or an advantage in the conduct of business.

The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence an official. Lavishness is just one factor that may be taken into account in determining whether an offence has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.

Public Interest Considerations

Prevention of bribery of foreign public officials is a significant policy aspect of the Act. When considering the public interest stage, the factors tending in favour of and against prosecution referred to in respect of "active bribery" (section 1) are likely to be relevant. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

Section 7: Failure of commercial organisations to prevent bribery

The legal elements

A "relevant commercial organisation" will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation, but only if the associated person is or would be guilty of an offence under section 1 or 6 (section 2 "passive bribery" is not relevant to a section 7 offence).

Section 7 does not require a prosecution for the predicate offences under section 1 or 6, but there needs to be sufficient evidence to prove the commission of such an offence to the normal criminal standard. For this purpose it is not necessary for the associated person to have a close connection with the United Kingdom (section 7(3)(b)).

The jurisdiction for this offence is wide (see section 12 of the Act). Provided that the commercial organisation is incorporated or formed in the UK, or that the organisation carries out its business or part of its business in the UK, courts in the UK will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.

The offence is not a substantive bribery offence. It does not involve vicarious liability and it does not replace or remove direct corporate liability for bribery. If it can be proved that someone representing the corporate 'directing mind' bribes or receives a bribe or encourages or assists someone else to do so then it may be appropriate to charge the organisation with a section 1 or 6 offence in the alternative or in addition to any offence

under section 7 (or a section 2 offence if the offence relates to being bribed).

The defence of adequate procedures

It is a defence if a relevant commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing. The standard of proof the defendant would need to discharge in order to prove the defence is on the balance of probabilities. Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case by case basis.

As stated in the Code (4.5) prosecutors must consider what the defence case may be, and how it is likely to affect the prospects of conviction, under the evidential stage. Clearly, the defence under s7(2) of adequate procedures is likely to be highly relevant when considering whether there is sufficient evidence to provide a realistic prospect of conviction.

Prosecutors must look carefully at all the circumstances in which the alleged bribe occurred including the adequacy of any anti-bribery procedures. A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance.

Section 9 Guidance

Section 9 of the Act requires the Secretary of State to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them. "*Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)*" has been published by the Ministry of Justice. Prosecutors must take it into account when considering whether the procedures put in place by commercial organisations are adequate to prevent persons performing services for or on their behalf from bribing.

The Ministry of Justice's guidance also provides some explanation of the Government policy behind the formulation of the offences and gives assistance on the particular concepts relevant to the application of sections 1, 6 and 7 in the context of commercial bribery. Prosecutors may find this helpful when reviewing cases involving commercial bribery.

Public Interest Considerations

The factors tending in favour of and against prosecution referred to above in respect of section 1 may be equally applicable to the section 7 offence. The additional factors in the Guidance on Corporate Prosecutions will also be particularly relevant in determining whether or not it is in the public interest to prosecute.

Obtaining the consent of the DPP or Director SFO

The DPP or the Director of the Serious Fraud Office must give personal consent to a prosecution under the Act as set out in section 10 of the Act. Prosecutors should follow any relevant internal procedures when submitting cases for consideration.

Useful links

Bribery Act 2010 and Explanatory Notes

Code for Crown Prosecutors

Guidance on Corporate Prosecutions

Approach of the SFO to dealing with overseas corruption (currently being revised)

OECD Convention on Combating Bribery of Foreign Public Officials (1997)

UN Convention against Corruption

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The Crown Prosecution Service. The CPS incorporates RCPO.

Data Protection Act 1998 - Criminal Offences

How to use this Legal Guidance

CPS Public Consultations

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Introduction

The Data Protection Act 1998 (DPA) came into force on 1 March 2000.

The 1998 Act applies to personal data held in all formats, whether electronic, paper, audio, visual or digital records. Processing, under the terms of the DPA, covers all conceivable manipulations of personal data including collection, use, storage, disclosure and amendment. Mere possession of such data amounts to processing.

Personal data is any recorded information about a living individual that can be identified from that data and other information, which is in the possession of the Data Controller as defined in the judgement in Durant v Financial Services Authority [2003] EWCA Civ 1746, Court of Appeal (Civil Division). A summary of this judgement is available on the Information Commissioner's website.

Offences

The DPA sets out what may or may not be done with personal data (personal data is any information that relates/identifies a living individual). The DPA creates a number of criminal offences that can only be instituted by the Commissioner or with the consent of the Director of Public Prosecutions (DPP).

The DPA creates a number of criminal offences, the most relevant DPA offences to consider are:

Section 55(1) DPA unlawful obtaining etc. of personal data
It is an offence to knowingly or recklessly obtain, disclose or procure the disclosure of personal information without the consent of the data controller.

There are some exceptions to this for example, where such obtaining or disclosure was necessary for crime prevention/detection. Section 55(2) sets out four defences to section 55 (1).

If a person has obtained personal information illegally it is an offence to offer or to sell personal information. Section 55(3) makes the contravention of section 55(1) a criminal offence.

Section 55(4) and section 55(5) DPA create offences of selling and offering to sell personal data. For the purposes of section 55(5) DPA an advertisement indicating that personal data are or may be for sale is an offer to sell the data.

When prosecuting DPA cases as per the case of R v Julian Connor (Southwark Crown Court, 19 May 2003) prosecutors should remember to deduce evidence that the individuals named in each charge were alive at the time their data was obtained, and as per R v Buckley, England, Wallace and Moore (Winchester Crown Court, September 2003), the prosecution has to prove that the information was data within the meaning of Section 2(1) of the DPA.

There are no custodial sentences in respect of DPA offences and no powers of arrest; all offences are punishable only by a fine. Search warrants are available to the Information Commissioner by virtue of section 50 and the powers outline at schedule 9 of the DPA.

Criminal Justice and Immigration Act 2008

Section 77 Criminal Justice and Immigration Act 2008 came into force on Royal Assent on 8 May 2008. Section 77 gives the Secretary of State the power to alter the penalty for an offence of unlawful obtaining etc. of personal data contrary to section 55 of the DPA. The Secretary of State has not increased the penalty for a section 55 DPA offence. Areas will be informed if this power is exercised.

Notification Offence

Section 17 DPA - Prohibition on processing of personal data without registration.

The DPA contains a number of notification offences. This is where processing is being undertaken by a data controller who has not notified the Commissioner either of the processing being undertaken or of any changes that have been made to that processing.

Personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Information Commissioner. Contravention of section 17 DPA is an offence. Pursuing offences under section 17 DPA offers a way of officially identifying the data-controller or webmaster of websites.

See also section 21(1) processing without a register entry.

Right of data subject

Section 10 DPA - Right of data subject to prevent processing likely to cause damage or distress.

A persons name and address may already be in the public domain but that does not mean that it is any less personal data. Any processing of that data, including putting it on a website would have to comply with the Data Protection Act. Any question of whether such processing would be fair (one of the key DPA concepts) would depend on why the information was being put on the website. The data subject may have an avenue of recourse under section 10 of the DPA.

Under section 10 DPA a data subject (can be anybody) at anytime can write to a data controller (e.g. webmaster) to require him to cease or not to begin, processing any personal data in respect of which he is the data subject. This is on the grounds that the processing of that data is causing or likely to cause substantial damage or distress to the data subject or another and that damage or distress is or would be unwarranted.

The data controller has 21 days from receiving the data subject notice to provide a written notice stating he has complied or intends to comply, or stating his reasons for regarding the data subject notice as unjustified.

If a data controller (i.e. the person uploading information on to the website) fails to comply with the written request by the data subject to cease processing the data, the data subject could then apply to the Information Commissioner to intervene or to a court.

Relevant Links

The Information Commissioners Office

Data Protection Act 1998

CPS

The Crown Prosecution Service. The CPS incorporates RCPO.

Public Justice Offences incorporating the Charging Standard

Revised: 09 February 2011

How to use this Legal Guidance

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Introduction

A large number of offences cover conduct, which hinders or frustrates the administration of justice, the work of the police, prosecutors and courts.

Charging Standard - Purpose

The charging standard below, gives guidance concerning the charge which should be preferred if the criteria set out in the Code for Crown Prosecutors are met. The purpose of charging standards is to make sure that the most appropriate charge is selected, in the light of the facts, which can be proved, at the earliest possible opportunity.

Adoption of this standard should lead to a reduction in the number of times charges have to be amended which in turn should lead to an increase in efficiency and a reduction in avoidable extra work for the police, CPS and the courts.

This will help the police and Crown Prosecutors in preparing the case. Adoption of this standard should lead to a reduction in the number of times charges have to be amended which in turn should lead to an increase in efficiency and a reduction in avoidable extra work for the police and the Crown Prosecution Service.

The guidance set out in this charging standard:

- should not be used in the determination of any investigatory decision, such as the decision to arrest;
- does not override any guidance issued on the use of appropriate alternative forms of disposal short of charge, such as cautioning or conditional cautioning;
- does not override the principles set out in the Code for Crown Prosecutors;
- does not override the need for consideration to be given in every case as to whether a charge/prosecution is in the public interest;
- does not remove the need for each case to be considered on its individual merits or fetter the discretion to charge and to prosecute the most appropriate offence depending on the particular facts of the case.

This standard covers the following offences:

Perverting the Course of Justice

Perjury

- Offences akin to perjury

Offences Concerning Witnesses and Jurors

- Intimidation - criminal proceedings
- Intimidation - civil proceedings
- Offences committed by jurors

Offences Concerning the Police

- Obstructing a police officer
- Wasting police time
- Impersonating a Police Officer
- Refusing to assist a constable

Offences Concerning Prisoners and Offenders

- Escape
- Harbouring
- Assisting an offender
- Prison Mutiny

Offences Concerning the Coroner

- Obstruction
- Preventing Burial of a Body

General Charging Practice

You should always have in mind the following general principles when selecting the appropriate charge(s):

- the charge(s) should accurately reflect the extent of the accused's alleged involvement and responsibility thereby allowing the courts the discretion to sentence appropriately;
- the choice of charges should ensure the clear and simple presentation of the case particularly when there is more than one accused;
- there should be no overloading of charges by selecting more charges than are necessary just to encourage the accused to plead guilty to a few;

- there should be no overcharging by selecting a charge which is not supported by the evidence in order to encourage a plea of guilty to a lesser allegation.

Charging Practice for Public Justice Offences

The following factors will be relevant to all public justice offences when assessing the relative seriousness of the conduct and which offence, when there is an option, should be charged. Consider whether the conduct:

- was spontaneous and unplanned or deliberate and elaborately planned;
- was momentary and irresolute or prolonged and determined;
- was motivated by misplaced loyalty to a relative/friend or was part of a concerted effort to avoid, pervert, or defeat justice;
- whether the activities of the defendant drew in others;
- was intended to result in trivial or 'serious harm' to the administration of justice;
- actually resulted in trivial or 'serious harm' to the administration of justice.

Examples of 'serious harm' include conduct which:

- enables a potential defendant in a serious case to evade arrest or commit further offences;
- causes an accused to be granted bail when he might otherwise not have;
- avoids a police investigation for disqualified driving or other serious offences;
- misleads a court;
- puts another person in real jeopardy of arrest/prosecution or results in the arrest/prosecution of another person;
- avoids a mandatory penalty such as disqualification;
- results in the police losing the opportunity to obtain important evidence in a case.

In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, prosecutions for public justice offences should usually go ahead and those factors should be put to the court for consideration when sentence is being passed.

For guidance on charging in cases involving rape and/or domestic violence allegations see Perverting the course of Justice - charing in cases involving rape and or domestic violence allegations, elsewhere in the Legal Guidance.

Perverting the Course of Justice

(Archbold 28-1 to 28-28)

The offence of Perverting the Course of Justice is committed when an accused:

- does an act or series of acts;
- which has or have a tendency to pervert; and

- which is or are intended to pervert;
- the course of public justice.

The offence is contrary to common law and triable only on indictment. It carries a maximum penalty of life imprisonment and/or a fine.

The course of justice must be in existence at the time of the act(s). The course of justice starts when:

- an event has occurred, from which it can reasonably be expected that an investigation will follow; or
- investigations which could/might bring proceedings have actually started; or
- proceedings have started or are about to start.

In *R v Cotter and Others* [2000] EWCA Crim 1033 it was held that 'the course of public justice included the process of criminal investigation following a false allegation against either an identifiable or unidentifiable individual.'

The offence of perverting the course of justice is sometimes referred to as "attempting to pervert the course of justice". It does not matter whether or not the acts result in a perversion of the course of justice: the offence is committed when acts tending and intended to pervert a course of justice are done. The words "attempting to" should not appear in the charge. It is charged contrary to common law, not the Criminal Attempts Act 1981: *R v Williams* 92 Cr. App. R. 158 CA.

The offence of perverting the course of justice overlaps with a number of other statutory offences. Before preferring such a charge, consideration must be given to the possible alternatives referred to in this Charging Standard and, where appropriate, any of the following offences:

- corruption: Prevention of Corruption Act 1906 and Public Bodies Corrupt Practices Act 1889;
- agreeing to indemnify a surety: s.9 Bail Act 1976;
- making false statement: s.89 Criminal Justice Act 1967, s.106 Magistrates' Courts Act 1980 and s. 11(1) European Communities Act 1972;
- using documents with intent to deceive: s.173 Road Traffic Act 1988;
- impersonating a police officer: s.90 Police Act 1966;
- acknowledging a recognisance or bail in the name of another: s.34 Forgery Act 1861; and
- concealing an arrestable offence: s.5 Criminal Law Act 1967.

Perverting the course of justice covers a wide range of conduct. A charge of perverting the course of justice should, however be reserved for serious cases of interference with the administration of justice. Regard must be had to the factors outlined General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter, which help to identify the seriousness of the conduct.

Before deciding to proceed with a charge of perverting the course of public justice you should consider whether the acts complained of can properly be dealt with by any available statutory offence, or any other offence mentioned in this Charging Standard. If the

seriousness of the offence can properly be reflected in any other charge, which would provide the court with adequate sentencing powers, and permit a proper presentation of the case as a whole, that other charge should be used unless:

- the facts are so serious that the court's sentencing powers would be inadequate; or
- it would ensure the better presentation of the case as a whole; for example, a co-defendant has been charged with an indictable offence and the statutory offence is summary only.

Note that in *R v Sookoo* (2002) TLR 10/4/02 the Court cautioned against adding a count of perverting the course of justice when the conduct could properly be treated as an aggravating feature of the principal offence. However, consecutive sentences may be imposed when the conduct is a separate and subsequent act, in which case a count of perverting the course of conduct should be considered.

The following are examples of acts which may constitute the offence, although General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter should be carefully considered before preferring a charge of perverting the course of justice:

- persuading, or attempting to persuade, by intimidation, harm or otherwise, a witness not to give evidence, to alter his evidence or to give false evidence;
- interference with jurors with a view to influencing their verdict;
- false alibis and interference with evidence or exhibits, for example blood and DNA samples;
- providing false details of identity to the police or courts with a view to avoiding the consequences of a police investigation or prosecution;
- giving false information, or agreeing to give false information, to the police with a view to frustrating a police inquiry; for example, lying as to who was driving when a road traffic accident occurred;
- lending a driving licence to another to produce to the police following a notice to produce, thereby avoiding an offence of driving whilst disqualified being discovered;
- agreeing to give false evidence;
- concealing or destroying evidence concerning a police investigation to avoid arrest;
- assisting others to evade arrest for a significant period of time; and
- making a false allegation which wrongfully exposes another person to the risk of arrest, imprisonment pending trial, and possible wrongful conviction and sentence.

In deciding whether or not it is in the public interest to proceed, consideration should be given to:

- The nature of the proceedings with which the defendant was trying to interfere;
- The consequences, or possible consequences, of the interference.

A prosecution may not be in the public interest if the principal proceedings are at a very early stage and the action taken by the defendant had only a minor impact on those proceedings.

It is likely that perverting the course of justice will be the appropriate charge when:

- the acts wrongfully expose another person to risk of arrest or prosecution;
- the obstruction of a police investigation is premeditated, prolonged or elaborate;
- the acts hide from the police the commission of a serious crime;
- a police investigation into serious crime has been significantly or wholly frustrated or misled;
- the arrest of a wanted person for a serious crime has been prevented or substantially delayed, particularly if the wanted person presents a danger to the public or commits further crimes;
- the acts completely frustrate a drink/drive investigation thereby enabling the accused to avoid a mandatory disqualification;
- the acts strike at the evidence in the case. For example, influencing a vital witness to give evidence/altered evidence/false evidence, or destroying vital exhibits or frustrating a scientific examination;
- the acts enable a defendant to secure bail when he would probably not have otherwise secured it;
- the acts strike at the proceedings in a fundamental way. (For example, by giving a false name so as to avoid a mandatory disqualification or a 'totting' disqualification: giving false details which might significantly influence the sentence passed; giving details which may result in a caution instead of prosecution);
- concerted attempts to interfere with jurors; attacks on counsel or the judge; or conduct designed to cause the proceedings to be completely abandoned);
- a concerted attempt has been made to influence significant witnesses, particularly if accompanied by serious violence;
- the sentencing powers of the court for an alternative offence would be inadequate.

Internal Procedures

Due to their sensitivity, and to ensure a consistent approach, all cases involving an allegation of rape in which consideration is given to prosecuting the complainant for perverting the course of justice must be referred to the Director's Principal Legal Advisor (PLA). This will enable the PLA to oversee charging decisions and provide advice where appropriate.

For the avoidance of doubt, details of all cases referred by the police, including those which are not thought to pass the Full Code Test, must be sent to the PLA (before the decision is communicated to the police), not only those where it is intended to authorise charge.

Referrals to the PLA must be through Heads of Complex Casework Units or Chief Crown Prosecutors and comprise the following:

- a synopsis of the evidence prepared by the reviewing lawyer, including an outline of the relevant legal considerations to the facts of the case;
- a copy of the MG3; and
- endorsement of the proposed course of action from the CCU Head or CCP through whom the referral to the PLA is being made.

Misrepresentation as to Identity

The most common example is when a suspect provides false details to an officer - whether it involves giving a false name, date of birth, address or a combination of the three. Usually in such cases the facts of the basic offence (often motoring) are not in dispute.

In the absence of any other aggravating features, it is unlikely that it will be appropriate to charge perverting the course of justice in the following circumstances:

- Giving a false name in circumstances in which no-one else is exposed to the risk of prosecution
- The attempt to avoid prosecution is inevitably doomed to failure
- The misrepresentation is discovered before a significant period of time has elapsed.

In these circumstances, the alternative offences of wasting police time and obstructing the police should be considered, but may not be necessary in the public interest depending upon the nature of the misrepresentation and the circumstances of the offence.

Regard should be had to the case of *R v Sookoo* (2002) TLR 10/4/02, which cautioned against adding a charge of perverting the course of justice when the conduct could properly be treated as an aggravating feature of the principal offence, and *R v Cotter* (2002) TLR 29/5/02, which suggests the use of offences other than perverting the course of justice when other individuals are not exposed to risk.

Note that extended time limits apply to some summary only motoring offences and the principal offence can be prosecuted beyond the 6 months time limit. Note also section 49 Road Traffic Offenders Act 1991. This allows a Court to re-sentence an individual who has deceived it about circumstances which were or might have been taken into account in deciding whether, or for how long, to disqualify that person.

Perjury

(Archbold 28-152 to 28-174)

By section 1(1) of the Perjury Act 1911, perjury is committed when:

- a lawfully sworn witness or interpreter
- in judicial proceedings
- wilfully makes a false statement
- which he knows to be false or does not believe to be true, and
- which is material in the proceedings.

The offence is triable only on indictment and carries a maximum penalty of seven years' imprisonment and/or a fine.

A conviction cannot be obtained solely on the evidence of a single witness as to the falsity of any statement. There must, by virtue of section 13 Perjury Act 1991, be some other evidence of the falsity of the statement, for example, a letter or account written by the defendant contradicting his sworn evidence is sufficient if supported by a single witness.

Perjury is regarded as "one of the most serious offences on the criminal calendar because it wholly undermines the whole basis of the administration of justice": Chapman J in *R v Warne* (1980) 2 Cr. App.R. (S) 42. It is regarded as serious whether it is committed in the context of a minor case, for example a car passenger who falsely states that the driver did not jump a red light as alleged, or a serious case, for example a false alibi witness in a bank robbery case.

In most cases, an offence of perjury will also amount to perverting the course of justice. If the perjury is the sole or principal act, then it will be normal to charge perjury. If the perjury is part of a much more significant series of acts aimed at perverting justice, then a charge of perverting the course of justice would be more appropriate.

A charge of perverting the course of justice cannot be brought simply to avoid the requirements of corroboration of the falsity of the evidence as required by s.13: *Tsang Ping Nam v R* 74 Cr. App. R. 139 PC.

Perjury by a Prosecution Witness

Proceedings against a prosecution witness for perjury will depend on an assessment of the material effect of the perjured evidence. If a wrongful conviction is believed to have occurred because of the perjured evidence, a prosecution should follow, unless there are exceptional circumstances. If the witness has lied to protect his or her own interests rather than with an intent to pervert the course of justice, a prosecution may be unnecessary.

Perjury by a Defendant

If a defendant is convicted despite giving perjured evidence, the decision to prosecute must take note of the sentence imposed for the original offence. If you think a conviction for perjury is unlikely to result in a substantial increase in sentence, then the public interest probably does not require a prosecution.

Consider also the possible consequences to the original conviction of an acquittal of the defendant on a charge of perjury arising out of the earlier proceedings. You should, therefore, be satisfied that the evidence of perjury is exceptionally strong before instituting proceedings.

Evidence of premeditation is an important factor in coming to a decision on whether or not to prosecute. If the defendant's lies have been planned before the hearing as opposed to arising on the spur of the moment during cross-examination, the public interest in prosecuting will be stronger.

Where a defendant is acquitted, wholly or partly because of false evidence given by him or her, a prosecution for perjury might be appropriate. Where there is clear evidence of perjury, which emerges after the trial, and which goes to the heart of the issues raised at the trial, a prosecution for perjury may be appropriate. A prosecution should not be brought, however, where it may give the appearance that the prosecution is seeking to go behind the earlier acquittal: see *dicta* by Lord Hailsham L.C. in *DPP v Humphrys* [1977] AC.

Perjury by a Defence Witness

The decision to prosecute a defence witness for perjury partly depends on whether the defendant in the earlier trial was convicted:

- If the defendant was convicted, and there is no clear evidence of collusion, a prosecution would not usually be appropriate;
- If the defendant was convicted and there is clear evidence of collusion between the witness and defendant to give perjured evidence, a prosecution may be appropriate. Where it is in the public interest to prosecute for perjury others involved in fabricating false evidence with the defendant, then the defendant should also be prosecuted, except in exceptional circumstances;
- In the event of an acquittal, in the absence of clear evidence of collusion, the evidential test for a prosecution is unlikely to be met. Where there is clear evidence of collusion, and where the perjured evidence is sufficiently material to the case, then careful consideration should be given to a prosecution.

Offences Akin to Perjury

(Archbold 28-175 to 28-191)

There are a number of offences akin to perjury in the perjury act 1911 which, though not detailed in this charging standard, should be considered, including:

- false statements on oath made otherwise than in a judicial proceeding: s.2;
- false statements etc with reference to marriage: s.3;
- false statements as to births or deaths: s.4;
- false statutory declarations and other false statements without oath: s.5;
- false declarations etc to obtain registration etc for carrying on a vocation: s.6;
- subornation of perjury: s.7
- false statements with reference to civil partnerships: s.80 Civil Partnership Act 2004.

These offences may overlap with other criminal offences, such as forgery or deception. The more flagrant the breach of the appropriate section of this Act, the more likely it will be that the defendant should be prosecuted for an offence under the Act as well as any other offences that arise.

Where the false evidence is tendered in written form under:

- Section 9 Criminal Justice Act 1967, an offence is committed under section 89 of that Act
- Section 5 Magistrates' Courts Act 1980, an offence is committed under s.106 of that Act

The Perjury Act does not cover making an untrue statement to obtain a passport. It is an offence contrary to section 36 Criminal Justice Act 1925 and you will have discretion whether to charge under section 36 or whether to charge for attempting to obtain a passport by deception. Where the defendant has not succeeded in obtaining a passport you should normally favour charging the offence under section 36.

Section 11 of the European Communities Act 1972 creates an offence of making a false statement (which is known to be false or not believed to be true) in sworn evidence before the European Court.

Section 80 of the Civil Partnership Act 2004 creates an offence of knowingly giving a false declaration, notice, certificate or statement in order to procure the formation of a civil partnership.

Offences Concerning Witnesses and Jurors

Intimidating or Harming Witnesses and Others - Criminal Proceedings

(Archbold 28-142 to 28-150a)

Attempts are often made to threaten or persuade a witness not to give evidence, or to give evidence in a way that is favourable to the defendant. Such offences go to the heart of the administration of justice. If there is sufficient evidence the public interest requires that normally such cases be prosecuted.

Section 51 Criminal Justice and Public Order Act 1994 creates two offences:

- s.51(1) creates an offence directed at acts against a person assisting in the investigation of an offence or is a witness or potential witness or juror or potential juror whilst an investigation or trial is in progress; and
- s.51(2) creates an offence directed at acts against a person who assisted in an investigation of an offence or who was a witness or juror after an investigation or trial has been concluded.

The offences are triable either way. In the magistrates' court, the maximum penalty is six months' imprisonment and/or a fine to the statutory maximum. In the Crown Court, the maximum penalty is five years' imprisonment and/or a fine.

Section 51 is concerned with the protection of persons who are involved with criminal, as opposed to civil, investigations and/or trials. The section is not concerned with protecting evidence from being tampered with or fabricated, which may amount to the offence of perverting the course of justice, or one of the other statutory alternatives relating to written or other forms of evidence, referred to elsewhere in this Charging Standard.

Section 51(1): Intimidation of Witnesses/Jurors

A person commits an offence contrary to s.51(1) when doing to another person:

- an act which intimidates, and is intended to intimidate, that other person;
- knowing or believing the other person is assisting in the investigation of an offence or is a witness/potential witness or a juror/potential juror in proceedings for an offence;
- intending thereby to cause the investigation or course of justice to be obstructed, perverted or interfered with.

Note, there must be an investigation underway at the time of the alleged act. It is insufficient that the doer of the act believes this to be the case *R v Singh (B) and Others* 1999, CLR. In a case in which the Defendant believed (wrongly) that there was an investigation underway, it may be appropriate to charge him with attempting the section 51

(1) offence.

If a person does an act which intimidates another with the requisite knowledge or belief then he is presumed to have done so with the necessary intent unless the contrary is proved (s.51(7)).

Examples of the type of conduct appropriate for a charge of intimidating include:

- orally or in writing threatening a witness not to make a statement to the police;
- damaging or threatening to damage the property of a potential witness in such a way that the witness will know or believe that it is linked to him assisting an investigation or giving evidence;
- staring at witnesses waiting to give evidence at court or at jurors, in an intimidating manner;
- intending to intimidate a juror by following a juror away from the court building before the trial is concluded;
- assaulting or threatening to assault a relative or friend of a witness or juror in such a way that he/she will know that it is linked to him/her giving evidence or trying the case.

There is an overlap between conduct which amounts to an offence contrary to s.51(1) and conduct which amounts to the more serious offence of perverting the course of justice. Regard must be had to the factors outlined General Charging Principles, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter which help to identify conduct too serious to charge as s.51.

There may be an overlap between intimidating under s.51 and contempt in the face of the court. A s.51 offence should be considered unless the court deals with the behaviour as a contempt. When it does so, the court will act of its own motion.

Section 51(2): Harming People who have Assisted the Police/Given Evidence/Been a Juror

A person commits an offence contrary to Section 51(2) when doing to another person:

- An act which harms and is intended to harm another person, or intending to cause another person to fear harm, threatens to do an act which would harm that other person
- Knowing or believing the person harmed or threatened to be harmed (the victim), or some other person, has assisted in an investigation into an offence, or has given evidence or particular evidence in proceedings for an offence or has acted as a juror, or concurred in a particular verdict in proceedings for an offence, and
- the act is done or the threat is made because of that knowledge or belief.

Note, if within (the relevant period) a person does or threatens to do an act to another person which harms or would harm that other person, with the required intent and knowledge or belief, he is presumed, unless the contrary is proved, to have done so with the necessary motive. (For definition of "the relevant period" see Section 51(9)).

Harm done or threatened may be financial or physical, whether to person or property. Such cases apart, harm in this context is to be given its ordinary meaning of "physical harm" *R v Normanton* 1998, CLR. In that case the harm alleged was spitting in the face of the victim.

Whilst that amounted to an assault, it was held the impact of the spittle would not, in itself, cause harm as required under the Act.

The Section 51(2) offence is directed at acts committed after an investigation or trial is concluded and is aimed at those who wish to take revenge against witnesses, jurors and those involved in the investigation of offences. It is unlikely, therefore, there will be an overlap with other public justice offences.

Examples of post trial conduct appropriate for a s.51(2) charge are:

- attacking or threatening to attack the home of someone who provided a police observation point, or police informant;
- attacking or threatening to attack the home or family of a police officer or other witness;
- assaulting or threatening to assault a former juror or witness who gave evidence;
- scaring customers away from a former juror's business.

Application to Set Aside a 'Tainted' Acquittal

Where a person who has been acquitted of an offence is later convicted of an administration of justice offence involving interference with, or intimidation of a juror or a witness (or potential witness) in the proceedings which led to their acquittal, application may be made to the High Court to have the acquittal set aside as "tainted" - see Section 54 and 55 Criminal Procedure and Investigations Act 1996. If granted, such an application opens the way to fresh proceedings for the original offence.

Interfering or Harming Witnesses - Civil Proceedings

Two new offences were created by Sections 39 and 40 0f the Criminal Justice and Police Act 2001:

- Section 39 creates the offence of intimidating a witness in the course of civil proceedings. An offence is only committed where an act of intimidation occurs after proceedings have been commenced;
- Section 40 creates the offence of harming a witness in civil proceedings. For this offence the act must be committed after the commencement of proceedings and within a year of proceedings being finally concluded.

The offences are triable either way. In the magistrates' court the maximum penalty is six months imprisonment and/or a fine to the statutory maximum. In the Crown Court the maximum penalty is five years imprisonment and/or a fine.

Section 39 - Intimidation

A person commits an offence contrary to Section 39 when doing to another person:

- An act which intimidates, and is intended to intimidate another person (the victim)
- Knowing or believing that the victim is, or may be a witness in any relevant proceedings,

and

- Intending by his act to cause the course of justice to be obstructed, perverted or interfered with, and
- The act is done after the commencement of those proceedings.

It is immaterial:

- Whether the act is done in the presence of the victim.
- Whether the act is done to the victim himself or to another.
- Whether or not the intention to cause the course of justice to be obstructed, perverted or interfered with is the predominant intention of the person doing the act.

A witness is defined as a person who provides, or is able to provide information or documentation which might be used in evidence in proceedings, or might confirm other evidence which will or might be admitted in those proceedings, be referred to in the course of evidence given by another witness in those proceedings or be the basis for any cross-examination during those proceedings.

There is a presumption that the Defendant intended to pervert, obstruct or interfere with the course of justice if it is proved that he did an act that intimidated and was intended to intimidate another person, and did the act knowing or believing that the person in question was, or might be a witness in relevant proceedings.

Section 40 - Harming

A person commits an offence contrary to Section 40 when doing to another person:

- An act which harms and is intended to harm another person, or
- Intending to cause another person to fear harm, he threatens to do an act, which would harm that other person.

The offence is committed where the offender does the act knowing that the person harmed or threatened has been a witness in relevant proceedings, and he does or threatens to do that act because of that knowledge or belief. The act must be committed after the commencement of proceedings and within a year of proceedings being finally concluded.

It is immaterial whether the act in question is carried out in the presence of the person who it is intended to harm, or whether a threat is made in the presence of that person; whether the motive set out in the offence is the predominating one, or whether the harm done or threatened is physical, financial or harms a person or property.

For the purpose of Section 40 a witness is defined as a person who has provided information, a document or something else which was, or might have been used in evidence in the proceedings, or which tended or might have tended to confirm other evidence which was, or could have been given in those proceedings; was or might have been referred to in the course of evidence given by another witness in those proceedings; or was or might have been the basis for cross-examination during those proceedings.

For both Section 39 and 40, relevant proceedings are defined as proceedings in or before:

- The Court of Appeal

- The High Court
- The Crown Court
- Any County or magistrates' court,

which are not proceedings for an offence and which were commenced on or after the date these provisions came into force (1st August 2001).

Interference with Jurors

The common law offence of embracery covers any attempt to persuade a juror to be more favourable to one side or the other. It is generally regarded as obsolete. You should therefore regard allegations of interference with jurors as acts intended to pervert the course of justice. Where the alleged act amounts to the intimidation of a juror or potential juror, you should also consider the provisions of Section 51 Criminal Justice and Public Order Act 1994 outlined General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter.

If it is alleged that a jury member has been approached with a view to influencing the verdict, and a full scale investigation is needed to investigate the matter, the CCP should be consulted before further enquiries are made. This applies whether the allegation is in the form of a request by a Trial Judge for a Police investigation, or arises from any other source.

Allegations of jury interference which do not involve an attempt to influence the verdict, but are simply improper contact with a juror should be reported to the Judge. He or she can then be reminded of the Court's powers under the Contempt of Court Act 1981. Where the alleged interference is such that a full scale investigation might be considered unwarranted because of the relatively minor nature of the interference, the Court's powers to dispense immediate justice under the 1981 Act may avoid the necessity for such an enquiry.

Offences Committed by Jurors

Section 20 of the Juries Act 1974, (as amended)

(Archbold 28-46)

This section creates a range of summary offences that may be committed by persons summoned for jury service. Examples include making false representations for the purposes of evading jury service or enabling another to do so; failure, without reasonable excuse, to answer questions under section 2(5) or deliberately or recklessly giving false answers; and of serving on a jury when ineligible, disqualified or not qualified.

The offence under section 20(5)(a) of serving when disqualified (for instance because of a previous conviction) carries a fine not exceeding level 5 on the standard scale: all the other offences carry a fine not exceeding level 3 on the standard scale.

Public Interest Considerations

A prosecution should follow (unless there are exceptional circumstances) where there is

clear evidence that:

- a defendant has knowingly made a false declaration as to disqualification by virtue of a previous conviction; and
- is part of a deliberate attempt to serve on a jury.

Where the false declaration is made knowingly, but with a genuine belief that the disqualifying period has elapsed, then you may take the following factors into account in deciding whether it is in the public interest to prosecute:

- what steps the defendant took to clarify the position.
- whether the defendant's belief was sincere.
- how long was the disqualifying period;
- how much of it was still to run.

Permission to Interview Jurors

Where police wish to interview jurors, permission should be sought from the Court of Appeal.

There is no legal requirement for officers to obtain the leave of the Court of Appeal to interview jurors per se. However, a practice has been agreed with the Court of Appeal that where it is the intention of an officer to interview jurors, where there is a suggestion of a tainted acquittal or jury intimidation, then an application for such interviews should be made to the Court of Appeal.

These applications should be made via the Crown Court and passed to the Court of Appeal for consideration. It may be that the Court of Appeal would draft questions in order to elicit the information required. This requirement still applies where the trial judge has purported to give permission for such enquiries or even directed they take place.

The purpose of the procedure is to protect the sanctity of jury deliberations and the basis for their decisions in any given case. It would also ensure that section 8 of the Contempt of Court Act 1981 is not breached.

Offences Concerning the Police

Obstructing a Police Officer - section 89(2) Police Act 1996

(Archbold 28-6)

The offence of obstructing a police officer is committed when a person:

- wilfully obstructs
- a constable in the execution of his duty, or
- a person assisting a constable in the execution of the constable's duty.

It is a summary only offence carrying a maximum penalty of one month's imprisonment and/or a level 3 fine.

A person obstructs a constable if he prevents him from carrying out his duties or makes it more difficult for him to do so.

The obstruction must be 'wilful', meaning the accused must act (or refuse to act) deliberately, knowing and intending his act will obstruct the constable: *Lunt v DPP* [1993] Crim.L.R.534. The motive for the act is irrelevant.

Many instances of obstruction relate to a physical and violent obstruction of an officer in, for example, a public order or arrest situation. This standard only deals with conduct which can amount to an obstruction in the context of an interference with public justice.

Examples of the type of conduct which may constitute the offence of obstructing a police officer include:

- warning a landlord that the police are to investigate after hours drinking;
- warning that a police search of premises is to occur;
- giving a warning to other motorists of a police speed trap ahead;
- a motorist or 'shoplifter' who persists in giving a false name and address;
- a witness giving a false name and address;
- a partner who falsely claims that he/she was driving at the time of the accident but relents before the breathalyser procedure is undertaken;
- an occupier inhibiting the proper execution of a search warrant (if the warrant has been issued under the Misuse of Drugs Act, see also s 23 of that Act);
- refusing to admit constables into a house when there is a right of entry under s.4(7) of the road Traffic Act 1988 (arrest for driving etc while unfit through drink or drugs).

Regard must be had to the factors outlined General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter which identify conduct too serious to charge as an obstruction. Then consideration should be given to charges of assisting an offender, or perverting the course of justice refer to Misrepresentation as to Identity, elsewhere in this chapter.

Wasting Police Time - section 5(2) Criminal Law Act 1967

(Archbold 28-224)

The offence of wasting police time is committed when a person:

- causes any wasteful employment of the police by
- knowingly making to any person a false report orally or in writing tending to:
  - show that an offence has been committed; or,
  - give rise to apprehension for the safety of any persons or property; or,
  - show that he has information material to any police inquiry.

It is a summary only offence carrying a maximum penalty of six months' imprisonment and/or a level 4 fine.

Proceedings may only be instituted by or with the consent of the Director of Public Prosecutions: s.5(3). Consent may be granted after charge but must be before a plea of

guilty is entered or summary trial. Consent must be obtained before proceedings are started by way of summons.

Examples of the type of conduct appropriate for a charge of wasting police time include:

- false reports that a crime has been committed, which initiates a police investigation;
- the giving of false information to the police during the course of an existing investigation.

The public interest will favour a prosecution in any one of the following circumstances:-

- police resources have been diverted for a significant period (for example 10 hours);
- a substantial cost is incurred, for example a police helicopter is used or an expensive scientific examination undertaken;
- when the false report is particularly grave or malicious;
- considerable distress is caused to a person by the report;
- the accused knew, or ought to have known, that police resources were under particular strain or diverted from a particularly serious inquiry;
- there is significant premeditation in the making of the report;
- the report is persisted in, particularly in the face of challenge.

There are statutory offences which involve wasting police time and which should be used instead of section 5(2) when there is sufficient evidence. For example:

- perpetrating a bomb hoax - s51(2) Criminal Law Act 1977;
- false alarms of fire - s.49 Fire and Rescue Services Act 2004;
- fraudulent insurance claims based on false reports of crime - deception.

There is an overlap between the offence of wasting police time and other, more serious offences. Regard must be had to the factors outlined in General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter which help to identify conduct too serious to charge as wasting police time, when consideration should be given to a charge of perverting the course of justice

Misrepresentation as to Identity

In *R v Cotter and Others* [2000] TLR it was held that 'the course of public justice included the process of criminal investigation following a false allegation against either an identifiable or unidentifiable individual.' In that case, the actions of the defendants in making the false allegations amounted to conspiracy to pervert the course of justice. See also *R v Bailey* [1956] NI 15 and *Rowell* [1978] 1 WLR 132 where it was held that section 5(2) of the Criminal Law Act 1967 could be invoked where police time and resources had been wasted but where individuals (identified or otherwise) had been exposed to the risk of arrest, imprisonment, pending trial and possible wrongful conviction and punishment that would amount to perverting the course of justice.

Impersonating a Police Officer

Section 90 Police Act 1996 (Archbold 22-62) creates several offences relating to the

impersonation of police officers or the possession of articles of police uniform, namely:

- impersonating a police officer (including a special constable);
- making a statement or doing any act calculated falsely to suggest membership of a police force;
- wearing a police uniform calculated to deceive;
- possessing an article of police uniform.

The circumstances of the case may disclose more than one of these offences. It will seldom be necessary to charge more than one offence. You should select the most appropriate.

You should consider the motive of the defendant. Where the impersonation involves a threat to the safety of any person, or to property, or is done with a view to financial gain, then a prosecution should follow.

Refusing to Assist a Constable

At common law it is an offence to refuse to assist a constable when called on to do so.

To establish the offence you need to prove that:

- the constable saw a breach of the peace being committed; and
- there was a reasonable necessity for calling upon the defendant for assistance; and
- when called on to do so the defendant, without any physical impossibility or lawful excuse, refused to do so.

The offence is triable on indictment but is rarely used.

Offences Concerning Prisoners and Offenders

Failing to Surrender to Bail

Refer to Bail, elsewhere in this guidance

Breach of Prison

(Archbold 28-192 to 28-216)

A person who, being in lawful custody either in prison or elsewhere on a criminal charge, escapes without the use of force commits the common law offence of Escape. Where any force is used, the common law offence of Breaking Prison should be considered. In this context, force can include damage to property such as locks or fences. For sentencing guidelines see *R v Coughtrey* [1997] 2 Cr.App.R.(S) 269, CA.

Section 39 Prison Act 1952 makes it an offence to assist a prisoner to escape. Unlike escape or breach of prison, this particular offence only applies to persons in prison, not, for example, making a remand appearance at a magistrates' court. Section 39 of the Act also makes it an offence to take things into prison or to send things in by post to facilitate an

escape.

Where the defendant was in custody facing only summary offences (or either way offences where he has consented to summary trial) you should consider the availability of other charges, such as assault or obstruction.

However, where force has been used to break out of prison, the public interest will usually require a prosecution for Breaking Prison.

In relation to escape, the following factors are among those to be considered before deciding whether to prosecute:

- how successful was it?
- what were the charges the defendant originally faced?
- how carefully planned was the escape?

Where the escape is from prison a prosecution should normally follow but, you should also consider:

- administrative prison procedures such as loss of remission, and
- any lack of security, for example, an open prison.

Assisting a prisoner to escape is a serious matter and will usually require a prosecution in the public interest.

Harbouring Escaped Prisoners

The offence of harbouring is created by section 22(2) Criminal Justice Act 1961. You need to prove that the person harboured had escaped from prison or detention in a remand centre or Young Offenders' Institution and such provisions are construed strictly: see *Nicoll v Catron* (1985) Cr App R 339; *Moss* (1985) 82 Cr App R 116. The offence, therefore, cannot be committed in respect of a person who escapes from custody whilst in transit to or from prison, or from court etc. In serious cases, however, an offence of Perverting the Course of Justice might be considered.

When considering the public interest in prosecuting a person accused of harbouring, you should always bear in mind:

- what was the motive for harbouring?
- how serious was the offence for which the escapee was imprisoned?

Often, the public interest will not demand proceedings against a wife or parent who has been put under pressure to harbour a husband or son, especially if the offence for which the prisoner was incarcerated is not serious.

Assisting an Offender - section 4(1) Criminal Law Act 1967

(Archbold 18-34)

The offence of assisting an offender ("the principal offender") is committed when:

- the principal offender has committed an arrestable offence;
- the accused knows or believes that the principal offender has committed that or some other arrestable offence;
- the accused does any act with intent to impede the apprehension or prosecution of the principal offender; and
- the act is done without lawful authority or reasonable excuse.

It is an offence triable only on indictment unless the principal offence is an either way offence, in which case the offence of assisting a principal offender is also triable either way. The maximum sentence for the offence varies from three to ten years' imprisonment, depending on the punishment applicable to the principal offence: s.4(3).

Proceedings may only be instituted by or with the consent of the Director of Public Prosecutions: s.4(4). Consent may be granted after charge but must be before committal proceedings (indictable offences) or mode of trial (either way offences). Consent must be obtained before proceedings are started by way of summons. It is not an offence to attempt to commit an offence under section 4.

Examples of the type of conduct appropriate for a charge of assisting an offender include:

- hiding a principal offender;
- otherwise assisting a principal offender to avoid arrest;
- assisting a principal offender to abscond from bail;
- lying to the police to protect principal offenders from investigation and prosecution;
- hiding the weapon used in an assault/robbery;
- washing clothes worn by a principal offender to obstruct any potential forensic examination.

There may be an overlap between the offence of assisting an offender and obstructing a constable, wasting police time, concealing arrestable offences (s.5(1) Criminal Law Act 1967) and perverting the course of justice .

The courts have made it clear that assisting an offender is a serious offence and, if the statutory offence of assisting an offender can be charged, it should normally be preferred over common law offences.

However, the common law offence of perverting the course of justice should be considered when:

- the assisting is aimed at preventing or hindering the trial process (as opposed to the arrest or apprehension of an accused);
- the facts are so serious that the court's sentencing powers for the statutory offence are considered inadequate;
- admissible evidence of the principle offence is lacking.

Assisting an offender is sometimes not an easy offence to prove since it requires proof that the principle committed an arrestable offence and that the accused knew or believed this. In the absence of such proof, other public justice offences, such as obstruction or perverting the course of justice, can provide alternative charges.

Offences Concerning the Coroner

Obstructing a Coroner - Preventing the Burial of a Body

Any disposal of a corpse with intent to obstruct or prevent a coroner's inquest, when there is a duty to hold one, is an offence. The offence is a common law offence, triable only on indictment and carries a maximum penalty of life imprisonment and/or a fine.

The offence of preventing the burial of a body (indictable only, unlimited imprisonment) is an alternative charge. Proof of this offence does not require proof of the specific intent required for obstructing a coroner.

The offences of obstructing a coroner and preventing the burial of a body may arise for example, when a person decides to conceal the innocent and unexpected death of a relative or friend or prevent his burial. Such cases inevitably raise sensitive public interest factors which must be carefully considered.

When the evidence supports a charge of involuntary manslaughter, it may be necessary to add a charge of obstructing a coroner or preventing a burial if the disposal of the body is more serious than the unlawful act which caused the death.

Obstructing a coroner may also amount to an offence of perverting the course of justice. Regard must be had to the factors outlined in General Charging Practice, above in this chapter and Charging Practice for Public Justice Offences, above in this chapter which help to identify conduct too serious to charge as obstructing a coroner, when consideration should be given to a charge of perverting the course of justice.
