

# The Law Commission

(LAW COM. No. 96)

## CRIMINAL LAW

### OFFENCES RELATING TO INTERFERENCE WITH THE COURSE OF JUSTICE

*Laid before Parliament by the Lord High Chancellor  
pursuant to section 3(2) of the Law Commissions Act 1965*

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# THE LAW COMMISSION

## CRIMINAL LAW

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# THE LAW COMMISSION

## *Item XVIII of the Second Programme*

### CRIMINAL LAW

#### OFFENCES RELATING TO INTERFERENCE WITH THE COURSE OF JUSTICE

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.,  
Lord High Chancellor of Great Britain*

#### PART I: INTRODUCTION

1.1 This report deals with offences relating to interference with the course of justice including perjury and makes recommendations for the reform and codification of the law in this field. A draft Bill, which would give effect to those recommendations which require legislation, is attached<sup>1</sup>.

1.2 In our *Second Programme of Law Reform*<sup>2</sup> we recommended a comprehensive examination of the criminal law with a view to its codification. Our *Report on Conspiracy and Criminal Law Reform*,<sup>3</sup> which was a part of that examination, recommended that for the future the crime of conspiracy should, with some temporary exceptions, be limited to agreements to commit a crime, and this recommendation has become law.<sup>4</sup> That recommendation made it necessary to examine certain areas of the law where gaps would be left by the limitation of conspiracy to conspiracy to commit an offence; where such gaps were revealed, it became necessary to consider whether and if so what new substantive offences were required.

1.3 One of these areas was that relating to the administration of justice. In Working Paper No. 62<sup>5</sup> we examined offences relating to interference with the course of justice and reached the conclusion that there was a common law offence of perverting the course of justice which was of wide and uncertain ambit, and which could be committed by one person without any requirement of conspiracy.<sup>6</sup> Consultation confirmed our conclusion. We were therefore able to say in our *Report on Conspiracy and Criminal Law Reform*<sup>7</sup> that the restriction of conspiracy to conspiracy to commit an offence would not result in any narrowing of the law relating to interference with the course of justice.

1.4 There is, however, no room in a criminal code for common law offences, and we went on in Working Paper No. 62 to propose statutory offences to replace

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<sup>1</sup> Appendix A.

<sup>2</sup> (1968) Law Com. No. 14, Item XVIII.

<sup>3</sup> (1976) Law Com. No. 76,

<sup>4</sup> Criminal Law Act 1977, ss. 1 and 5.

<sup>5</sup> (1975) *Offences relating to the Administration of Justice*.

<sup>6</sup> Working Paper No. 62, para. 10. It was not until 1968 that it was held that no element of conspiracy was necessary (*R.v. Grimes* [1968] 3 All E.R. 179) and not until 1973 that this was confirmed by the Court of Appeal (*R.v. Panayiotou and Another* [1973] 1 W.L.R. 1032 and *R.v. Andrews* [1973] Q.B. 422); see further para. 3.3, below.

<sup>7</sup> (1976) Law Com. No. 76, para. 1.19.

both the wide common law offence of perverting the course of justice and the other more specific common law offences in the same area. In this we were following the practice which we and the Criminal Law Revision Committee have adopted of reducing to statutory form those common law offences falling within any area of the law which we have under consideration.<sup>8</sup> We were fortunate to have the help of a considerable amount of work done by a sub-committee of the latter body, who gave preliminary consideration to replacing the general offence of perverting the course of justice with a series of statutory offences.<sup>9</sup> Recommendations as to offences relating to interference with the administration of justice other than perjury will be found in Part III of this Report.

1.5 As long ago as 1970 we issued a working paper on *Perjury and Kindred Offences*,<sup>10</sup> which dealt with both perjury in judicial proceedings and many other offences relating to the making of false statements. When we started work on offences relating to the administration of justice it was apparent that perjury in judicial proceedings was one of the most important offences to be considered in that area, and that it was severable from the other offences involving the making of a false statement.<sup>11</sup> Accordingly, we set out in the forefront of Working Paper No. 62 proposals in regard to perjury in judicial proceedings, which took account of the very full consultation we had had on the Working Paper on Perjury.<sup>12</sup> In the light of the further consultation on this subject we now make recommendations on perjury in judicial proceedings in Part II. In Part IV we deal with penalties and procedure, which can conveniently be discussed in relation to perjury and the other offences together.

1.6 Some of those who commented on Working Paper No. 62<sup>13</sup> suggested that comprehensive proposals for offences relating to the administration of justice would not be complete without provisions relating to the law of contempt of court, which, as they argued and we accept, is a central feature of the law relating to the administration of justice.

1.7 The law of contempt of court, which provides a very specialised remedy with its own procedures for regulating conduct affecting court proceedings, has recently been the subject of a wide-ranging report by a committee under the chairmanship of the late Lord Justice Phillimore.<sup>14</sup> This Report recognised the overlap between some instances of contempt of court and the offence of perverting the course of justice, and some of its proposals in relation to contempt of court were aimed at limiting this overlap by restricting the ambit of certain kinds of contempt. Nevertheless the Committee did not attempt a full restatement of the law of contempt of court in statutory terms. The form to be taken by new, statutory provisions for contempt is now under active consideration, and the

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<sup>8</sup> See *Seventh Annual Report: 1971-1972*, Law Com. No. 50, para. 29.

<sup>9</sup> This was undertaken as part of our *First Programme of Law Reform* (1965) Law Com. No. 1, Item XIV, under the general subject of "Common Law Misdemeanours".

<sup>10</sup> Working Paper No. 33.

<sup>11</sup> These latter offences we are considering in our work on conspiracy to defraud. See Working Paper No. 56, paras. 24-25 and 68.

<sup>12</sup> A list of those who commented on Working Paper No. 33 is at Appendix B.

<sup>13</sup> A list of those who commented on Working Paper No. 62 is at Appendix C.

<sup>14</sup> (1974) Cmnd. 5794; see also the Discussion Paper on Contempt of Court (March 1978) Cmnd. 7145.



Queen's Speech at the opening of Parliament indicated that the Government would introduce a Bill during this current session. Our recommendations are designed to be independent of the recommendations as to contempt in the Phillimore Report. But if in accordance with that Report conduct now punishable as contempt were to cease to be so punishable because it would fall outside the time limits recommended by it, our recommendations would ensure that the conduct which in our view needs to be subject to the penalties of the criminal law would for the most part be covered by specific offences.

1.8 It must, however, be noted that there are two matters with regard to which we make no recommendations. The first is payment or offer of payment to witnesses for their stories. We are aware of the concern which allegations of this practice have recently aroused, especially where the amounts paid are in effect contingent on the outcome of the case. But the extent to which such conduct at present amounts to an offence of perverting the course of justice is debateable, and we would not feel able to recommend any particular course with regard to it without further consultation. This would cause further delay in the publication of the present Report.<sup>15</sup> The second matter is the disclosure after the end of proceedings of what occurred in the jury room. Such disclosure is not now a criminal offence and there is at least a doubt as to whether it amounts to contempt of court. This question was not considered either in the Phillimore Committee Report or in our Working Paper on *Offences relating to the Administration of Justice*, nor was it raised in consultation upon that Paper. Its difficulties are such that without further consultation we feel unable to make recommendations as to whether the criminal law should intervene here and, if so, what form any offence should take, and such consultation would again delay the publication of the present Report. We do, however, recognise that it may be necessary for further consideration to be given to this question at some time in the future if such disclosures become prevalent and appear to be adversely affecting the administration of justice.

1.9 In many of the offences which we recommend in this Report we use the words "intending", "knowing" or "being reckless", or associated words, to indicate the state of mind required of the defendant before his conduct amounts to an offence. These words are used in the senses recommended in our *Report on the Mental Element in Crime*,<sup>16</sup> namely that—

- (a) a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result;
- (b) a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists;

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<sup>15</sup> The Phillimore Report recommended that an inquiry should be carried out as to the prevalence of the practice but did not itself recommend legislation: (1974) Cmnd. 5794, paras. 78–79. A Dealings with Witnesses Bill prohibiting the practice was introduced by Lord Wigoder but withdrawn after the debate on 2nd Reading in the House of Lords on 16 July 1979.

<sup>16</sup> (1978) Law Com. No. 89, paras. 44, 49 and 65 respectively; see also Appendix A, Draft Criminal Liability (Mental Element) Bill, cl. 2(1), 3(1) and 4(2) and (4). The meaning of "reckless" in s. 1 of the Criminal Damage Act 1971 was recently considered by the Court of Appeal (Criminal Division) in *R. v. Stephenson* [1979] 3 W.L.R. 193. See also Appendix A. cl. 33.

- (c) a person should be regarded as being reckless as to whether a particular circumstance exists if, but only if, (i) he realises at the time of that conduct that there is a risk of that circumstance existing and (ii) it is unreasonable for him to take that risk. The question whether it is unreasonable for him to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct.

We *recommend* that these definitions should apply to the offences we are recommending in this report.

## **PART II: PERJURY**

### **A. PRESENT LAW AND WORKING PAPER PROPOSALS**

#### **1. The law**

2.1 The present law as to perjury in judicial proceedings is to be found in the Perjury Act 1911 (hereafter “the 1911 Act”). Section 1 of the Act provides that if a person lawfully sworn as a witness or interpreter in a judicial proceeding wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true he shall be guilty of perjury. By virtue of section 1(5) the offence extends to such statements made by persons lawfully sworn under the authority of an Act of Parliament (a) in any part of H.M.’s dominions or (b) before a British tribunal or officer in a foreign country. Certain statements not made before a court are by section 1(3) treated as being made in judicial proceedings.<sup>1</sup>

2.2 The 1911 Act deals not only with perjury in judicial proceedings but also with statements on oath otherwise than in judicial proceedings (section 2), false oaths or statements with reference to marriage (section 3), false declarations or statements in relation to births and deaths (section 4), false statutory declarations and other oral declarations required under an Act of Parliament (section 5), and false declarations to obtain registration for carrying on a vocation (section 6). Finally, section 7(1) deals with aiding, abetting or suborning a person to commit an offence under the Act and section 7(2) with inciting or attempting to procure or suborn a person to commit an offence under the Act. Subornation is no more than another name for procuring an offence, whilst the other ancillary offences in this section add nothing to the general law to be found in section 8 of the Accessories and Abettors Act 1861 and the common law.

2.3 Where conduct of the kind specified in section 1 is prosecuted, it is almost always charged as perjury, but on some occasions, where there has been a conspiracy to commit perjury, a charge of conspiring to obstruct or pervert the course of justice has been brought.<sup>2</sup>

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<sup>1</sup> Section 1(3) states that “where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorised by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.”

<sup>2</sup> See *R. v. Demaine* [1971] Crim. L.R. 110.

## 2. The incidence of offences under the Perjury Act 1911

2.4 The following tables containing details abstracted from criminal statistics for the years 1974–1977<sup>3</sup> give some indication of the incidence of prosecutions for perjury.<sup>4</sup>

### Trial and disposal of persons proceeded against for perjury<sup>5</sup>

#### *Magistrates' Courts*

Year	Total	Guilty-custodial sentence	Guilty-Non custodial sentence
1974	43	5	33
1975	33	5	27
1976	44	6	35
1977	46	1	40

#### *Crown Court*

Year	Total	Guilty-custodial sentence	Guilty-Non custodial sentence
1974	131	56	61
1975	119	37	66
1976	104	40	48
1977	135	48	73

“Non-Custodial sentences” include suspended sentences of imprisonment, which in the Crown Court accounted for over half the total under this heading for each of the three years. “Custodial sentences” here include detention centre orders and borstal training.

<sup>3</sup> *Criminal Statistics England and Wales 1974*, Cmnd. 6168; 1975, Cmnd. 6566; 1976, Cmnd. 6909; 1977, Cmnd. 7289.

<sup>4</sup> By virtue of the Criminal Law Act 1977, s. 16 and Sch. 2 para. 12, all offences under the 1911 Act save those under ss. 1, 3, 4 and 5 are triable either way, that is, triable on indictment or summarily. Thus perjury itself is triable only on indictment.

<sup>5</sup> In the Criminal Statistics “perjury” consists of perjury or false statement (also false declaration or representation made punishable by any statute).”

*Duration of sentences of immediate imprisonment imposed at the Crown Court*

Year	Up To 6 Months	6-12 Months	1-2 Years	2-3 Years	3-4 Years	4-5 Years	Total
1974	11	35	8	—	—	—	54
1975	3	18	9	2	1	—	33
1976	10	18	8	—	1	1	38
1977	18	17	10	—	—	—	45

No sentence exceeding 5 years was imposed. Immediate terms of imprisonment of up to 6 months were also imposed by magistrates' courts in 3 cases in the years 1974 and 1975, in 5 cases in 1976, and in one case in 1977; these were, of course, not cases of perjury itself; see note 4, above. The totals here do not include detention centre orders and borstal training; compare the first table, above.

2.5 There can be no doubt that the incidence of perjury, in the sense of deliberately telling falsehoods under oath, is much higher in both civil and criminal cases than these figures suggest. Because of the numerous opportunities for oral examination under oath which arise under the adversary system, perjury must occur frequently both in civil cases and criminal cases, in particular where the defendant's case and the alibi evidence of witnesses is rejected by the jury. But prosecutions for perjury are unusual,<sup>6</sup> primarily because the Director of Public Prosecutions, to whom most cases of perjury are reported, exercises his discretion by reference to particular criteria in such cases. A number of factors weigh in the decision whether or not to prosecute an unsuccessful defendant in a criminal case. Among these is the penalty imposed on him by the Court on the original charge and the likelihood of a heavier penalty resulting from a prosecution for perjury. Again, in view of the doubts which an acquittal would cast on the verdict of guilty in the original case, there is the need to have exceptionally strong evidence which will ensure a conviction. Even then, prosecution is unusual without further aggravating factors if the unsuccessful defendant has not involved others. Such factors relate in the main to the nature of the lie told, for example, whether it involved an attack on the truthfulness of prosecution witnesses, and whether it was clearly planned before the hearing and persistently maintained. In the case of prosecution witnesses, where there is a reasonable prospect of conviction the D.P.P. undertakes proceedings if the perjured evidence goes to the heart of the matter before the Court. This summary<sup>7</sup> of the factors which the D.P.P. takes into consideration before authorising or instigating a prosecution for perjury in criminal cases suggests why only the most flagrant of such cases result in prosecutions. This lends particular significance to the level of sentences set out in the last table above. It shows that no sentence of imprisonment exceeding five years was imposed in 1974-1977. This will be an important factor in determining the maximum sentence for perjury, at present seven years, in any new legislation.<sup>8</sup> In addition, however, we now have to take into account in this context the recommendations of the Advisory Council on the Penal System.<sup>9</sup>

<sup>6</sup> For the position if the defendant is found not guilty, see *D.P.P. v. Humphrys* [1977] A.C.1.

<sup>7</sup> The summary condenses paragraphs 119-123 of the evidence given by the D.P.P. to the Royal Commission on Criminal Procedure.

<sup>8</sup> See para. 4.12, below.

<sup>9</sup> *Sentences of Imprisonment*, Report of the Advisory Council on the Penal System (1978), p. 81.

### 3. Working Paper proposals

2.6 In our Working Paper on *Perjury and Kindred Offences*<sup>10</sup> we proposed that the present offences in the 1911 Act should be replaced by three offences, namely—

- (i) Perjury in judicial proceedings,
- (ii) Making false statements or representations in relation to births, marriages and deaths, to replace the offences in sections 3 and 4 of the 1911 Act,
- (iii) Making false statements (a) on oath other than in judicial proceedings, (b) in a statutory declaration or (c) in any oral or written statement required or authorised by, under or in pursuance of an Act of Parliament. This would replace the offences in sections 2, 5 and 6 of the 1911 Act.

We also proposed the repeal of a large number of offences of making false statements found in a variety of statutes. Comment on the Working Paper for the most part favoured this reduction in the number of offences to three. We do not intend to consider the second and third of these proposed offences in the present context; our concern as regards the 1911 Act is solely with perjury in judicial proceedings since that is the only one of these offences relating to the administration of justice, the subject of this Report. The other proposed offences are concerned primarily with the efficient operation of statutory schemes and other formal requirements not having a direct connection with the administration of justice.<sup>11</sup>

2.7 The detailed proposals for the offence of perjury in judicial proceedings aroused relatively little adverse criticism on consultation; thus there seemed no need to change them in our Working Paper on *Offences relating to the Administration of Justice*.<sup>12</sup> In summary form we proposed that perjury should be defined as—

- (i) the making of a false statement,
- (ii) that was material,
- (iii) on oath (or its equivalent),<sup>13</sup>
- (iv) in, or for the purposes of, judicial proceedings, that is, proceedings before any court, tribunal or person having power by law to hear, receive and examine evidence on oath,
- (v) with the intention that the statement be taken as true,
- (vi) with the knowledge that it was false or not believing it was true.

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<sup>10</sup> Working Paper No. 33 (1970).

<sup>11</sup> Our recommendations in regard to these offences will be contained in our report on fraud, which will also deal with conspiracy to defraud; see further para. 2.25, below.

<sup>12</sup> Working Paper No. 62, paras. 43–44 and 60.

<sup>13</sup> Under the Oaths Act 1978, s. 5(1) any person who objects to being sworn may without giving a reason make his solemn affirmation instead of taking an oath. Under s. 5(2) of the Act sub-s. (1) applies in relation to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies in relation to a person objecting to be sworn. By virtue of the Interpretation Act 1978, s. 5 and Sch. 1, “oath” in any Act is construed to include “affirmation”.

In addition we proposed that—

- (i) corroboration of the falsity of a statement made under oath should continue to be required before there could be a conviction for perjury, and
- (ii) there should be no offence of making self-contradictory statements on oath.

The recommendations we now make take into account the further comments we have received on these proposals in response to the second Working Paper.

## B. RECOMMENDATIONS AS TO PERJURY IN JUDICIAL PROCEEDINGS

### 1. The problem of false evidence not given on oath and the meaning of “judicial proceedings”

2.8 By far the most intractable matters encountered in our reconsideration of perjury have been the problems of whether it should be an offence to make a false statement in evidence which is not on oath and whether the present meaning of judicial proceedings<sup>14</sup> should be extended beyond its presently accepted boundaries to include the proceedings of the many and varied tribunals which do not have specific powers to administer the oath under the legislation establishing them. These closely connected problems are considered after the examination which follows of the proposals in our Working Papers and of the present law.

#### (a) Working paper proposals

2.9 After consultation on Working Paper No. 33, the conclusion we reached was that the meaning of judicial proceedings should not be changed and that false evidence should be penalised only when a witness gives sworn evidence in such proceedings. We set out this conclusion in Working Paper No. 62. The reasoning by which we reached this conclusion appears in paragraphs 48–52 of that Working Paper—

“48. The general rule, in criminal and civil proceedings alike, is that all oral evidence must be given on oath: the law places no reliance on testimony not given on oath or affirmation. No person can give testimony in any trial, civil or criminal, until he has given an outward pledge that he considers himself responsible for the truth of what he is about to say and has rendered himself liable to the temporal penalties of perjury in the event of his wilfully giving false testimony. The sole criterion of competence to give evidence is the person’s understanding of the nature of the oath.”<sup>71</sup>

49. In criminal proceedings there is specific provision<sup>72</sup> for a defendant to make an unsworn statement from the dock, which, although not evidence in the sense of sworn evidence, is evidence in the sense that the jury can give it such weight as they think fit in considering only the case against the

<sup>14</sup> *Phipson on Evidence* (11th ed., 1970), paras. 1486 and 1477, *Taylor on Evidence* (12th ed., 1931), para. 1378; *Cross. Evidence* (4th ed., 1974), p. 149.

<sup>72</sup> Criminal Evidence Act 1898, s. 1 (h).

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<sup>14</sup> By s. 1(2) of the 1911 Act “‘judicial proceeding’ includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.”

defendant making the statement.<sup>73</sup> No penalty attaches to the telling of lies in such an unsworn statement. A second exception in criminal proceedings to the rule that all oral evidence must be given on oath is to be found in section 38 of the Children and Young Persons Act 1933. Under this section a court may receive, in any proceedings against a person for any offence, the evidence of a child of tender years, though not given on oath if in the opinion of the court the child understands the duty to speak the truth. The section makes a child who wilfully gives false evidence liable on summary conviction to be dealt with as if he had been convicted of an indictable offence punishable in the case of an adult with imprisonment. The provision is now probably of limited application by reason of the effect of section 50 of the Children and Young Persons Act 1933, as amended by section 16 of the Children and Young Persons Act 1963, which provides a conclusive presumption that no child under the age of ten years can be guilty of any offence.

50. There are no statutory exceptions applicable to civil proceedings for the reception of oral evidence otherwise than on oath. The sole criterion of the competence of a person to give evidence must, therefore, be whether he understands the nature of the oath. It must follow that unsworn evidence from a child who does not understand the nature of the oath cannot be received. As we understand the position, the admissibility of unsworn evidence of children, where it is given, depends upon the agreement of the parties to waive the taking of the oath.

51. In the case of many other tribunals, however, it is not uncommon for an informal procedure to be adopted under which evidence is received without the requirement that it be given under oath, even where the tribunal has the power to take sworn evidence. The commonest examples of tribunals not requiring evidence to be given on oath, though they have the power to do so, are arbitration tribunals under the Arbitration Act 1950 and tribunals conducting local inquiries under the Town and Country Planning Act 1971. In the cases where tribunals have a discretion as to whether to require evidence to be given on oath or to receive unsworn evidence there is no sanction provided for the making of false statements in unsworn evidence. The furthest that any legislation seems to go is to make it an offence deliberately to alter, suppress, conceal or destroy any book or other document which is required in any inquiry under the Local Government Act 1972.<sup>74</sup>

52. The oath is normally dispensed with when it is felt that the proceedings will be more satisfactorily conducted in an informal atmosphere. It is relevant to note that the Report of the Franks Committee on *Administrative Tribunals and Enquiries*<sup>75</sup> attached "importance to the preservation of informality of atmosphere before many tribunals". They thought that this would be destroyed if the oath were made obligatory, and they favoured the

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<sup>73</sup> *R. v. Frost and Hale* (1964) 48 Cr. App. R.284. This is not evidence in the full sense as it is not to be taken into account against a co-defendant, by analogy from *R. v. Gunewardene* (1951) 35 Cr. App. R.80, 91. [Thus when a co-defendant makes such a statement against the other, the latter cannot call evidence in rebuttal: *R. v. George* [1979] Crim. L.R. 172].

<sup>74</sup> Sect. 250(3). The maximum penalty on summary conviction is a fine of £100, or six months' imprisonment, or both.

<sup>75</sup> (1957) Cmnd. 218, para. 91.

retention of the discretionary power. We agree with this approach. Nor do we think it would be satisfactory to create a separate offence of giving false evidence where the oath is not administered. If there were such an offence it would be necessary to warn the witness of the consequence of his giving false evidence, and that, of itself, would destroy the informality of the occasion. A number of those we consulted stressed how the decisions of many tribunals can seriously affect the lives and property of those who appear before them; they suggested for that reason that there was a case for providing a criminal sanction against the giving of false evidence before tribunals even where the oath was not required. We do not agree. The tribunal which has decided to accept unsworn evidence will have done so because it feels that that procedure will facilitate its work. To provide a penalty, of which the witnesses will have to be warned, will nullify that decision. In a proper case, a tribunal which has that power can always require the evidence of a particular witness to be given on oath if it considers this necessary to arrive at a proper decision.”

2.10 This conclusion evoked some dissent from those who commented upon this Working Paper. JUSTICE, for example, suggested that judicial proceedings should include “a proceeding before an administrative tribunal” whether or not there was power to administer the oath. The Association of Chief Police Officers for England and Wales thought that too much emphasis had been given to the factor of informality, which had “no real foundation in fact”; and in the view of the Society of Public Teachers of Law, this was a problem which could in any event be overcome by cautioning witnesses of the possible penalty if they failed to tell the truth. The Senate of the Inns of Court and the Bar also considered that false evidence should be penalised whether on oath or not and that this should apply to evidence given before all tribunals in respect of which prerogative orders would issue.

### ***(b) The present law***

2.11 Before reconsidering what should be the ambit of judicial proceedings for the purposes of perjury, we think it important to examine in some detail what is comprehended by the present law, a matter which we think has hitherto not been analysed with the attention it deserves, either by ourselves or elsewhere.

#### **(i) The Evidence Act 1851, section 16**

2.12 As we have noted, under section 1(2) of the Perjury Act 1911 (the 1911 Act) “judicial proceedings” includes “a proceeding before any court, tribunal or person having by law power to hear, receive and examine evidence on oath”. The immediate issue raised by this definition is which “courts, tribunals or persons” have this power. No doubt exists as to the powers of any of the courts to administer the oath, such powers now being derived from specific statutory provisions.<sup>15</sup> Again, many tribunals have power to administer the oath by or under the statutes creating them; we look at these powers in more detail below.<sup>16</sup>

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<sup>15</sup> See n. 21, below.

<sup>16</sup> See para. 2.17, below.



But for an all-embracing definition of bodies with power to administer the oath, it is necessary to refer to section 16 of the Evidence Act 1851 (the 1851 Act). This provides that—

“Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or consent of parties authority to hear, receive and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.”

This section, although presenting difficulties in interpretation, is quite general in terms. It has, however, remained little-known and almost free of authority. As it is crucial to an understanding of the scope of the present law of perjury, it needs examination in some detail.

### *Origin and purpose of section 16*

2.13 The Parliamentary debates on the Evidence Act 1851 do not explain the reasons for the enactment of section 16.<sup>17</sup> It is noteworthy, however, that section 13 of the Statutory Declarations Act 1835 forbade “any justice of the peace or other person” to administer an oath, affidavit or solemn affirmation except where statutes then in force gave them jurisdiction over any matter. This did not apply to oaths etc. before justices concerning matters touching the preservation of the peace or the prosecution, trial and punishment of offences, nor to the proceedings of either House of Parliament or their committees. Nor were the powers of judges and justices to administer the oath in judicial proceedings affected.<sup>18</sup> But the limitation of the oath-administering power to matters then regulated by statute undoubtedly left gaps in the law, as was illustrated by *R. v. Hallett*;<sup>19</sup> here it was held that perjury could not be committed before an arbitrator, since he had no power to administer the oath. Clearly referring to the consequences of sections 7 and 13 of the Statutory Declarations Act 1835, Lord Campbell C. J. said<sup>20</sup> that at the relevant time “no one had authority to administer an oath, unless it were given to him by express statute, or he were sitting judicially, according to the course of the common law”. Section 16 of the 1851 Act rectified this lacuna, but also went very much wider.

### *Scope of the oath-administering powers*

2.14 Those empowered by section 16 to administer the oath are “every court, judge, justice, officer, commissioner, arbitrator, or other person” who “by law or consent of parties” have authority to hear, receive and examine evidence. The terms could hardly be more widely drawn. In many instances the provision has been overtaken by more modern statutes. Thus the powers of courts in this respect are now conferred by later statutes<sup>21</sup> as are those of arbitrators.<sup>22</sup> There is no clear indication of what is meant by “officer”; taken literally it may mean anyone who holds an office, although it has been understood to refer to an officer

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<sup>17</sup> It was added to the Bill at a late stage.

<sup>18</sup> See s. 7.

<sup>19</sup> (1851) 2 Den. 237; 169 E.R. 488.

<sup>20</sup> *Ibid.*, p. 239.

<sup>21</sup> See Supreme Court of Judicature (Consolidation) Act 1925, ss. 18(3), 26(2) (b) and 103 (High Court and Court of Appeal); Courts Act 1971, s. 4(8) (Crown Court); County Court Rules S.R. & O. 1936 No. 626, Order 20(2); Magistrates' Courts Act 1952, s. 78; Courts-Martial (Appeals) Act 1968, s. 49 and Courts-Martial Appeal Rules 1968, S.I. 1968 No. 1071, r. 14(6); Army Act 1955, s. 93, Air Force Act 1955, s. 93, Naval Discipline Act 1957, s. 60; Tribunals of Inquiry (Evidence) Act 1921.

<sup>22</sup> See Arbitration Act 1950, s. 12.

of the court. Moreover, the inclusion of the omnibus “other person” makes it clear that anyone who by law or consent of parties has the power to hear, receive and examine evidence may administer the oath. Thus all tribunals having this power may administer the oath, whether they are statutory<sup>23</sup> or non-statutory, or merely of domestic character. There is therefore little doubt that most, if not all, statutory tribunals and inquiries, whether or not their parent legislation gives specific powers in this respect,<sup>24</sup> may administer the oath and consequently that their proceedings are judicial proceedings for the purposes of perjury. Tribunals whose powers to hear, receive and examine evidence derive from the common law,<sup>25</sup> from prerogative powers,<sup>26</sup> or from Royal charter are in a similar position. The position would appear to be the same even in the case of disciplinary committees of private clubs and the like, provided their rule-books give power to hear, receive and examine evidence. This proposition, however, depends also on the interpretation given to the words “legally called before them”, which require more detailed consideration.

#### *Witnesses to whom the oath-administering power applies*

2.15 Does “legally called before them” mean merely that a witness must be competent to give evidence before a body, that is, that his evidence is properly receivable by it, or does it mean that a witness must be not only competent but also compellable in the sense that disobedience to a summons to give evidence or produce documents renders such a witness liable to penalties? Such authority as there is supports the first interpretation,<sup>27</sup> but even if the second is to be preferred, all “inferior tribunals” have power, either in their own right or by the aid of the Queen’s Bench Division to compel attendance of witnesses (save where statute excludes such aid in relation to a particular tribunal),<sup>28</sup> and then by virtue of

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<sup>23</sup> See Wade, *Administrative Law* (4th ed., 1977) p. 767 and *Halsbury’s Laws of England* (4th ed., 1976) Vol. 11, p. 550 and Vol. 17, pp. 187 and 221.

<sup>24</sup> See further para. 2.17, below.

<sup>25</sup> *E.g.* Disciplinary Tribunals of the Senate of the Inns of Court and the Bar, whose powers originate in the common law: *Re S (a barrister)* [1970] 1 Q.B. 160. These tribunals have since 1975 heard all oral evidence on oath and rely for their power to do so on the words “by law” in s. 16 of the 1851 Act.

<sup>26</sup> *E.g.* Royal Commissions.

<sup>27</sup> In *GMC v. Spackman* [1943] A.C. 627, a case turning on the Medical Act 1859, a medical practitioner ordered to be struck off the register on grounds of infamous conduct sought to call evidence to refute a finding in a divorce suit that he had committed adultery. The GMC declined to hear the evidence, but the House of Lords held they were bound to hear it. While the judgments at first instance, and in the Court of Appeal ([1942] 2 K.B. 261), and all save one of the speeches in the House of Lords maintained that the GMC had no power either to compel attendance of witness or to take evidence on oath, Lord Atkin said (p. 638) “they must examine witnesses *if tendered* . . . Further it appears to me very doubtful whether it is true to say that ‘they have no power to administer an oath’. This proposition . . . appears to ignore the provisions of Lord Brougham’s Evidence Act 1851” (emphasis added). At that time the GMC had no power to compel attendance of witnesses, although its Professional Conduct Committee now has this power: see Medical Act 1978, Sch. 4, para. 2 and S.I. 1970 No. 596, Appendix, Rule 47(6). See also Wade, *Administrative Law* (4th ed., 1977) p. 767 and *Halsbury’s Laws of England* (4th ed., 1976) Vol. 11, p. 550 and Vol. 17, pp. 187 and 221.

<sup>28</sup> “When the powers of an inferior tribunal as to obtaining evidence are incomplete, the Queen’s Bench has always from time immemorial had power to grant its aid to those tribunals by itself issuing subpoenas” (*Soul v. Inland Revenue Commissioners* [1963] 1 W.L.R. 112, 113 *per* Lord Denning M.R.); but this is not the case where statute has already provided a specific remedy in the event of failure of witnesses to attend before or produce documents to a particular tribunal (*R. v. Hurle Hobbs. Ex parte Simmons* [1945] 1 K.B. 165). See generally *Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals* (1960) Cmnd. 1033.

section 16 to administer the oath. Thus, whatever view is taken of section 16 of the Evidence Act 1851, almost all tribunals have by virtue of that section power to administer the oath. And as we have indicated, if the "competent" interpretation is to be preferred, many non-statutory domestic bodies which by consent of parties are authorised to hear, receive and examine evidence also have that power. On this view, proceedings before all these tribunals, statutory or not, are judicial proceedings for the purposes of the Perjury Act 1911.

### *Conclusion*

2.16 We have pointed out that limited attention has hitherto been paid to section 16 of the Evidence Act 1851. It seems to us beyond doubt that, notwithstanding the difficulties of interpretation which the section presents, its effect when read with section 1(2) of the Perjury Act 1911 is to make the penalties for perjury available in respect of the proceedings of virtually all statutory tribunals and many non-statutory bodies. We believe that the very wide scope of judicial proceedings for the purposes of perjury has not generally been recognised. The fact that it is so wide, however, is a factor which we must take into consideration in deciding upon the future scope of the law of perjury.

#### (ii) Express statutory powers of tribunals

2.17 In more recent times, despite the existence of section 16 of the 1851 Act, express provision has frequently been made in legislation establishing tribunals conferring on them a power to administer the oath. Why these provisions were thought necessary it is not always possible to discern. In some instances it may have been because the relevant legislation applied also in Scotland; the 1851 Act does not apply there and in the law of Scotland there is, so far as we know, no general provision corresponding to section 16. Specific provision for oath-administering powers were therefore necessary in these instances. But we suspect that in some cases the existence of section 16 was overlooked; certainly there are many instances where, whatever answer is given to the interpretative problems raised by that section, its terms render superfluous the express provisions made for particular tribunals.

2.18 It is beyond the scope of this Report to undertake a review of the various statutory powers conferred on the fifty or more different types of tribunals now in existence.<sup>29</sup> Nevertheless, a description of how these powers operate in the case of a few representative bodies, whose activities substantially affect the lives of a large number of people, will focus attention on the problems raised by the suggestion of some of our commentators to the effect that lying to tribunals should be subject to penalty whenever it occurs. The tribunals which we have specifically taken into consideration for this purpose are those concerned with tax appeals, social security questions and planning appeals, as well as industrial tribunals and tribunals under the Rent Act 1977.

### *Commissioners of Inland Revenue*

2.19 Under section 52 of the Taxes Management Act 1970 the Commissioners of Inland Revenue may summon any person other than the appellant to give

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<sup>29</sup> There are over two thousand tribunals of more than fifty different types: see de Smith, *Constitutional and Administrative Law* (3rd. ed., 1977), p. 530 and generally, Wraith and Hutchesson, *Administrative Tribunals* (1973) pp. 145-147.

evidence, and a witness may be examined on oath. It is well settled that a false answer given on oath before the Commissioners constitutes perjury.<sup>30</sup> But by contrast with court proceedings, not all witnesses are examined on oath: it is our understanding that in the interests of informality the oath is frequently dispensed with, and is usually administered only when there is reason to believe that a witness is telling lies, or is likely to do so. Administration of the oath therefore brings home to the witness the particular importance of telling the truth and makes him aware of the consequences of failure to do so.

### *Town and country planning and industrial tribunals*

2.20 Specific statutory power to administer the oath is also provided in the case of local inquiries held under section 282 and under other specific provisions of the Town and County Planning Act 1971. By virtue of section 250 of the Local Government Act 1972 such inquiries have power to summon persons to give evidence, to take evidence on oath and to administer the oath or affirmation; and this power extends by virtue of that section to all inquiries held under enactments relating to the functions of a local authority, thus applying to inquiries held under some fifty such Acts. Local inquiries under the Town and Country Planning Act itself deal with a variety of appeals, and the practice as regards administration of the oath differs. For example, in those which are held by way of appeal against a refusal to grant planning permission,<sup>31</sup> it is not usual for a witness to be required to take the oath. But on an appeal against an enforcement notice requiring a breach of planning control to be remedied,<sup>32</sup> the oath is always administered both because particular importance is attached to the answers given and because the witness needs to be made aware of that importance. In the case of industrial tribunals, although practices may differ, we understand that the oath is administered to the majority of those giving evidence. Here the statute gives power to make regulations governing procedure which may authorise the administration of the oath to witnesses, and this power has been exercised.<sup>33</sup>

### *Tribunals etc. under the Social Security Act 1975*

2.21 The position of tribunals under the Social Security Act 1975 is more complex. Inquiries on matters specified in section 93 of that Act are conducted by a person appointed by the Secretary of State, while appeals on claims and the like are conducted by insurance officers, local appeal tribunals and National Insurance Commissioners. The Secretary of State's nominee is by section 115(4) given power to administer the oath, a power confirmed by procedure regulations made under section 115(1); but although this sub section enables these regulations to make similar provision in regard to the other bodies, this power has not in fact been exercised.<sup>34</sup> There is therefore no specific provision giving a power to local tribunals or National Insurance Commissioners to administer the oath and the power can be derived only from section 16 of the Evidence Act 1851. In

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<sup>30</sup> *R. v. Hood-Barrs* [1943] 1 K.B. 455.

<sup>31</sup> See s. 36 and Sch. 9., para. 5.

<sup>32</sup> See s. 88 and Sch. 9., para 5.

<sup>33</sup> See Employment Protection (Consolidation) Act 1978 Sch. 9. paras 1(1) and 1(2) (d) and the Industrial Tribunals (Labour Relations) Regulations 1974, S.I. 1974 No. 1386, Reg. 3 and Sch., Rule 7.

<sup>34</sup> See Social Security (Determination of Claims and Questions) Regulations 1975, S.I. 1975 No. 558, regs. 6(3), 11 and 13.

practice, the oath is not administered by them: "the strict rules as to admissibility of evidence do not apply . . . and signed statements and even hearsay evidence of witnesses who do not attend are frequently acted on."<sup>35</sup>

### *Tribunals under the Rent Act 1977*

2.22 Rent Tribunals under Part V of the Rent Act 1977 have no specific statutory powers to administer the oath: the regulations<sup>36</sup> which prescribe the procedure of these tribunals make no reference to such a power, and procedure at a hearing is simply "such as the Tribunal may determine."<sup>37</sup> Authority suggests that the tribunals have no power to administer the oath,<sup>38</sup> and indeed in practice they act "on all kinds of evidence which no court of law would look at for a minute."<sup>39</sup> This is no doubt the position as it is widely believed to be at present, but as we have pointed out it is almost certain that a power to administer the oath does exist by virtue of section 16 of the Evidence Act 1851 since parties may appear before them in person or by a legal representative, and it is inherent in their functions to "hear, receive and examine evidence" when this is necessary for the purpose of reaching their decisions.<sup>40</sup> The same considerations apply to rent assessment committees which hear appeals from the determination of "fair rents" by rent officers under Part IV of the Rent Act. Procedure is "such as the committee may determine", there is no specific provision giving power to administer the oath,<sup>41</sup> and in practice the committees receive a wide range of evidence which would not be admissible in court.<sup>42</sup> But again, in exercising their functions it seems clear that the committees must frequently "hear, receive and examine evidence" and therefore have power to administer the oath by virtue of section 16.

### (iii) Other criminal offences

2.23 The presence of the oath-administering power is important as signifying the availability of perjury as a criminal sanction in the event of false evidence being given to tribunals whenever that power is exercised. But it is also important to note that even in relation to false evidence in court proceedings perjury is a weapon of last resort, one which, as the statistics indicate,<sup>43</sup> is used infrequently.

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<sup>35</sup> Micklethwait, *The National Insurance Commissioners* (The Hamlyn Lectures, 28th series, 1976) p. 59. It has been suggested that specific provision had to be made for the oath-administering powers of the person appointed under the Social Security Act 1975, s. 93 because, unlike the local appeal tribunals and National Insurance Commissioners, he did not fall within the terms of s. 16 of the Evidence Act 1851. But like these bodies he is a person who has by law authority to hear, receive and examine evidence; and on the proper interpretation of s. 16 (see para. 2.15. above), he would therefore have by virtue of that section power to administer the oath.

<sup>36</sup> The Furnished Houses (Rent Control) Regulations 1946, S.R. & O. 1946 No. 781, which have effect as the relevant regulations under s. 84 of the Rent Act 1977 by virtue of s. 155 (3) and Sch. 24, para. 1.

<sup>37</sup> *Ibid.*, reg. 8.

<sup>38</sup> *Ex parte Zerek* [1951] 2 K.B. 1, 7 per Lord Goddard C.J.; and see *Ex parte Keats* [1951] 2 K.B. 15n, 15 and 17. (1950) 114 J.P. News 288, and Megarry, *The Rent Acts*, (10th ed., 1967) p. 514.

<sup>39</sup> *R v. London etc. Rent Tribunal, Ex parte Honig* [1951] 1 K.B. 641, 646 per Lord Goddard C.J.

<sup>40</sup> On this aspect, see *Ex parte Zerek, ibid.*, at p. 7.

<sup>41</sup> See the Rent Assessment Committees (England and Wales) Regulations 1971, S.I. 1971 No. 1065, reg. 4.

<sup>42</sup> See Samuels, "Rent Assessment in Action" (1967) 117 N.L.J. 121.

<sup>43</sup> See paras. 2.4–2.5. above.

Before the stage of giving evidence to tribunals is reached, other criminal offences may be committed, sometimes particular offences provided in the Acts establishing tribunals and sometimes offences which are part of the general law. Taking only the examples given in the foregoing paragraphs, there are several provisions in respect of false returns to the Revenue appropriate for use before an appeal to the Commissioners is heard. They include the provisions in sections 95–99 of the Taxes Management Act 1970 imposing monetary penalties for incorrect returns or accounts for income tax, capital gains tax and corporation tax, the offence under section 5(b) of the Perjury Act 1911 (false statements in documents authorised or required to be made by statute),<sup>44</sup> and the common law offence of cheating the public revenue.<sup>45</sup> In relation to planning, there are detailed provisions in sections 26 and 27 of the Town and Country Planning Act 1971 relating to notices of application for planning permission to be published locally and notification of applications for planning permission to be given to owners of the land, and applications to local authorities for planning permission must be accompanied by certificates of compliance with the provisions of these sections. False statements in these certificates are subject to a fine on summary conviction. Further, it is an offence deliberately to alter, suppress, conceal or destroy any book or other document required in any inquiry under the Local Government Act 1972. This provision appears in section 250 of that Act, along with the provisions as to the oath-administering power and sanctions to compel the attendance of witnesses. It is in our view significant that this section enables penalties to be imposed for tampering with documents for inquiries and for false evidence given before them on oath, but is silent as regards false evidential statements made without the oath. Special provision is also to be found in the Social Security Act 1975. Under section 146(3)(c) a false statement made, or a document provided, which is false in a material particular, in either case to obtain a benefit or other payment, is penalised by summary fine or imprisonment. As mentioned above, it is not the practice to administer the oath before local appeal tribunals or National Insurance Commissioners; but this offence ensures that the making of false documents and statements is subject to penalty before they reach these tribunals and at the time of the hearing of the case. In the case of industrial tribunals and tribunals under the Rent Act there are no special offences of this character. But it is not uncommon for witnesses to be sworn in the former, while in the latter, where it seems to be accepted—in our view incorrectly<sup>46</sup>—that there is no power to administer the oath, it must nevertheless be borne in mind that any false statement made with the intention of obtaining property or evading a liability may well amount to an attempt to contravene either section 15 of the Theft Act 1968 or section 2 of the Theft Act 1978.

#### (iv) Conclusions

2.24 Section 16 of the Evidence Act 1851 gives a general power to tribunals to administer the oath. The foregoing survey shows that, of the many tribunals possessing in addition a power by or under specific statutory provisions to administer the oath, some habitually put their witnesses on oath, but many more

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<sup>44</sup> See para. 2.25, below.

<sup>45</sup> See *R. v. Hudson* [1956] 2 Q.B. 252. This offence is under review in our work on the law of fraud and recommendations regarding it will be made in our forthcoming Report.

<sup>46</sup> See para. 2.22, above.

do not. Special criminal offences provided in some of the more important statutes under which tribunals have been created also ensure that false statements or omissions in documents may be subject to prosecution before the stage of a tribunal hearing is reached. Furthermore, quite apart from perjury, the general criminal law also penalises at least some of the false statements made before tribunals, whether or not the statements are made on oath.

2.25 This discussion would not be complete without a further reference to our work in progress on the law of fraud. We have already mentioned that we propose to deal with such of the offences in the Perjury Act 1911 as penalise the making of false statements outside judicial proceedings in our Report on Fraud, rather than in the present Report, and one of the offences which we shall have to consider in that context is that contained in section 5(b) and (c) of the 1911 Act, which penalises false statements in documents authorised or required to be made by statute and oral statements required to be made by, under or in pursuance of statute. It will be necessary to examine whether this offence should in substance be retained and, if so, whether in a wider or a narrower form.

**(c) Possible liability for false evidence not given on oath**

2.26 Before considering whether criminal liability should be extended to false statements not given on oath, we must point out that, whatever the arguments for and against the oath in its present form,<sup>47</sup> we have in this Report assumed that the oath or the alternative of affirmation will be retained for the present. We did not canvass the possibility of abolition in any of our Working Papers and few of those commenting gave us their views on this issue. If the oath did not exist, or if it were open to us to abolish it in its entirety, we would be in a position to recommend the creation of an entirely new offence of giving false evidence, which would require the administration of a warning of the penalties involved in doing so. But we do not think this option is open to us. We are aware that abolition of the oath has been strongly urged in recent years, but we consider that this is an issue of general policy going beyond the criminal law, and that the significance attaching to the oath in judicial proceedings today requires assessment of social as well as legal considerations.<sup>48</sup> Furthermore, it should be noted that when Parliament had the opportunity recently to review policy, it decided against complete abolition and in favour of the option of making affirmation freely available without the necessity of giving a reason.<sup>49</sup> We have little doubt that in the circumstances of today the practical importance of both the affirmation and the oath derives principally from the fact that they serve as a means of warning a witness that his undertaking to tell the truth carries with it a liability to criminal penalties if he does not. In our view a warning to this effect is indeed an essential precondition for criminal liability for giving false evidence,<sup>50</sup> and if it were to be decided at a future date that the oath should be abolished, we would see no major obstacle to substituting such a warning for the oath in the law of perjury.

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<sup>47</sup> These arguments are summarised in the Eleventh Report of the Criminal Law Revision Committee, *Evidence (General)*, (1972) Cmnd. 4991, paras. 280–281.

<sup>48</sup> *Ibid.*, para. 279.

<sup>49</sup> Since the Administration of Justice Act 1977, s. 8(1), now the Oaths Act 1978, s. 5(1), “any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath”.

<sup>50</sup> See further para. 2.28, below.

2.27 In the present reconsideration of whether the ambit of the criminal law should be extended to all false statements made to tribunals, we must state at the outset that in our view, notwithstanding the sustained and powerful arguments of some of our commentators, the case remains for leaving the law substantially unchanged, as set out in Working Paper No. 62 and quoted above.<sup>51</sup> An extension of the law to penalise all such false statements might be predicated on one of two bases. Either the present ambit of perjury could be widened, or a new offence could be created, penalising all false evidential statements not falling within the terms of perjury itself. As regards the first possibility, perjury has always been linked both by name and by practice with the administration of the oath, and since it is and will continue to be the most significant of all offences concerned with the administration of justice, we think that link must be preserved. In theory it would be possible to widen the scope of perjury described in the foregoing paragraphs by providing generally that all tribunals, like the courts, should have, not merely the power, but also the obligation to administer the oath to all witnesses, a course which would ensure that all false evidence was subject to penalties. But we have seen how widely tribunal practice varies in regard to administration of the oath.<sup>52</sup> Inevitably, this first course would, we think, lead to changes in tribunal procedure in the direction of greater formality. We believe that many tribunals which have evolved what they consider to be the methods best adapted to their purposes would not welcome such changes. We would be more inclined to recommend this course if there was evidence that tribunals as a rule make use of their power to administer the oath because witnesses would otherwise take advantage of the informality of their procedure to lie with impunity. Our examination of the practice of selected tribunals affords no such evidence.

2.28 We also see great disadvantages in adopting the alternative course of subjecting to penalty all false statements to tribunals not on oath. What would be the constituent elements of such an offence? It could, we think, only subject to penalty false evidence as to matters of fact. Even if it were to be a less serious offence than perjury, its safeguards ought not in our view to be less than those which apply to that offence; it would therefore require the elements of materiality and corroboration.<sup>53</sup> In other words, the offence would resemble in many ways perjury itself, even if its penalties were less. But it has to be borne in mind that, when the oath is absent, a tribunal's procedure is frequently of so informal a character that matters of submission, opinion and fact are inextricably mixed. In order that this lesser perjury offence could operate, there would have to be a particular and clearly delineated stage in the proceedings at which there would be no doubt that evidence of fact was being taken, marked by a warning to the effect that false evidence at that stage would be subject to penalties. In the absence of such demarcation, the lesser perjury offence would give rise to what in our view would be serious practical difficulties, since it would seldom be certain that any statement which was alleged to be false was given as, and received as, evidence. The requirements of this offence would therefore lead to changes of procedure in the direction of greater formality, and would also, we believe, necessitate more

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<sup>51</sup> See para. 2.9, above.

<sup>52</sup> See paras. 2.17–2.22, above.

<sup>53</sup> See paras. 2.50 and 2.62, below. It is of course possible that false evidence not on oath could in theory be penalised by the common law offence of perverting the course of justice in which case these elements would not be required. But the offence has never been used for this purpose, and we are in any event recommending its abolition; see further paras. 3.3–3.4 and 3.132, below.



elaborate arrangements than hitherto for recording evidence of fact. We are satisfied that there are many tribunals which would not welcome this development and indeed would see it as an undesirable step. Furthermore, it must be noted that many tribunals at present receive and act upon “evidence” in the form of letters and other informal documents. But if it were desired to attach penalties to all false evidence given to tribunals, irrespective of whether the oath had been administered, the changes of procedure to which we have referred would almost certainly entail tribunals requiring the attendance of all witnesses to give oral evidence. Thus it seems to us that the position which now obtains in the case of, for example, tribunals under the Rent Act 1977 or social security appeals, whereby the tribunals act “on all kinds of evidence which no court of law would look at for a minute”,<sup>54</sup> would be unlikely to survive the extension of penal sanctions of the kind we have analysed.

2.29 We conclude, then, that a blanket imposition of penalties upon false statements made to tribunals, regardless of whether the oath has been administered, is both undesirable in principle and would be productive of serious difficulties in practice. The practical difficulties would naturally have to be faced if there was evidence of widespread abuse of the informal procedures adopted by tribunals in which individuals were taking the opportunity to lie with impunity. Nothing we have heard suggests that such abuse is in fact widespread; but we are prepared to accept the contention of some of our commentators that instances do occur where lies told to tribunals which deserve to be penalised have gone unpunished. If this is the case, however, the appropriate remedy lies readily at hand: a change of practice whereby the power to administer the oath is more frequently exercised would enable abuses to be checked by the threat of the sanction of perjury. That sanction would add to the armoury of offences which we have noted are already available in many instances to penalise false statements in documents before the stage of tribunal hearings is reached.<sup>55</sup> The exercise of the power to administer the oath whenever this may be considered to be necessary would however in no way preclude the maintenance of informality of procedure at all times when this is not considered to be necessary.

#### ***(d) Definition of judicial proceedings***

2.30 In the foregoing discussion we have established the very wide scope of application of the present law of perjury by virtue of section 16 of the Evidence Act 1851, and have indicated why in our view penalties for giving false evidence should continue to depend upon the prior administration of the oath or affirmation. The outstanding issue we must now consider is the definition of “judicial proceedings” for the purposes of a reformed law of perjury; in effect this means determining which bodies before whom evidence is given should have the power to administer the oath.

2.31 We do not think that there can be any dispute that judicial proceedings should at least include all bodies and persons empowered to hear evidence who have by or under statute the authority to administer the oath to witnesses appearing before them. As we have noted,<sup>56</sup> the powers of the courts and of

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<sup>54</sup> See paras. 2.21–2.22, above.

<sup>55</sup> See para. 2.23, above.

<sup>56</sup> See para. 2.14, above.

arbitrators under the Arbitration Act 1950 are now conferred by specific statutory provisions; so too are those of many other bodies,<sup>57</sup> and we have outlined the specific powers in this respect given to some tribunals by or under the legislation establishing them. There is, indeed, a substantial case for limiting judicial proceedings to proceedings before bodies having specific statutory powers to administer the oath. In other contexts we have stressed the need to make the scope of the criminal law as clear as possible, an aim which is not only in our view desirable in itself but important in the context of codifying the law; and a statutory limitation of this kind here would clarify the ambit of the law of perjury. Furthermore, where a statutory tribunal has no specific power by or under the legislation establishing it to administer the oath, such a limitation would provide an opportunity to consider in individual cases whether instances of abuse of procedure were so serious as to warrant some remedy additional to the range of criminal offences which might be available.<sup>58</sup> If this were the case, the decision might then be taken to confer the power to administer the oath on individual tribunals by amending the relevant legislation. By this means perjury would be made available to tribunals in all cases where there was a demonstrable need while leaving untouched informality of procedure where this was considered to be of paramount importance.

2.32 We must, however, recognise that section 16 of the Evidence Act 1851<sup>59</sup> not only provides a general power for tribunals to administer the oath, but enables any person to administer the oath, who “by law or by consent of parties” has power to examine evidence; that is, in addition to bodies with powers derived from statute, anyone who has power at common law or by private agreement to examine evidence. We have seen<sup>60</sup> how by this means section 16 spreads the definition of judicial proceedings under the Perjury Act 1911 to the proceedings of a variety of bodies such as Royal Commissions and disciplinary tribunals of certain professions whose powers derive from the common law or Royal charter. Such bodies, if they wish to take evidence on oath,<sup>61</sup> are obliged to rely on section 16 for their power to administer the oath. Thus a limitation upon the definition of judicial proceedings such as that discussed above, namely, proceedings before bodies having specific statutory powers to administer the oath, would exclude these miscellaneous bodies and tribunals. We would not consider it appropriate in a report concerned with offences against the administration of justice to recommend that non-statutory bodies should be deprived of the power to administer the oath if that power is one which is exercised. Nor do we think it feasible either to endow all such bodies with new, statutory powers to administer the oath or specifically to include them in a definition of judicial proceedings

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<sup>57</sup> *E.g.* House of Lords’ Committees (Parliamentary Witnesses Act 1858, s. 2) and House of Commons’ Committees (Parliamentary Witnesses Oaths Act 1871, s.1); these provisions govern select committees of either House. Joint committees of both Houses have the same power to administer an oath to witnesses examined before them as select committees (*Erskine May, Parliamentary Practice* (19th ed., 1976) p. 680, citing proceedings of the Joint Committee on Railway, etc. (Transfer and Amalgamation) Bills 1873).

<sup>58</sup> See para. 2.23, above.

<sup>59</sup> Para. 2.12, above.

<sup>60</sup> See para. 2.14, above.

<sup>61</sup> We understand that all oral evidence given before Disciplinary Tribunals of the Senate of the Inns of Court and the Bar has since 1975 been given on oath, but our consultations suggest that the oath is never administered by disciplinary tribunals of professions governed solely by charter; see further para. 2.34, below.

otherwise limited to bodies having such statutory powers. We feel bound to conclude, therefore, that the substance of section 16 of the 1851 Act must be retained for the purpose of defining which bodies have power to administer the oath. There are in any event advantages in such retention. As it is broad enough to include all statutory tribunals, all such tribunals will be empowered to administer the oath, and the penalties for perjury will be available in respect of false evidence before them if given on oath. As we have pointed out, this is in our view the existing law, although the oath is not in practice administered in many instances; and its reaffirmation would, it seems to us, go far to answer those who criticise the alleged inability of the law to penalise those who tell falsehoods to tribunals. The remedy would in all cases lie with the tribunals concerned who could, as they may in our view now do, administer the oath in the appropriate circumstances—for example, where the evidence to be given is regarded as of crucial importance, where evidence already given seems unconvincing, or where there is a conflict of evidence. We are encouraged in our view that this is the right course to adopt after consultation with the Council on Tribunals, whose duty it is under the Tribunals and Inquiries Act 1971 to keep under its direct supervision the statutory tribunals in question. In the Council's view, there is no practical need to penalise false statements made before tribunals in evidence otherwise than on oath, but the power to administer the oath which most, if not all, tribunals possess by virtue either of specific procedural legislation or section 16 of the 1851 Act is one which should be retained.

2.33 We have, however, pointed out that section 16 is in a number of ways difficult to interpret, and that its existence and its possible application to statutory tribunals in general have not generally been adverted to.<sup>62</sup> To avoid uncertainty in ascertaining the scope of judicial proceedings for the future, we think that the section should be repealed and recast in modern terms. We discuss the way in which we consider this should be done in the following paragraphs.

2.34 The oath-administering powers under section 16 are possessed by "every court, judge, justice, officer, commissioner, arbitrator, or other person" who "by law or consent of parties" has authority to hear, receive and examine evidence. The most important change we recommend is omission of the words "or consent of parties". We have pointed out that this phrase is wide enough to permit the oath to be administered to witnesses before domestic tribunals, for example, to a member of a club, or even a non-member, appearing before its committee in its consideration of disciplinary measures to be taken for the member's breach of club rules: by consent of the members such a committee may "hear, receive and examine evidence". Such proceedings must clearly be taken outside the ambit of judicial proceedings for the purposes of perjury: it would in our view be unacceptable for it to be possible to impose criminal penalties merely for making false statements to domestic committees of this kind, whose powers derive solely from the consent of their members to the exercise of particular functions. We see no other means of excluding this possibility save by omission of the reference to "consent of parties". We are aware that in so recommending, there is a possibility that certain professional institutions, or at any rate their disciplinary bodies, may thereby be deprived of the opportunity of administering the oath to those of their members who may be subject to disciplinary proceedings before them. Most

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<sup>62</sup> See paras. 2.14–2.15 and 2.22, above.

professional bodies are, however, now regulated by statute, and our enquiries suggest that there are not in fact any disciplinary bodies of this kind whose power to administer the oath derives from this particular term in section 16 and which in practice exercise this power.

2.35 Omission of the phrase “consent of parties” leaves power to administer the oath to those who “by law” have authority to hear, receive and examine evidence. “Law” in this context should in our view refer only to the general law, whether it be statute law, common law or the powers of the prerogative. To clarify this point we recommend that for “by law” there be substituted “by virtue of any rule of law.”

2.36 Of the bodies and individuals specified in section 16, we think “Arbitrator” is now superfluous, since specific provision is made elsewhere for them.<sup>63</sup> “Officer” is potentially too wide a term<sup>64</sup> and, although it may have been intended to refer only to an officer of the court, even in that restricted sense we do not think it now serves any purpose.<sup>65</sup> “Commissioner” also seems to us superfluous and unnecessary. And while the omnibus “other person” is sufficiently wide to include any tribunals, it is at the same time potentially too wide.<sup>66</sup> We think it is preferable not to use these words and to substitute specific reference to tribunals. This does, however, raise problems of its own.

2.37 The phrase “tribunal authorised by law to hear, receive and examine evidence” could quite possibly be interpreted to include all statutory tribunals and others without any statutory origin or regulation. But there is no agreed definition of what constitutes a “tribunal”. In this respect, little progress seems to have been made since Fry L. J. stated in 1892 that the term “has not, like the word ‘court’, an ascertainable meaning in English law”.<sup>67</sup> Furthermore, if reference is made to Schedule 1 to the Tribunals and Inquiries Act 1971 (tribunals under the direct supervision of the Council on Tribunals) it will be seen that the tribunals there listed possess a wide variety of titles<sup>68</sup> and include several individuals with functions additional to that of acting as a tribunal.<sup>69</sup> We would regard it as essential that all of these should clearly fall within the proposed provision replacing section 16; in all probability they at present fall within that section by

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<sup>63</sup> See Arbitration Act 1950, s.12 and n.77, below.

<sup>64</sup> Does it include a rent officer or a national insurance officer? There appears to be nothing to preclude this interpretation since they must “hear, receive and examine evidence” in order to discharge their functions.

<sup>65</sup> The oath-administering powers of officers of the Supreme Court and of the county courts are dealt with by other legislation; see Commissioners for Oaths Act 1889, s. 2 and R.S.C. O.32, r. 8 (Officers of the Supreme Court) and County Courts Act 1959, s. 201 (definition of “officer” of the court) and County Court Rules, S.R. & O.1936 No. 626 O.48, r. 5 (powers of county court registrar where authorised to hear and determine proceedings). In court proceedings neither the judge nor justice actually administers the oath; this as a matter of practice is done on their behalf by a court officer who may well not, in terms of s.16 of the 1851 Act, have authority to hear, receive or examine evidence. See also Oaths Act 1978, s. 1(4).

<sup>66</sup> Compare n. 64, above; the individuals there specified might also be regarded as “other persons” for the purpose of s. 16.

<sup>67</sup> *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 446.

<sup>68</sup> E.g. the Air Transport Licensing Board; the Commons Commissioners and assessors; rent assessment committees.

<sup>69</sup> E.g. the comptroller-general of patents, designs and trade marks; the Director-General of Fair Trading.

virtue of the words "other person". Furthermore, as a matter of general principle, we think it is essential for it to be clearly ascertainable in advance whether the proceedings of any particular body are judicial proceedings for the purposes of perjury. The advantages in providing a readily definable criterion in this context in our view outweigh any attempt at devising an all-embracing definition of "tribunal", which in any event we think is impossible in the present state of administrative law. In other words, we favour the drawing of a clearly defined line as to what is a "tribunal", rather than a line which, while arguably more consistent in approach, would provoke disputes as to whether a particular body lies on one side of it or the other.<sup>70</sup>

2.38 We have come to the conclusion that the most satisfactory definition available is one which makes reference to the statutory tribunals under the direct supervision of the Council on Tribunals. As we have noted, these are listed in Schedule 1 to the Tribunals and Inquiries Act 1971. Their number may be added to by Order under section 15(1) of the Act, and additions have also been made to the Schedule by other Acts of Parliament. In substance, then, under the new provision replacing section 16, any such tribunal with authority to hear, receive and examine evidence<sup>71</sup> would be empowered to administer the oath, and its proceedings would therefore constitute judicial proceedings for the purposes of perjury.

2.39 It must be noted that the Tribunals and Inquiries Act 1971 deals separately with "statutory inquiries".<sup>72</sup> At present any person conducting a statutory inquiry in all probability has power to administer the oath by virtue of the term "other person" in section 16 of the 1851 Act. The proposed limitation upon the meaning of "tribunal" in the new provision replacing section 16 makes necessary a separate reference to inquiries.<sup>73</sup> We think it should be made clear that any person conducting an inquiry who is authorised to hear, receive and examine evidence has the power to administer the oath. "Inquiry" should for this purpose be defined as any inquiry or hearing held in pursuance of a duty imposed or a power conferred by any statutory provision.<sup>74</sup>

2.40 It is necessary that the bodies specified in the provision to replace section 16 should be so defined as to include any which at present by law, but not by statute, have power to hear, receive and examine evidence. Specific provision

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<sup>70</sup> See e.g. *Attorney General v. British Broadcasting Corporation* [1978] 2 All E.R. 731 (Div.Ct.), [1979] 3 W.L.R. 312 (C.A.).

<sup>71</sup> This power is inherent in the function of tribunals; in effect, therefore, the new provision would cover all tribunals under the direct supervision of the Council on Tribunals.

<sup>72</sup> By s.19(1) "statutory inquiry" means (a) an inquiry or hearing held or to be held in pursuance of a duty imposed by any statutory provision; or (b) an inquiry or hearing, or an inquiry or hearing of a class designated . . . by an order under subsection (2)". Under subs. (2) an order may designate any inquiry or hearing held or to be held in pursuance of a power conferred by any statutory provision specified or described in the order, or any class of such inquiries or hearings. The Tribunals and Inquiries (Discretionary Inquiries) Order 1975, S.I. 1975 No. 1379 lists over one hundred such inquiries.

<sup>73</sup> See e.g. *Social Security Act 1975*, para. 2.21, above: the "inquiry" under s. 93 falls within the Order noted in n.72, above, and is not a "tribunal" under the Council's direct supervision.

<sup>74</sup> Compare the definition in the Tribunals and Inquiries Act 1971, n.72, above. In so far as concerns inquiries held under a statutory power, we do not think it necessary to link the definition of "inquiry" to those specified in an Order made under s.19(2) of the Act.

for them is in fact needed if, as we recommend, the term “other person” is omitted and tribunals and inquiries do not extend beyond those governed by statute. We think that the only feasible term in the context is “other body of persons”; the replacement section would therefore specify “any other body of persons having by virtue of any rule of law authority to hear, receive and examine evidence”. We believe that so drafted it will be clear that this will cover only the limited number of bodies to which we have already referred.<sup>75</sup>

2.41 We deal finally with the phrase which concludes the present section 16; the oath may be administered to any witness “legally called before” the persons empowered to hear, receive and examine evidence. We have commented on its ambiguity of meaning<sup>76</sup> and in our view it should be made clear that the oath may be administered to any competent witness irrespective of whether the witness may be compelled to attend.

2.42 The recommendations in the foregoing paragraphs will in our view clarify the ambit of the oath-administering power. We have already indicated that perjury is and should continue to be linked with the administration of the oath. Judicial proceedings for the purposes of perjury should therefore continue to be confined to proceedings before any person or body empowered to hear, receive and examine evidence on oath, and we *recommend* accordingly.<sup>77</sup>

### **(e) Summary**

2.43 We *recommend* that section 16 of the Evidence Act 1851 should be replaced; the new provision should state that any witness may be examined on oath before (a) a judge or magistrate (b) a court or tribunal (c) any other body of persons having by virtue of any rule of law authority to hear, receive and examine evidence, and (d) a person holding a statutory inquiry. “Tribunal” should here mean a tribunal subject to the direct supervision of the Council on Tribunals, and “statutory inquiry” should mean any inquiry or hearing held in pursuance of a duty imposed or a power conferred by any statutory provision. Judicial proceedings for the purposes of perjury<sup>78</sup> should continue to be confined to proceedings before any person or body who is empowered to hear, receive and examine evidence on oath. These general provisions will make unnecessary the specific provisions given by or under statute to statutory tribunals and inquiries to administer the oath to witnesses, and we therefore *recommend* their repeal.<sup>79</sup>

## **2. The meaning of evidence**

### **(a) Oral evidence**

2.44 The Perjury Act 1911, section 1(1),<sup>80</sup> refers merely to the wilful making

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<sup>75</sup> See para. 2.14 and notes 25 and 26, above.

<sup>76</sup> See para. 2.15, above.

<sup>77</sup> As is made clear by cl. 2(2) of the Draft Bill in Appendix A, proceedings before arbitrators, officers of the court, coroners and others with express statutory powers will continue to be judicial proceedings for the purposes of perjury since their powers to hear, receive and examine evidence and to administer the oath are specified elsewhere: see paras. 2.31 and 2.36, above.

<sup>78</sup> The meaning of judicial proceedings for the purposes of the other offences recommended in this Report is considered at para. 3.22, below. The definition of judicial proceedings is in cl. 1 of the Draft Bill in Appendix A, the provision replacing the Evidence Act 1851, s.16 in cl. 2(1), and the definition of “tribunal” and “inquiry” in cl. 2(3).

<sup>79</sup> See Appendix A, cl. 36 and Sch. 3.

<sup>80</sup> See para. 2.1, above.

of a “statement”<sup>81</sup> on oath in a judicial proceeding. We propose to clarify the kinds of documentary evidence in which false statements may ground a charge of perjury, and we think it should be made clear as a matter of drafting that perjury is primarily concerned with the making of false statements on oath in oral evidence either in or for the purposes of judicial proceedings. There seems to be no need for further definition of oral evidence.

**(b) Documentary Evidence**

2.45 Certain statements made on oath and recorded or authenticated by a person authorised by law to do so are by section 1(3) of the Act of 1911 treated as having been made in a judicial proceeding,<sup>82</sup> so that charges of perjury may be brought in respect of falsities contained in them. We think the effect of this subsection should be preserved and, indeed, widened. For example, it is not obvious that statements in an affidavit in relation to entries in the books of a bank made admissible in evidence,<sup>83</sup> and relied on as accurate by virtue of their provenance, would fall within section 1(3). In our view, therefore, some alternative and wider phraseology is called for in its replacement.

2.46 We recommend that a statement in any affidavit, statutory declaration or certificate made for the purposes of judicial proceedings, and admissible in those proceedings, should be treated as having been made in those proceedings. A provision so framed would in our view be sufficiently wide to comprehend what is at present included within section 1(3) as well as certain other important categories of document, for example—

- (i) cases where by Rules of Court or by order evidence may be given by affidavit;<sup>84</sup>
- (ii) statements in an affidavit under section 4 of the Bankers’ Books Evidence Act 1879 in relation to entries in the books of a bank;
- (iii) evidence by statutory declaration<sup>85</sup> under section 27(4) of the Theft Act 1968 as to the despatch and receipt of any goods; and
- (iv) evidence by certificate in relation to plans under section 41 of the Criminal Justice Act 1948 and in relation to the identity of a vehicle driver, under section 181 of the Road Traffic Act 1972.

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<sup>81</sup> By this is meant the statement of fact in evidence given in or for the purposes of judicial proceedings.

<sup>82</sup> Sect. 1(3) is set out in para. 2.1, n.1, above.

<sup>83</sup> See Bankers’ Books Evidence Act 1879, s. 4, and para. 2.46(ii), below.

<sup>84</sup> See Cross, *Evidence* (4th ed., 1974), p. 196. It should be noted that certain documentary evidence under the Criminal Evidence Act 1965, s. 1 and the Civil Evidence Act 1968 may in the circumstances provided by those Acts be admissible as evidence of the facts stated in the documents, but the documents are not normally made “for the purpose” of judicial proceedings. Statements intended for admission under the 1968 Act must by s. 5(4) be accompanied by a certificate, and false statements in such certificates are penalised by s. 6(5).

<sup>85</sup> False statements in statutory declarations are penalised at present by the 1911 Act. s. 5(a); replacement of this section is being considered in the context of our examination of the law of Fraud.

### **(c) Recommendations**

2.47 We recommend that perjury should be available in respect of false statements given—

- (i) in oral evidence on oath in or for the purposes of judicial proceedings; and
- (ii) in any affidavit or statutory declaration or in a certificate—
  - (a) made for the purposes of judicial proceedings; and
  - (b) made admissible in those proceedings.<sup>86</sup>

### **3. Competence of the Court**

2.48 Can perjury be committed in a court lacking jurisdiction to hear the case in which the alleged perjury took place? There exists a difference of view as to whether or not the court before whom perjury is alleged to have been committed must be competent to entertain the proceedings. *Archbold*<sup>87</sup> takes the view that the competence of the court is irrelevant, but Smith and Hogan<sup>88</sup> (citing authorities decided under earlier and now repealed legislation) take a different view, although they concede that perjury in the course of proceedings before a court to determine whether it has jurisdiction will constitute perjury. With this latter point we agree. But it seems on the authorities that, if the relevant proceeding does not fall within the definition of a judicial proceeding given in section 1(2) of the 1911 Act, perjury cannot be committed.<sup>89</sup> This is in our view clearly right: if the court is not properly constituted it could not administer the oath and its proceedings would therefore not constitute judicial proceedings. It is also our view that, even if the court's proceedings do constitute "judicial proceedings", the incompetence of the court in question to deal with the matter upon which false evidence is given vitiates the proceedings so fundamentally as to make liability for perjury in such proceedings inappropriate; on appeal such proceedings would be held to be a nullity. Accordingly, whatever view is taken of the existing law, we think that in new legislation it should be a defence to prove that the proceedings in which perjury was alleged to have been committed were a nullity; and we recommend that specific provision be made to this effect.<sup>90</sup>

### **4. The nature of the statement**

2.49 The question of the nature of the statement which can be made the subject of proceedings for perjury has also evoked considerable comment: for example, whether it must be material, whether it must be false, and whether self-contradiction can of itself amount to perjury. These issues are now examined in turn.

#### **(a) Materiality**

2.50 Under section 1(1) of the 1911 Act, to found a prosecution for perjury, the relevant statement must be material and under section 1(6) materiality is a question of law to be determined by the court.

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<sup>86</sup> Appendix A, cl. 3(1).

<sup>87</sup> (40th ed., 1979) para. 3504.

<sup>88</sup> *Criminal Law* (4th ed., 1978), p.713.

<sup>89</sup> *R. v. Shaw* (1911) 6 Cr. App. R. 103 in which licensing justices held a preliminary meeting where there was no power to administer an oath.

<sup>90</sup> Appendix A, cl. 6.



2.51 The element of materiality is one which, in our view, should be retained. It may be argued that a witness should undertake to tell the truth without reservation even as to matters which he himself regards as embarrassing and immaterial; indeed this point of view was strongly pressed by some of our commentators. But in our view this ignores countervailing factors to which we attach greater weight. Material in this context means in essence material to the outcome of proceedings. If as a result of vanity a person understates his or her age in giving evidence, in many instances this would not in itself be material to the administration of justice. Again, if a witness denies in cross-examination as to credit convictions for offences occurring many years before, this may not be sufficient to show that his other evidence on oath ought not to be believed and may therefore be immaterial to the issue on which he is being examined when he makes the denial.<sup>91</sup> The concept of materiality provides a means of excluding statements in these circumstances from the ambit of perjury.

2.52 Another factor to be considered in relation to the view expressed by some of our commentators is the latitude given in criminal cases in particular to defending counsel. No doubt morality dictates that the truth should be told at all times. But sometimes cross-examinations are so conducted as merely to drive a witness to ill-considered and intemperate answers as a means of attack on their credibility, and judges may be justifiably reluctant to intervene too early, not knowing the purpose of the line of questioning. We do not consider that it should be possible to render witnesses liable to perjury for such answers on irrelevant matters, and the element of materiality, in our view, affords protection to witnesses in these circumstances.

2.53 These considerations lead us to the view that the materiality of the false statement should be an essential feature of perjury and that it would not be satisfactory for it to be of relevance only as a factor to be taken into account in the exercise of a prosecution's discretion whether or not to institute proceedings for perjury.<sup>92</sup> Accordingly we *recommend* that materiality be retained as a necessary element of perjury and that, as at present, the issue of what is material should be a question of law to be determined by the court.<sup>93</sup>

#### **(b) Perjury by true statements**

2.54 There is old authority to the effect that it is no defence to a charge of perjury that the relevant statement was true if the accused did not believe it to be

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<sup>91</sup> *R. v. Sweet-Escott* (1971) 55 Cr. App. R.316 (Derbyshire Assizes, Lawton J): in committal proceedings against a woman for blackmailing S-E, he denied in cross-examination as to credit some convictions for offences occurring over twenty years before. On a charge of perjury the jury were directed to acquit S-E on grounds of immateriality: in cross-examination as to credit, the matter must relate to his likely standing after cross-examination with the tribunal hearing his evidence. The cross-examination here would not have affected the magistrates' decision to commit the woman for trial, and it was not material since it offended against the principle mentioned above for deciding whether cross-examination as to credit is material. It seems, however, that proceedings for perjury of this kind would not be affected by the Rehabilitation of Offenders Act 1974: see s.7(2)(a).

<sup>92</sup> In exercising his discretion whether to authorise or instigate proceedings the D.P.P. may instead advise a caution in cases where a prosecution witness had lied merely to protect himself on an issue which is somewhat peripheral: Evidence of the D.P.P. to the Royal Commission on Criminal Procedure, para. 119. See further para. 2.5, above.

<sup>93</sup> Appendix A, cl. 3(2)(a) and 34.

true<sup>94</sup> and, subject to what is said below,<sup>95</sup> there seems to be nothing in the 1911 Act to suggest that, if the other elements of the offence are proved, it is a defence to the charge of perjury under section 1 of the Act that the statement was in fact true.

2.55 In both our Working Papers dealing with perjury we expressed the view that perjury should be confined to the making of a false statement. We took the view that perjury was essentially an offence designed to punish the telling of lies which might mislead a court and so pervert the course of justice, and we doubted whether any purpose was served by making liable to punishment a person who made a true statement even if he believed it to be false. While not a large number commented on this, it was pointed out<sup>96</sup> that what was in issue was the trustworthiness of the witness, and it was in the public interest that he should tell the truth as he saw it at all times.

2.56 We are aware of the force of the arguments favouring what is commonly accepted as the present position, and also of the fact that the matter was apparently settled over three centuries ago. But prosecutions today for making a statement on oath which was true are unknown. Furthermore it is now,<sup>97</sup> and has for long been, a requirement of perjury that there should be corroboration of the actual falsity of any statement alleged to be false, and not merely of the defendant's belief in its falsity. It is true that the wording of section 13 of the 1911 Act leaves open the possibility of a charge in respect of a statement alleged to be true but we think this possibility will never arise in practice;<sup>98</sup> and a provision requiring corroboration of the falsity of a statement seems to us inconsistent with permitting statements which are in fact true to be the subject of perjury proceedings. For these reasons we *recommend* that for the future perjury should be so defined as to penalise only the making of false statements.<sup>99</sup>

### **(c) *Contradictory statements by persons giving evidence on oath***

2.57 In our Working Paper on Perjury we concluded that no legislative proposals should be made aimed at punishing people who make two contradictory statements on oath, one of which must be false. In this we agreed with the Criminal Law Revision Committee's reasoning set out in its Sixth Report.<sup>100</sup> We did not, of course—nor do we now—intend that self-contradiction should constitute a defence where there is corroborative evidence of the falsity of one of the statements: in those circumstances a prosecution for perjury should continue to be possible. Notwithstanding this, some commentators on our Working Paper on *Offences relating to the Administration of Justice* again pressed on us the desirability of new provisions.

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<sup>94</sup> See e.g. *Allen v. Westley* (1629) Het. 97; 1 Hawkins P.C. (6th ed., 1788) c. 69, s. 6.

<sup>95</sup> See para. 2.56, below.

<sup>96</sup> In particular by Professor Glanville Williams, "Evading Justice" [1975] Crim. L.R. at p. 615.

<sup>97</sup> Perjury Act 1911, s.13; see para. 2.62, below.

<sup>98</sup> See para. 2.5. above as to the considerations at present taken into account by the D.P.P. in deciding whether to authorise or instigate proceedings for perjury.

<sup>99</sup> Appendix A, cl. 3(1)(a). Whether, having regard to *Haughton v. Smith* [1975] A.C. 476, a charge of attempted perjury could lie in respect of a true statement is a matter being considered in the context of our examination of the law of Attempt. It is also noteworthy that section 1A of the 1911 Act (see para. 2.71, below) penalises only statements which are false.

<sup>100</sup> (1964) Cmnd. 2465. "Perjury and Attendance of Witnesses."

2.58 There is in our view no justification for rendering self-contradictory witnesses liable to perjury solely on that account. As we indicate below,<sup>101</sup> we consider that some form of corroboration will continue to be needed in cases of perjury. Corroboration therefore would, in cases of self-contradiction, be needed of the falsity of one or other of the statements. But “cases can and do occur in which a witness makes a contradictory statement on oath but cannot be prosecuted for perjury because, although it is plain that one or other of the statements must have been perjured, there is insufficient evidence to prove which statement was false”.<sup>102</sup> Thus, even if the prosecution were able to charge perjury in the alternative in cases where it was uncertain which of the statements was false, they would still have to elect on which count to proceed at trial and to satisfy the jury that the statement was false;<sup>103</sup> and they would be bound to fail unless they had sufficient evidence, including corroborative evidence, that this was the case as regards that particular statement.

2.59 The remaining question is whether a separate offence, other than perjury, should be introduced directed solely at the self-contradictory witness. No fresh considerations have been suggested to us which would lead us to disagree with the thorough examination of this issue by the Criminal Law Revision Committee. In their Report,<sup>104</sup> they pointed out that a special provision dependent on the fact of contradiction would have to apply whether the false statement in question was the earlier or the later, and it may well be the later which is true. If self-contradiction were an offence, a witness who had given false evidence might, in consequence, be deterred from correcting it, which would hinder rather than promote the interests of justice.<sup>105</sup> It could also not be ruled out that an overzealous police officer or prosecution solicitor might warn a prosecution witness who wished to modify his evidence of the risks of doing so; and this might result in injustice to the defence in a criminal trial. The Committee further commented<sup>106</sup> that, however the offence might be drafted, it would be committed only when the second statement was made, and this might well be the true one.

2.60 Another objection raised by the Committee<sup>107</sup> was their belief that a frequent cause of witnesses falsely going back on their evidence was fear of violence from friends of the accused, a fear which in many cases was “real and justified”. The Committee urged<sup>108</sup> the strengthening of the law against this behaviour; and one of the offences which we recommend in this Report<sup>109</sup> is designed to perform precisely this task. Our recommendation, as will be seen, takes the form of new statutory offences penalising anyone who threatens or bribes a person with intent to induce him either not to give evidence in judicial proceedings or not to give some particular evidence in such proceedings.

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<sup>101</sup> Para. 2.62.

<sup>102</sup> Cmnd. 2465, para. 5; and see also paras. 18–19.

<sup>103</sup> As to the mental element, see para. 2.65, below.

<sup>104</sup> See Cmnd. 2465, paras. 12–14.

<sup>105</sup> We do not think that the proposal by Justice for a reduced penalty in cases where the witness desires to correct a previous false statement is sufficient answer to this difficulty: see *False Witness*, Report by Justice (1973) para. 47.

<sup>106</sup> Cmnd. 2465, para. 17.

<sup>107</sup> *Ibid.*, para. 13.

<sup>108</sup> *Ibid.*, para. 24.

<sup>109</sup> See para. 3.40, below.

2.61 For the reasons given by the Criminal Law Revision Committee, the most important of which are summarised above, we do not recommend that contradictory statements by a witness should constitute an offence. We believe, however, that our recommendation for creation of a new offence directed at intimidation of witnesses before trial will strengthen the law in that area and thus assist in reducing the incidence of self-contradictory statements by persons giving evidence on oath, whether in civil or criminal proceedings.

**(d) Corroboration**

2.62 Section 13 of the 1911 Act, which was confirmatory of earlier authority,<sup>110</sup> requires corroboration for the conviction of all offences against that Act or of any offence declared by any other Act to be perjury or subornation of perjury, stating that no person may be liable for any such offence “solely upon the evidence of one witness as to the falsity of any statement alleged to be false”. This has been interpreted to mean that proof must be provided either by two witnesses or by one witness with proof of other material and relevant facts substantially confirming his testimony.<sup>111</sup> We think that corroboration of this kind should be retained for perjury in judicial proceedings. The reason often given in the past for the existence of the common law rule (“else there is only oath against oath”) is unconvincing, as this may arise in other similar contexts where corroboration is not required. Of greater importance is the suggestion<sup>112</sup> that, if perjury could be prosecuted merely as a result of one statement on oath contradicting the statement at issue, there would be a reluctance to give evidence; the requirement of corroboration therefore encourages the giving of evidence. To this we would add that the requirement also acts as a safeguard in those instances where a principal witness against the person charged with perjury has a strong interest in securing his conviction. This will arise in cases where, for example, that witness may have been imprisoned, or lost his case in a civil matter, in consequence of the allegedly perjured evidence in respect of which he is now a prosecution witness, whether or not the proceedings for perjury were actually instituted by him.

2.63 We have noted that the terms of section 13 were interpreted in *R. v. Threlfall*<sup>113</sup> as meaning that proof must be provided either by two witnesses or by one witness with proof of other material and relevant facts substantially confirming his testimony. The latter, less restrictive, interpretation approximates closely to other existing provisions as to corroboration,<sup>114</sup> and we think there would be some advantage in making clear that a new provision replacing section 13 explicitly adopts this approach. Accordingly, we *recommend* that it be provided that a person shall not be liable to be convicted of perjury unless the evidence is accompanied by other evidence corroborative of the falsity of the testimony in issue.<sup>115</sup>

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<sup>110</sup> *R. v. Muscot* (1713) 10 Mod. Rep. 192; 88 E.R. 689.

<sup>111</sup> *R. v. Threlfall* (1914) 10 Cr. App. R. 112. Consideration of corroboration for offences other than perjury in the Act of 1911 fall to be considered in our report on Fraud: see para. 2.6. above.

<sup>112</sup> See Cross, *Evidence* (4th ed. 1974) p.170, and the Eleventh Report of the Criminal Law Revision Committee, *Evidence (General)*, (1972) Cmnd. 4991, para. 190.

<sup>113</sup> (1914) 10 Cr. App. R. 112. Hearsay and other inadmissible evidence is not corroboration: *In re a Solicitor*, *The Times* 24 March 1978.

<sup>114</sup> See e.g. Sexual Offences Act 1956, ss. 2(2), 3(2), 4(2), 22(2) and 23(2).

<sup>115</sup> Appendix A, cl. 3(4).

## 5. Mental Element

### (a) *The present law and working paper proposals*

2.64 Under section 1(1) of the Perjury Act 1911 a person lawfully sworn as a witness or interpreter in a judicial proceeding is guilty of perjury if he—

“wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true”.

The mental element in relation to the statement is therefore its wilful making, with knowledge of its falsity or absence of belief in its truth. In the view of some writers<sup>116</sup> this last expression means that recklessness will suffice. Whether or not this is so, it is our present view that the matter should be clarified.

2.65 In our Working Papers on *Perjury and Kindred Offences* and on *Offences relating to the Administration of Justice*<sup>117</sup> we proposed that it should be necessary to show that the statement in question (i) was intended to be taken as true, and (ii) was known to be false or not believed to be true. The first element was intended only as a minor, but in our view, necessary, safeguard for the witness whose reply, while intentionally made, was not intended to be believed; for example, the sarcastic response which, if taken literally would be a false statement. The second element reproduced part of the existing law. At the time we rejected the idea of importing recklessness into perjury, because of the uncertain meaning of this concept.<sup>118</sup> Some of our commentators criticised us for refusing to make this extension, while others thought that, by accepting the terminology of the existing law, we had in any event done so.

### (b) *Recommendations*

2.66 Since publication of our Working Paper on *Offences relating to the Administration of Justice* we have issued our *Report on the Mental Element in Crime*.<sup>119</sup> In this we recommend what should be the meaning attached to the concepts of intention, knowledge and recklessness when used in new offences contained in future legislation. The meaning of recklessness for the purpose of the criminal law<sup>120</sup> is embodied in the draft clause contained in the Criminal Liability (Mental Element) Bill annexed thereto.<sup>121</sup> For the future, then, we hope that there will be less difficulty and no confusion in the meaning of the term. By the same token, we are now less in favour of using terms such as “absence of belief” the meaning of which, as comments on our Working Papers indicated, is open to more than one interpretation.

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<sup>116</sup> See Smith and Hogan, *Criminal Law* (4th ed., 1978) p.718.

<sup>117</sup> See Working Paper No. 33, para. 33 and Working Paper No. 62, para. 60.

<sup>118</sup> See Working Paper No. 33, para. 30.

<sup>119</sup> (1978) Law Com. No. 89.

<sup>120</sup> In para. 65 of the Report we recommend that where there is a provision specifying recklessness as to whether a circumstance exists, a person should be regarded as being reckless as to that circumstance if (a) he realises at the time of his conduct that there is a risk of that circumstance existing and (b) it is unreasonable for him to take it. The question whether it is unreasonable for him to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct. See further, Appendix A, cl. 33.

<sup>121</sup> See cl. 4.

2.67 The issue for consideration now is whether, having regard to the terms of our *Report on the Mental Element in Crime*, recklessness as to whether a statement made by the defendant is false should suffice for a charge of perjury. In this context the relevant aspect of recklessness, as it is defined in the Report, is recklessness as to circumstances; that is, did the defendant realise at the time he made the false statement that there was a risk that it was false, and was it unreasonable for him nevertheless to make that statement? It may be argued that if a defendant realises there is a risk of any statement of his being false, it would always be unreasonable for him to go ahead and make that statement. On this argument the addition of recklessness in this context would make the offence unjustifiably wide: however small the risk, the defendant would be liable for perjury. On balance, however, we think the arguments for including the element of recklessness as we have defined it are stronger. There will, we think, be instances where the risk taken in making the statement is slight and it will be reasonable to take that risk; in these instances no offence will be committed. On the other hand, if in replying to a question the vital character of which is apparent to him the defendant nevertheless makes a positive assertion as to the truth of which he has no sufficient belief, we think it right that he should be liable. In such circumstances we do not think that a summing up to the jury in terms of knowledge or recklessness should give rise to real difficulties. Accordingly we *recommend* that a person should be guilty of perjury if he makes a false statement (i) intending it to be taken as true, and (ii) knowing that it is false or reckless as to whether it is false.<sup>122</sup>

## 6. Extraterritorial considerations

2.68 The 1911 Act as amended contains several provisions dealing with both perjury in proceedings held here for the purpose of providing evidence for courts outside England and Wales and with perjury in proceedings held abroad for the purpose of providing evidence in proceedings in England and Wales. We deal with these in turn and with other miscellaneous provisions relevant in this context.

### (a) *Evidence taken in England and Wales for judicial proceedings abroad*

2.69 The scope and procedure for taking evidence in one part of the United Kingdom on behalf of courts and tribunals abroad or in another part of the United Kingdom is governed by the Evidence (Proceedings in Other Jurisdictions) Act 1975 (hereafter the 1975 Act). In the case of civil proceedings instituted or in contemplation before such a court or tribunal, application is made under section 1 to the appropriate court in the particular part of the United Kingdom (in England and Wales the High Court) for an order for evidence to be obtained in that part.<sup>123</sup> Section 2 sets out the steps which may be ordered for the obtaining of evidence, restricting the steps to those available in civil proceedings in the United Kingdom, but permitting the order to require a person to give unsworn testimony when this is asked for by the requesting court. By section 5 these provisions are applied to evidence in criminal proceedings with, among others, two important limitations: requests for evidence may emanate only from courts and tribunals outside the United Kingdom, and must refer to proceedings which have been instituted. By section 6, sections 1–3 may by Order in Council have effect in relation to evidence

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<sup>122</sup> Appendix A, cl. 3(2)(b); see also cl. 33.

<sup>123</sup> See R.S.C. 1965, Order 70.

required by various international proceedings; such an Order has been made for the purpose of evidence required by the Court of Justice of the European Communities.<sup>124</sup>

2.70 The 1911 Act contains penalties for giving false evidence under these provisions. Section 1(4) of the Act of 1911 provides that—

“A statement made by a person lawfully sworn in England for the purposes of a judicial proceeding—

- (a) in another part of His Majesty’s dominions; or
- (b) in a British tribunal lawfully constituted in any place by sea or land outside His Majesty’s dominions; or
- (c) in a tribunal of any foreign state, shall, for the purposes of this section, be treated as a statement made in a judicial proceeding in England”.

Further, section 6 of the 1975 Act<sup>125</sup> gives power to direct by Order in Council that section 1(4) shall have effect in relation to international proceedings as it has effect in relation to a judicial proceeding in a tribunal of a foreign state, and, by the Order to which reference has already been made,<sup>126</sup> section 1(4) has effect in relation to the European Court.

2.71 In the case of false evidence not given on oath, the 1975 Act adds a new section 1A to the Perjury Act 1911. This provides that where a person, in giving testimony (oral or written) otherwise than on oath where required to do so by an order under section 2,<sup>127</sup> makes a statement (a) which he knows to be false in a material particular or (b) which is false in a material particular and which he does not believe to be true, he is liable on indictment to a maximum of two years’ imprisonment and a fine.<sup>128</sup>

2.72 Of the provisions described above, only section 1(4) and section 1A of the Act of 1911 require consideration with a view to replacement. The former<sup>129</sup> is out of date in that its language refers to a period when special provision was made for British people in certain foreign countries, and we understand that it has not been necessary to invoke the subsection in recent times. It may be, therefore, that its only useful purpose now lies in its application to international proceedings dealt with in section 6 of the 1975 Act.<sup>130</sup> In any event since all proceedings for taking evidence for courts abroad are now governed by the 1975 Act, replacement of section 1(4) may be effected by extending perjury to cover false statements in proceedings held in pursuance of an order under section 2 of the 1975 Act. We recommend accordingly.<sup>131</sup>

2.73 As regards section 1A of the Act of 1911, although this deals specifically with unsworn evidence, it is convenient to examine it in the present

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<sup>124</sup> The Evidence (European Court) Order 1976, S.I. 1976 No. 428.

<sup>125</sup> See para. 2.69, above.

<sup>126</sup> See n.124, above.

<sup>127</sup> See para. 2.69, above.

<sup>128</sup> Sch. 1. Similar provisions are added to the False Oaths (Scotland) Act 1933 and the Perjury Act (Northern Ireland) 1946.

<sup>129</sup> See para. 2.70, above.

<sup>130</sup> See para. 2.70, above.

<sup>131</sup> Appendix A, cl. 3(3) (a) (i).

context. This provision as it stands forms an exception to the general conclusion to which we have come<sup>132</sup> that false statements in evidence not given on oath should not be penalised. The provision is nevertheless necessary because a court outside England and Wales requesting evidence under section 1 of the 1975 Act may require the evidence to be taken without oath; and section 2(3) of that Act specifically provides that, while an order may only require steps which can ordinarily be taken for the purpose of obtaining evidence in civil proceedings, this provision does “not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.” Hence the special provision penalising false unsworn evidence which will continue to be needed. Since we think it desirable to repeal all the provisions in the 1911 Act relating to giving false evidence we *recommend* an entirely fresh provision to replace section 1A as set out in Schedule 1 to the 1975 Act.<sup>133</sup> The only change of substance needed in the section concerns the mental element required in order to render the defendant guilty if he makes a false statement which he knows to be false in a material particular or is reckless as to whether it is false; as we have noted,<sup>134</sup> on one view this change amounts to a clarification rather than an alteration of the law. A minor amendment will also be required to section 6(2) of the 1975 Act. The subsection provides that an Order in Council under the section<sup>135</sup> “may direct that section 1(4) of the Perjury 1911 . . . shall have effect in relation to international proceeding to which the Order applies as it has effect in relation to a judicial proceedings in a tribunal of a foreign state.” The reference to the 1911 Act can be repealed without replacement.<sup>136</sup> In regard to both amendments outlined in this paragraph, it must be noted that the relevant provisions of the 1975 Act refer also to legislation corresponding to the 1911 Act in force in other parts of the United Kingdom. We do not think that our recommendations for change will necessitate any amendments to this legislation, but if, contrary to our view, any amendments are thought desirable, further consultation will be required in regard to them.

### **(b) Evidence taken abroad for judicial proceedings in England and Wales**

2.74 Section 1(5) of the Act of 1911 provides that—

“Where, for the purposes of a judicial proceeding in England, a person is lawfully sworn under the authority of an Act of Parliament—

(a) in any other part of His Majesty’s dominions; or

(b) before a British tribunal or a British officer in a foreign country, or within the jurisdiction of the Admiralty of England;

a statement made by such person so sworn as aforesaid (unless the Act of Parliament under which it was made otherwise specifically provides) shall be treated for the purposes of this section as having been made in the judicial proceeding in England for the purposes whereof it was made”.

The scope of this subsection is not certain. For example, does paragraph (b) cover a statement made by a foreigner outside the United Kingdom for the purposes of

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<sup>132</sup> See para. 2.47, above.

<sup>133</sup> Appendix A, cl. 4.

<sup>134</sup> See para. 2.67, above.

<sup>135</sup> See para. 2.70, above.

<sup>136</sup> Clause 3(3) (a) (i), which expressly provides that false evidence on oath given in pursuance of an order under s. 2 of the 1975 Act shall be perjury, makes this reference unnecessary.



judicial proceedings in England and Wales? It is arguable that by consenting to be sworn or affirmed abroad, he consents to participating in the process and therefore to any penalties imposed for perjury. On the other hand, in general Parliament does not legislate to make acts committed by foreigners outside the country criminal offences, and when it imposes penalties on conduct outside the country, it usually specifies not only the type of conduct involved but the class of persons made liable to those penalties.<sup>137</sup>

2.75 Clarification of the law is needed here, but we first consider whether a provision is desirable. Should a lie told on oath be penalised under the law of England and Wales where the proceedings in which the evidence in issue was given take place outside England and Wales? As we have noted, it is unusual for Parliament specifically to penalise conduct abroad, but there are provisions in the present law which in our view clearly indicate the need for continued provision as regards perjury. In the Tokyo Convention Act 1967, for example, section 5 provides for the admission, in proceedings here in respect of offences on board aircraft, of depositions made on oath abroad by persons whose testimony cannot otherwise be obtained, being depositions made before judges or magistrates in other Commonwealth countries or before United Kingdom consular officers abroad. There are also the provisions in section 691 of the Merchant Shipping Act 1894 and in the draft clauses annexed to our *Report on the Territorial and Extraterritorial Extent of the Criminal Law*,<sup>138</sup> which relate to offences on board ships. The offence of perjury should in our view be available in respect of such depositions on oath. Furthermore, it seems to us right in principle that false evidence given abroad expressly for the purpose of judicial proceedings in England and Wales should be capable of being penalised here: this is one instance<sup>139</sup> where, if there is the deliberate purpose of adversely affecting judicial proceedings here, there is justification for making the offence extraterritorial in operation.

2.76 We recommend that section 1(5) of the 1911 Act be replaced. This may be done by providing that, if the other requirements of the offence are present, a person commits perjury wherever the false statement in question is made, whether in England and Wales or elsewhere, if it is made in evidence on oath (or in authorised documents)<sup>140</sup> for judicial proceedings in England and Wales. We recommend accordingly,<sup>141</sup>

### **(c) Evidence given in other parts of the United Kingdom**

2.77 Existing legislation makes provision for securing the evidence of witnesses for proceedings in one part of the United Kingdom by compelling their attendance before the courts in another part.<sup>142</sup> In addition, section 1 of the

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<sup>137</sup> See e.g. Criminal Justice Act 1948, s. 31 and Official Secrets Act 1911, s. 10(1).

<sup>138</sup> (1978) Law Com. No. 91; see Appendix A, draft clause 6 annexed thereto.

<sup>139</sup> We discuss others in the context of offences against the administration of justice at para. 3.125, below.

<sup>140</sup> See paras. 2.45–2.46, above.

<sup>141</sup> Appendix A, cl. 3(1) (a).

<sup>142</sup> As to criminal proceedings, see Criminal Procedure (Attendance of Witnesses) Act 1965; and as to civil proceedings, Supreme Court of Judicature (Consolidation) Act 1925, s. 49, Attendance of Witnesses Act 1854 and Judicature (Northern Ireland) Act 1978, s. 67, which apply in different parts of the United Kingdom.

Evidence (Proceedings in Other Jurisdictions) Act 1975 makes provision in relation to civil proceedings for the court in one part of the United Kingdom to make an order for the obtaining of evidence in that part for use in judicial proceedings in the court of another part which seeks its assistance for that purpose. It may well be that false evidence in proceedings for the taking of evidence on oath pursuant to an order constitutes perjury under the law in force in that part of the United Kingdom in which the Proceedings take place.<sup>143</sup> Nevertheless, we think it should also be possible to prosecute the giving of such false evidence in the court of that part of the United Kingdom which requested the evidence. This is at present possible in England and Wales under the terms of section 1(5) of the 1911 Act, which treats as perjury false statements in sworn evidence given in “any other part of His Majesty’s dominions” for the purpose of judicial proceedings in England. The recommendation we have made in the preceding paragraph for replacement of section 1(5) will ensure that perjury will continue to be available in respect of false statements in evidence given in other parts of the United Kingdom for the purposes of judicial proceedings in England and Wales.

**(d) Other provisions**

The European Communities Act 1972, section 11(1)

2.78 Section 11(1) of the European Communities Act 1972 provides that—

“A person who, in sworn evidence before the European Court, makes any statement which he knows to be false or does not believe to be true shall, whether he is a British subject or not, be guilty of an offence and may be proceeded against and punished (a) in England and Wales, as for an offence against section 1(1) of the Perjury Act 1911; [or (b) in Scotland or (c) in Northern Ireland as for offences against the corresponding legislation there.]<sup>144</sup> Where a report is made as to any such offence under the authority of the European Court, then a bill of indictment may, in England or Wales . . . be preferred as in a case where a prosecution is ordered under section 9 of the Act of 1911 . . .”<sup>145</sup>

2.79 This subsection requires examination in the present context for two reasons. In the first place, the offence-creating part of it is modelled on the wording of section 1(1) of the 1911 Act (which is also in this respect the same as the Scottish and Northern Irish Acts); thus it is appropriate that offences under the subsection should be proceeded against in England and Wales as for an offence of perjury under the 1911 Act. We have considered whether it would be possible merely to substitute for the reference in section 11(1) (a) to the 1911 Act a reference to the new legislation which we recommend in its place, but have concluded that this would not be the right course. It would entail a discrepancy in wording and substance between the offence in section 11(1) and the new offence of perjury which we recommend. We think the simplest means of replacing section 11(1), so far as it applies to England and Wales, is to provide that anyone making a false statement in sworn evidence before the European Court shall be guilty of

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<sup>143</sup> Where the proceedings are not on oath, false evidence is penalised by the special provisions added by the Evidence (Proceedings in Other Jurisdictions) Act 1975. As regards England and Wales, these are to be found in s.1A of the Perjury Act 1911; see para. 2.71, above.

<sup>144</sup> See n.128, above.

<sup>145</sup> As to s. 9, see para. 2.85, below.

perjury under our recommendations, with corroboration, materiality and the other requirements we recommend for this offence.<sup>146</sup> Section 11(1) was of course included in the European Communities Act 1972 in pursuance of obligations contained in the European Community treaties, but on our reading of the relevant provisions of these treaties,<sup>147</sup> our recommendation as to section 11(1) still meets these obligations.

2.80 Section 11(1) also requires examination because it provides that, in any case where a report is made under the authority of the European Court as to any offence under section 11(1), a bill of indictment may be preferred as in a case where a prosecution is ordered under section 9 of the 1911 Act. We recommend below<sup>148</sup> that section 9 be repealed without replacement. We have considered whether this provision in section 11(1) affords an obstacle to that recommendation and have concluded that it does not. It seems to us that the relevant provisions of the treaties<sup>149</sup> entail no special obligation as to the procedure to be followed when an offence under section 11(1) is committed, and, indeed, as regards Scotland no such provision is made since the False Oaths (Scotland) Act 1933 contains nothing corresponding to section 9. Proceedings for a section 11(1) offence (as amended by our recommendations), will therefore be dealt with in the same way as other cases of perjury after receipt of the report by the Director of Public Prosecutions,<sup>150</sup> and committal proceedings will be required in the normal way.

2.81 As a result of our recommendations in the two preceding paragraphs, section 11(1) of the European Communities Act 1972 will need consequential amendments to delete paragraph (a) and the reference to section 9 of the 1911 Act.

#### The Perjury Act 1911, section 8

2.82 Section 8 of the 1911 Act makes specific provision for proceedings to be held in England in cases where offences against the Act, or offences punishable as

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<sup>146</sup> Appendix A, cl. 3(3) (a) (ii).

<sup>147</sup> The relevant provisions are contained in articles 28, 27 and 28 respectively of the Protocols on the Statute of the European Court annexed to the ECSC Treaty, the EEC Treaty and the Euratom Treaty. Article 28 of the first states in part:—

“Where it is established that a witness or expert has concealed facts or falsified evidence on any matter on which he has testified or been examined by the Court, the Court is empowered to report the misconduct to the Minister of Justice of the State of which the witness or expert is a national, in order that he may be subjected to the relevant penal provisions of the national law.”

Article 27 of the second states:—

“A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court, the Member State concerned shall prosecute the offender before its competent court.”

Article 28 of the third is in terms identical to the latter.

<sup>148</sup> See para. 2.85, below.

<sup>149</sup> See n.147, above.

<sup>150</sup> The powers of the DPP arise by way of practice rather than under express statutory powers. Perjury is not an offence which must be reported to him either under the (revoked) Prosecution of Offences Regulations 1946, S.I. 1946 No. 1467 or the Prosecution of Offences Regulations 1978, S.I. 1978 No. 1357. As a matter of practice, however, it appears to be usual to send the papers to the DPP; see further para. 2.85, below.

perjury or subornation under other Acts, are committed outside the United Kingdom. We see no need to keep this provision in so far as it relates to perjury. We are recommending the replacement of section 1(5) of the Act of 1911 by a provision which will specify precisely which conduct abroad will be treated as perjury in judicial proceedings in new legislation.<sup>151</sup> So far as the question of venue was dealt with by section 8, it is superseded by section 6 of the Courts Act 1971, which provides that the Crown Court shall have jurisdiction over indictable offences wherever committed. Accordingly, no special provision is needed in respect of perjury where the conduct concerned takes place outside the United Kingdom.

## **7. Miscellaneous provisions**

2.83 There are a number of provisions in the Perjury Act 1911 which need consideration with a view either to their replacement or omission in fresh legislation. We now consider these in the order in which they appear in the Act.

### **(a) Interpreters**

2.84 Section 1(1) of the 1911 Act applies the offence of perjury both to witnesses and to those who are sworn as interpreters in judicial proceedings. We think that any new legislation should continue to apply to interpreters, but that there should be special provisions in relation to them which define more precisely than does the existing law the conduct which is to be penalised. It seems to us that the matter which needs to be penalised is that which deliberately misleads the court. In such cases the interpreting of the words will usually also be incorrect, but this may not necessarily be so in every case: in some instances a literal translation may be misleading. The vital point is whether the matter interpreted is misleading: if it is (and the requisite mental element is present) it should fall within the offence. Furthermore, the offence must be sufficiently wide to cover not only those who translate from one language to another, but also those expert in other forms of translation, such as interpreters of sign language. As in the case of perjury, the mental element should include recklessness as we have defined the term;<sup>152</sup> the interpreter will therefore be guilty of the offence if, when he makes his translation, he either knows that the translation is misleading or is reckless as to whether it is misleading. Accordingly, we *recommend* that new provisions should penalise an interpreter sworn in judicial proceedings who interprets in a misleading manner in those proceedings, knowing when he gives his interpretation that it is misleading, or being reckless as to whether it is misleading.<sup>153</sup>

### **(b) Power of the court to order prosecutions**

2.85 Section 9 of the Act of 1911 empowers courts to order prosecutions for perjury believed to have been committed in proceedings before them, and a bill of indictment, omitting the committal proceedings, may be preferred on such an order.<sup>154</sup> As we have noted,<sup>155</sup> this last provision has been adapted for use in

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<sup>151</sup> See para. 2.76, above.

<sup>152</sup> See para. 2.66, above.

<sup>153</sup> See Appendix A, cl. 5. The clause contains provisions as to materiality and corroboration similar to those applying to perjury under cl. 3.

<sup>154</sup> Administration of Justice (Miscellaneous Provisions) Act 1933, s. 2(2). Parts of s. 9(1), and all of s. 9(2) were repealed by the Courts Act 1971, s. 56(4), Sch.11, Part IV.

<sup>155</sup> See para. 2.80, above.

perjury proceedings arising out of false statements made before the Court of Justice of the European Communities. The powers are now little used as the court usually takes the course of sending the papers to the Director of Public Prosecutions. In our Working Paper<sup>156</sup> we propose that section 9 should not be replaced, a view with which those commenting on it were in general agreement. Further, the Criminal Law Revision Committee, in its Eleventh Report on *Evidence*,<sup>157</sup> recommended its abolition. We agree with the view expressed in that Report that “it seems undesirable that the power should exist, because it involves the proposition that the authority in question has formed the opinion that the offence was committed, and this might be prejudicial to the accused.”<sup>158</sup> Accordingly, we *recommend* that section 9 should not be replaced.<sup>159</sup>

### **(c) Form and substance of indictments for perjury**

2.86 Section 12(1) of the Act of 1911 deals with the form and substance of indictments for perjury and certain other offences under the 1911 Act and section 12(2) makes similar provision for offences under section 7 of the Act. It is of course important that informations and indictments for perjury should provide the accused with sufficient particulars to enable him to understand the nature of the charge against him.<sup>160</sup> In our Working Paper,<sup>161</sup> however, we suggested that the provisions of section 3 of the Indictments Act 1915 and of Rule 83 of the Magistrates’ Courts Rules 1968<sup>162</sup> are sufficient for this purpose. No-one has disagreed with this view, and we *recommend* that section 12 should not be replaced.

### **(d) Certificate of proceedings**

2.87 Section 14 of the Act provides that—

“On a prosecution (a) for perjury alleged to have been committed on the trial of an indictment for misdemeanour, ... the fact of the former trial shall be sufficiently proved by the production of a certificate containing the substance and effect (omitting the formal parts) of the indictment and trial purporting to be signed by [the appropriate officer of the Crown Court]<sup>163</sup> without proof of the signature or official character [of that officer]”.

In the absence of general provisions as to proof of previous proceedings by certificate we believe it necessary to retain the effect of this provision so far as it relates to perjury, and indeed we see no reason why similar provision should not be made in regard to proceedings in magistrates’ courts where perjury is alleged to have been committed. These proceedings do not, of course, exhaust the types of

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<sup>156</sup> Working Paper No. 33, para. 53.

<sup>157</sup> (1972) Cmnd. 4991; see para. 221 and clause 27 and Sch. 2 of the annexed draft Bill.

<sup>158</sup> This consideration applies with still greater force to the provisions in some Commonwealth codes enabling courts to deal summarily with cases of apparent perjury occurring in the course of proceedings before them: *Chang Hang Kiu v. Piggott* [1909] A.C. 312 and *Subramaniam v. The Queen* [1956] 1 W.L.R. 456 (P.C.).

<sup>159</sup> Appendix A, cl. 7.

<sup>160</sup> See *R. v. Aylesbury Justices, Ex parte Wisbey* [1965] 1 W. L. R. 339.

<sup>161</sup> See Working Paper No. 33, para. 54.

<sup>162</sup> S.I. 1968 No. 1920.

<sup>163</sup> See Courts Act 1971, s. 56 and Sch. 8, para. 2 and Table, reference 12.

judicial proceedings in which perjury may be committed,<sup>164</sup> but they do cover a substantial proportion, and a new provision will to that extent simplify requirements of proof. We *recommend* an extended provision accordingly.<sup>165</sup>

**(e) Children**

2.88 Section 16(2) of the Perjury Act 1911 states, in effect, that the 1911 Act does not apply to evidence given without oath by a child under section 38 of the Children and Young Persons Act 1933. Section 38(1) provides for the reception of evidence not given on oath in a criminal case where in the court's opinion the child, although not understanding the nature of the oath, is "possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth." By section 38(2), if the child gives false unsworn evidence such that, had it been given on oath, he would be guilty of perjury, he may be convicted on summary trial (assuming he is of the age of criminal responsibility). While this is therefore an example of evidence not on oath being penalised, it arises solely from the policy of the 1933 Act that the oath should not be administered to children too young to appreciate its significance. Although an exceptional case, it is therefore not inconsistent with the general policy of the law of perjury.

2.89 In its Eleventh Report on *Evidence*<sup>166</sup> the Criminal Law Revision Committee recommended the replacement of section 38 by a provision to the effect that a child below a particular age (normally fourteen) should not be sworn as a witness, but might give evidence otherwise than on oath if in the court's opinion he possessed sufficient intelligence to justify reception of his evidence and understood the importance of telling the truth in the proceedings. If false evidence were to be given by him in these circumstances where, if given on oath, he would have been guilty of perjury, he would be treated for the purposes of Part I of the Children and Young Persons Act 1969<sup>167</sup> as guilty of an offence, and dealt with as provided by that Act. But there is no need for section 16(2) to be retained until any provisions to replace section 38 of the 1933 Act may be implemented, or until any review takes place of the giving of evidence by children, since a child, like anybody else, can only commit perjury if he gives evidence on oath. We therefore *recommend* that section 16(2) of the 1911 Act be repealed without replacement.<sup>168</sup>

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<sup>164</sup> See para. 2.8 *et seq.*, above. We do not extend our recommendation to perjury in civil proceedings: where the "substance and effect" are to be gathered from the pleadings and judgment, which may be of great complexity, the issues cannot easily be summarised in the same way as criminal proceedings. Furthermore, there is no officer of the court who has the same standing as the appropriate officer of the Crown Court, whose signature it would be appropriate to require in this context.

<sup>165</sup> Appendix A, cl. 31. The clause makes this provision applicable to all offences under the draft Bill where proof is required of the result of criminal proceedings. These include, apart from perjury and related offences (clauses 3, 4 and 5), wrongful pleading to a criminal charge (para. 3.115, below and cl. 25) and use of threats and bribes to induce pleas at a trial (para. 3.119 and cl. 28).

<sup>166</sup> (1972) Cmnd. 4991, para. 204 *et seq.* and clause 22 of the annexed draft Bill.

<sup>167</sup> Sect. 4 of this Act, which is not yet in force, would raise the age of criminal responsibility from 10 to 14.

<sup>168</sup> Appendix A, cl. 36(2) and Schedule 3. Repeal of s. 16(2) of the Perjury Act 1911 will make possible the prosecution of a child for false statements without oath under s. 5 of that Act (see para. 2.25, above), but this possibility is unlikely.

## 8. Repeals and abolitions

2.90 Implementation of our recommendations will enable the provisions in the 1911 Act dealing with perjury in judicial proceedings to be repealed. As we have explained, the other offences in the Act are being considered in the context of our work on fraud. Section 7 of the Act should be repealed, so far as it concerns subornation. The section deals with aiding, abetting, counselling, procuring and suborning offences against the 1911 Act. Subornation was a misdemeanour at common law penalising procurement of perjury and it finds no place in modern practice.

2.91 There remain a few references to perjury in Acts passed before 1911. Section 6 of the Piracy Act 1850<sup>169</sup> and section 22 of the Slave Trade Act 1873 provide for false evidence given in proceedings under those Acts, whether in England and Wales or elsewhere, to be punished as perjury. In so far as the sections from part of the law of England and Wales, they are superseded by our proposals and we *recommend* them for repeal.

2.92 Finally it is appropriate to mention in this context the position as to offences before courts martial. We mentioned in our Working Paper on *Perjury and Kindred Offences* in 1970<sup>170</sup> that, at that time, perjury by persons subject to Army and Air Force discipline before courts martial was a specific offence against section 58 of the Army Act 1955 and section 58 of the Air Force Act 1955, which each contained an offence of giving false evidence based in all material respects upon section 1(1) of the 1911 Act. But these offences were abolished with the repeal of these sections by the Armed Forces Act 1971.<sup>171</sup> Proceedings before courts martial in all three services fall within the definition of judicial proceedings in section 1(2) of the 1911 Act,<sup>172</sup> and provisions in the respective Acts<sup>173</sup> enable courts martial to try any criminal offence punishable under English law, whether committed in the United Kingdom or elsewhere. Thus offences of perjury contrary to the 1911 Act are, by virtue of these provisions, triable by courts martial. We *recommend* that the new provisions relating to perjury should apply similarly to criminal proceedings under legislation governing the armed forces.<sup>174</sup>

2.93 As regards the common law, we pointed out in our Working Paper on *Perjury and Kindred Offences*<sup>175</sup> that there was some doubt as to whether there ever existed a common law offence of perjury. There does however survive at least one statutory reference to such an offence;<sup>176</sup> for the avoidance of doubt we therefore *recommend* that perjury at common law should be abolished.<sup>177</sup>

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<sup>169</sup> The other Piracy Acts are reviewed in our *Report on the Extraterritorial Extent of the Criminal Law*, (1978) Law Com. No. 91.

<sup>170</sup> Working Paper No. 33, para. 40.

<sup>171</sup> See ss. 35 and 77, and Sch. 4, Pt. 1.

<sup>172</sup> See s. 93 in each of the Army Act 1955 and the Air Force Act 1955, and s. 60 of the Naval Discipline Act 1957 as amended.

<sup>173</sup> See s. 70 in each of the Army Act 1955 and the Air Force Act 1955, and s. 42 of the Naval Discipline Act 1957, all as amended by s. 34 of the Armed Forces Act 1971.

<sup>174</sup> Appendix A, cl. 1.

<sup>175</sup> See Working Paper No. 33, para. 1.

<sup>176</sup> See Schedule to the Extradition Act 1873.

<sup>177</sup> Appendix A, cl. 35(2).

## C. SUMMARY OF RECOMMENDATIONS

2.94 In relation to perjury and connected offences, we *recommend* changes to the present law to the following effect—

- (1) There should be an offence of perjury committed when a person makes a false statement—
  - (a) in oral evidence given on oath in, or for the purposes of, judicial proceedings; or
  - (b) in any affidavit or statutory declaration or in a certificate, made for the purposes of judicial proceedings and admissible in those proceedings; or,
  - (c) subject to sub-paragraph (9), below, in giving evidence in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (which sets out the powers of the High Court to give effect to applications for assistance made by a court outside England and Wales); or
  - (d) in sworn evidence before the Court of Justice of the European Communities.

Judicial proceedings for the purposes of perjury should mean proceedings before any person or body having power to hear, receive and examine evidence on oath (paragraphs 2.43–2.47; 2.54–2.56; 2.69–2.72; 2.78–2.79 and clauses 1, 3(1)(3)).

- (2) For the purposes of defining the persons and bodies who under sub-paragraph (1) have power to hear, receive and examine evidence on oath, new provision should be made in place of the Evidence Act 1851, section 16, to the effect that any witness may be examined on oath before (a) a judge or magistrate (b) a court or tribunal (c) any other body of persons having by virtue of any rule of law authority to hear, receive and examine evidence, and (d) a person holding a statutory inquiry. “Tribunal” should here mean a tribunal subject to the direct supervision of the Council on Tribunals; “statutory inquiry” should mean any inquiry held in pursuance of a duty imposed or a power conferred by any statutory provision (paragraphs 2.33–2.42 and clause 2).
- (3) It should be a defence to a charge of perjury to prove that the judicial proceedings in which it is alleged to have been committed were a nullity (paragraph 2.48 and clause 6).
- (4) The false statement must be one which is material to the proceedings; and the question whether it is material should be a question of law (paragraphs 2.50–2.53 and clauses 3(2)(a) and 34).
- (5) The person making the statement must intend it to be taken as true and must know that it is false or be reckless whether it is false (paragraphs 2.64–2.67 and clause 3(2)(b)).
- (6) There must be corroboration of the falsity of the statement; if one witness gives evidence as to its falsity, there must at least be some other admissible evidence corroborating that evidence (paragraphs 2.62–2.63 and clause 3(4)).



- (7) The false statement in cases of perjury falling within sub-paragraphs (1)(a) and (b) above may be made in England and Wales or elsewhere, provided it is made in or for the purposes of judicial proceedings in England and Wales (paragraphs 2.74–2.77 and clause 3(1)(a)).
- (8) There should be separate provision for an offence of perjury by interpreters, penalising a person sworn as such in judicial proceedings who interprets in a misleading manner for the purposes of those proceedings. The provisions applying to perjury as to materiality, the mental element and corroboration should also apply to perjury by interpreters (paragraph 2.84 and clause 5).
- (9) There should be separate provision for an offence (replacing section 1A of the Perjury Act 1911) penalising a person who makes a false statement in giving oral or written testimony otherwise than on oath, in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (as to which, see sub-paragraph (1) (c) above). The provisions applying to perjury as to materiality, the mental element and corroboration should also apply to this offence (paragraph 2.73 and clause 4).
- (10) There should be provision in relation to all the offences referred to above which are alleged to have been committed in criminal proceedings for proof by certificate of the nature and result of those proceedings (paragraph 2.87 and clause 31).
- (11) The common law offences of perjury (in so far as it exists) and subornation of perjury should be abolished and all provisions in the Perjury Act 1911 dealing with perjury should be repealed (paragraphs 2.90–2.96 and clauses 35(2), 36(2) and Schedule 3).

### **PART III: OTHER OFFENCES**

#### **A. THE PRESENT LAW**

##### **1. Introduction**

3.1 Apart from perjury, unlawful conduct aimed at interfering with the course of justice can at present be prosecuted as one or more of a number of offences, either at common law or under statute, and in some cases it also amounts to contempt of court.

3.2 The common law offences range from a wide general offence, variously referred to as perverting or obstructing the course of justice, obstructing or interfering with the administration of justice, and defeating the due course, or the ends, of justice (which we refer to as perverting the course of justice), to specific offences such as embracery (that is, bringing improper pressure to bear on a juryman) and personating a juryman. Among the statutory offences may be mentioned the making of a formal statement that is false, penalised by section 89 of the Criminal Justice Act 1967, the concealing of information for reward about an arrestable offence contrary to section 5(1) of the Criminal Law Act 1967,

causing wasteful employment of the police by knowingly making a false report penalised by section 5(2) of the Criminal Law Act 1967, and obstructing a constable in the execution of his duty contrary to section 51(3) of the Police Act 1964. In many cases the conduct which constitutes these offences would also amount to contempt of court and be punishable under that head.

## 2. Common law offences

### (a) *Perverting the course of justice*

3.3 A general offence of perverting the course of justice was held to exist in *R. v. Grimes*<sup>1</sup>, was confined by the Court of Appeal in *R. v. Panayiotou and Another*<sup>2</sup>, and is now generally accepted.<sup>3</sup>

3.4 The boundaries of the offence are uncertain, but it clearly includes the following—

- (i) fabricating, concealing or destroying evidence, with intent to influence the outcome of judicial proceedings, civil or criminal, whether or not they have yet been instituted—*R. v. Vreones*<sup>4</sup>; *R. v. Sharpe and Another*<sup>5</sup>;
- (ii) preventing a witness or potential witness from giving evidence—*R. v. Lawley*<sup>6</sup>; *R. v. Steventon and Others*<sup>7</sup>; *R. v. Grimes*<sup>8</sup>;
- (iii) persuading a witness to give false evidence—*R. v. Cutts*<sup>9</sup>;
- (iv) threatening a witness with intent to induce him not to give evidence in judicial proceedings—*R. v. Kellett*<sup>10</sup>;
- (v) persuading a person to make a false statement to the police to mislead them in their investigation of an offence, so as to avoid prosecution—*R. v. Sharpe and Another*<sup>11</sup>; *R. v. Grimes*<sup>12</sup>;
- (vi) offering to a person or seeking a reward for making a false statement to the police either to mislead them in their investigation of an offence or

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<sup>1</sup>[1968] 3 All E.R. 179.

<sup>2</sup>[1973] 1 W.L.R. 1032.

<sup>3</sup>*R. v. Andrews* [1973] Q.B. 422. See also *R. v. Rowell* (1977) 65 Cr. App. R. 174, para. 3.5 and n. 20, below.

<sup>4</sup>[1891] 1 Q.B. 360. The defendant had tampered with wheat samples taken for submission to arbitrators to be appointed to determine any dispute that might arise as to the quality of the consignment. He was convicted of a common law misdemeanour of attempting by the manufacture of false evidence to mislead a judicial tribunal.

<sup>5</sup>(1937) 26 Cr. App. R. 122. The defendants agreed to conceal and destroy evidence of a collision between the car driven by one of them and a cyclist, to persuade another to make a false statement, and by making false statements to mislead the police investigating the collision. They were convicted of conspiracy to defeat the ends of justice.

<sup>6</sup>(1731) 2 Str. 904; 93 E.R. 930. The defendant was charged with attempting to persuade a witness not to appear and not to give evidence.

<sup>7</sup>(1802) 2 East 362; 102 E.R. 407. This was a charge of conspiracy, unlawfully and with intent to obstruct the due course of justice, to persuade or prevent a witness with force and arms from appearing and giving evidence.

<sup>8</sup>[1968] 3 All E.R. 179.

<sup>9</sup>[1969] Crim. L.R. 385. The defendant was convicted of conspiracy to pervert the course of justice by persuading witnesses to give false evidence, and of interfering with a witness by threatening an opponent's witness so that he changed his evidence.

<sup>10</sup>[1976] Q.B. 372; this case is discussed in para. 3.37. below.

<sup>11</sup>(1937) 26 Cr. App. R. 122. See para. 3.4(i), n. 5, above.

<sup>12</sup>[1968] 3 All E.R. 179.

to prevent proceedings being brought—*R. v. Panayiotou and Another*<sup>13</sup>; *R. v. Andrews*<sup>14</sup>;

(vii) giving a false story to the police in relation to a criminal offence, resulting in the arrest of another—*R. v. Rowell*<sup>15</sup>; *R. v. Rose*<sup>16</sup>;

(viii) giving a false story to the police in relation to a criminal offence, to indicate that a deceased person committed an offence, to divert suspicion from the true offender and to prevent proceedings being brought—*R. v. Robinson*<sup>17</sup>;

(ix) making it impossible for the police to obtain vital evidence against oneself—*R. v. Britton*<sup>18</sup>;

(x) giving information to another with a view to assisting him to avoid questioning as a suspect in a serious offence—*R. v. Thomas*; *R. v. Ferguson*.<sup>19</sup>

3.5 In the majority of cases conduct of this nature comes to light before the conclusion of the proceedings which it is sought to influence. For this reason, as well as because it is not easy to prove that the course of justice was actually perverted, the conduct has been more usually charged as an attempt<sup>20</sup> or incitement, or (where more than one person is involved) as a conspiracy, to pervert the course of justice.

#### **(b) Other common law offences**

3.6 Conduct that can now be prosecuted under the general offence of perverting the course of justice has in the past been prosecuted in a number of ways. For example, in *R. v. Lawley*<sup>21</sup> the charge was of persuading a witness not to appear for the purpose of giving evidence, and in *R. v. Vreones*<sup>22</sup> the charge was attempting by the manufacture of false evidence to mislead a judicial tribunal. In many cases charges have been based on conspiracy and *Russell*<sup>23</sup> lists

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<sup>13</sup> [1973] 1 W.L.R. 1032. This case in fact involved a conspiracy.

<sup>14</sup> [1973] Q.B. 422. A witness asked a potential accused for a reward if the witness gave false evidence.

<sup>15</sup> (1977) 65 Cr. App. R. 174.

<sup>16</sup> (1937) 1 Jo. Crim. Law 171. This case, which involved a motoring offender pretending with the help of his passenger to be someone else, was charged as a conspiracy to effect a public mischief.

<sup>17</sup> (1937) 2 Jo. Crim. Law 62. The charge in this case too was a charge of conspiracy to effect a public mischief; the agreement was to tell the police that a passenger killed in a motor accident had been the driver.

<sup>18</sup> [1973] R.T.R. 502. The defendant enlisted another's help in delaying the police while he drank from a bottle of beer after being asked by the police to take a breath test. He was convicted of attempting to defeat the course of justice.

<sup>19</sup> [1979] 2 W. L. R. 144, (C.A.). This was a far-reaching decision in that on an alternative count of contravening s. 4(1) of the Criminal Law Act 1967 (see para. 3.13 below) the accused were acquitted on the basis that that section required them to *know or believe* the person warned to be guilty of an arrestable offence, whereas the conviction for attempting to pervert the course of justice was based merely on knowledge that the person was a suspect.

<sup>20</sup> In *R. v. Rowell* (1977) 65 Cr. App. R. 174, 180 the Court of Appeal stated that the use of the word "attempt" in this context is misleading. The defendant "was not charged with an attempt to commit a substantive offence but with the substantive offence itself, . . . namely the doing of an act (or . . . a series of acts) which has a tendency and is intended to pervert the course of justice".

<sup>21</sup> (1731) 2 Str. 904; 94 E.R. 930.

<sup>22</sup> [1891] 1 Q.B. 360.

<sup>23</sup> *Russell on Crime* (12th ed., 1964), p. 1484.

instances of conduct in this area which have formed the subject of conspiracy charges, namely—

- (a) dissuading or preventing witnesses from giving evidence;
- (b) preventing a witness from attending a trial;
- (c) preparing (sic) a witness to suppress the truth;
- (d) bribing or tampering with jurors, or corrupting judges;
- (e) perverting the minds of magistrates or jurors by publishing, pending criminal proceedings, matter likely to prejudice a fair trial.

It will be seen from *R. v. Rose*<sup>24</sup> and *R. v. Robinson*<sup>25</sup> that recourse has also been had to conspiracy to effect a public mischief. The House of Lords in *Director of Public Prosecutions v. Withers and Others*<sup>26</sup> has now held that there is no separate and distinct offence of effecting a public mischief or of conspiracy to commit a public mischief.<sup>27</sup>

3.7 There are also some little used common law offences such as—

- (i) embracery—in any way attempting to corrupt, influence or instruct a jury, or inclining them to be more favourable to one side or the other, by money, promises, threats or persuasion;
- (ii) personating a jurymen;
- (iii) misconduct by an officer of justice in relation to his office;<sup>28</sup>
- (iv) bribing a judicial officer;
- (v) Obstructing a coroner in his duty;
- (vi) escaping from custody and breach of prison.

### (c) Contempt of court

3.8 Contempt of court is, generally, conduct which is likely to interfere with, or bring into disrepute, the administration of justice by the courts (either in pending proceedings or, in cases of victimising of witnesses, or of vilification of a judge, after the completion of proceedings) if there is a real risk that the administration of justice will be prejudiced thereby. It can be punished with a fine or imprisonment.<sup>29</sup>

3.9 Contempt therefore covers not only the physical obstruction of court proceedings but also many of the acts which constitute the common law offence of perverting the course of justice, for example, interfering with witnesses, parties, officers of the court or jurors. Deterring or preventing a person from bringing

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<sup>24</sup> (1937) 1 Jo. Crim. Law 171. See para. 3.4 n.16, above.

<sup>25</sup> (1937) 2 Jo. Crim. Law 62. See para. 3.4 n.17, above.

<sup>26</sup> [1975] A.C. 842.

<sup>27</sup> Recent authorities suggest that charges of conspiracy to effect a public nuisance might be used to fill the gap caused by *D.P.P. v. Withers*: see e.g. the conviction of two women for conspiracy to effect a public nuisance by helping a convicted person to escape from Broadmoor (*The Times*, 17 October 1978). The common law offence referred to in para. 3.7(vi) would have been of no avail since Broadmoor is a mental hospital and not a prison.

<sup>28</sup> This is part of the wider common law offence of misconduct by a public officer in relation to his office: *Russell on Crime* (12th ed., 1964) p. 361.

<sup>29</sup> See generally *Balogh v. St. Albans Crown Court* [1975] Q.B. 73.

proceedings or from continuing with the prosecution or defence of an action may also amount to contempt.

3.10 The recommendations of the Phillimore Committee,<sup>30</sup> if implemented, will limit the applicability of contempt of court in two main ways—

- (i) conduct intended to pervert the course of justice will be punishable as contempt of court only if it occurs between the start and the completion of the proceedings to which it relates, and
- (ii) conduct directed against a litigant in connection with legal proceedings will be punishable as contempt of court only if it amounts to intimidation or unlawful threats to the person, property or reputation.

The Committee also recommended two new statutory offences. One was to penalise the taking or threatening of reprisals against a witness or juror in respect of anything done in connection with the proceedings, and the other to penalise the imputing of improper or corrupt judicial conduct in certain circumstances.

### **3. Statutory offences**

3.11 Apart from the common law offences, several statutory offences relate to conduct which interferes with the course of justice. Some, such as offences under section 89 of the Criminal Justice Act 1967, relate to written statements tendered in evidence in criminal proceedings; others are concerned with the wider conduct of obstructing police investigations and helping offenders. The most important of the latter are to be found in sections 4 and 5 of the Criminal Law Act 1967.

#### **(a) False formal statements**

3.12 Sections 2 and 9 of the Criminal Justice Act 1967 make admissible, in committal proceedings and in trial proceedings respectively, written statements which the makers sign as being true and which comply with those sections. Section 89 penalises a person who in such a statement wilfully makes a material statement which he knows to be false or does not believe to be true, provided that the statement has been tendered in evidence. The maximum penalty is imprisonment for two years. In practice almost all statements taken by police officers from prospective witnesses in a criminal case comply with the requirements of sections 2 and 9.

#### **(b) Criminal Law Act 1967**

3.13 Section 4(1) of the Criminal Law Act 1967<sup>31</sup> penalises a person who, knowing or believing another to be guilty of an arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede the apprehension or prosecution of that person if he has committed an arrestable offence. It seems that the offence can be committed by making a false statement

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<sup>30</sup> See (1974) Cmnd. 5794.

<sup>31</sup> This subsection is set out in para. 3.82. below.

to the police with the required intent,<sup>32</sup> but not, presumably, by failing or refusing to give information even when asked. The maximum penalty for this offence varies from ten years' imprisonment to three years' imprisonment, depending upon the offence to which it is related.

3.14 Section 5(1) of the Criminal Law Act 1967<sup>33</sup> penalises a person who accepts or agrees to accept any consideration (other than compensation for the loss or injury caused by the offence) for not disclosing information he has which might assist in securing the prosecution or conviction of another who has committed an arrestable offence, when he knows that an arrestable offence has been committed.<sup>34</sup> The maximum penalty is imprisonment for two years.

3.15 Section 5(2) of the Criminal Law Act 1967 provides an offence, punishable with up to six months' imprisonment and a fine of £200, for causing wasteful employment of the police by knowingly making to anyone a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry.

3.16 Many cases in which conduct is covered by one or other of these offences also fall within the minor offence of obstructing the police contrary to section 51(3) of the Police Act 1964, punishable with imprisonment for one month, and a fine of £200.<sup>35</sup> The "obstruction" referred to in this section has been held to cover obstruction other than physical obstruction<sup>36</sup> and the section is sometimes used in cases of obstruction by giving false information.

**(c) Other statutory offences.**

3.17 Other statutory offences connected with interfering with the course of justice include—

- (i) failing to surrender to custody, contrary to section 6 of the Bail Act 1976;
- (ii) Agreeing to indemnify a surety, contrary to section 9 of the Bail Act 1976;<sup>37</sup>
- (iii) personating bail, contrary to section 34 of the Forgery Act 1861;
- (iv) threatening, punishing, damnifying or injuring (or attempting to do so) a person for giving evidence or particular evidence at an inquiry unless the evidence was given in bad faith. This offence is punishable under section 2 of the Witnesses (Public Inquiries) Protection Act 1892 with three months' imprisonment and a £100 fine.

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<sup>32</sup> *R. v. Brindley* [1971] 2 Q.B. 300.

<sup>33</sup> This subsection is set out in para. 3.82, below.

<sup>34</sup> Neither of the common law offences of misprovision of treason and compounding treason were abolished by the Criminal Law Act 1967. In Working Paper No. 72 (1977), *Treason, Sedition and allied offences*, para. 67, we provisionally proposed replacement of the former, at least in relation to treason in wartime, and abolition of the latter.

<sup>35</sup> Criminal Law Act 1977, s. 31(1) and Schedule 6.

<sup>36</sup> *Betts v. Stevens* [1910] 1 K.B. 1; *Rice v. Connolly* [1966] 2 Q.B. 414, 420. In the latter case, however, the defendant was acquitted on appeal on the basis that a refusal to answer a policeman's question was not of itself an obstruction.

<sup>37</sup> As to the common law *R. v. Head and Head* [1978] Crim. L.R. 427.

#### 4. Statistics

3.18 Statistics are helpful in keeping in perspective the offences discussed in this Part of the report. It can also be seen from the accompanying table<sup>38</sup> that the figures for the years 1974–1977 (the last four years for which figures are available) have largely remained stable.

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<sup>38</sup> We are grateful to the Home Office for providing the information on which this table is based. Where proceedings involve more than one offence—and this may be particularly relevant to the offences we are considering—only the principal offence is recorded.

<i>Offence</i>	<i>Year</i>	<b>Persons tried at Magistrates' Courts</b>			<b>Persons tried at Crown Courts</b>		
		<i>Total</i>	<i>Guilty— Custodial Sentence</i>	<i>Guilty—non- Custodial Sentence<sup>39</sup></i>	<i>Total</i>	<i>Guilty— Custodial Sentence</i>	<i>Guilty—non- Custodial Sentence<sup>39</sup></i>
Impeding a prosecution (Criminal Law Act 1967, section 4(1)) <sup>40</sup>	1974	19	—	11	25	5	13
	1975	14	—	9	50	10	33
	1976	23	1	14	62	14	37
	1977	18	1	10	43	20	18
Wasteful employment of police (Criminal Law Act 1967, section 5(2)) <sup>41</sup>	1974	219	12	198	8	2	5
	1975	243	14	216	19	3	11
	1976	245	18	210	9	3	5
	1977	163	6	145	8	3	5
Conspiracy, or attempt to pervert the course of justice	1974	11	—	1	120	31	66
	1975	12	—	2	157	67	67
	1976	13	—	—	145	37	79
	1977	8	—	—	135	40	78

There were no trials in these 4 years for any offence of concealing information contrary to section 5(1) of the Criminal Law Act 1967. The only trial for making a false written statement, contrary to section 89 of the Criminal Justice Act 1967, resulted in a non-custodial sentence at the Crown Court.



<sup>39</sup> “Non-custodial sentences” include suspended sentences of imprisonment, which were frequently imposed, especially for conspiracy, or attempt, to pervert the course of justice. For these offences almost half the non-custodial sentences in the Crown Court were suspended sentences.

<sup>40</sup> For this offence 1 person was also committed by a Magistrates’ Court to a Crown Court for sentence in 1977.

<sup>41</sup> For this offence 1 person was also committed by a Magistrates’ Court to a Crown Court for sentence in 1974, as were 4 persons in 1975, and 5 in 1976. and 3 in 1977.

## B. CODIFICATION AND REFORM

### 1. General

3.19 We stated in the Working Paper that our main objective was to provide a series of specific and relatively tightly defined offences, rather than a general offence which was open to extension by judicial interpretation, with the uncertainty that this entails.<sup>42</sup> Few of our commentators disagreed with this policy although some regretted that it would not allow the courts flexibility to adapt the law to deal with new conditions and types of misconduct. This may well be true, but we think that today it is generally accepted that such alteration of the criminal law should, when required, be made by the legislature. As we have already pointed out,<sup>43</sup> it was only in 1968 in *R. v. Grimes*<sup>44</sup> that the offence of perverting the course of justice was recognised as a substantive offence independent of conspiracy. Since then, increasing use of this offence has been paralleled by increasing uncertainty as to its ambit. Most of the conduct discussed in this part tends by its nature to be preparatory conduct.<sup>45</sup> Likewise, most of the offences which we are recommending do not depend upon whether the conduct has succeeded in interfering with the course of justice. We believe that the effect of our recommended offences would be to cover all the most common ways of perverting the course of justice.<sup>46</sup>

3.20 In considering possible legislation in this field, we deal separately with, on the one hand, conduct which relates to criminal proceedings including interference with criminal investigations and, on the other, with conduct which relates to all types of proceedings, civil, criminal and administrative. This was the method adopted in the Working Paper where we mentioned<sup>47</sup> a feature distinguishing the two categories of conduct: it is primarily in criminal matters that there is a duty upon some authority to consider whether or not proceedings should be brought and should be pursued to finality. This is a duty which directly affects the public interest and which has to be exercised in accordance with the public interest. In dealing with perverting the course of justice in criminal matters, the distinction led us to propose offences covering not only the perverting of judicial proceedings but also the misleading of officials whose duty it is to consider whether or not proceedings should be taken. Our commentators generally agreed with this.

3.21 We deal in paragraphs 3.29 to 3.79 below with those offences which we recommend should apply to all proceedings, and in paragraphs 3.80 to 3.122 below with those which we recommend should apply only to criminal proceedings. Before considering them in turn, we deal with two general problems of relevance to this part of the Report as a whole, namely, what should be the scope of "proceedings" for these offences, and what should be the mental element in the offences with which this part of the Report is concerned.

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<sup>42</sup> Working Paper No. 62, para. 26.

<sup>43</sup> See para. 3.3, above.

<sup>44</sup> [1968] 3 All E.R. 179.

<sup>45</sup> See e.g. para. 3.5, above.

<sup>46</sup> Certain conduct not covered by our recommendations is discussed in para. 1.8. above.

<sup>47</sup> Working Paper No. 62, para. 30.

**(a) The scope of judicial proceedings**

3.22 So far as concerns criminal proceedings, dealt with below in paragraphs 3.80 to 3.122, the meaning of “proceedings” raises no problems. All the offences are concerned with interference of some kind with investigations being carried out with a view to the bringing of charges in the criminal courts; there is no need, therefore, for any definition of proceedings, and indeed the draft clauses in Appendix A refer to criminal investigations rather than proceedings. Thus our problem lies only with those offences, other than perjury, which may constitute some kind of interference with the actual administration of judicial proceedings, whether civil or criminal.

(i) Application to proceedings other than court proceedings

3.23 In discussing the meaning of “judicial proceedings” for the purposes of perjury, we pointed out that that offence already applies to false statements made to most tribunals by virtue of section 16 of the Evidence Act 1851, and we concluded<sup>48</sup> that perjury should continue to be available at any rate where a tribunal under the direct supervision of the Council on Tribunals has authority to hear, receive and examine evidence. Leaving aside perjury, however, it is difficult to be confident as to the present ambit of the proceedings to which the common law offence of perverting the course of justice applies. The cases which have concerned interference with the administration of judicial proceedings have been confined hitherto to activities in relation either to court or arbitration proceedings;<sup>49</sup> and at any rate on the reported cases it is an open question whether such activities as fabricating, concealing or destroying evidence to be submitted to administrative tribunals, or preventing a witness from giving evidence to such tribunals, are offences. But if charges were brought in respect of such conduct we have little doubt that the courts would hold that the common law did penalise it: there is ample authority in other contexts for the view that many tribunals have some of the attributes of courts and are for particular purposes (such as the law of contempt) to be treated as such.<sup>50</sup> We are equally clear that for the future the codified offences which we are recommending in place of the common law should be available to penalise the specified conduct when it occurs in relation to tribunals. In the context of perjury we have pointed out, as did some of our commentators, the important effects which tribunals’ decisions can have on the lives of many people; and if perjury is to continue to be available to penalise false evidence given to them, it would be quite illogical for such activities as fabrication of evidence for tribunals to lie outside the criminal law. This general principle is unaffected by the fact that certain types of the conduct to be penalised by our new offences, such as impersonation of a juror, will be inapplicable to tribunals. The question which now requires further examination is whether the scope of judicial proceedings in the case of these offences should be the same as it is for the purposes of perjury.

(ii) Consideration of the scope of judicial proceedings

3.24 Central to the concept of judicial proceedings for the purposes of perjury which we have recommended is the power of the bodies in question to hear,

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<sup>48</sup> See paras. 2.37–2.38, above.

<sup>49</sup> See *R. v. Vreones* [1891] 1 Q.B. 360, referred to in para. 3.4(i), above.

<sup>50</sup> See e.g. the judgment of Lord Widgery, C.J. in *Attorney General v. British Broadcasting Corporation* [1978] 2 A 11 E.R. 731 (Div. Ct.) and see also [1979] 3 W.L.R. 312 (C.A.).

receive and examine evidence on oath; and in order to ascertain more precisely which bodies have that power we have recommended a new provision to replace section 16 of the Evidence Act 1851.<sup>51</sup> But there is no necessary connection between the offences under consideration in this section of the Report and the actual taking of the oath: they may occur variously before, during or after a hearing. At first sight, therefore, it would be possible to take the view that judicial proceedings for the purposes of these offences need not be restricted in the way we have recommended in the case of perjury. This would, however, ignore some other important factors which were taken into account in our recommendations regarding perjury.

3.25 In considering the terms in which section 16 of the Evidence Act 1851 should be replaced we noted that there are numerous bodies which, although they may be obliged to observe the rules of natural justice in the exercise of their functions, are otherwise unregulated by the general law and derive their powers solely from submission of the parties to their agreed rules of conduct; club committees form one example.<sup>52</sup> We have recommended that for the future such bodies should not have power to administer the oath and should consequently be excluded from the ambit of judicial proceedings for the purposes of perjury. Equally, we do not think it appropriate that the other offences which we are recommending should be capable of commission in relation to them.

3.26 The tribunals whose proceedings constitute judicial proceedings for the purposes of perjury would, by virtue of the provision we recommend to replace section 16 of the 1851 Act, be limited to those under the direct supervision of the Council on Tribunals. The reasoning<sup>53</sup> which led us to confine the tribunals in question to this readily ascertainable class is as relevant in the present context as it was in the context of perjury. We do not think that it would be justifiable to extend the tribunals to which the other offences are to apply beyond the bounds recommended in relation to perjury. This view is reinforced by the further consideration that the power to administer the oath is an "important feature"<sup>54</sup> indicating that the tribunal concerned has judicial and fact-finding functions rather than purely administrative functions.

### (iii) Recommendation

3.27 To summarise, it seems to us that the considerations which led us to recommend replacement of section 16 of the Evidence Act 1851, and to limit judicial proceedings for the purposes of perjury in the way we have done, are germane also to the definition of judicial proceedings for the offences dealt with in this section. Accordingly we *recommend* that judicial proceedings for the purpose of offences constituting improper interference with the administration of civil or criminal judicial proceedings should be the same as for perjury; that is, proceedings before any person or body empowered to hear, receive and examine evidence on oath.

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<sup>51</sup> See para. 2.43, above.

<sup>52</sup> See para. 2.34, above.

<sup>53</sup> See paras. 2.37–2.38, above.

<sup>54</sup> *Attorney General v. British Broadcasting Corporation* [1978] 2 A11 E.R. 731, 735 *per* Lord Widgery, C.J.

## **(b) *The mental element***

3.28 In the Working Paper we proposed a broadly phrased mental element for several of the offences put forward. In particular, we proposed an intention to pervert the course of justice, taking those words from the definition of the wide common law offence which we were replacing. On reconsideration we prefer, in the offences which we are now recommending, to express more specifically the intention<sup>55</sup> which will be an essential element of those offences. Thus for example, in the offence of interfering with evidence there must be an intent to prevent the bringing of judicial proceedings or to influence their outcome, and in the offence of threats to prevent evidence being given there must be an intent to induce a person not to give evidence in proceedings. But in some of the offences there is no need to specify a mental element since this is implicit in the conduct penalised, as in blackmail aimed at stopping proceedings.

## **2. Offences relating to civil and criminal proceedings**

### **(a) *Fabricating or tampering with evidence***

3.29 We proposed in the Working Paper an offence of—  
“tampering with, or fabricating, evidence with the intention of perverting the course of justice in any judicial proceedings (whether instituted or not at the time), or with the intention of affecting the decision of any authority with a duty to consider whether to institute criminal proceedings.”<sup>56</sup>

This offence was designed to cover the type of conduct which gave rise to the prosecution in *R. v. Vreones*,<sup>57</sup> where the defendant tampered with grain samples from consignments of grain delivered under a contract which provided for arbitration proceedings in the event of any dispute as to the quality of the grain delivered. The samples tampered with would have been of evidential value in those proceedings. The proposal met with the general approval of commentators.

3.30 This offence is aimed at interference with what has been called “real” evidence as distinct from “testimonial” evidence, which includes testimony and hearsay, and is “the assertion of a human being offered as proof of the truth of that which is asserted.”<sup>58</sup> Real evidence is not a precise term of art, but we use it here to mean anything other than testimony, admissible hearsay or a document the contents of which are offered as testimonial evidence which may be examined by a tribunal as a means of proof,<sup>59</sup> or which could be so examined if it could be preserved. This may consist of material objects, the appearance of persons, a site which may be viewed by the court, and includes not only a thing itself but the context in which it is found. Thus there will be “fabrication” of evidence if in order to create the impression that there has been a struggle chairs and tables in a room are overturned, and there will be destruction of evidence if to conceal that there has been a struggle a room is put back into normal order. We think that the prohibited conduct is best defined as fabricating, concealing or destroying evidence; these terms cover all types of interference.

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<sup>55</sup> For the sense in which “intention” is used in this Report see para. 1.9, above.

<sup>56</sup> Working Paper No 62, para. 65.

<sup>57</sup> [1891] 1 Q.B. 360, para. 3.4(i), above.

<sup>58</sup> Cross, *Evidence* (4th ed., 1974) p. 9.

<sup>59</sup> *Ibid.*, p. 13.

3.31 The requisite intent proposed in the Working Paper was an intention to pervert the course of justice or to affect the decision of any authority having a duty to consider whether to institute criminal proceedings. There was little comment on this proposal, but on further consideration we think that the distinction between criminal and other proceedings can be dropped if the intention is expressed as an intent to prevent the bringing of, or to influence the outcome of, proceedings. We think it right that there should be an offence to penalise a person who, for example, tampers with a sample of grain from a consignment so that a prospective litigant on examining the sample would conclude that he had no basis for starting proceedings. Subject to the qualification in regard to the destruction of evidence which is reasonable in the circumstances, discussed in the next paragraph, we do not think that an offence in these terms will be too widely drawn.

3.32 Since the offence which we recommend will require an intent to prevent the bringing of, or to influence the outcome of, proceedings, there will be many situations where the destruction of evidence will not be penalised because of the absence of the requisite mental element: the tidying of a disordered room after a struggle could only fall within the offence if the intent could be proved. But even where a person destroys evidence, having no substantial doubt that this will influence the outcome of judicial proceedings (and thus on the test we recommend intending that result),<sup>60</sup> there may be exceptional cases where he should not be penalised. For example, in giving emergency treatment to a victim of a serious assault a person may destroy evidence by removing fragments of a weapon from a wound. It would clearly be wrong that he should be guilty of an offence. We therefore recommend that it should not be an offence to destroy evidence if to do so is reasonable in all the circumstances.

3.33 We recommend that it should be an offence to fabricate or conceal real evidence or to destroy real evidence, with intent to prevent the bringing of judicial proceedings or to influence the outcome of current or future judicial proceedings, but that it should not be an offence to destroy evidence if it is reasonable to do so in the circumstances.<sup>61</sup>

**(b) Preventing evidence or proceedings**

3.34 In the Working Paper we proposed two offences to cover preventing the giving of evidence or the institution of proceedings. The first was an offence of—

preventing witnesses, or those who might be witnesses, in judicial proceedings from giving evidence in the proceedings, or inducing them either not to give the evidence or to absent themselves so as to be unavailable to give the evidence, in each case with the intention of perverting the course of justice in judicial proceedings.<sup>62</sup>

The second was an offence of—

making an unwarranted demand with menaces that a person should not institute any judicial proceedings, or that he should withdraw or agree to

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<sup>60</sup> See para. 1.9(a), above.

<sup>61</sup> Appendix A, clause 8. This clause also contains provisions to adapt it so far as necessary to the proceedings of tribunals, statutory inquiries and non-statutory bodies, and to exclude the possibility of prosecutions for this offence as an alternative to perjury.

<sup>62</sup> Working Paper No. 62, para. 67.

settle any such proceedings, or that a defendant in criminal proceedings should plead in a particular way.<sup>63</sup>

3.35 Consideration of the views of those who commented on these proposals has led us to rearrange the way in which the conduct to be penalised should be divided. We propose to treat separately witnesses in civil and criminal proceedings and parties in civil proceedings, and subsequently the question of pressure on litigants. Pressure on a defendant in criminal proceedings to plead in a particular way is treated in the section of the Report dealing with offences relating to criminal investigations and proceedings.<sup>64</sup>

(i) Preventing the giving of evidence

*Witnesses in civil and criminal proceedings*

3.36 An inducement to witnesses in civil and criminal proceedings can range from a legitimate appeal for sympathy to threats of physical violence, and we think that the offence proposed in the Working Paper was too wide in that it would have penalised any inducement to a person not to give evidence. The two types of conduct which we think should in general be penalised are threatening a person to induce him not to give evidence and bribing a person not to give evidence. We therefore propose that the conduct to be penalised should be divided into—

1. threatening a person to induce him not to give evidence;
2. bribing a person to induce him not to give evidence;
3. accepting a bribe not to give evidence.

We consider first the question of the type of pressure which should in general be penalised by an offence of this nature, for, as was said in *R. v. Kellett*,<sup>65</sup> it is not every interference with a witness which is an offence of interfering with the course of justice. For example, the offence would not necessarily be committed by a person who tried simply to persuade another, in the belief that he was going to give false evidence, to speak the truth or to refrain from giving false evidence.

3.37 In *Kellett's* case the defendant was convicted on two counts of unlawfully attempting to pervert the course of justice by trying to dissuade potential witnesses in an impending divorce suit in which he was a party from giving evidence in accordance with statements they had made to an enquiry agent for his wife. He tried to dissuade them by threatening to sue them for damages for slanderous statements said to have been made by the witnesses to a friend of his, who at his instigation had questioned them about their opinion of him; he suggested at the same time that the witnesses might like to withdraw the statements they had made to the enquiry agent. The Court of Appeal was therefore primarily concerned with deciding which kind of threats were sufficient to constitute the offence. On this point the court held that any threat was unlawful, including a threat to do a lawful act, such as to exercise a legal right to sue for defamation, provided that one of the intentions of the threatener was to

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<sup>63</sup> Working Paper No. 62, paras. 83–84.

<sup>64</sup> See paras. 3.116–3.119, below.

<sup>65</sup> [1976] Q.B. 372.

intimidate or persuade a witness into altering or withdrawing evidence, whether or not he had any other intention.<sup>66</sup> In the circumstances the threat to sue for slander coupled with an invitation to withdraw the statements to the enquiry agent amounted to an attempt to pervert the course of justice. In the course of its judgment the Court of Appeal also indicated that any promise of reward made to a witness with intent to induce him to alter his evidence or refrain from giving evidence would be within that offence.<sup>67</sup> This states the offence in very wide terms, but it is clear from the judgment as a whole that the Court fully appreciated this and yet did not shrink from stating it in these terms. The Court did however indicate that it was concerned only with bringing pressure to bear on witnesses and that different considerations came into play in regard to pressure on a litigant in civil proceedings.<sup>68</sup>

3.38 So far as concerns witnesses in general, we propose to adopt the broad view taken by the Court of Appeal in *Kellett's* case. We must, however, mention the position of those who pay a retainer to expert witnesses. In our view it would be wrong to penalise this common practice. In the usual case the retainer is paid in order to secure the witness for the party paying it, and not to prevent the witness giving evidence. It may be that in some cases a retainer has the effect of preventing an expert from acquiring knowledge or information about a particular situation in regard to which he might otherwise be able to offer an expert opinion in giving evidence. In such cases, therefore, the expert may not be in a position to give any useful evidence if called upon to do so. But this must in our view be distinguished from the conduct at which the offence under consideration is aimed, which is essentially bribing witnesses not to give evidence in general or evidence in relation to a particular matter. On the other hand, there may be exceptional cases where a retainer does have the effect of suppressing evidence; this may occur, for example, if experts whose evidence may be vital to the outcome of a case are induced by means of a consideration to absent themselves at the time when the hearing of the case is due. In such rare instances there may be sufficient evidence to prove that the consideration was given with the intention of suppressing vital evidence, and in these circumstances we see no objection of policy to the application of the offence under consideration.

3.39 It should also be noted that the offences under consideration deal with conduct before and during a case. As the Court of Appeal indicated in *Kellett's* case<sup>69</sup> the limits of legitimate approach to a witness who has actually given his evidence may differ, and we deal separately with action taken against witnesses after the conclusion of judicial proceedings.<sup>70</sup>

3.40 We think that the requisite mental element for the offence which we recommend should be an intention to induce a person not to give evidence, or particular evidence, in judicial proceedings, whether or not these have been instituted at the time. An intention to induce a person not to give evidence covers the case where the objective is that the person should be unavailable to give

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<sup>66</sup> [1976] Q.B. 372 at pp. 388 and 391–392.

<sup>67</sup> *Ibid.*, p. 392.

<sup>68</sup> *Ibid.*, p. 390. See para. 3.41, below.

<sup>69</sup> *Ibid.*, p. 389.

<sup>70</sup> See paras. 3.58–3.63, below.



evidence. An intention to induce a person not to give particular evidence covers the case where the objective is to prevent evidence of a particular description or evidence of a particular matter being given. If it appears that the potential witness is in addition being threatened or bribed to give false evidence, this will of course amount to an incitement to commit perjury. In our view it is irrelevant whether the threat or reward is made to the witness or to some other person, such as the wife of the witness, provided that the requisite intent—in this case, the intent that the husband should not give evidence or certain evidence—is present. Accordingly, we *recommend* that it should be an offence to threaten or bribe a witness to induce him not to give evidence, or particular evidence, in current or future judicial proceedings. It should be an offence whether the threat or bribe is directed or offered to the witness or to some other person provided that it is made with the requisite intent. It should also be an offence to accept or offer to accept any bribe in return for evidence not being given in current or future judicial proceedings.<sup>71</sup>

### *Parties in civil proceedings*

3.41 In our view different considerations apply when the person to be induced not to give evidence in civil proceedings is himself a party to those proceedings. In this regard we adopt the view expressed by the Court in *Kellett's* case that a distinction can be drawn between bringing pressure to bear on a witness not to give evidence in proceedings and for the same purpose bringing pressure to bear on a litigant.<sup>72</sup> An important difference between a litigant and a witness is that almost all witnesses can be compelled to give evidence, and the evidence of a witness should be available to whichever side wishes to call him; whereas a party has a free choice as to whether or not to give evidence and, subject to the law of perjury, as to the oral and documentary evidence which he will or will not give, call or provide in support of his case. In addition it is well recognised that the bringing or defending of civil proceedings necessarily involves a party in certain legitimate pressures which may be brought to bear upon him. There may be threats to counterclaim if he proceeds with his action, threats not to do business with him in the future, and of course offers to make payments to, or to withdraw claims against, him. These considerations indicate that it is inappropriate to penalise a person who offers a consideration to induce a party to undertake negotiations for a settlement of his claim, and even more inappropriate to penalise a party who accepts a consideration for a settlement. So far as threats to a party are concerned, whether from his opponent in litigation or from another quarter, there are circumstances where a threat, such as a threat to counterclaim, may clearly be permissible. On the other hand, in circumstances such as those which arose in *Smith v. Lakeman*<sup>73</sup> and *Re Mulock*,<sup>74</sup> the threats may be impermissible.

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<sup>71</sup> Appendix A, clauses 9 and 10.

<sup>72</sup> We deal in paras. 3.42–3.47 below with the question of bringing pressure to bear on a person with intent to induce him either not to bring or to discontinue judicial proceedings.

<sup>73</sup> (1856) 26 L. J. Ch. 305. This case and the one following were cases of contempt of court, where pressure had been exerted on a litigant not to continue proceedings. Subject to the question of time limits, the facts of both cases if repeated would also fall within the definition of contempt of court as recommended by the Phillimore Committee; see generally (1974) Cmnd. 5794, paras. 57–62, and n.77, below.

<sup>74</sup> (1864) 33 L.J.P.M. & A. 205; 164 E.R. 1407. See also *Webster v. Bakewell Rural District Council* [1916] 1 Ch. 300 and n.77, below.

The offence which we consider necessary to deal with impermissible threats is considered below.<sup>75</sup> We do not consider that any specific provisions are required by way of exception to any of these offences to safeguard the position of those putting legitimate pressures on litigants, whether in the form of threats or rewards. The two offences recommended in relation to threatening and bribing witnesses penalise only those who so act with the intention of inducing another not to give evidence. They do not cover, and are not aimed at, any lawful moves made for the purpose of negotiating settlements of claims.

(ii) Blackmail to prevent proceedings

3.42 As we said in paragraph 3.41 above, where inducements by way of threats or rewards are directed at a party, the real objective is often to induce the party either not to bring or not to defend the proceedings. A person involved as a party in civil proceedings must accept that he can legitimately be subjected to a variety of pressures not to proceed with his case or defence. Nevertheless, we pointed out that there must be some limit to permissible pressure upon a litigant. A person's right to seek relief from the courts is important, for it is in the public interest that he should not be deterred from bringing or resisting claims; otherwise denial of access to the courts by threats or pressure might induce a recourse to self-help. The difficulty lies in seeking the proper line between legitimate and illegitimate pressure in this context. Threats may be of several varieties—for example, threats to commit a criminal offence; to commit a tort, such as defamation; to expose a secret tending to subject a person to hatred, contempt or ridicule or to impair credit or business repute;<sup>76</sup> to commit a breach of contract, such as summary dismissal of an employee; or to cause harm by doing what one is entitled to do, such as a threat to give lawful notice to a tenant or employee.

3.43 It is clearly difficult to draw a distinction between legitimate and illegitimate pressure by reference to the nature of the threat alone.<sup>77</sup> In particular, it may be justifiable in some situations, but not in others, to threaten to do what one is entitled to do in order to induce another to refrain from bringing proceedings. In the Working Paper<sup>78</sup> we suggested that this difficulty be solved by an offence based on section 21 of the Theft Act 1968 (blackmail) which would

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<sup>75</sup> See para. 3.42.

<sup>76</sup> American Law Institute's Model Penal Code (1962), s. 223(4) (c).

<sup>77</sup> The difficulty is illustrated by the cases on contempt where *Webster v. Bakewell R.D.C.* is reconcilable with *Smith, v. Lakeman* and *Re Mulock*, if at all, only on the basis that the first related to a threat to exercise a legal right. In *Smith v. Lakeman* (1856) 26 L. J. Ch. 305, P was held to have been in contempt for writing a letter to D threatening that, if D proceeded with his defence in pending litigation, he would be indicted for perjury and forgery and would thereby bring disgrace on his family. It was held that the letter had been written to intimidate D as a suitor and so divert the course of justice. In *Re Mulock* (1864) 33 L.J.P.M. & A. 205, a person not a party wrote to the petitioner in a pending divorce suit, threatening that if she did not withdraw he would publish the truth of the case with full documentation. The attempt to prevent the suit being brought before the court by threats of bringing her into disgrace and disrepute were held to be contempt. In *Webster v. Bakewell R.D.C.* [1916] 1 Ch. 300, a landlord threatened her tenant, who was suing the Rural District Council for trespass to his property, that she would terminate his tenancy to deprive him of *locus standi* if he did not withdraw. The landlord thought it was in her interest to stop the litigation, which affected her nearby property as well, and the threat was interpreted by the court as a threat to exercise a legal right. It was held that it was no contempt for her to threaten to assert her legal rights to prevent continuation of an action which she considered detrimental to her interest in the property. This case has been criticised: Borrie and Lowe, *Contempt of Court* (1973) p. 229.

<sup>78</sup> Working Paper No. 62, paras. 83–84.

penalise the making of an unwarranted demand with menaces that a person should not institute or should discontinue judicial proceedings. We now recommend such an offence. Section 21 is confined to instances where the demand is made with a view to gain or to cause loss. So limited, the section no doubt covers many instances of threats against litigants not to proceed with, or to cease to defend, a civil case. Other instances, however, may have no financial element, and we do not recommend such a limitation in the present context.

3.44 There are, however, two limitations upon the offence which we do recommend. Like section 21 of the Theft Act 1968, we think a demand with menaces should be unwarranted unless the person making it believes that he has reasonable grounds for making the demand and that the use of menaces is a proper means of reinforcing the demand; thus, while qualified by the objective criteria of reasonableness and propriety, the questions as to what kinds of demands are to be treated as justified, and when it is permissible to use menaces in support, are answered by a subjective test.<sup>79</sup>

3.45 Secondly, it should be noted that the offence only penalises menaces before or during judicial proceedings. The extent to which threats to parties after conclusion of proceedings should be penalised is considered below.<sup>80</sup> The offence is unlikely to be required in relation to criminal proceedings save in cases of private prosecutions, but we do not favour confining the offence to civil proceedings.

3.46 We did not propose in the Working Paper any offence of inducing a person not to institute, or to withdraw, proceedings by offering him some consideration. Nor do we here. This needs no elaboration in regard to civil proceedings. But in regard to criminal proceedings some explanation is required. In so far a decision either not to institute or to withdraw criminal proceedings is a matter for the police or some public authority, such conduct is already sufficiently penalised by the Prevention of Corruption Act 1906. In regard to “private” prosecutions we see no objection to a defendant being allowed to offer consideration to a private prosecutor for the discontinuation of proceedings with leave of the court. This does not mean that a demand for some consideration in return for discontinuation of proceedings would be legitimate. Such conduct is likely to amount to an unwarranted demand with menaces in contravention of section 21 of the Theft Act 1968.

3.47 We *recommend* that it should be an offence to make an unwarranted demand with menaces of another not to institute, or to withdraw or settle judicial proceedings. A demand with menaces should be unwarranted unless made in the

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<sup>79</sup> See further Eighth Report of the Criminal Law Revision Committee on *Theft and Related Offences* (1966) Cmnd. 2977, paras. 108–125. The CLRC considered “menaces” to be a stronger term than “threats” (*ibid.*, para. 123). Smith and Hogan (*Criminal Law* (4th ed., 1978) p. 577) comment that in view of Lord Wright’s definition of menaces in *Thorne v. Motor Trade Association* [1937] A.C. 797, 817, (a threat of “any action detrimental to or unpleasant to the person addressed”) “it might be thought that any distinction between menaces and threats is wholly illusory”. We ourselves doubt whether any distinction of substance is possible, and note that the OED defines the terms interchangeably. However, for consistency with the Theft Act 1968, s. 21, we retain the term “menaces” in the offence we recommend.

<sup>80</sup> See paras. 3.74–3.75, below.

belief that there are reasonable grounds for it and that menaces are a proper means of reinforcing the demand.<sup>81</sup>

3.48 To summarise, we *recommend* that there should be the following offences relating to bribing and threatening witnesses and threats to parties before or during judicial proceedings—

- (a) Threatening a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings.
- (b) Giving or agreeing to give or offering to give any consideration to a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings.
- (c) Accepting or agreeing to accept or offering to accept any consideration for a person or any other person not giving evidence, or particular evidence, in current or future judicial proceedings.
- (d) Making an unwarranted demand with menaces that a person should either not institute judicial proceedings, or should withdraw, or in the case of civil proceedings should settle, those proceedings. There should be provisions based upon section 21(1) and (2) of the Theft Act 1968 to the effect—
  - (1) that a demand with menaces is unwarranted unless the person making it does so in the belief—
    - (i) that he has reasonable grounds for making the demand; and
    - (ii) that the use of the menaces is a proper means of reinforcing the demand; and
  - (2) that it is immaterial whether the menaces relate to action to be taken by the person making the demand.<sup>82</sup>

**(c) Offences in relation to members of a court**

3.49 In the Working Paper<sup>83</sup> we proposed three offences concerning conduct relating to members of a court—

- (i) seeking to influence a member of a court by threats or bribery, or by persuasion improperly brought to bear,
- (ii) agreeing as a juror to give a verdict otherwise than in accordance with one's oath, and
- (iii) impersonating a juror.

Our present recommendations for the most part follow those proposals, though with some modifications.

- (i) Influencing the decision in judicial proceedings

3.50 We proposed in the Working Paper an offence of seeking to influence the decision in a judicial proceeding—

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<sup>81</sup> Appendix A, cl. 15. Provision is made in cl. 17 to adapt cl. 15 to relator actions and to proceedings before tribunals, statutory inquiries and non-statutory bodies.

<sup>82</sup> Appendix A, clauses 9, 10 and 15.

<sup>83</sup> Working Paper No. 62, paras. 87(1), 91 and 88.

(a) by threatening or bribing a juryman, or any officer or member of the court or tribunal, or

(b) by persuasion improperly brought to bear on such persons.<sup>84</sup>

This conduct is at present punishable as contempt of court and is also penalised by the common law offences of conspiracy,<sup>85</sup> embracery<sup>86</sup> and bribery.<sup>87</sup> We aim to abolish these common law offences and believe that specific legislation is required to deal with such conduct, even though it may also be punishable as contempt of court. We consider that the offence should cover not only threats, bribery and direct persuasion but also such conduct as giving to a member of a jury information which he should not have.<sup>88</sup> This may be just as effective as direct persuasion. The mental element required for the offence should be an intention to affect the outcome of judicial proceedings in which he or another is already or may in future be involved. There should be liability for the offence irrespective of whether the object is to secure an unjustified decision or verdict.

3.51 In the Working Paper we proposed that this offence should extend to improperly persuading any officer of the court. On reconsideration we think that the offence which we now recommend should be confined to persuading those persons who make the decision in any judicial proceedings,<sup>89</sup> and that there is no need to extend it to those less directly concerned in the making of the decision such as clerks to the justices, solicitors or barristers. Any offer of a bribe to clerks to the justices will be an offence under section 1 of the Prevention of Corruption Act 1906 as they are clearly “agents” within the meaning of the Act to whom it is an offence to offer a bribe.<sup>90</sup> As to solicitors and barristers, we feel that the code of conduct under which they operate and the sanctions available against them are sufficient deterrent to their being bribed, without in addition penalising the person seeking to bribe them. In fact, we have no evidence that this is a problem in relation to the administration of justice.

3.52 We recommend that it should be an offence improperly to influence a judge, member of a jury or a tribunal, by using threats, by giving or agreeing to give or offering to give any consideration, or by other means, with intent to affect the outcome of current or future judicial proceedings before him.<sup>91</sup>

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<sup>84</sup> Working Paper No. 62, para. 87(1).

<sup>85</sup> Para. 3.6(d), above.

<sup>86</sup> Para. 3.7(i), above.

<sup>87</sup> Para. 3.7(iv), above.

<sup>88</sup> For such conduct there was a conviction for embracery in *R. v. Owen* [1976] 1 W.L.R. 840.

<sup>89</sup> This may include certain officers of court, such as registrars, who sit in a judicial capacity. For convenience, in this Report we use the term “a member of a tribunal” to refer to a tribunal member who participates, alone or otherwise, in judicial proceedings. Thus in this offence, and in the offences recommended in paras. 3.55, 3.63 and 3.70, where reference is made to a “judge or member of a tribunal”, this means any person or body proceedings before whom constitute “judicial proceedings” for the purposes of this part of the Report: see para. 3.27, above.

<sup>90</sup> Sect. 1(3) states that an “agent” includes “a person serving under the Crown, or under any corporation or any municipal, borough, county or district council.”

<sup>91</sup> Appendix A, cl. 11. The offence covers officers of courts only in those cases where judicial proceedings take place before them: see n. 89, above.

(ii) Misconduct as a member of a jury or tribunal

3.53 The converse aspect of seeking improperly to influence a member of a jury or tribunal in the decision of any judicial proceeding is that of misconduct in office. This applies to misconduct by any public officer although this offence has been very seldom used in recent years; certainly there are no modern instances of criminal proceedings against judges of the Supreme Court for misconduct in office. But it would make for confusion rather than clarity to attempt to distinguish between misconduct by a judicial officer and by any other public officer and to repeal only so much of the general common law offence of misconduct in a public office as relates to judicial officers. It was for this reason that we made no such proposal in the Working Paper.<sup>92</sup> We did however propose that it should be an offence for a juror to give a verdict otherwise than in accordance with his oath.

3.54 We still prefer not to create a general offence of misconduct in office by a judicial officer, believing that this should be dealt with in the context of misconduct by any public officer.<sup>93</sup> We do, however, consider that there should be a specific offence, which will be the correlative of that which we recommend in paragraph 3.52, penalising any judge or member of a jury or tribunal who agrees or offers to influence the outcome of current or future judicial proceedings otherwise than in accordance with his duty as a judge or member of a jury or tribunal. Such an offence is clearly appropriate in the context of offences against the administration of justice.

3.55 We *recommend* that it should be an offence to agree or offer as a judge or a member of a jury or tribunal to influence the outcome of current or future judicial proceedings before him, otherwise than in accordance with his duty in relation to them.<sup>94</sup>

(iii) Impersonating a member of a jury

3.56 We proposed the replacement of the common law offence of impersonating a juror with a statutory offence requiring no specific intent other than that involved in entering the jury box and taking the oath in the name of another.<sup>95</sup> The need for such an offence was not disputed on consultation. Impersonation of a member of a jury can take two forms: either one person impersonates another at the time of the empanelling of a jury and takes the oath in place of the person actually called, or he can in exceptional circumstances take the place of a juror during a trial. We recommend that the offence should be cast in such a form as to cover both types of conduct.

3.57 We *recommend* that it should be an offence for a person—

- (a) to take the oath as a member of the jury knowing that he has not been selected to be a member of the jury; or

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<sup>92</sup> Working Paper No. 62, para. 89.

<sup>93</sup> Different considerations apply, however, if an officer of the court is sitting in a judicial capacity; if the proceedings before him are judicial proceedings, we think that the offence under consideration should cover him: compare cl. 11 and n. 91, above.

<sup>94</sup> Appendix A, cl.12.

<sup>95</sup> Working Paper No. 62, para. 88.

(b) to perform any of the functions of a member of the jury, knowing that he is not a member of the jury.<sup>96</sup>

**(d) Offences recommended by the Phillimore Committee**

(i) Taking reprisals

3.58 The Phillimore Committee recommended that it should be an offence to take or threaten reprisals after the conclusion of proceedings against a witness or juror in respect of anything done by him in that capacity.<sup>97</sup> The Committee cited section 2 of the Witnesses (Public Inquiries) Protection Act 1892<sup>98</sup> as a precedent for such an offence and *Attorney General v. Butterworth*<sup>99</sup> and *Chapman v. Honig*<sup>100</sup> as recent instances of conduct held to be contempt of court. In the first of these cases the intention to punish or to take revenge was the vital factor turning into unlawful action what would otherwise be lawful. The Committee considered such conduct could interfere with the administration of justice because—

“(a) a witness may be deterred from giving evidence for fear of reprisals even if he has not been threatened before the proceedings;

(b) other witnesses in future cases may be deterred.

It is also offensive to justice that a man should suffer in consequence of performing a public duty which may have been burdensome to him.”<sup>101</sup>

3.59 We adopted their recommendation in the Working Paper.<sup>102</sup> If contempt of court were limited to conduct between the start and the completion of the proceedings, as the Committee recommended, a criminal offence would then be needed to deal with reprisals after the completion of the proceedings; in any event it is in our view right that such conduct should be covered by a criminal offence, particularly if it does not amount to some other offence, for example, an assault which can be prosecuted as such.

3.60 The offence which we recommend gives protection not only to witnesses and members of juries but also to members of tribunals, who may be in as vulnerable a position as members of juries. We propose that the acts penalised should be “taking or threatening reprisals” for anything said or done by a witness or member of a jury or tribunal in the course of judicial proceedings. In itself the

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<sup>96</sup> Appendix A, cl. 20.

<sup>97</sup> (1974) Cmnd. 5794, paras. 155–158.

<sup>98</sup> See para. 3.17 (iv), above.

<sup>99</sup> [1963] 1 Q. B. 696: the defendant and others, members of a trade union, disapproving of evidence which G, another member, had given before the Restrictive Practices Court, censured him for his conduct and purported to relieve him of his position as branch treasurer. It was held that those defendants whose motives included that of punishing G for giving evidence were guilty of contempt, whether or not this was their predominant motive.

<sup>100</sup> [1963] 2 Q.B. 502: C gave evidence in an action by H against their common landlord, L. Next day L gave C notice to quit. In C's action against L for trespass and breach of covenant, it was held on appeal that, even if L's action amounted to contempt, C had no civil right of action for damages, as L's notice to quit was a valid exercise of his contractual rights as against C, and effective to terminate the tenancy; his vindictive motive was irrelevant; see further, para. 4.19, below.

<sup>101</sup> (1974) Cmnd. 5794, para. 155.

<sup>102</sup> Working Paper No. 62, paras. 111–112.

term “reprisals” to some extent indicates the punitive element of the conduct penalised, but we recommend that this be clarified by provision of a mental element of intent to punish. If this mental element is proved to be present, it will be irrelevant that the defendant might have had mixed motives for his conduct, or that his conduct might in other circumstances have been lawful.

3.61 We further recommend that the offence should cover reprisals taken or threatened during the course of proceedings. These may only come to light after the proceedings have concluded, but may be indistinguishable in character from action taken or threatened after the proceedings. It will be evident that, so far as it penalises threats of reprisals against witnesses during proceedings, there is an overlap here with the offence recommended in paragraph 3.48 of threatening witnesses to induce them not to give evidence in current or future judicial proceedings. Similarly, so far as it penalises threats of reprisals against members of juries and tribunals during proceedings, there is an overlap with the offence of improper persuasion in relation to judicial proceedings recommended in paragraph 3.52, above. But the separate offences which we recommend in our view make for clarity as to the respective types of conduct penalised by each of them, and the minor overlaps seem to us unobjectionable in principle.

3.62 There is one situation where we do not think that taking reprisals should constitute this offence. If, for example, a witness deliberately gives false evidence, it would in our view be wrong to penalise another who lawfully ends a trading agreement with him because of that evidence. Again, an employer who dismisses an employee for having given untrue evidence should not in our view be penalised by this offence.<sup>103</sup> We therefore recommend an exception where a witness gives untruthful evidence, which will apply if the evidence is in fact false, and the witness knows that, or is reckless whether, it is false. Mere belief in its falsity by the person taking or threatening reprisals will not suffice for this exception; in this respect it is similar to the exception in the Witnesses (Public Inquiries) Protection Act 1892, which penalises reprisals against a witness giving evidence upon an inquiry “unless such evidence was given in bad faith.”<sup>104</sup> We consider that the exception should be a limited one and therefore would only be justified if the burden of proving it, upon a balance of probabilities, lies on the defendant.

3.63 We *recommend* that it should be an offence to take or threaten to take reprisals against a witness, a judge, or a member of a jury or tribunal, intending to punish him for anything which he has done in that capacity in judicial proceedings—save that it should not be an offence if a person proves that the reprisals he took or threatened were in respect of a witness’s evidence which was false and which the witness knew to be false or was reckless whether it was false.<sup>105</sup>

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<sup>103</sup> The employee may have a remedy for unfair dismissal: see Employment Protection (Consolidation) Act 1978, s. 57.

<sup>104</sup> See para. 3.17 (iv), above. The offence under consideration here, applying to “judicial proceedings” as defined in para. 3.27, above, makes this Act unnecessary, and we therefore recommend its repeal. But as to s. 4 of this Act, see para. 4.20 n. 33, below.

<sup>105</sup> Appendix A. cl.18.



(ii) Publishing false allegations as to corrupt judicial conduct

3.64 The Phillimore Committee recommended an offence which would be constituted by the publication, in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice; they recommended that it be a defence to show that the allegations were true and that the publication was for the public benefit.<sup>106</sup> In our Working Paper we supported this recommendation<sup>107</sup> and we received little comment on the desirability of such an offence. At present the law of contempt prohibits, broadly speaking, (a) scurrilous abuse of a judge as a judge or of a court and (b) attacks upon the integrity or impartiality of a judge or court. But in practice “Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them”,<sup>108</sup> and the Committee felt the law should be brought into line with this practice. They recommended that such an attack made actually in the face of the court should continue to be contempt.<sup>109</sup> For two main reasons they also recommended that there should be an effective remedy against damaging attacks other than in the face of the court: first, some attacks, such as attacks upon an unspecified group of judges, might not be capable of being the subject of libel proceedings, and, secondly, judges commonly felt constrained by their position not to take action in reply to criticism and had no other means of refuting allegations.<sup>110</sup> They considered a separate criminal offence to cover this latter type of attack more appropriate than leaving it to be dealt with by the law of contempt. They recognised that in such cases there was not usually any particular urgency, so that there was no need to retain the speedy contempt procedure<sup>111</sup> under which cases are dealt with on application by judges sitting without a jury and usually only on affidavit evidence.<sup>112</sup>

3.65 The Committee were in some doubt as to whether conduct of this nature needed to be the subject of penal sanctions at all, but finally decided in favour of recommending an offence, primarily because public confidence in the honesty and impartiality of the administration of justice should not be undermined by unwarranted attacks upon the integrity and impartiality of the courts, the judges or magistrates. In order to limit the conduct which would fall within such an offence they recommended that, while the conduct should be the publishing of matter imputing improper or corrupt judicial conduct, there should be an intention to impair confidence in the administration of justice.

3.66 We think that there would be great difficulty in interpreting a phrase such as “with intent to impair confidence in the administration of justice.” The Committee clearly had in mind that it should mean more than an intention to lead people to think that a particular judgment should not have been given, for they characterised the offence as one which struck generally at the administration of justice. It is doubtful whether an attack on the impartiality of a bench of

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<sup>106</sup> (1974) Cmnd. 5794, paras. 164 and 167.

<sup>107</sup> Working Paper No. 62, paras. 113–114.

<sup>108</sup> *McLeod v. St. Aubyn* [1899] A.C. 549, 561 *per* Lord Morris; see (1974) Cmnd. 5794, para. 161.

<sup>109</sup> (1974) Cmnd. 5794, paras. 30–31.

<sup>110</sup> *Ibid.*, para. 162.

<sup>111</sup> See Rules of the Supreme Court, Order 52, set out in the *Supreme Court Practice* (vol. 1) 1979, pp.807–818.

<sup>112</sup> (1974) Cmnd. 5794, para. 163.

magistrates in a particular locality, or an attack on courts or tribunals<sup>113</sup> concerned with a particular body of law, such as industrial tribunals, would be within the offence. These difficulties and, in addition, the view expressed to us on consultation that all that need be covered are allegations of corrupt judicial conduct have caused us to reconsider the form of the offence.

3.67 We think that an offence penalising the publication of matter imputing improper judicial conduct would be too wide in scope, principally because of the uncertain scope in this context of the term “improper”: it may well be “improper” for a judge to interfere too much in the conduct of a case, or continually to interrupt counsel. We think that it would be sufficient to penalise the publication of matter which imputes corrupt judicial conduct to a tribunal or a member of a tribunal; allegations short of this are unlikely generally to impair confidence in the administration of justice.

3.68 If the conduct penalised is limited to imputing corrupt judicial conduct, there is in our view no need to require in addition an intent to impair confidence in the administration of justice. Whatever the intention, it is sufficiently serious that such an allegation is made. But we think that such conduct should, like perjury,<sup>114</sup> only be an offence if the allegation is false, if the defendant either knows it to be false or is reckless whether it is false, and if he intends it to be taken as true.<sup>115</sup> A true allegation of judicial corruption should not in our view be penalised in any circumstances.

3.69 By “publication” in this context we intend to cover only a communication addressed to the public at large, but the communication can be in any form, whether written, oral or visual. Furthermore, we think that a person who distributes the material should be liable in the same way as the publisher.<sup>116</sup>

3.70 We *recommend* that it should be an offence to publish or distribute false matter, with intent that it be taken as true and knowing it to be false or being reckless whether it is false, when it imputes corrupt judicial conduct to any judge, tribunal or member of a tribunal.<sup>117</sup>

### (iii) Supplementary offences

3.71 While the two offences in the preceding paragraphs cover the conduct which the Phillimore Committee recommended should be the subject of new criminal offences, our own further consideration of these problems has led us to the conclusion that additional offences are needed to penalise conduct which would otherwise be subject to no penalty, either under the scheme of offences which we are recommending or—if the Phillimore recommendations as to contempt are implemented—for contempt of court. We examine the two supplementary offences which we consider necessary in the following paragraphs.

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<sup>113</sup> We use the term “tribunal” to refer to a tribunal which participates in “judicial proceedings” as defined in para. 3.27, above; see n.89, above.

<sup>114</sup> See para. 2.94, above.

<sup>115</sup> For the meaning in this Report of “intention”, “knowledge” and “recklessness”, see para. 1.9, above.

<sup>116</sup> See para. 3.78, below.

<sup>117</sup> Appendix A, cl.13.

### *Reprisals against persons for attending jury service or as witnesses*

3.72 The offence which we recommend penalising reprisals against witnesses and members of juries and tribunals is aimed at such reprisals for “anything said or done” by them in proceedings. It therefore penalises reprisals against a witness for having given evidence, the situation which arose in *Attorney General v. Butterworth*.<sup>118</sup> Similarly, it penalises reprisals against a juror for being a member of a jury which returned a particular verdict, the situation which arose in *R. v. Martin*.<sup>119</sup> But it does not cover the cases of a witness who, for example, is dismissed by an employer for attending court to give evidence, whether or not he actually does so, or the employee similarly dismissed for attending court when summoned for jury service, whether or not he is selected for service. Such dismissals may amount to contempt at present, whether the dismissal occurs before, during or after the period of attendance at court,<sup>120</sup> but, if the recommendations of the Phillimore Report<sup>121</sup> are implemented, will cease to be contempt if dismissal occurs after the conclusion of judicial proceedings.

3.73 Dismissals of an employee for attending court on jury service occurring after the conclusion of judicial proceedings may amount to unfair dismissal giving rise to a remedy under the Employment Protection (Consolidation) Act 1978. But we do not think it would be satisfactory to leave such dismissals to be dealt with solely by this means, since, quite apart from the fact that such conduct will cease to be contempt if the Phillimore Report is implemented, instances where protection is needed may occur outside the relationship of employer and employee.<sup>122</sup> At the same time, we have indicated that this type of conduct, whether occurring before, during or after judicial proceedings, differs from that penalised by our principal reprisal offence:<sup>123</sup> it does not relate to anything done by the witness or juror in that capacity, and to that extent it has a less direct impact on the course of justice in general. We therefore consider it preferable to penalise it specifically, and *recommend* that it be an offence for a person to take or threaten reprisals against another, intending to punish him for attending court when summoned for jury service, or for attending to give evidence as a witness in judicial proceedings.<sup>124</sup>

### *Reprisals against parties in judicial proceedings*

3.74 It will be noted that the offences penalising reprisals which we have recommended do not penalise reprisals threatened or taken against parties during or after proceedings for having instituted proceedings. The Working Paper did not raise the question of whether the offence there proposed should extend to reprisals

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<sup>118</sup> [1963] 1 Q.B. 696; see para. 3.58, n.99, above.

<sup>119</sup> (1848) 5 Cox C.C. 356; D called on the foreman of a jury which had convicted D's brother of a crime the previous day, and challenged him to mortal combat “for having bullied the jury”. D was committed for contempt.

<sup>120</sup> See *Attorney General v. Times Newspapers Ltd.* [1974] A.C. 273, 318 *per* Lord Simon of Glaisdale; *Rooney v. Snaresbrook Crown Court* (1978) 68 Cr.App.R. 78.

<sup>121</sup> (1974) Cmnd. 5794.

<sup>122</sup> *E.g.* where the witness or juror is an independent contractor.

<sup>123</sup> See para. 3.63, above.

<sup>124</sup> Appendix A, cl.19. The clause also covers members of a jury attending a coroner's inquest. Inquests are “judicial proceedings” by virtue of the Coroners Act 1887, s.4(1), which requires coroners to examine witnesses on oath.

of this nature, and there was no discussion in the consultation of whether it should do so. Furthermore, there is room for doubt as to whether such reprisals at present amount to contempt of court.<sup>125</sup> As we have indicated<sup>126</sup> the pressures to which a party may legitimately be subjected during the course of proceedings differ from those which may be brought to bear on a witness. Under our recommendations, the limits of legitimate pressure on a party during proceedings are set by the offence of blackmail.<sup>127</sup> It is therefore necessary to give separate consideration to an offence of threatening or taking reprisals against parties after judicial proceedings.

3.75 In our approach to the recommended offence of blackmailing parties to judicial proceedings, we pointed out the importance to be attached to a person's right to seek relief from the courts without being deterred by threats amounting to blackmail.<sup>128</sup> But the offence of blackmail is inappropriate to deal with threats made after conclusion of judicial proceedings, and indeed the offence which we recommend is limited to unwarranted demands with menaces made to a party before or during such proceedings.<sup>129</sup> Yet there are in our view strong considerations which weigh in favour of providing protection by means of the criminal law for parties after conclusion of proceedings as well as during them. The principal consideration seems to us to be that a lacuna would be left in the law if no such protection were given, which would be capable of exploitation by the unscrupulous. Under our scheme of offences, blackmail of parties is penalised if it occurs during proceedings; but if no protection is given to parties after proceedings have ended, it will only be necessary for persons intent on taking reprisals against a party to await this moment, with the result that their conduct would then be outside the scope of the criminal law—and, if the Phillimore Report is implemented, also outside the time limits for the operation of contempt. The belief of a litigant that reprisals could be taken against him with impunity after the end of the proceedings could well inhibit him from bringing proceedings in the first place; and the fact that reprisals can be taken against a litigant with impunity could well affect the due administration of justice by deterring others from bringing proceedings in similar circumstances. Examples of the kind of reprisals we have in mind are not difficult to postulate, and we instance only the trade association or cartel which withholds supplies from a retailer or the trade union which withdraws a union card from a member,<sup>130</sup> in either case because of action taken against it or another member. It is true that there are other factors which have caused us to hesitate in deciding whether to recommend an offence of reprisals against parties. In relation to the offence of reprisals against witnesses we recommend provision of a mental element of an intent to punish, and comment that, if this is proved to be present, it will be irrelevant that the defendant might have had mixed motives for his conduct, or that his conduct might in other circumstances have been lawful. Such considerations carry little weight in the context of reprisals against witnesses, because of the high degree of protection which should be accorded to them. On the other hand, even with provision of a

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<sup>125</sup> See *Attorney General v. Times Newspapers Ltd.* [1974] A.C. 273, 320 per Lord Simon of Glaisdale.

<sup>126</sup> See paras. 3.40 and 3.42, above.

<sup>127</sup> See para. 3.47, above.

<sup>128</sup> See para. 3.42, above.

<sup>129</sup> See para. 3.47, above.

<sup>130</sup> Compare *Attorney General v. Butterworth* [1963] 1 Q.B. 696, n. 99, above.

similar mental element, an offence of reprisals against parties might be capable of penalising otherwise lawful retaliatory acts taken in the ordinary course of commercial dealings if done with malice; and it may be argued that parties, as distinct from witnesses, do not deserve or require so high a degree of protection. But weighing all these considerations, and emphasising in particular the lacuna which there would otherwise be in the criminal law, we have concluded that the factors in favour of an offence are on balance the stronger. Accordingly we *recommend* that it should be an offence for a person to take or threaten reprisals against a party to judicial proceedings after they have ended intending to punish him for instituting or not withdrawing or settling them or for anything else which he may have done or omitted to do in relation to them.<sup>131</sup>

**(e) Publishing matter with intent to pervert justice**

3.76 We proposed in the Working Paper an offence of—

“publishing, where there was an intent to pervert the course of justice, any material which creates a risk that the course of justice in judicial proceedings will be seriously obstructed or prejudiced.”<sup>132</sup>

The Phillimore Committee recognised<sup>133</sup> that such a publication would at present constitute an offence of perverting the course of justice and proceeded on the assumption that such an offence would continue to exist. They recommended—and here proof of an intent such as an intent to pervert or obstruct would not be necessary—that the publication of any material which creates a risk that the course of justice will be seriously obstructed or prejudiced should be contempt if it occurred after the proceedings started and before they were completed.<sup>134</sup> Conduct outside those time limits would not be penalised at all if their recommendation were to be implemented and the general offence of perverting the course of justice were to be abolished. Clearly there is need for an offence penalising conduct which creates a risk of a wrong outcome of proceedings and is aimed at bringing about such an outcome, and we think that the offence should follow the lines proposed in the Working Paper.

3.77 It can, however, be argued that the mental element as formulated in the Working Paper should be widened to cover cases where there is no intent to pervert, obstruct or prejudice the course of justice but where for other reasons the publication is undesirable, for example, when such articles are published in a newspaper solely to boost sales. But we agree with the Phillimore Committee that this is not a ground for penalising publication: our sole concern is with publications made with intent to achieve an outcome in judicial proceedings which would in fact be a miscarriage of justice, that is contrary to the proper course of justice in the sense of a wrong result.

3.78 The Committee meant by “publication” in this context “any speech, writing, broadcast or other communication, in whatever form, which is addressed

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<sup>131</sup> Appendix A, cl.16. As in the case of blackmail against parties to judicial proceedings, necessary adaptations are provided in cl.17 for the application of this offence to the proceedings of tribunals and statutory inquiries, and to parties in relator actions.

<sup>132</sup> Working Paper No. 62, para. 87(2).

<sup>133</sup> (1974) Cmnd. 5794, para. 65.

<sup>134</sup> *Ibid.*, paras. 113, 123, 127, 129 and 132.

to the public at large". This is in our view<sup>135</sup> the appropriate meaning. Under the law of contempt of court, where there is liability without any intent to influence the proceedings, the question arises whether a distributor of a publication containing matter likely to affect the proceedings should be liable. Under the Phillimore Committee's recommendations which, as we have noted, would require no mental element of intent to pervert the course of justice, the distributor would continue to be liable for contempt if distribution occurred within the specified time limits. Similarly, in relation to the offence under consideration, which would require a particular mental element, we see no basis for drawing a distinction between a publisher and a distributor, both of whom, if they have the requisite intent, should in our view be liable.

3.79 We *recommend* that it should be an offence to publish or distribute, with intent to achieve a miscarriage of justice in current or future judicial proceedings, any matter the publication or distribution of which creates a risk of a miscarriage of justice.<sup>136</sup>

### 3. Offences relating to criminal proceedings and investigation

#### (a) Introduction

3.80 We now turn to consider what further conduct relating to interference with criminal proceedings needs to be covered by the criminal law. In the Working Paper<sup>137</sup> we noted what we regarded as an important distinguishing feature between criminal and other proceedings, namely that in most criminal matters there is a duty upon some authority to consider whether or not proceedings should be brought and prosecuted to finality. This duty is one which has to be exercised in accordance with the public interest.

3.81 This distinction led us to think that in relation to perverting the course of justice in criminal matters it was necessary to provide offences to deal not only with perverting judicial proceedings, but also with misleading authorities whose duty it was to consider whether or not proceedings should be taken. With these considerations in mind we proposed two offences to cover conduct aimed at hindering the proper investigation of criminal conduct, and the retention of two statutory offences contained in the Criminal Law Act 1967 relating to impeding the apprehension of prosecution of a person known to be guilty of an arrestable offence and to agreeing for a consideration not to disclose information material to securing the prosecution or conviction of another who has committed an arrestable offence.

3.82 The two new offences which we proposed in the Working Paper<sup>138</sup> were—

- (a) Preventing those who might be witnesses in any criminal proceedings from giving information as to any offence which had been committed, inducing such persons to absent themselves so as to be unable to give such information and persuading such persons by threat or intimidation

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<sup>135</sup> See para. 3.69, above.

<sup>136</sup> Appendix A, cl.14; and as to the definition of "publication" and "distribution", see cl. 32.

<sup>137</sup> Working Paper No. 62, para. 30.

<sup>138</sup> *Ibid.*, paras. 98 and 100.

not to give such information, in each case with the intention of obstructing the police or any public authority in their duty to decide upon the institution or conduct of criminal proceedings: maximum penalty—2 years' imprisonment and a fine.

- (b) Giving false information to the police or to any public authority with the intention of obstructing them in their duty to decide upon the institution or conduct of criminal proceedings: maximum penalty—2 years' imprisonment and a fine.

The two offences in the Criminal Law Act 1967 which we thought needed to be retained were—

- (i) "Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence." (Section 4(1)); and
- (ii) "Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years." (Section 5(1)).

3.83 Comments on our Working Paper, including a three-part article by Professor Williams in the *Criminal Law Review*,<sup>139</sup> have made us realise that we cannot deal with offences of interfering with the administration of justice without at the same time giving detailed consideration to the offences created by sections 4 and 5 of the Criminal Law Act 1967, and section 89 of the Criminal Justice Act 1967,<sup>140</sup> as well as the offence of obstruction of the police in section 51(3) of the Police Act 1964. In particular we feel that a fuller consideration must be given to the extent to which penalties should be imposed for making a false statement to the police or other prosecuting authority who are investigating a crime, and of other conduct which obstructs the police in combating crime.

### **(b) General considerations**

3.84 Prior to 1967 the law as to misleading or obstructing the police was rigorous in content but mild in application. The weapons to hand for felonies were misprison and perhaps<sup>141</sup> accessory after the fact; and, for all offences whether felony or misdemeanour, the common law offence of perverting the course of justice, although it was only in 1968<sup>142</sup> that the existence of this offence was

<sup>139</sup> "Evading Justice", [1975] *Crim. L.R.* 430, 479 and 608.

<sup>140</sup> This penalises a person who makes a formal witness statement under either section 2 or section 9 of the Act, when that statement is tendered in evidence: see para. 3.12. above.

<sup>141</sup> See Williams, *Criminal Law, The General Part* (2nd ed., 1961) at p. 411.

<sup>142</sup> *R. v. Grimes* [1968] 3 All E.R. 179.

clearly spelt out. In addition there was the minor offence of obstruction of the police contrary to section 51(3) of the Police Act 1964. Misprision of felony was so rarely charged that the House of Lords spent five days listening to argument as to whether it had ever existed as an offence and, if it had, whether it still did.<sup>143</sup> The decision of the House of Lords that the offence existed was accompanied, in some at least of the speeches, with expressions of satisfaction with the law.<sup>144</sup> The decision, or at any rate the state of the law, was however severely attacked by some academic writers.<sup>145</sup> It was doubtful whether merely lying to the police made one an accessory after the fact to felony, but, as Professor Glanville Williams pointed out,<sup>146</sup> this possible limitation was unimportant because the common law offence of interfering with the course of justice could also be called in aid. However, apart from the minor offence under the Police Act, none of this armoury has been used. The only reported case of the conviction of a single person for a lie told to police investigating a crime appears to be *R. v. Rowell*,<sup>147</sup> and in that case there was the additional factor that the lie involved alleging the guilt of an innocent person. Until recently, instances of other conduct by one person which frustrated the police in their investigation of crime were not normally charged as perverting the course of justice but as obstruction of the police contrary to section 51 (3) of the Police Act 1964.<sup>148</sup>

3.85 Section 51(3) of the Police Act 1964 provides that—

“Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty”

shall be guilty of a summary offence punishable with one month’s imprisonment. This sub section re-created provisions contained in earlier legislation.<sup>149</sup> According to Professor Glanville Williams<sup>150</sup> this offence was originally directed against obstruction having a physical aspect but, by 1961, it had been extended in England<sup>151</sup> to non-physical obstruction such as giving warnings,<sup>152</sup> and Lord Goddard C.J. made the very wide statement that—

“obstructing means making it more difficult for the police to carry out their duties”.<sup>153</sup>

There seems to be no direct decision to the effect that lying to the police can amount to an “obstruction” but, in *Rice v. Connolly*,<sup>154</sup> the Divisional Court expressed the view, obiter, that even an offender’s lies could amount to an “obstruction”.

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<sup>143</sup> *Sykes v. Director of Public Prosecutions* [1962] A.C. 528.

<sup>144</sup> *Ibid.*, per Lord Denning at p. 564, per Lord Goddard at p. 569, per Lord Morris at p. 572.

<sup>145</sup> See e.g. Williams, *Criminal Law, The General Part* (2nd ed., 1961) pp. 422–427.

<sup>146</sup> See n.141, above.

<sup>147</sup> (1977) 65 Cr.App.R. 174.

<sup>148</sup> *Betts v. Stevens* [1910] 1 K.B.1 (warning motorists of a speed trap); *Dibble v. Ingleton* [1972] 1 Q.B. 480 (drinking to nullify a breathalyser test); cf. *R. v. Britton* [1973] R.T.R. 502. (where the charge was attempting to defeat the course of justice); *Hinchliffe v. Sheldon* [1955] 1 W.L.R. 1207 (warning a licensee of a public house of the imminent entry of the police); *R. v. Sandbach, Ex parte Williams* [1935] 2 K.B. 192 (warning a bookmaker of the approach of police).

<sup>149</sup> The Prevention of Crimes Act 1871 as amended by the Prevention of Crimes Amendment Act 1885.

<sup>150</sup> *Criminal Law, The General Part* (2nd ed., 1961) p. 419.

<sup>151</sup> But not apparently in Scotland: *Curlitt v. McKechnie* 1938 S.C. (J.) at 179.

<sup>152</sup> *Betts v. Stevens* [1910] 1 K.B. 1.

<sup>153</sup> *Hinchliffe v. Sheldon* [1955] 1 W.L.R. 1207, 1210.

<sup>154</sup> [1966] 2 Q.B. 414.



3.86 Criminal law and procedure were radically reformed in the legislation of 1967,<sup>155</sup> the provisions of which in this area of the law implemented many of the recommendations contained in the Seventh<sup>156</sup> and Ninth<sup>157</sup> Reports of the Criminal Law Revision Committee.

3.87 In their Seventh Report the Criminal Law Revision Committee recommended the abolition of the distinction between felonies and misdemeanours. This meant that they had to consider the law relating to accessories after the fact to felony, which, with the abolition of the distinction, would cease to have effect. They recommended the replacement of the law relating to accessories after the fact by statutory provisions which were later enacted in the Criminal Law Act 1967 and, in making their recommendations, they identified "the essential feature of the present offence" as "the intention to obstruct the working of the criminal law". Indeed Glanville Williams, who was a member of the Committee, begins his first article with the sentence—

"The Criminal Law Revision Committee in its Seventh Report, which was implemented by the Criminal Law Act 1967, made a serious effort to state *restrictively* the law regulating *interference with justice*."<sup>158</sup>

3.88 The Committee fully appreciated that the offences they were creating did not penalise a person who refrained from giving information about an offence because he did not think it right that the offender should be prosecuted. They thought it difficult to justify such an offence. They also thought that public opinion would be opposed to an offence of refusing to give information about an offence to the police in answer to questions, even if this were done from a wish to conceal facts from the police. Furthermore, in regard to actively misleading the police they said—

"An offence of actively misleading the police might be easier to justify than an offence of refusing to give information; but we do not think that there is sufficient need to create it, and it would be difficult to distinguish between active misleading and mere withholding of information."<sup>159</sup>

3.89 The Committee then went on to recommend the creation of the offence under section 5(2) of the Criminal Law Act 1967 of wasting police time<sup>160</sup> which applies to all offences, not merely arrestable ones. This seems to show that the decision to restrict sections 4(1) and 5(1)<sup>161</sup> to arrestable offences was not made merely because the offences being replaced only related to felonies (indeed there was some doubt whether compounding was so limited). It is important to note that for liability under each of these sections the defendant must know or believe that an arrestable offence has been committed.

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<sup>155</sup> Criminal Law Act 1967 and Criminal Justice Act 1967.

<sup>156</sup> *Felonies and Misdemeanours*. (1965) Cmnd. 2659.

<sup>157</sup> *Evidence (Written Statements, Formal Admissions and Notices of Alibi)*. (1966) Cmnd. 3145. [1975] Crim. L.R. at 430 (emphasis added).

<sup>158</sup> (1965) Cmnd. 2659, para. 42.

<sup>160</sup> This penalises a person who "causes any wasteful employment of the police by knowingly making to any person a false report tending to show that the offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry."

<sup>161</sup> These are set out in para. 3.82, above.

3.90 The enunciation and present use of the common law offence of perverting the course of justice (as a substantive offence independent of conspiracy), which were first clearly made in *R. v. Grimes*,<sup>162</sup> seem to be at variance with the direction taken by the Criminal Law Revision Committee. The policy questions now to be decided are to what extent false statements made to the police or other prosecuting authorities during their investigation of an offence should be made criminal, and how other conduct which obstructs the police in combating crime should be treated.

**(c) False statements to the police**

3.91 It seems clear that the Criminal Law Revision Committee did not intend that the offence eventually enacted in section 4(1) should extend to telling lies to the police, and a further indication of this intent is shown by the procedural recommendations which they made in their Ninth Report,<sup>163</sup> which were implemented by sections 2, 9 and 89 of the Criminal Justice Act 1967. Sections 2 and 9 make provision for the admissibility as evidence of written statements at committal proceedings and trials. The Criminal Law Revision Committee<sup>164</sup> considered what the position should be if such a statement contained a falsehood. They recommended that if the statement was tendered in evidence the maker should be subject to the law of perjury in respect of any falsehood in the statement as if he had given false evidence in court,<sup>165</sup> so long as the statement contained a declaration that it was true and that the maker knew of his criminal liability should he wilfully say anything false in it. The Committee went on to consider what the position should be if the statement was not tendered in evidence. Their report reads—

“The question of liability for perjury is not free from difficulty, and we reached our conclusion after considering other possible provisions. There seems to be a substantial case in principle for making a person liable in respect of anything false in a statement whether or not the statement is tendered in evidence. The moral guilt of the maker is no different in either event. The falsehood may mislead, or cause considerable difficulty to, the other parties (especially if the maker disappears after making the statement), and it may be a matter of chance whether the statement is tendered in evidence. But on the whole we think that this would be too wide a provision. The clause will have the advantage that, if the maker has said something in his statement which is untrue, he will be able to avoid liability by telling the party proposing to tender his statement that he wishes to withdraw or alter it. For it would obviously be improper to tender a statement to which the maker no longer adhered; and in any event the maker would not be prosecuted in such a case.”

It seems therefore that the view of the Criminal Law Revision Committee was that an offence should only be committed if—

1. silence in respect of an arrestable offence is bought for money (other than compensation) (section 5(1)), or

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<sup>162</sup> [1968] 3 All E.R. 179.

<sup>163</sup> (1966) Cmnd. 3145: *Evidence (Written Statements, Formal Admissions and Notices of Alibi)*.

<sup>164</sup> *Ibid.*, at paras. 12 and 13.

<sup>165</sup> On the basis that the penalty would be limited to 2 years' imprisonment instead of the 7 year maximum for perjury.

2. a false report is knowingly made in the circumstances outlined in section 5(2), or
3. a written statement tendered in evidence contains a falsehood (section 89).

It seems clear that, as Glanville Williams writes—

“the Committee did not contemplate that it would or should be an offence for a person to tell lies to the police in order to protect another person from a charge of crime, whether in response to questions or not, where suspicion is not intentionally cast on an innocent person”,

(when it might be an offence under section 5(2)). But, as he says, they “did not reckon with their own section 4(1)”.<sup>166</sup>

3.92 In *R. v. Brindley*<sup>167</sup> the Court of Appeal upheld the conviction of the defendants for offences under section 4(1) of the Criminal Law Act 1967 based upon false information given by them when interviewed by the police about the moving of two lorries from a garage forecourt. The point at issue in the appeal was whether the offence was committed even though the defendants did not know the identity of the person who had committed the arrestable offence of stealing the lorries. But it was conceded by the defence and accepted by the court that making a false statement “could be an act within the section that was capable of impeding the apprehension of an offender”.<sup>168</sup>

3.93 After further consultation with the Home Office and with representatives of police authorities, we have reconsidered the proposal made in our Working Paper that it should be an offence to give false information to the police with the intention of obstructing them in their duty to decide upon the institution or conduct of criminal proceedings.<sup>169</sup> We now recommend that the giving of false information to the police should be specifically penalised only if—

- (i) the information given in a formal statement is in writing, whether or not it is tendered in evidence;
- (ii) though not in a formal statement, the information falsely implicates an innocent person in an offence;
- (iii) again though not in a formal statement, the information is a false admission of having been the driver of a motor vehicle in relation to which an endorsable offence is being investigated.

We recommend also that the offence of impeding investigations at present in section 4(1) of the Criminal Law Act should not cover cases of giving false information. These recommendations are discussed in the following paragraphs.

(i) False information in a formal written statement

3.94 The starting point of our reasoning is that while the giving of false information to the police can in some cases seriously affect the administration of justice, this is usually so only where the lying is deliberate and sustained. If in the

<sup>166</sup> [1975] Crim. L.R. at 436.

<sup>167</sup> [1971] 2 Q.B. 300.

<sup>168</sup> *Ibid.*, at 302B.

<sup>169</sup> Working Paper No. 62, para. 100.

course of their initial interrogation of a witness the police suspect that they are not being given truthful information they can always ask that the witness make a formal witness statement on what in the Metropolitan area is known as Form 991. If the witness repeats the suspect information in such a statement and it is shown to be false, then, under our recommendation, he will have committed an offence. If he changes his story and gives truthful information no harm will be done, and if he declines to make the statement in a formal way the police will realise that they may not be able to rely on it. Thus our recommendation that it should be an offence to make a formal witness statement for which the maker could be prosecuted regardless of whether the statement is tendered in evidence (such tendering in evidence is at present required by section 89 of the Criminal Justice Act 1967) will give a very wide measure of protection against any significant misleading of the police by false statements.

3.95 Such an offence should follow as closely as possible the form we have recommended for the offence of perjury. The statement must be false and there must be corroboration of its falsity and it must be material to a criminal investigation, although no crime need actually have been committed. It must be made with the intention that it be taken as true, and either knowing it to be false or being reckless whether it is false. On the formal side, the statement must be in a document prepared for the purposes of a criminal investigation, containing a declaration by the maker that it is true to the best of his knowledge and belief, and that he made it knowing he would be liable to prosecution if it was false. The document must be signed by the maker of the statement, and if he cannot read it must be read to him before he signs it. If he is under 18<sup>170</sup> his age must be stated in the document.

3.96 This recommendation also enables us to propose that section 4(1) of the Criminal Law Act 1967 should be limited in the way which the Criminal Law Revision Committee intended so that it does not extend to the giving of false information. If the police suspect that a person is impeding the apprehension or prosecution of another by giving them false information, they can ask that he give the information in a formal witness statement. In any event they can also rely on the minor offences under section 51(3) of the Police Act 1964 (obstruction of the police) or under section 5(2) of the Criminal Law Act 1967 (wasteful employment of the police).<sup>171</sup>

(ii) Falsely implicating an innocent person

3.97 There are two types of false statement which in our view, although not made formally in writing, should for different reasons be penalised. In the first place, we think that the false implication of an innocent person in an offence even in an informal statement is sufficiently serious to warrant criminal sanctions when it is accompanied by an intention that a criminal investigation should be pursued in relation to that person. Such conduct can have serious consequences for the person falsely implicated, even if the truth is discovered in time to prevent proceedings being instituted against him: he may be subjected to long

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<sup>170</sup> The age limit currently specified in s. 9(3)(a) of the Criminal Justice Act 1967 is 21. Our proposal brings this age into line with the present age of majority.

<sup>171</sup> Sect. 5(2) is to be retained under our recommendations, with the term "knowingly" having the meaning given in para. 1.9, above; see Sch. 2, para. 1.

interrogation and even arrest. Although this conduct also falls within the conduct penalised by section 5(2) of the Criminal Law Act 1967 (wasteful employment of the police) the Court of Appeal in *R. v. Rowell*<sup>172</sup> indicated that prosecution under that section was not an appropriate way of dealing with the person who so exposed another to the risk of arrest and possible imprisonment pending trial; with this we agree.

(iii) False admission of an offence under the Road Traffic Act 1972

3.98 A person who makes a false admission of liability for an offence, or admits a fact which indicates that if anyone is to be charged with an offence it is he who should be charged, will not normally be required by the police to make a formal witness statement such as we have recommended above should be penalised if false. By such conduct he may contravene section 5(2) of the Criminal Law Act 1967 in that he has wasted the time of the police, but he will not commit an offence under the other provisions which we are recommending in place of the common law. We considered whether there should be a general offence of falsely admitting liability for a crime, but decided not to recommend such an offence. Apart from traffic offences there is no indication that such conduct is a real problem. Although in the case of serious crimes there are frequently people who come forward to make false confessions, they are often people suffering from some psychological problem, who do not cause serious interference with an investigation, and whom it would in any event be inappropriate to punish.

3.99 It has, however, been drawn to our attention that every year a number of cases are detected of persons falsely taking the blame for another in regard to road traffic offences.<sup>173</sup> There is, of course, a particular reason for such conduct in this connection since the person accepting responsibility may, because he has no endorsement on his driver's licence, receive a much lighter sentence than the true offender who has one or more endorsements; and he may also avoid disqualification from driving which the true offender might suffer. We think it important that there should be no evasion of the provisions of the law which lead to the disqualification of drivers in certain circumstances, and such evasion may the more easily occur if the conduct we are now considering is not penalised. Furthermore, for the majority of driving offences section 179 of the Road Traffic Act 1972 prohibits the conviction of a person unless he has been warned within fourteen days of an offence of an intended prosecution. This provision can result in considerable difficulty in proceeding against the true offender if it is discovered after the expiry of the fourteen days that it is he and not the false confessor who should be charged.

3.100 It may be argued that the offence we are proposing should be directed in the first place at the true culprit, by penalising a person who incites or persuades another falsely to admit liability. But in our view it is simpler to create the false admission offence in the first place and rely on incitement or conspiracy to commit that offence in order to penalise the true driver.

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<sup>172</sup> (1977) 65 Cr.App.R. 174, 179.

<sup>173</sup> See *e.g. R. v. Crabtree* (1978) 142 J.P. 677 (reported on sentence only).

3.101 We *recommend* that there should be a further offence added to the Road Traffic Act 1972 to penalise a person who gives a police constable a false indication that he was the driver or person in charge of a vehicle in respect of which an offence involving obligatory endorsement of a driving licence is being investigated. The required intention should be an intention to induce the constable or any other person to believe that an investigation of the alleged offence should be pursued against the person making the statement.

3.102 To summarise, we *recommend* that section 4(1) of the Criminal Law Act 1967 should be repealed and replaced by an offence with the following elements—

Where a person has committed an arrestable offence, another person commits an offence who, knowing him to be guilty of the offence or of some associated arrestable offence, does without lawful authority or reasonable excuse any act, apart from giving false information, with intent to impede its investigation or the apprehension, prosecution or conviction of the offender.

As far as false statements to the police are concerned, we *recommend* the following new offences—

- (i) Making a false statement material to a criminal investigation, with intent that it be taken as true and knowing it to be false or being reckless as to whether it is false, provided that—
  - (a) the statement is in writing, and has been signed by the person making it as being true to the best of his knowledge and belief, and
  - (b) in the statement he acknowledges that he knows that, if he subscribes to a false statement knowing it to be false or being reckless as to whether it is false, he is liable to prosecution.
- (ii) Giving a false indication, knowing it to be false, with intent that in reliance on it another—
  - (a) shall wrongly suspect that a person other than the person giving the indication has committed an offence and
  - (b) shall pursue a criminal investigation relating to that person.
- (iii) An offence, added to the Road Traffic Act 1972, where a person indicates falsely to the police that he was the driver or person in charge of the motor vehicle when the commission of any endorsable offence in relation to that vehicle is being investigated.<sup>174</sup>

**(d) Other conduct interfering with investigations**

3.103 Closely connected with the giving of false information to the police is the use of threats and bribes, and the acceptance of bribes, to induce the giving of false information, and similar conduct aimed at inducing the withholding of information. We deal with the latter first.

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<sup>174</sup> Appendix A, clauses 21, 23, 24 and 26; see also para. 3.140, and as to corroboration, para. 3.123, below. Clause 21, intended to replace the Criminal Law Act 1967, s. 4(1) and (2), excludes from the offence the giving of false information, but not a refusal to give information. Refusal to give information to the police is, as we note in para. 3.113, not in general an offence nor, in particular, an offence of obstructing the police under the Police Act 1964, s. 51(3); see para. 3.16, n. 36, above. Thus no specific mention of this is needed in the clause.

(i) Threats and bribes to induce the withholding of information

3.104 At present section 5(1) of the Criminal Law Act 1967 penalises in certain cases the acceptance of a consideration for not disclosing information about an arrestable offence. This was introduced with the abolition of the distinction between felonies and misdemeanours to replace the common law offence of compounding a felony. The section reads—

“Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be liable on conviction on indictment to imprisonment for not more than two years.”

Any person offering or paying a consideration, which it would be an offence to accept, is liable either as an inciter or as an aider and abettor.

3.105 In our view the substance of the present offence should be retained, but it should be extended to acceptance of a bribe to withhold information about any offence, whether or not arrestable. Under our recommendations, it will therefore continue to be an offence for a person to accept or agree to accept for not disclosing information about an offence which he knows has been committed any consideration other than the making good of loss or injury caused by the offence or the making of reasonable compensation for that loss or injury.

3.106 At present section 5(1) of the 1967 Act has a mental element of knowledge or belief that the offence or some other arrestable offence has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of the offender. This therefore requires proof that the accused knows or believes that he has information of material assistance in securing an offender's prosecution or conviction. We think it would be preferable to provide a mental element of knowing<sup>175</sup> that the offence or some other offence has been committed, and intending to impede the investigation or the apprehension, prosecution or conviction of an offender for it. In substance this follows the pattern we recommend for the offence of impeding investigations.

3.107 The counterpart of accepting a bribe for non-disclosure is giving or offering to give a bribe which, as we have indicated, may at present be dealt with at common law, either as an incitement or aiding and abetting an offence under section 5(1) of the Criminal Law Act 1967, or possibly as an offence of perverting the course of justice. Threats to induce non-disclosure may be dealt with by the latter. Whether these types of conduct should be made the subject of criminal sanctions is complicated by several considerations. There is no obligation on a person to give information to the police even in regard to an arrestable offence, the offence of misprision of felony having disappeared with the abolition of the distinction between felonies and misdemeanours. It is possible to take the view, therefore, that there is no need to penalise as an offence against the course of

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<sup>175</sup>“Knowing” is used here in the extended sense of actual knowledge of or having no substantial doubt as to the commission of the offence: see cl. 32(3) and (4).

justice threats or bribes to secure a non-criminal objective. Certainly it would be inappropriate to penalise the giving of a consideration where its acceptance is not an offence, that is, where as stated by section 5(1) a consideration is accepted for "the making good of loss or injury caused by the offence". In this connection, it may be difficult to distinguish clearly between some threats, particularly threats of economic consequences, and the offer of a consideration which may be in the form of a veiled threat. Nevertheless, we have concluded that, where a person knows that an offence has been committed, his use of threats to induce another not to disclose information about it is a sufficiently serious interference with the administration of justice to be penalised. If this is accepted, we think it would be both illogical and unsatisfactory to leave the giving of bribes to induce non-disclosure of information to be dealt with solely by aiding, abetting or inciting an offence under section 5(1) of the 1967 Act. Accordingly we *recommend* that it should be an offence to threaten, or to give or offer to give a bribe, to induce another not to disclose information about an offence; but, as in the case of acceptance of a consideration, it should not be an offence to give or offer to give a consideration solely for the making good of loss or injury caused by the offence.

(ii) Threats and bribes to secure the giving of false information

3.108 In many cases the use of threats or bribes to induce another to give false information to the police will amount to incitement to commit the offence of making a false formal statement which we have recommended in paragraph 3.95, above. It is not sufficient, however, to leave such conduct to be dealt with in this way, as in some circumstances the incitement may fall short of incitement to make a false formal statement. In our view it is necessary that there should be an offence of using threats or bribes to induce another to give false information to someone investigating which the person threatening or bribing knows to be false when this is done with intent to impede the investigation of an offence—whether it be an arrestable, indictable or purely summary offence—or the apprehension, prosecution or conviction of an offender for it. It should also be an offence to accept, or agree or offer to accept, a consideration for giving false information known to be false with like intent. In each case, the defendant must know that an offence has been committed.

(iii) Other ways of impeding investigations

3.109 The investigation of offences can of course be impeded in other ways. There has been a tendency apparent from some recent cases to treat such conduct as the offence of obstructing the course of justice. In *R. v. Britton*<sup>176</sup> the deliberate drinking of alcohol to avoid a breathalyser test after a police request to take one was held to constitute the common law offence, although in *Dibble v. Ingleton*<sup>177</sup> the defendant was convicted under section 51(3) of the Police Act 1964 of obstruction of a constable in the execution of his duty.

3.110 The common law offence has also been used to secure a conviction where the stricter requirements of section 4(1) of the Criminal Law Act 1967 would prevent a conviction under that section for assisting an offender by impeding his apprehension or prosecution. We pointed out in paragraph 3.89

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<sup>176</sup> [1973] R.T.R. 502.

<sup>177</sup> [1972] 1 Q.B. 480.



above that there are two limitations upon the offence provided by section 4(1) of the Criminal Law Act 1967, which was enacted on the recommendation of the Criminal Law Revision Committee. In the first place, it depends on the accused assisting those who have committed arrestable offences, and secondly, liability depends on the prosecution establishing that the accused knew or believed that the person whose apprehension or prosecution is intended to be impeded has committed an arrestable offence. The second of these limitations was avoided in *R. v. Thomas: R. v. Ferguson*<sup>178</sup> by also charging the defendants with attempting to pervert the course of justice. In that case the defendants, knowing that another was being watched and pursued by the police, who intended to arrest him on suspicion of having committed one or more robberies, warned him of the registration numbers of the cars the police were using. Their intention was to assist him to avoid arrest. Since there was no evidence that the defendants knew or believed that the person they warned was guilty of an offence, there was no case for them to answer on a count of contravening section 4(1) of the Criminal Law Act 1967, but it was held that they had been properly convicted of the common law offence. The court held that the investigation of offences and the arrest of suspected persons by the police were part of the administration of justice and that the conduct amounted to the offence of attempting to pervert the course of justice.

3.111 On the facts of *R. v. Thomas: R. v. Ferguson* we can sympathise with the views of those who may regard the penalty of 3 years' imprisonment imposed on both defendants as appropriate for their conduct, but we believe there are considerable dangers in adopting the principles which appear to underlie the decision. It follows from the decision that, to secure a conviction for attempting to pervert the course of justice in the situation exemplified by *Thomas and Ferguson* there is no need to show that the defendant knew or believed that the person helped was guilty of the offence, nor even that any offence at all had been committed. It is sufficient to establish that the police were investigating an offence which is merely suspected of having been committed, and were hampered in their investigations. This seems to us to be far too broad an approach. But let it be assumed that a new offence to cover the facts of *Thomas and Ferguson* were required, additional to section 4(1) of the Criminal Law Act 1967 (amended as we recommend): the last-mentioned point might be met by providing specifically that an arrestable offence must have been committed. Even so, it would in our view be necessary to provide for a mental element more restricted than an intention to obstruct the course of justice. Such a requirement would be satisfied where a defendant not only believed but actually knew that his friend was innocent of any offence, but notwithstanding this, knowing that the police wished to arrest him on suspicion of having committed an offence, warned him of the approach of a police officer to enable him to avoid the arrest.

3.112 Section 4(1) of the Criminal Law Act 1967 enacted the Criminal Law Revision Committee's policy of restricting the scope of the conduct penalised. The common law offence of perverting the course of justice has, however, developed in a manner incompatible with these legislative restrictions. Not only were the Court of Appeal in *Thomas and Ferguson* in substance creating new law, they were also expanding the old common law to a degree which could not have been

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<sup>178</sup> [1979] 2 W.L.R. 144: the House of Lords refused leave to appeal, [1979] 1 W.L.R. 203.

contemplated before the enactment of the Criminal Law Act in 1967. Prior to that time, the only relevant charge would have been one of being an accessory after the fact to a felony for which it was essential for the prosecution to establish that the defendant *knew* that a felony had been committed. It is our view that this move away from the scheme recommended by the Criminal Law Revision Committee and implemented in the Criminal Law Act 1967 is not one to be perpetuated in the legislation we are proposing. The proposed penalty for the offence we are recommending in place of that in section 4(1) of the Criminal Law Act 1967 is a maximum of five years' imprisonment. The seriousness of the offence is reflected in the mental element of the requirement of knowledge that the person helped has committed an arrestable offence. To make a defendant liable for such a serious offence without such knowledge is in our view both unnecessary and undesirable. For these reasons we do not recommend that the conduct penalised in *Thomas and Ferguson* should be made the subject of a new statutory offence against the administration of justice.

3.113 We must point out, however, that in appropriate cases a charge can be preferred of obstructing a constable in the execution of his duty contrary to section 51(3) of the Police Act 1964. This is a section which, as interpreted by the English courts, is of wide application<sup>179</sup> and does not cover only physical obstruction. Although there is a wide discrepancy between the maximum penalty of one month for this offence, and five years for the offence we are recommending in place of section 4(1), we nonetheless believe that this is justified by the fact that impeding the police is a very much more serious offence if done with the knowledge that the person helped has committed an arrestable offence. Since refusal to assist the police is not an act which can constitute an offence, we do not think that it should be made a serious offence to impede the police in the execution of their duty without proof that the defendant knows that a particular individual has committed an offence and deliberately impedes the police in their investigation of that offence.<sup>180</sup>

3.114 Accordingly, in relation to conduct interfering with investigations other than the giving of false information to the police, we *recommend* that—

Where an offence has been committed, any person, knowing that it has been committed and with intent to impede its investigation or the apprehension, prosecution or conviction of an offender for that or some associated offence, commits an offence if he—

- (i) uses threats, or gives or agrees to give or offers to give any consideration, to induce either the giving of false information which he knows to be false or the withholding of information; or
- (ii) accepts or agrees to accept or offers to accept any consideration either for the giving of false information which he knows to be false or for the withholding of information.

But there should be excluded from the offence, where it relates to the withholding of information, consideration amounting only to the making good of loss or injury caused by the offence, or the making of reasonable

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<sup>179</sup> See para. 3.16 above.

<sup>180</sup> The powers of the police in the investigation of crime are under review by the Royal Commission on Criminal Procedure who will no doubt give further consideration to the penalty and scope of section 51(3) of the Police Act 1964 in the light of our recommendation here.

compensation for that loss or injury. Section 5(1) of the Criminal Law Act 1967 should be repealed.<sup>181</sup>

**(e) Impersonating a defendant**

3.115 Just as section 5(2) of the Criminal Law Act 1967 is in our view adequate to deal with false confessions or admissions to the police, other than in the road traffic cases we have mentioned above, so also are that subsection and section 51(3) of the Police Act 1964 adequate to penalise anyone who when rightly charged by the police with an offence gives them the name of another person. But these summary offences are hardly adequate to deal with such cases when they come to court, and when the person called upon to plead does so in another's name. Instances of this type of impersonation, either with or without the agreement of the person whose name is used, have been reported recently in the press,<sup>182</sup> and it seems to us that such cases are clear examples of the perversion of the course of justice which deserve to be penalised as such. Consequently we recommend that specific provision be made to cover this type of impersonation in court.<sup>183</sup>

**(f) Inducing a plea of guilty or not guilty by threat or payment**

3.116 We have dealt<sup>184</sup> with the offence, proposed in the Working Paper,<sup>185</sup> of making an unwarranted demand with menaces that a person should either not institute or should withdraw or agree to settle judicial proceedings. As yet, however, we have not dealt with the proposal in it<sup>186</sup> that it should be a criminal offence for anyone to make an unwarranted demand with menaces that a defendant in criminal proceedings should plead in a particular way. It is a principle of English criminal justice that the right of a person accused of a crime to decide of his own free will (and with such legal advice as he can command and wishes to have) whether to plead guilty or not guilty should be free from outside interference. This is exemplified both in the rule that it is improper for a person to be given a more severe sentence than that appropriate for the offence simply because he exercised his right to plead not guilty, no matter how remote the prospects of his acquittal, and by the extent to which the criminal law sets its face against "plea bargaining".<sup>187</sup> Where the law itself declines to induce pleas of guilty by threats or by installing fears of heavier sentences, even where guilt seems obvious, and notwithstanding the heavy cost to the community of contested criminal cases, it must follow that unwarranted threats from outside the criminal process to induce a person to plead in a particular way cannot be tolerated, since

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<sup>181</sup> Appendix A, cl. 22 and Sch. 3.

<sup>182</sup> See e.g. *R. v. Pattinson and Others* (C.C.C.) where P pleaded guilty to a charge of unlawful obstruction in the name of E, who was responsible for the obstruction; P, E and others were convicted of conspiracy to pervert the course of justice (*The Times* 6 April 1977); and *R. v. Clarke* (C.C.C.) where C used D's name when charged with theft, of which D learnt when he read a report of the case in his local paper. C was convicted of attempting to pervert the course of justice (*Evening Standard* 18 January 1979).

<sup>183</sup> Appendix A, cl. 25.

<sup>184</sup> Paras. 3.42–3.43, above.

<sup>185</sup> Working Paper No. 62, paras. 83–84.

<sup>186</sup> *Ibid.*, para. 84.

<sup>187</sup> See the directions contained in the Court of Appeal decision in *R. v. Turner* [1970] 2 Q.B. 321 (confirmed by *Practice Direction: (Crime: Inconsistent Decisions)* [1976] 1 W.L.R. 799). See also *R. v. Atkinson* [1978] 1 W.L.R. 425 per Lord Scarman at p. 428.

such efforts must constitute an illegitimate interference with the course of justice. We think that the offence should extend to threats made with the intention of inducing “Not Guilty” as well as “Guilty” pleas. Accordingly we recommend that the use of threats with the intention of inducing anyone to enter a particular plea, whether guilty or not guilty, in any criminal proceedings should be penalised.

3.117 An offer of consideration to a defendant in a criminal proceeding to induce him to plead in a particular way is not exactly analogous to the making of threats. For one thing, the present law provides that a guilty plea should ordinarily be regarded as a mitigating factor in sentencing.<sup>188</sup> There may be logical difficulties in reconciling, on the one hand, the prohibition of a threat of a heavier sentence for pleading not guilty when one should have pleaded guilty with, on the other, the express encouragement of a guilty plea by making it a relevant factor in mitigation. But these take second place to the consideration that the system of criminal justice in the country would collapse if every accused in a Crown Court exercised his undoubted right to plead not guilty. If therefore the law allows the inducement of at least the prospect of a lighter sentence to be offered to those proposing to plead guilty, why should it not be permissible, or at any rate not criminal, for an offer of consideration to be made to an accused person in order to induce him to enter a particular plea? The answer to this question is in our view as follows. In recognising that a guilty plea may justify a less severe sentence than would otherwise be given, the law has in mind a number of perfectly proper considerations, such as that the plea provides evidence of the defendant’s repentance and the saving of time, anxiety and expense. But if anyone offers a consideration other than the prospect of a more lenient sentence than the defendant would otherwise receive, the motives may well be more reprehensible and of many kinds.

3.118 Cases where it may be very much in the interest of persons unconnected with the administration of criminal justice to offer consideration to someone accused of a crime to plead in a particular way are so numerous that it is not necessary to give examples. We recognise however that the degree of wickedness and the harm done to the system will vary greatly from one end of the scale to the other. We have been much exercised about instances where, although there had undoubtedly been consideration offered or accepted to induce a plea of “Guilty” rather than one of “Not Guilty”, the facts may be such as to make the interference understandable, if not justifiable. For example, X is accused of raping Y’s daughter, and her consent, a notoriously difficult issue for a jury, is in issue. Y, believing X to be guilty but anxious to spare his daughter the ordeal of cross-examination, offers him substantial consideration to plead guilty. X accepts and, whether he is in truth guilty or not, pleads guilty, thereby foregoing such chance of an acquittal as he had. Whether or not X in fact committed the offence, most people would feel that Y’s action was at least understandable and have a strong feeling that X would not have accepted such a proposal unless he either knew himself to be guilty or, at any rate, did not value his chances of acquittal higher than the likelihood of a lesser sentence in return for a guilty plea. Hesitation may therefore be expressed at making Y’s actions criminal, where none would be felt if Y had made threats rather than offered consideration. Yet in both situations the

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<sup>188</sup> “A confession of guilt should tell in favour of an accused person, for that is clearly in the public interest”: *R. v. De Hann* [1968] 2 Q.B. 108, 111, *per* Edmund Davies L.J.

free choice of the defendant has been undermined. However, the former case may afford ground for a prosecutor exercising his discretion not to institute proceedings; in any event, if proceedings were brought the court would almost certainly impose a low or nominal penalty. Nevertheless, we think that the right of a person accused of crime to decide which way to plead free from all considerations, save that necessarily imposed on him by the system, is so important that outside influences thereon, whether by way of threats or the offer of consideration, should be made the subject of criminal sanctions.

3.119 We recommend that it should be an offence to threaten a person, or to give or agree to give or offer to give him any consideration, with intent to induce him to plead in a particular way to a charge against him.<sup>189</sup>

### (g) *Avoiding trial*

3.120 In our Working Paper we provisionally proposed three offences in the whole field of avoiding trial. The first two have already been enacted in the Bail Act 1976 as failing to surrender to custody<sup>190</sup> and as agreeing to indemnify a surety for any liability incurred in the event of the non-appearance of an accused to answer his bail.<sup>191</sup> The other offence which we provisionally proposed<sup>192</sup> was escaping from lawful custody with the intention of avoiding trial, which may be said to pervert the course of justice by preventing justice from taking its proper course.

3.121 At common law there are separate offences of escape from confinement and prison breaking,<sup>193</sup> the latter being an offence complicated by technicalities which make it inappropriate as a charge where a person breaks out of prison pending trial. The whole question of escape from custody or from prison will have to be dealt with in due course, and eventually it may be possible to abolish the common law and rationalise existing statutory offences. For the present, we limit our concern to escape from lawful custody occurring at any time after an arrest in criminal investigations (which would include escape during the course of judicial proceedings) but before sentence on a criminal charge. Escape after sentence<sup>194</sup> is a matter more appropriately dealt with in a review of the legislation relating to prisons. Commentators on our proposal favoured the creation of an offence of escaping from lawful custody before trial, but in general were opposed to the requirement of an intention to avoid trial. In *R. v. Timmis*,<sup>195</sup> a person taken into custody for the purpose of having a blood or urine sample taken to determine the alcohol content, escaped from the police vehicle in which he had been placed; the case indicates that the offence should be sufficiently wide to cover any escape from custody after a lawful arrest in relation to any criminal investigation, being an investigation into an offence under the law of England and Wales. As regards the wording of the offence, escape from custody as a result of

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<sup>189</sup> Appendix A, cl. 28.

<sup>190</sup> Sect. 6.

<sup>191</sup> Sect. 9.

<sup>192</sup> Working Paper No. 62, para. 102.

<sup>193</sup> Smith and Hogan, *Criminal Law* (4th ed. 1978), pp. 726–727.

<sup>194</sup> See e.g. the unreported case, referred to in para. 3.6. n. 27 above, in which the prosecution had to resort to the charge of conspiracy to effect a public nuisance to deal with two women who were convicted of helping a convicted person to escape from Broadmoor.

<sup>195</sup> [1976] Crim. L.R. 129.

any lawful arrest should in our view have the effect of excluding from this offence escape after sentence, because the custody would in that event result from the sentence and not from the arrest.

3.122 We recommend that it should be an offence for a person to escape from custody as a result of any lawful arrest, being an arrest in an investigation of an offence under the law of England and Wales.<sup>196</sup>

#### 4. Corroboration

3.123 For the reasons stated in Part II<sup>197</sup> we are retaining the requirement of corroboration for perjury in judicial proceedings. Corroboration is at present also required for an offence under section 89 of the Criminal Justice Act 1967. The need for corroboration, as explained in relation to perjury, seems also to be present in the offences which we recommend of making a false allegation in a written statement and of falsely implicating another in an offence.<sup>198</sup>

3.124 We recommend that corroboration, in the same form as that recommended for perjury, should be required for the offence of making a false allegation in a written statement and the offence of falsely implicating another in an offence.<sup>199</sup>

#### 5. Territorial jurisdiction

3.125 Earlier in this Report<sup>200</sup> we examined the circumstances in which perjury committed abroad should constitute an offence under the new provisions which we are recommending in place of the Perjury Act 1911. Our recommendation<sup>201</sup> on this aspect of perjury does no more than clarify and modernise the existing law. At present there are however no statutory provisions expressly governing the position as to the other offences examined in this Report, most of which are intended to replace the common law. The general principles applicable to territorial jurisdiction where criminal conduct takes place abroad were canvassed in our Working Paper<sup>202</sup> on the *Territorial and Extraterritorial Extent of the Criminal Law*. However, our Report on this subject<sup>203</sup> does not deal with these matters, and it is now our policy to examine them in the context of the individual statutory offences we recommend as part of the process of codification of the law. We have therefore to consider whether and to what extent our recommended offences, other than perjury, should be penalised when the conduct in issue takes place outside or partly outside England and Wales.

3.126 In approaching this problem, we have naturally had to bear in mind that, in broad terms, all crime is territorial, that is, as Lord Reid put it in *R. v. Treacy*<sup>204</sup>—

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<sup>196</sup> Appendix A, cl. 27.

<sup>197</sup> Paras. 2.62–2.63, above.

<sup>198</sup> Paras. 3.95 and 3.97, above.

<sup>199</sup> Appendix A, clauses 23(2) and 26(3).

<sup>200</sup> See para. 2.74, above.

<sup>201</sup> Para. 2.76, above.

<sup>202</sup> Working Paper No. 29 (1970).

<sup>203</sup> (1978) Law Com. No. 91, *Territorial and Extraterritorial Extent of the Criminal Law*.

<sup>204</sup> [1971] A.C. 537, 551; see also *Cox v. Army Council* [1963] A.C. 48, 67 per Viscount Simonds.

“when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England ... the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act.”

We have therefore to specify in regard to each of the recommended offences the extent to which they should operate extraterritorially. Our approach to this has been influenced by other factors. Considerations of international comity demand that the criminal law of this country should not penalise the conduct of foreigners abroad where their activities have no apparent connection with England or Wales. Considerations of reciprocity require further that, if particular kinds of conduct abroad are to be penalised by English law, any corresponding claim to jurisdiction under the criminal law of other states should be unobjectionable from the point of view of public policy here.

3.127 Bearing these factors in mind, we have considered the offences recommended in this Report, having regard in each case to how close the connection may be between the perpetration abroad of the particular conduct penalised by an offence and the proper functioning of the courts in the administration of justice in this country. On this basis, and also taking into account whether the offence could in practice be carried out abroad, we have come to the conclusion that each of the following recommended offences should penalise those perpetrating the prohibited conduct, whether or not it takes place in England or Wales,—

- (a) interfering with real evidence (paragraph 3.33);
- (b) threats to prevent evidence being given (paragraph 3.48);
- (c) bribes to prevent evidence (paragraph 3.48);
- (d) blackmail to stop judicial proceedings (paragraph 3.48);
- (e) improperly influencing a member of a jury or tribunal (paragraph 3.52);
- (f) improper agreements and offers to influence the outcome of judicial proceedings (paragraph 3.55);
- (g) taking reprisals (paragraph 3.63);
- (h) reprisals against parties (paragraph 3.75);
- (i) reprisals against persons for attending for jury service or as witnesses (paragraph 3.73);
- (j) impeding a prosecution (paragraph 3.96);
- (k) threats or bribes as to information (paragraphs 3.105, 3.107 and 3.108);
- (l) false allegations in written statements<sup>205</sup> (paragraph 3.95);
- (m) falsely implicating another in an offence taking place in England and Wales (paragraph 3.97)

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<sup>205</sup> By virtue of the Criminal Justice Act 1972, s. 46(1), the offence of making a false written statement tendered in evidence (which this offence is intended to replace) applies to statements made in Scotland and Northern Ireland; and s. 46(2) makes admissible as evidence in committal proceedings written statements made outside the United Kingdom.

- (n) threats or bribes to induce a plea (paragraph 3.119); and
- (o) escaping from custody pending trial (paragraph 3.122).

In all these cases it will be observed that the prohibited conduct has a close connection with the functioning of judicial proceedings in England or Wales. In consequence, it seems to us irrelevant whether that conduct occurs within or outside England or Wales, and whether or not those responsible are British subjects.

3.128 Applying the criteria already outlined, we recommend that the following offences should have no extraterritorial operation—

- (a) impersonating a member of a jury (paragraph 3.57);
- (b) publishing false allegations of corrupt judicial conduct (paragraph 3.70);
- (c) publishing to achieve a miscarriage of justice (paragraph 3.79); and
- (d) impersonating a defendant (paragraph 3.115).

We also recommend that section 5(2) of the Criminal Law Act 1967 (wasteful employment of police) should have no extraterritorial operation.

3.129 We have further considered what should be the position as to attempts, incitements and conspiracies to commit the above offences. In the case of the offences listed in paragraph 3.127, we recommend that an attempt, incitement or conspiracy anywhere to commit any of these offences, wherever committed, should constitute an offence and be triable here accordingly. In the case of the offences listed in paragraph 3.128 we recommend that an attempt, incitement or conspiracy outside England and Wales to commit one of these offences in England and Wales should constitute an offence and be triable here accordingly.

3.130 Finally, we must consider in this context whether any amendments are required to legislation governing extradition. The Extradition Act 1870, which regulates the procedure for extradition to foreign states with which extradition arrangements are in force, lists extraditable crimes in its first schedule; and perjury and subornation of perjury were added to that list by the Extradition Act 1873. Subornation of perjury is not retained under our recommendations for new legislation,<sup>206</sup> and the reference to it in the Extradition Acts should therefore be repealed. We do not recommend any other changes to these Acts. In consequence the other offences dealt with in this Report will not be ones in respect of which extradition from the United Kingdom to foreign states will be possible. In the ordinary course, therefore, it follows that if one of the offences having extraterritorial operation is committed in a foreign country, a defendant will only be triable in England or Wales if he thereafter comes to the United Kingdom.

3.131 Extradition to Commonwealth countries is governed by the Fugitive Offenders Act 1967, and “perjury or subornation of perjury” and “conspiring to defeat the course of justice” are among the “relevant offences” described in general terms in its first schedule. The wording of the latter offence was appropriate at a time when it was still not clear whether conspiracy was in English law an essential element of offences concerned with obstructing the course of

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<sup>206</sup> See para. 2.90, above.



justice. The wording is however not now appropriate and will be altogether anomalous if our recommendations are implemented. Accordingly we *recommend* deletion of the words “subornation of perjury” and replacement of the conspiracy offence by the general description “offences of obstructing or perverting the course of justice.” It will be noted that there is, and under our recommendations there will continue to be, a difference in treatment of offences against the administration of justice between the Extradition Act 1873 and the Fugitive Offenders Act 1967. We see no justification of policy for this differentiation, but we consider it best to leave further consideration of it to the interdepartmental working party which has been reconvened in order to review the extradition laws.<sup>207</sup>

## 6. Abolitions, repeals and amendments

### (a) *Common law offences*

3.132 The implementation of our recommendations would<sup>208</sup> enable several offences at common law to be abolished and would necessitate repeals of and amendments to some statutory provisions. The most important offence to be abolished<sup>209</sup> is what we have referred to as perverting the course of justice, including conspiracy, attempt and incitement to do so.<sup>210</sup> A large number of other common law offences which have been used in the past, often the distant past, do not need retention in the light of our recommendations. These include—

- fabricating false evidence for the purpose of misleading a judicial tribunal;
- making a false statement with a view to perverting the course of, or preventing, judicial proceedings;
- dissuading or preventing a witness from giving information, or from appearing or giving information or evidence in judicial proceedings;
- embranchery;
- personating a juror and kindred offences;<sup>211</sup>
- bribing or tampering with jurors or corrupting judges;
- perverting the minds of magistrates or jurors by publishing, pending criminal proceedings, matter likely to prejudice a fair trial;
- agreeing to indemnify bail;
- attempting to rescue a defendant from his surety's custody; and
- disposing of a corpse with intent to obstruct or prevent a coroner's inquest.<sup>212</sup>

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<sup>207</sup> The Home Secretary intends to publish a consultative document in the light of the working party's report: Hansard (H.C.) 21 March 1979, col. 607 (written answers).

<sup>208</sup> As was provisionally proposed in Working Paper No. 62, *e.g.*, paras.116 and 119.

<sup>209</sup> See paras. 1.4 and 3.19, above.

<sup>210</sup> See para. 3.2, above.

<sup>211</sup> It is a common law offence by improper means to procure oneself or others to be sworn on a jury for the purpose of giving a verdict favourable to one of the parties, or for a person to induce a juror not to appear.

<sup>212</sup> As to the offences listed, see *Archbold* (40th ed., 1979) paras. 1602, 3447, 3473a, 3544 and 3907, and *Russell on Crime* (12th ed., 1964) p.1484.

3.133 It is not entirely clear whether the bribery of judicial officers is a separate common law offence or merely an example of the wider offence of bribing a public official. *Halsbury*<sup>213</sup> treats bribery of judicial officers as a separate offence while *Archbold*<sup>214</sup> treats it as a sub-division of the wider offence, adding that some textbooks confine the common law offence of bribery to bribery of officers of justice,<sup>215</sup> but conceding that such a definition is too narrow.

3.134 It would of course be possible to provide that the bribery of judicial officers is no longer within the common law offence of bribing public officials, but there are other considerations which lead us to think that it would be preferable to abolish the whole common law offence of bribery of public officials.

3.135 The Prevention of Corruption Acts 1906 and 1916 now cover the acceptance or giving of any bribe by or to an agent, defined as including any person employed by or acting for another, and any person serving under the Crown or any public authority of any description. In our view this clearly covers any officer who discharges any duty in the discharge of which the public are interested, as this is the definition of a public officer by whom the common law offence can be committed.<sup>216</sup>

3.136 In 1966 a sub-committee of the Criminal Law Revision Committee, which was then charged with considering the abolition or conversion into statutory offences of what were then common law misdemeanours, recommended the abolition of the common law offence of bribery without the enactment of a statutory offence in its place. It is now our task to eliminate these common law offences, dealing with them in the context of those broad divisions under which they most appropriately fall.<sup>217</sup>

3.137 Having consulted the Home Office and the Director of Public Prosecutions we are satisfied that no gap will be left in the law by the abolition of the common law offence of bribery of a public official, and we accordingly *recommend* such abolition.<sup>218</sup>

### **(b) Statutory offences**

3.138 The only recent statutory offences to be repealed, those in sections 4(1) and 5(1) of the Criminal Law Act 1967 and section 89 of the Criminal Justice Act 1967, involve conduct which is covered by our recommended offences, in the first two cases, of interference with criminal investigations<sup>219</sup> and, in the last case, of false allegations in written statements.<sup>220</sup> Various amendments would in

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<sup>213</sup> *Laws of England* (4th ed., 1976) vol. 11, paras. 921 and 922.

<sup>214</sup> (40th ed., 1979) para. 3483.

<sup>215</sup> 3 Co. Inst. 145.

<sup>216</sup> *Halsbury's Laws of England* (4th ed., 1976) vol. 11, para. 922.

<sup>217</sup> *Seventh Annual Report, 1971-1972*, Law Com. No. 50, para. 29.

<sup>218</sup> See Appendix A, cl. 35 as to abolitions; we are unable to include this abolition in our draft Bill as bribery of public officials is not an offence against the administration of justice.

<sup>219</sup> Paras. 3.96 and 3.105 above.

<sup>220</sup> Para. 3.94, above.

consequence be needed to section 5 of the Criminal Law Act 1967<sup>221</sup> and sections 2 and 9 of the Criminal Justice Act 1967. The Witnesses (Public Inquiries) Protection Act 1892 should be repealed, since the greater part of it is covered by our offence of reprisals against witnesses etc.<sup>222</sup>

## C SUMMARY OF RECOMMENDATIONS

3.139 “Judicial proceedings” for the purposes of this Part of the Report should have the same meaning as in Part II, that is, proceedings before any person or body having power to hear, receive and examine evidence on oath (paragraph 3.27). In relation to all judicial proceedings we *recommend* the following offences—

- (1) Fabricating or concealing real evidence, or without reasonable excuse destroying real evidence, with intent to influence the outcome of current or future judicial proceedings (paragraphs 3.29—3.33 and clause 8).
- (2) (a) Threatening a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36—3.40 and clause 9).  
  
(b) Giving or agreeing to give or offering to give any consideration to a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36—3.40 and clause 10).  
  
(c) Accepting or agreeing to accept or offering to accept any consideration for a person or any other person not giving evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36—3.40 and clause 10).  
  
(d) Making an unwarranted demand with menaces that a person should either not institute judicial proceedings, or should withdraw or should settle those proceedings. There should be provisions based on section 21(1) and (2) of the Theft Act 1968 to the effect—
  - (1) that a demand with menaces is unwarranted unless the person making it does so in the belief—
    - (i) that he has reasonable grounds for making the demand; and
    - (ii) that the use of the menaces is a proper means of reinforcing the demand; and
  - (2) that it is immaterial whether the menaces relate to action to be taken by the person making the demand.  
(paragraphs 3.42—3.47 and clause 15).
- (3) Improperly influencing a judge or a member of a jury or tribunal by using threats, by giving or agreeing to give or offering to give any consideration, or by other means, with intent to affect the outcome of current or future judicial proceedings before him (paragraphs 3.50—3.52 and clause 11).
- (4) Agreeing or offering as a judge or a member of a jury or tribunal to influence the outcome of current or future judicial proceedings before

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<sup>221</sup> See para. 3.96, n. 171, above.

<sup>222</sup> We consider the issue of compensation, for which provision is made in s. 4 of the 1892 Act, in para. 4.20, below.

him otherwise than in accordance with his duty in relation to them (paragraphs 3.53–3.55 and clause 12).

- (5) Taking the oath as a member of the jury knowing that he has not been selected to be a member of the jury, or performing any of the functions of a member of the jury, knowing that he is not a member of the jury (paragraphs 3.56–3.57 and clause 20).
- (6) Taking or threatening to take reprisals against a witness, a judge, or a member of a jury or tribunal with intent to punish him for anything which he has done in that capacity in judicial proceedings—save that it should not be an offence if a person proves that the reprisals he took or threatened were in respect of evidence which was false and which the witness knew to be false or was reckless whether it was false (paragraphs 3.58–3.63 and clause 18).
- (7) Taking or threatening to take reprisals against another with intent to punish him for attending court when summoned for jury service or for attending to give evidence as a witness in judicial proceedings (paragraphs 3.72–3.73 and clause 19).
- (8) Taking or threatening reprisals against a party to judicial proceedings after they have ended with intent to punish him for instituting, or for not withdrawing or settling or for anything else he has done or omitted to do in the proceedings (paragraphs 3.74–3.75 and clause 16).
- (9) Publishing or distributing false matter, with intent that it be taken as true and knowing it to be false or being reckless as to whether it is false, when it imputes corrupt judicial conduct to any judge, tribunal or member of a tribunal (paragraphs 3.64–3.70 and clause 13).
- (10) Publishing or distributing, with intent to achieve a miscarriage of justice in current or future judicial proceedings, any matter the publication or distribution of which creates a risk of a miscarriage of justice (paragraphs 3.76–3.79 and clause 14).

3.140 In relation to criminal proceedings we *recommend* the following offences—

- (1) Where a person has committed an arrestable offence, another person, knowing him to be guilty of the offence or of some associated arrestable offence, does without lawful authority or reasonable excuse any act, apart from giving false information, with intent to impede its investigation or the apprehension, prosecution or conviction of the offender (paragraphs 3.96 and 3.102 and clause 21).
- (2) Where an offence has been committed, knowing that it has been committed and with intent to impede its investigation or the apprehension, prosecution or conviction of an offender for that or some associated offence,—
  - (i) using threats, or giving or agreeing to give or offering to give any consideration, to induce either the giving of false information which he knows to be false or the withholding of information, or

- (ii) accepting or agreeing to accept or offering to accept any consideration either for the giving of false information which he knows to be false or for the withholding of information.

But there should be excluded from the offence, where it relates to the withholding of information, consideration amounting only to the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury (paragraphs 3.103–3.108 and clause 22).

- (3) An offence, added to the Road Traffic Act 1972, where a person indicates falsely to the police that he was the driver or person in charge of the motor vehicle when the commission of any endorsable offence in relation to that vehicle is being investigated (paragraphs 3.98–3.101 and clause 24).
- (4) Making a false statement material to a criminal investigation, with intent that it be taken as true and knowing it to be false or being reckless as to whether it is false, provided that—
  - (i) the statement is in writing, and has been signed by the person making it as being true to the best of his knowledge and belief, and
  - (ii) in the statement he acknowledges that he knows that, if he subscribes to a false statement knowing it to be false or being reckless as to whether it is false, he is liable to prosecution (paragraphs 3.91–3.95 and clause 26).
- (5) Giving a false indication, knowing it to be false, with intent that in reliance on it another—
  - (i) shall wrongly suspect that a person other than the person giving the indication has committed an offence and
  - (ii) shall pursue a criminal investigation relating to that person (paragraph 3.97 and clause 23).
- (6) Section 5(2) of the Criminal Law Act 1967 (wasteful employment of the police) to be retained (paragraph 3.96).
- (7) Wrongful pleading to a criminal charge (paragraph 3.115 and clause 25).
- (8) Threatening a person, or giving or agreeing to give or offering to give him any consideration, with intent to induce him to plead in a particular way to a charge against him (paragraphs 3.116–3.119 and clause 28).
- (9) Escaping from lawful custody as a result of a lawful arrest in a criminal investigation of an offence under the law of England and Wales (paragraphs 3.120–3.122 and clause 27).

3.141 Corroboration should be required for the offence of making a false allegation in a written statement and the offence of falsely implicating another in an offence (paragraphs 3.123– 3.124 and clauses 23(2) and 26(3)).

- 3.142 (1) The following offences should apply to conduct either within England or Wales or outside England and Wales—
- (a) Interfering with real evidence;
  - (b) threats to prevent evidence;
  - (c) bribes to prevent evidence;
  - (d) blackmail to stop judicial proceedings;
  - (e) improperly influencing a member of a jury or tribunal;
  - (f) improper agreements and offers to influence the outcome of judicial proceedings;
  - (g) taking reprisals;
  - (h) reprisals against parties;
  - (i) reprisals against persons for attending for jury service or as witnesses;
  - (j) impeding a prosecution;
  - (k) threats or bribes as to information;
  - (l) false allegations in written statements;
  - (m) falsely implicating another in an offence taking place in England or Wales;
  - (n) threats or bribes to induce a plea; and
  - (o) escaping from custody pending trial (paragraph 3.127).
- (2) The following offences should only apply to conduct within England or Wales—
- (a) impersonating a member of a jury;
  - (b) publishing false allegations of corrupt judicial conduct;
  - (c) publishing to achieve a miscarriage of justice; and
  - (d) impersonating a defendant (paragraph 3.128).
- (3) An attempt, incitement or conspiracy anywhere to commit any of the offences in (1), wherever committed, should constitute an offence, triable in England and Wales; and an attempt, incitement or conspiracy anywhere to commit any of the offences in (2) in England and Wales should constitute an offence triable in England and Wales (paragraph 3.129 and clause 29).
- 3.143 (1) Perverting the course of justice, embracery and several other common law offences should be abolished (paragraphs 3.132–3.137 and clause 35).
- (2) Sections 4(1) and 5(1) of the Criminal Law Act 1967, and section 89 of the Criminal Justice Act 1967 should be repealed (paragraph 3.138 and clause 36(2)).
- (3) Amendments should be made to section 5 of the Criminal Law Act 1967, sections 2 and 9 of the Criminal Justice Act 1967, the schedule to the Extradition Act 1873, and schedule 1 to the Fugitive Offenders Act 1967 (paragraphs 3.138 and 3.130–3.131 and clause 36).

## PART IV: PROCEDURE AND PENALTIES

### A. CONSENT REQUIRED FOR PROSECUTION

4.1 No proceedings may at present be instituted for an offence under sections 4(1),<sup>1</sup> 5(1)<sup>2</sup> or 5(2)<sup>3</sup> of the Criminal Law Act 1967 or section 9 of the Bail Act 1976<sup>4</sup> except by, or with the consent of, the Director of Public Prosecutions. No special consent is required before a prosecution is brought for any of the other current offences discussed in this report.

4.2 There are particular advantages in some independent control being exercised over prosecutions for certain offences. This control sometimes takes the form of a special consent being required before proceedings for the offences may be instituted. Such a requirement is in our view necessary for offences where misguided prosecutions might otherwise be brought privately or possibly an overzealous prosecution might be instituted by the police themselves. We are recommending that no proceedings may be instituted for certain offences detailed in paragraph 4.5(1) below, except by or with the consent of the D.P.P.

4.3 In our Working Paper we agreed<sup>5</sup> with the view of the Phillimore Committee that an offence should be created to cover the publishing of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice. At paragraph 164 the Committee stated: "As the offence would be one which struck generally at the administration of justice itself, prosecution should only be at the instance of the Attorney General in England and Wales. ..." We consider that this offence, in the form in which we recommend it, and the other offence involving publishing, that of publishing to achieve a miscarriage of justice,<sup>6</sup> should similarly require the Attorney General's consent. These are offences whose possible political implications make it appropriate for the Law Officers to have ultimate responsibility for deciding whether a prosecution should proceed.

4.4 Another form of check on prosecutions results from the requirement that certain offences be reported to the D.P.P.<sup>7</sup> We consider that such a requirement is necessary for most of the other offences which we are recommending. It is appropriate where the conduct is against the administration of justice itself and where the conduct may have serious consequences. Furthermore, it conveys

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<sup>1</sup> See para. 3.13, above.

<sup>2</sup> See para. 3.14, above.

<sup>3</sup> See para. 3.15, above. The requirement of consent was recommended for these offences by the Criminal Law Revision Committee. In the case of s. 4(1) this was intended to give some protection in instances where non-prosecution on compassionate grounds might be justified e.g. in the case of a spouse, parent or child doing acts impeding investigation of an offence: see Seventh Report of the Criminal Law Revision Committee, *Felonies and Misdemeanours* (1965) Cmnd. 2659, paras. 31 and 40. We do not propose any change in the requirement of consent for the offences which we recommend in place of ss. 4(1) and 5(1).

<sup>4</sup> See para. 3.17(ii), above.

<sup>5</sup> Working Paper No. 62, paras. 113–114.

<sup>6</sup> See paras. 3.64–3.70 and 3.76–3.79, above.

<sup>7</sup> See the Prosecution of Offences Regulations 1978, S.I. 1978 No. 1357, rule 6. Offences of conspiracy to pervert the course of justice (formerly included in the list of offences to be reported) need now only be reported under rule 6(1)(b) "where it appears to the Chief Officer of police that the advice or the assistance of the D.P.P. is desirable."

information on the trend of prosecutions and on that basis enables advice to be given as to the criteria to be applied in future prosecutions, matters of some importance where an offence is comparatively rarely charged. It also enables the D.P.P. to call for further information where necessary and on occasion to take responsibility for the actual prosecution, whether by continuing the case or offering no evidence.

4.5 We recommend that—

- (1) no proceedings should be instituted for the offences of—
  - (a) impeding investigations of and prosecutions for offences;
  - (b) threats or bribes to induce the giving of false information or non-disclosure of information;
  - (c) falsely implicating another in an offence; and
  - (d) making a false formal written statement, except by or with the consent of the D.P.P.
- (2) no proceedings should be instituted for an offence of publishing false allegations of corrupt judicial conduct, or for an offence of publishing to achieve a miscarriage of justice, except by, or with the consent of, the Attorney General; and
- (3) there should be reported to the D.P.P. all the other offences recommended in this Report, except impersonation of a juror, false admission of driving, and escaping from custody pending trial.

## B. CONVICTION OF ALTERNATIVE OFFENCE

4.6 The only circumstance in which, in connection with any of the current offences discussed in this Report, a person can be convicted of an offence different from that for which he is prosecuted, apart from an attempt to commit the offence charged, is under section 4(2) of the Criminal Law Act 1967—

“If on the trial of an indictment for an arrestable offence the jury are satisfied that the offence charged (or some other offence of which the accused might on that charge be found guilty) was committed, but find the accused not guilty of it, they may find him guilty of any offence under subsection (1) above<sup>8</sup> of which they are satisfied that he is guilty in relation to the offence charged (or that other offence).”<sup>9</sup>

We are recommending<sup>10</sup> an offence on similar lines to that in section 4(1). The provision in section 4(2) is useful and should be retained irrespective of whether or not the trial is on indictment.<sup>11</sup> It is the only specific provision which we here recommend for conviction of an alternative offence.

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<sup>8</sup> See para. 3.82 above, for s. 4(1).

<sup>9</sup> See *R. v. Cross and Another* (1971) 55 Cr. App. R. 540.

<sup>10</sup> Para. 3.96, above and Appendix A, cl. 21.

<sup>11</sup> Appendix A, cl. 21(3). Our recommendation for extending the provision in s. 4(2) to summary proceedings is not intended to alter otherwise than in this respect the general principle confirmed by the Divisional Court in *Lawrence v. Same* [1968] 2 Q.B.93 that a magistrates' court has no jurisdiction either at common law or by statute to convict of a lesser offence than that charged even if it formed an ingredient of the greater offence. This principle is under examination in our work on inchoate offences so far as it concerns the law of attempt.



4.7 We *recommend* that in a trial for an arrestable offence, if the court is satisfied that the offence charged (or some other offence of which the accused might on that charge be convicted) was committed but find the accused not guilty of it, there should be power to convict of the offence of impeding a prosecution in relation to the offence charged (or that other offence).

### C. THE EFFECT OF AN OFFENCE UPON OTHER PROCEEDINGS

4.8 If a person is convicted of an offence of interfering with the course of justice, this will in certain circumstances cast doubt on the propriety of the outcome of the proceedings which were in some way interfered with. This Report is not the place to deal in detail with any effect which that conviction might have on those proceedings.<sup>12</sup> At present courts of trial and of appeal may, if the conduct comes to light in time, take such matters into account and so generally protect people against wrongful conviction. If the interference with the course of justice results in a wrongful acquittal on the principal charge the defendant will generally have been a party to such offence and so can be convicted of it.<sup>13</sup> We do not recommend any changes here.

4.9 There is however one offence which needs specific consideration. We are recommending a statutory offence<sup>14</sup> to replace the common law offence of personating a juror. Where a person personates a juror, at common law this amounts to a mistrial and the courts have power to order a new trial.<sup>15</sup> We consider that this position should be retained in relation to the statutory offence.

4.10 We *recommend* that, where there is a conviction for impersonating a member of a jury and the member concerned was a party to a decision in the judicial proceedings, the court before which those proceedings were held should have power to nullify the proceedings and to order a venire de novo.

### D. PENALTIES AND MODE OF TRIAL

#### 1. Penalties

4.11 In considering the maximum penalties for the offences which we are recommending we have borne in mind the current maxima, the level of sentences currently imposed for the conduct involved and the comments we have received on the provisional proposals in the Working Paper. Although we have in this context given weight to the recommendations of the Advisory Council on the Penal System,<sup>16</sup> ultimately it is in our view for the Government of the day to decide whether our recommendations should be implemented in the light of the Council's recommendations. Thus in making recommendations as to maximum penalties we recognise that others, such as the Home Office and the Advisory Council, are in a better position than ourselves to bring penological factors into consideration. We set out in paragraph 4.25 below the maximum terms of

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<sup>12</sup> See *Archbold* (40th ed., 1979), paras. 439–439a. There were certain recommendations on such aspects in *False Witness*, Report by Justice (1973). Judgments in civil proceedings may in certain circumstances be set aside for, in particular, fraud.

<sup>13</sup> See *D.P.P. v. Humphrys* [1977] A.C.1.

<sup>14</sup> Para. 3.57, above.

<sup>15</sup> *R. v. Wakefield* [1918] 1 K.B.216; and see *Juries Act 1974*, s. 18(3).

<sup>16</sup> *Sentences of Imprisonment*, Report of the Advisory Council on the Penal System (1978).

imprisonment which, subject to these considerations, we are recommending as appropriate, and indicate our reasons in the following paragraphs.

*(a) Perjury and allied offences*

4.12 Perjury is punishable with a maximum of seven years' imprisonment and a fine. This maximum of seven years has remained unchanged since the Perjury Act 1728. A few of those commenting on our Working Papers urged that the maximum should be increased, for example to ten or even fourteen years. But it must be pointed out that in the years 1970–1977 there were no instances of penalties greater than five years being imposed, and only three (two in 1971 and one in 1976) where it exceeded four years. We assume that these few represented the most serious recent instances of perjury for which there have been convictions; and, if this is correct, we do not think that there is sufficient evidence to support any increase in penalty. In discussions with the Home Office we ourselves suggested that the maximum penalty remain at its present level. On general penological grounds, however, the Home Office suggested a maximum prison sentence of five years; we have adopted this in the light of their greater experience. We bear in mind that, where separate instances of perjury are involved, there remains the possibility of imposing consecutive sentences on more than one count. It follows that the maximum penalty for the offence of falsely interpreting should also be reduced from seven years to five years. Under section 1A of the Perjury Act 1911<sup>17</sup> the maximum penalty for making false unsworn statements under the Evidence (Proceedings in Other Jurisdictions) Act 1975 is two years' imprisonment; we consider that this should continue to be the maximum.

*(b) Other offences*

4.13 With regard to the common law offences discussed in this Report, the penalty is imprisonment and a fine at the discretion of the court; there is no maximum. The maximum penalty for conspiracy to commit, and for attempting to commit, these common law offences is likewise at the discretion of the court. The maximum penalties for the statutory offences are set out in paragraphs 3.12 to 3.16 above.

*(i) Imprisonment*

4.14 In assessing what should be the maximum term of imprisonment for the new offences recommended in this Report, we have taken into consideration the seriousness of the conduct covered by each of the offences we are recommending, when compared with that involved in perjury. Those where we now recommend a maximum different from that proposed in the Working Paper<sup>18</sup> are interfering with real evidence, impeding a prosecution, threats or bribes as to information, escaping from custody and publishing material with intent to achieve a miscarriage of justice. Interfering with real evidence<sup>19</sup> has similarities to perjury and to impeding a prosecution;<sup>20</sup> since under our recommendations both these

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<sup>17</sup> See para. 2.71, above.

<sup>18</sup> Working Paper No. 62, paras. 117–118; but there was no equivalent in that paper to falsely implicating another in an offence, to a false admission of driving or to certain other new offences recommended in the Report.

<sup>19</sup> Para. 3.33, above.

<sup>20</sup> Para. 3.96, above.

offences would carry the maximum penalty of five years, we recommend the same maximum here. The conduct covered by the offence of threats or bribes as to information<sup>21</sup> is wider than that covered by section 5(1) of the Criminal Law Act 1967 and by the Working Paper proposal; there should, in our view, be a close relationship with the maximum for preventing evidence being given in proceedings by threats or bribes.<sup>22</sup> We recommend a maximum of five years for each of these offences. With regard to escaping from custody, we observe that the maximum penalty for merely assisting another to escape is five years' imprisonment<sup>23</sup> and we think the maximum for our offence ought at least to be no lower than that. Furthermore, such conduct would be more serious than failing to surrender to custody for which twelve months' imprisonment is the maximum, and there is need for a maximum sufficient to discourage attempts to escape, even though the common law offence of escape, with a penalty at large, would still exist. The offence of publishing material with intent to achieve a miscarriage of justice is comparable in gravity with the other offences involving interference with the administration of justice which we recommend should carry a high penalty. We therefore recommend that this offence should carry a maximum penalty of five years.

4.15 Impeding a prosecution currently has a scale of maximum penalties.<sup>24</sup> Although we provisionally proposed the retention of the scale, we now consider a single maximum would be more satisfactory. Such a scale is most exceptional in this country. The seriousness of what is done to impede is not necessarily closely related to the seriousness of the principal offence, and a scale implies that even relatively minor obstructive conduct warrants a considerable penalty if the main offence carries a heavy penalty. In our view it is preferable that the sentence should reflect the seriousness of the defendant's actual conduct irrespective of the penalties imposed for the offence the prosecution of which he is accused of impeding.

4.16 It is also appropriate to draw attention to the maximum penalty for corruption. Where there is bribery of a person such as a police officer this is most often tried as conspiracy to pervert the course of justice, and under our recommendations that would no longer be possible. The maximum sentence under the Prevention of Corruption Acts 1906 and 1916 (and the Public Bodies Corrupt Practices Act 1889) in such circumstances is two years' imprisonment and this limitation has been criticised by the courts. The common law offence of bribery, with a maximum of life imprisonment, is available but is not really appropriate here, and we have in any event suggested that it be abolished.<sup>25</sup> We therefore recommend that consideration be given to increasing the maximum penalty under the Prevention of Corruption Acts 1906 and 1916.

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<sup>21</sup> Paras. 3.103–3.108, above.

<sup>22</sup> There have been isolated instances of very high maximum sentences: e.g. sentence of 7 years' imprisonment upheld in *R. v. Jones* [1975] Crim. L.R. 197; and see *R. v. Field and Others* [1965] 1 Q.B. 417, supplemented by *The Times*, 14 July 1964.

<sup>23</sup> Under the Prison Act 1952, s. 39, as amended by the Criminal Justice Act 1961, s. 22(1).

<sup>24</sup> By s. 4(3) of the Criminal Law Act 1967, a person committing an offence under s. 4(1) is liable to imprisonment (a) for ten years if the offence has a sentence fixed by law, (b) for seven years if the maximum is fourteen years, (c) for five years if the maximum is ten years, and (d) for three years in any other case.

<sup>25</sup> See paras. 3.133–3.137, above.

(ii) Monetary penalties

4.17 We do not consider that a fixed maximum fine on indictment is needed for any of the offences which we recommend; in this we follow the Criminal Law Act 1977.<sup>26</sup> In a magistrates court the maximum fine will be £1,000 for all but one of those offences which can be tried there; this also follows the Criminal Law Act 1977.<sup>27</sup> The exception is making a false report; consideration should be given to increasing to £500 the present maximum of £200 for this offence.<sup>28</sup>

4.18 It is also appropriate to consider compensation for the offences which we recommend. By the Powers of Criminal Courts Act 1973, section 35(1)—

“...a court by or before which a person is convicted of an offence, in addition to dealing with him in any other way, may ... make an order ... requiring him to pay compensation for any personal injury, loss or damage resulting from that offence ...”

On its face this would appear to cover conduct against the administration of justice where somebody suffers loss or damage from the offence, but we are not aware of any such cases where compensation has been ordered. Frequent orders in this field are unlikely, since compensation orders are generally made where there has been personal injury or loss of or damage to property and courts are less likely to consider it appropriate to order compensation in other cases. Furthermore, it may be very difficult to assess what financial loss there has been, and where imprisonment is imposed a compensation order is not usually made.

4.19 In the Working Paper we dealt<sup>29</sup> with compensation only in the context of the Phillimore Report's recommended offence of taking reprisals. That Report cited the decision of the Court of Appeal in *Chapman v. Honig*,<sup>30</sup> which held it to be contempt to take reprisals against a witness who had given evidence in legal proceedings, and in which there was also some argument as to whether the dispossessed tenant was entitled to damages. The Court of Appeal held by a majority that he was not, mainly on the ground that the law of “criminal” contempt is for the protection of the administration of justice and not of the aggrieved individual. Lord Denning, M.R., however, strongly dissented from this view and thought that damages could and should be awarded.<sup>31</sup> The Phillimore Committee saw no reason why the victim should not be entitled to compensation and recommended that it should be open to the court to award it. In the Working Paper we agreed with the view recommended by the Committee that this should be an offence but we expressed doubt whether specific provision for compensation was necessary, having regard to the apparent width of section 35(1) of the Powers of Criminal Courts Act 1973, set out in the last paragraph.

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<sup>26</sup> Sect. 32(1).

<sup>27</sup> Sect. 28(1) and (2).

<sup>28</sup> It would in any event continue to have a maximum of 6 months' imprisonment and only be triable summarily.

<sup>29</sup> Working Paper No. 62, paras. 111-112; see also Working Paper No. 33, para. 48.

<sup>30</sup> [1963] 2 Q.B. 502; see para. 3.58, n.100, above. This case now has to be read in the light of *Acrow Automation Ltd. v. Rex Chainbelt Inc. and Another* [1971] 1 W.L.R. 1676 (C.A.) which indicates the possibility of a civil remedy for acts done in contempt of court.

<sup>31</sup> *Ibid.*, pp. 512-4.

4.20 Having regard to recent authority upon this last-mentioned provision,<sup>32</sup> we now think it unlikely that the powers to order compensation under section 35 of the Powers of Criminal Courts Act 1973 are of use where there is doubt as to whether civil liability exists; and if this is so, it is even less likely to be invoked with any success in cases where, as in perjury, it is clear that there is no civil liability at all.<sup>33</sup> These considerations have led us to examine whether for the elimination of doubt there should be specific provision excluding compensation altogether in respect of the offences recommended in this Report. But the principles upon which compensation under section 35 may be given now appear largely to be settled,<sup>34</sup> and if the possibility of awards of compensation exists in any individual case, we see no sufficient reason why this possibility should be excluded. Accordingly we make no specific recommendations, and leave the issue to be dealt with by the courts on the principles presently applying.

### (iii) Professional or other disqualification

4.21 It is unlikely that any person who has been convicted of an offence of interference with the course of justice committed in his working capacity as, say, a lawyer, police officer or member of a tribunal would be allowed to work in that capacity again while there was any danger of his repeating such an offence. But slightly different considerations apply to members of juries. By the Juries Act 1974<sup>35</sup> people are disqualified from jury service if either they have ever been sentenced to at least five years' imprisonment or they have served at least three months' custodial sentence in the previous ten years. We consider that a person convicted of, in particular, an offence of impersonating a member of a jury, or improper conduct by a member of a jury or tribunal,<sup>36</sup> should be disqualified from jury service for a considerable period or for life and such power should be vested in the sentencing court: this we *recommend*.

## 2. Mode of trial

### (a) *Perjury and allied offences*

4.22 Perjury is an offence triable only on indictment.<sup>37</sup> Although we have accepted the suggestion by the Home Office that the maximum penalty for this offence should be reduced from seven years to five years, it still remains the most serious of all offences against the administration of justice, and we recommend no change in the law in this respect. Falsely interpreting is under the present law triable only on indictment. The Home Office suggested to us that in future this offence should be triable either way; this we *recommend*. Making false unsworn statements under the Evidence (Proceedings in Other Jurisdictions) Act 1975 is

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<sup>32</sup> *R. v. Inwood* (1974) 60 Cr.App.R. 70; *R. v. Vivian* [1979] 1 W.L.R. 291; but as to the difficulties of interpreting the section, see Atiyah, "Compensation Orders and Civil Liability" [1979] Crim.L.R. 504.

<sup>33</sup> There is one exceptional case where by statute compensation can be awarded, under s. 4 of the Witnesses (Public Inquiries) Protection Act 1892 to witnesses at public inquiries who are victimised; we recommend repeal of this Act, and do not propose replacement of s. 4.

<sup>34</sup> See n. 32, above.

<sup>35</sup> Sect. 1 and Schedule 1.

<sup>36</sup> Paras. 3.57 and 3.55; see Appendix A, clauses 12 and 20, and Schedule 1, para. 8.

<sup>37</sup> Perjury Act 1911, s. 1; see also Criminal Law Act 1977, s. 16 and Schedules 2 and 3.

also now triable either way;<sup>38</sup> in view of the varying seriousness of such statements we consider that this offence should also continue to be so triable.

**(b) The other offences**

4.23 The common law offences discussed in this Report are only triable on indictment, except that the common law inchoate offences of attempt and incitement to commit an offence, including a common law offence, are sometimes triable summarily; but conspiracy is only triable on indictment. With regard to the main statutory provisions set out in Part III,<sup>39</sup> offences against sections 4(1) and 5(1) of the Criminal Law Act 1967 can generally<sup>40</sup> only be tried on indictment, offences against section 5(2) of that Act and against section 51(3) of the Police Act 1964 can only be tried summarily, and offences against section 89 of the Criminal Justice Act 1967 can only be tried on indictment; it will be noted that some<sup>41</sup> may be dealt with as contempt of court.

4.24 The question of the appropriate mode of trial is linked with the type and seriousness of the offence, the maximum penalty, and whether any special consent is necessary before a prosecution can be brought. In the Working Paper we provisionally proposed<sup>42</sup> maximum penalties for the offences to be created or retained; none of these were within the range imposable by the magistrates' courts. Our proposal therefore implied that all the offences should be triable on indictment and indeed that few, if any, should be triable summarily. We also agreed with the Phillimore Committee as to their recommended offences of taking reprisals, which they considered<sup>43</sup> should be indictable, and of publishing with intent to impair confidence in the administration of justice, which they considered<sup>44</sup> should be triable only on indictment. After consultation with the Home Office, we now *recommend* that both these offences should be triable either way. The mode of trial which we recommend for each offence appears from the summary of recommendations set out in the next paragraph.

**E. SUMMARY OF RECOMMENDATIONS**

- 4.25 (1) In relation to the offences recommended in Parts II and III of this Report, we *recommend* the provisions set out in the following table, which summarises—
- (a) the maximum term of imprisonment on indictment (paragraphs 4.14–4.17, and clause 30(1) and Schedule 1, Part I, paragraphs 1–3 and Table);
  - (b) the mode of trial (paragraphs 4.22–4.24, and clause 30(1) and Schedule 1, Part I, paragraphs 2 and 4 and Table);
  - (c) the requirement of consent (paragraph 4.5, and clause 30(1) and Schedule 1, Part II, paragraphs 6 and 7).

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<sup>38</sup> See s. 16 and Schedule 2 of the Criminal Law Act 1977. Triable "either way" means, in the case of an offence committed by an adult, triable either on indictment or summarily: Criminal Law Act 1977, s. 64(1).

<sup>39</sup> In paras. 3.12–3.16, above.

<sup>40</sup> By s. 16(1) and Sch. 2 of the Criminal Law Act 1977 they may be tried either way if the arrestable offence to which they relate may be tried either way.

<sup>41</sup> *E.g.*, failing to surrender to custody, contrary to the Bail Act 1976, s.6.

<sup>42</sup> Working Paper No. 62, paras. 117–118.

<sup>43</sup> (1974) Cmnd. 5794, para. 157.

<sup>44</sup> *Ibid.*, para. 164.

<i>Offence</i>	<i>Maximum term of imprison- ment on Indictment</i>	<i>Mode of trial</i>	<i>Consent or report required</i>
Perjury . . . . .	5 years	Indictment only	Report
False unsworn statements under Evidence (Proceedings in Other Jurisdictions) Act 1975 . . . . .	2 years	Either way	Report
Falsely interpreting . . . . .	5 years	Either way	Report
Interfering with real evidence . . . . .	5 years	Indictment only	Report
Threats to prevent evidence . . . . .	5 years	Indictment only	Report
Bribes to prevent evidence . . . . .	5 years	Indictment only	Report
Blackmail to stop judicial proceedings . . . . .	5 years	Indictment only	Report
Improperly influencing a member of a jury or tribunal . . . . .	5 years	Indictment only	Report
Improper conduct by a member of a jury or tribunal . . . . .	5 years	Indictment only	Report
Impersonating a member of a jury . . . . .	2 years	Either way	None
Reprisals against witnesses, etc. . . . .	2 years	Indictment only	Report
Reprisals against parties . . . . .	2 years	Either way	Report
Reprisals for attending court . . . . .	2 years	Either way	Report
Publishing false allegations of corrupt judicial conduct . . . . .	2 years	Either way	Attorney General's consent
Publishing to achieve a miscarriage of justice . . . . .	5 years	Either way	Attorney General's consent
Impeding a prosecution . . . . .	5 years	Either way	D.P.P.'s consent
Threats or bribes as to information . . . . .	5 years	Either way	D.P.P.'s consent
False admission of driving . . . . .	2 years/ 12 months		
False written statements . . . . .	2 years	Either way	None
Falsely implicating another in an offence . . . . .	5 years	Either way	D.P.P.'s consent
Wrongful pleading to a criminal charge . . . . .	2 years	Either way	None
Threats or bribes to induce a plea . . . . .	5 years	Indictment only	Report
Escaping from custody pending trial . . . . .	5 years	Either way	None

- (2) In a magistrates' court the maximum fine for each of the offences in the table should be £1,000 (paragraph 4.17, and clause 30(1) and Schedule 1, Part I, paragraph 5(a)).
- (3) A court should have power to disqualify from jury service a person convicted of either impersonating a member of a jury, or improper conduct by a member of a jury or a tribunal (paragraph 4.21, and clause 30(2) and Schedule 1, Part II, paragraph 8).
- (4) In a trial for an arrestable offence, if the court is satisfied that the offence charged (or some other offence of which the accused might on that charge be convicted) was committed but find the accused not guilty of it, there should be power to convict of the offence of impeding a prosecution in relation to the offence charged (or that other offence) (paragraph 4.7 and clause 21(3)).
- (5) Where there is a conviction for impersonating a member of a jury and the member concerned was a party to a decision in the judicial proceedings, the court before which those proceedings were held should have power to nullify the proceedings and to order a venire de novo (paragraph 4.10, and clause 30(1) and Schedule 1, Part II, paragraph 9).

## **PART V: CUMULATIVE SUMMARY OF RECOMMENDATIONS**

5.1 The following paragraphs summarise the conclusions and recommendations of this Report. Reference is made in each case to the relevant paragraphs where the matters summarised are discussed, and, where the recommendations involve the need for legislation here, to the draft clauses in Appendix A.

5.2 In relation to perjury and allied offences, discussed in Part II—

- (1) There should be an offence of perjury committed when a person makes a false statement—
  - (a) in oral evidence given on oath in, or for the purposes of, judicial proceedings; or
  - (b) in any affidavit or statutory declaration or in a certificate, made for the purposes of judicial proceedings and admissible in those proceedings; or,
  - (c) subject to sub-paragraph (9), below, in giving evidence in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (which sets out the powers of the High Court to give effect to applications for assistance made by a court outside England and Wales); or
  - (d) in sworn evidence before the Court of Justice of the European Communities.

Judicial proceedings for the purposes of perjury should mean proceedings before any person or body having power to hear, receive and examine evidence on oath (paragraphs 2.43–2.47; 2.54–2.56; 2.69–2.72; 2.78–2.79 and clauses 1, 3(1)(3)).



- (2) For the purposes of defining the persons and bodies who under subparagraph (1) have power to hear, receive and examine evidence on oath, new provision should be made in place of the Evidence Act 1851, section 16, to the effect that any witness may be examined on oath before (a) a judge or magistrate (b) a court or tribunal (c) any other body of persons having by virtue of any rule of law authority to hear, receive and examine evidence and (d) a person holding a statutory inquiry. "Tribunal" should here mean a tribunal subject to the direct supervision of the Council on Tribunals; "statutory inquiry" should mean any inquiry held in pursuance of a duty imposed or a power conferred by any statutory provision (paragraphs 2.33–2.42 and clause 2).
- (3) It should be a defence to a charge of perjury to prove that the judicial proceedings in which it is alleged to have been committed were a nullity (paragraph 2.48 and clause 6).
- (4) The false statement must be one which is material to the proceedings; and the question whether it is material should be a question of law (paragraphs 2.50–2.53 and clauses 3(2) (a) and 34).
- (5) The person making the statement must intend it to be taken as true and must know that it is false or be reckless as to whether it is false (paragraphs 2.64–2.67 and clause 3(2) (b)).
- (6) There must be corroboration of the falsity of the statement: if one witness gives evidence as to its falsity, there must at least be some other admissible evidence corroborating that evidence (paragraphs 2.62–2.63 and clause 3(4)).
- (7) The false statement in cases of perjury falling within subparagraphs (1) (a) and (b) above may be made in England and Wales or elsewhere, provided it is made in or for the purposes of judicial proceedings in England and Wales (paragraphs 2.74–2.77 and clause 3(1) (a)).
- (8) There should be separate provision for an offence of perjury by interpreters, penalising a person sworn as such in judicial proceedings who interprets in a misleading manner for the purposes of those proceedings. The provisions applying to perjury as to materiality, the mental element and corroboration should also apply to perjury by interpreters (paragraph 2.84 and clause 5).
- (9) There should be separate provision for an offence (replacing section 1A of the Perjury Act 1911) penalising a person who makes a false statement in giving oral or written testimony otherwise than on oath, in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (as to which, see subparagraph (1) (c) above). The provisions applying to perjury as to materiality, the mental element and corroboration should also apply to this offence (paragraph 2.73 and clause 4).
- (10) There should be provision in relation to all the offences referred to above which are alleged to have been committed in criminal proceedings for proof by certificate of the nature and result of those proceedings (paragraph 2.87 and clause 31).

- (11) The common law offences of perjury (in so far as it exists) and subornation of perjury should be abolished and all provisions in the Perjury Act 1911 dealing with perjury should be repealed (paragraphs 2.90–2.96 and clauses 35(2), 36(2) and Schedule 3).

5.3 In relation to other offences of interference with the course of justice, discussed in Part III—

(A) “Judicial proceedings” for the purposes of this Part of the Report should have the same meaning as in Part II, that is, proceedings before any person or body having power to hear, receive and examine evidence on oath (paragraph 3.27). In relation to all judicial proceedings we *recommend* the following offences—

(1) Fabricating or concealing real evidence, or without reasonable excuse destroying real evidence, with intent to influence the outcome of current or future judicial proceedings (paragraphs 3.29–3.33 and clause 8).

(2) (a) Threatening a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36–3.40 and clause 9).

(b) Giving or agreeing to give or offering to give any consideration to a person with intent to induce him or another not to give evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36–3.40 and clause 10).

(c) Accepting or agreeing to accept or offering to accept any consideration for him or another not giving evidence, or particular evidence, in current or future judicial proceedings (paragraphs 3.36–3.40 and clause 10).

(d) Making an unwarranted demand with menaces that a person should either not institute judicial proceedings, or should withdraw or should settle those proceedings. There should be provisions based on section 21(1) and (2) of the Theft Act 1968 to the effect—

(1) that a demand with menaces is unwarranted unless the person making it does so in the belief—

(i) that he has reasonable grounds for making the demand; and

(ii) that the use of the menaces is a proper means of reinforcing the demand; and

(2) that it is immaterial whether the menaces relate to action to be taken by the person making the demand (paragraphs 3.42–3.47 and clause 15).

(3) Improperly influencing a judge or a member of a jury or tribunal by using threats, by giving or agreeing to give or offering to give any consideration, or by other means, with intent to affect the outcome of current or future judicial proceedings before him (paragraphs 3.50–3.52 and clause 11).

(4) Agreeing or offering as a judge or a member of a jury or tribunal to influence the outcome of current or future judicial proceedings

before him otherwise than in accordance with his duty in relation to them (paragraphs 3.53 to 3.55 and clause 12).

- (5) Taking the oath as a member of the jury knowing that he has not been selected to be a member of the jury, or performing any of the functions of a member of the jury, knowing that he is not a member of the jury (paragraphs 3.56–3.57 and clause 20).
  - (6) Taking or threatening to take reprisals against a witness, a judge, or a member of a jury or tribunal with intent to punish him for anything which he has done in that capacity in judicial proceedings— save that it should not be an offence if a person proves that the reprisals he took or threatened were in respect of evidence which was false and which the witness knew to be false or was reckless whether it was false (paragraphs 3.58–3.63 and clause 18).
  - (7) Taking or threatening to take reprisals against another with intent to punish him for attending court when summoned for jury service or for attending to give evidence as a witness in judicial proceedings (paragraphs 3.72–3.73 and clause 19)
  - (8) Taking on threatening reprisals against a party to judicial proceedings after they have ended with intent to punish him for instituting, or for not withdrawing or settling, or for anything else he has done or omitted to do in the proceedings (paragraphs 3.74–3.75 and clause 16).
  - (9) Publishing or distributing false matter, with intent that it be taken as true and knowing it to be false or being reckless as to whether it is false, when it imputes corrupt judicial conduct to any judge, tribunal or member of a tribunal (paragraphs 3.64–3.70 and clause 13).
  - (10) Publishing or distributing, with intent to achieve a miscarriage of justice in current or future judicial proceedings, any matter the publication or distribution of which creates a risk of a miscarriage of justice (paragraphs 3.76–3.79 and clause 14).
- (B) In relation to criminal proceedings we *recommend* the following offences—
- (1) Where a person has committed an arrestable offence, another person, knowing him to be guilty of the offence or of some associated arrestable offence, does without lawful authority or reasonable excuse any act, apart from giving false information, with intent to impede its investigation or his apprehension, prosecution or conviction (paragraphs 3.96 and 3.102 and clause 21).
  - (2) Where an offence has been committed, knowing that it has been committed and with intent to impede its investigation or the apprehension, prosecution or conviction of an offender for that or some associated offence,—
    - (i) using threats, or giving or agreeing to give or offering to give any consideration, to induce either the giving of false infor-

mation which he knows to be false or the withholding of information; or

- (ii) accepting or agreeing to accept or offering to accept any consideration either for the giving of false information which he knows to be false or for the withholding of information.

But there should be excluded from the offence, where it relates to the withholding of information, consideration amounting only to the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury (paragraphs 3.103–3.108 and clause 22).

- (3) An offence, added to the Road Traffic Act 1972, where a person indicates falsely to the police that he was the driver or person in charge of the motor vehicle when the commission of any endorsable offence in relation to that vehicle is being investigated (paragraphs 3.98–3.101 and clause 24).
  - (4) Making a false statement material to a criminal investigation, with intent that it be taken as true and knowing it to be false or being reckless as to whether it is false, provided that—
    - (i) the statement is in writing, and has been signed by the person making it as being true to the best of his knowledge and belief, and
    - (ii) in the statement he acknowledges that he knows that, if he subscribes to a false statement knowing it to be false or being reckless as to whether it is false, he is liable to prosecution (paragraphs 3.91–3.95 and clause 26).
  - (5) Giving a false indication, knowing it to be false, with intent that in reliance on it another—
    - (i) shall wrongly suspect that a person other than the person giving the indication has committed an offence and
    - (ii) shall pursue a criminal investigation relating to that person (paragraph 3.97 and clause 23)
  - (6) Section 5(2) of the Criminal Law Act 1967, (wasteful employment of the police) to be retained (paragraph 3.96).
  - (7) Wrongful pleading to a criminal charge (paragraph 3.115 and clause 25).
  - (8) Threatening a person, or giving or agreeing to give or offering to give him any consideration, with intent to induce him to plead in a particular way to a charge against him (paragraphs 3.116–3.119 and clause 28).
  - (9) Escaping from lawful custody as a result of a lawful arrest in a criminal investigation of an offence under the law of England and Wales (paragraphs 3.120–3.122 and clause 27).
- (C) Corroboration should be required for the offence of making a false allegation in a written statement and the offence of falsely implicating another in an offence (paragraphs 3.123–3.124 and clauses 23(2) and 26(3)).

- (D) (1) The following offences should apply to conduct either within England or Wales or outside England and Wales—
- (a) Interfering with real evidence;
  - (b) threats to prevent evidence;
  - (c) bribes to prevent evidence;
  - (d) blackmail to stop judicial proceedings;
  - (e) improperly influencing a member of a jury or tribunal;
  - (f) improper agreements and offers to influence the outcome of judicial proceedings;
  - (g) taking reprisals;
  - (h) reprisals against parties;
  - (i) reprisals against persons for attending for jury service or as witnesses;
  - (j) impeding a prosecution;
  - (k) threats or bribes as to information;
  - (l) false allegations in written statements;
  - (m) falsely implicating another in an offence taking place in England or Wales;
  - (n) threats or bribes to induce a plea, and
  - (o) escaping from custody pending trial (paragraph 3.127).
- (2) The following offences should only apply to conduct within England or Wales—
- (a) impersonating a member of a jury;
  - (b) publishing false allegations of corrupt judicial conduct;
  - (c) publishing to achieve a miscarriage of justice; and
  - (d) impersonating a defendant (paragraph 3.128).
- (3) An attempt, incitement or conspiracy anywhere to commit any of the offences in (1), wherever committed, should constitute an offence triable in England and Wales; and an attempt, incitement or conspiracy anywhere to commit any of the offences in (2) in England and Wales should constitute an offence triable in England and Wales (paragraph 3.129 and clause 29).
- (E) (1) Perverting the course of justice, embracery and several other common law offences should be abolished (paragraphs 3.132–3.137 and clause 35).
- (2) Sections 4(1) and 5(1) of the Criminal Law Act 1967 and section 89 of the Criminal Justice Act 1967 should be repealed (paragraph 3.138 and clause 36(2)).
- (3) Amendments should be made to section 5 of the Criminal Law Act 1967, sections 2 and 9 of the Criminal Justice Act 1967, the schedule to the Extradition Act 1873, and schedule 1 to the Fugitive Offenders Act 1967 (paragraphs 3.138 and 3.130–3.131 and clause 36).

- 5.4 (1) In relation to the offences recommended in Parts II and III of this Report, we *recommend* the provisions set out on the opposite page, which summarises—
- (a) the maximum term of imprisonment on indictment (paragraphs 4.14–4.17, and clause 30(1) and Schedule 1, Part I, paragraphs 1–3 and Table);
  - (b) the mode of trial (paragraphs 4.22–4.24, and clause 30(1) and Schedule 1, Part I, paragraphs 2 and 4 and Table);
  - (c) the requirement of consent (paragraph 4.5, and clause 30(1) and Schedule 1, Part II, paragraphs 6 and 7).
- (2) In a Magistrates' Court the maximum fine for each of the offences in the table should be £1,000 (paragraph 4.17, and clause 30(1) and Schedule 1, Part I, paragraph 5(a)).
- (3) A court should have power to disqualify from jury service a person convicted of either impersonating a member of a jury, or improper conduct by a member of a jury or tribunal (paragraph 4.21, and clause 30(2) and Schedule 1, Part II, paragraph 8).
- (4) In a trial for an arrestable offence, if the court is satisfied that the offence charged (or some other offence of which the accused might on that charge be convicted) was committed but find the accused not guilty of it, there should be power to convict of the offence of impeding a prosecution in relation to the offence charged (or that other offence) (paragraph 4.7 and clause 21(3)).
- (5) Where there is a conviction for impersonating a member of a jury and the member concerned was a party to a decision in the judicial proceedings, the court before which those proceedings were held should have power to nullify the proceedings and to order a venire de novo (paragraph 4.10, and clause 30(1) and Schedule 1, Part II, paragraph 9).
- 5.5 (1) In regard to the mental element in the offences recommended in this Report—
- (a) a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result;
  - (b) a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists;
  - (c) a person should be regarded as being reckless as to whether a particular circumstance exists if, but only if,
    - (i) he realises at the time of that conduct that there is a risk of that circumstance existing and (ii) it is unreasonable for him to take that risk. The question whether it is unreasonable for him to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption

<i>Offence</i>	<i>Maximum term of imprisonment on Indictment</i>	<i>Mode of trial</i>	<i>Consent or report required</i>
Perjury . . . . .	.5 years	Indictment only	Report
False unsworn statements under Evidence (Proceedings in Other Jurisdictions)			
Act 1975 . . . . .	.2 years	Either way	Report
Falsely interpreting . . . . .	.5 years	Either way	Report
Interfering with real evidence . . . . .	.5 years	Indictment only	Report
Threats to prevent evidence . . . . .	.5 years	Indictment only	Report
Bribes to prevent evidence . . . . .	.5 years	Indictment only	Report
Blackmail to stop judicial proceedings . . . . .	.5 years	Indictment only	Report
Improperly influencing a member of a jury or tribunal . . . . .	.5 years	Indictment only	Report
Improper conduct by a member of a jury or tribunal . . . . .	.5 years	Indictment only	Report
Impersonating a member of a jury . . . . .	.2 years	Either way	None
Reprisals against witnesses, etc. . . . .	.2 years	Indictment only	Report
Reprisals against parties . . . . .	.2 years	Either way	Report
Reprisals for attending court . . . . .	.2 years	Either way	Report
Publishing false allegations of corrupt judicial conduct . . . . .	.2 years	Either way	Attorney General's consent
Publishing to achieve a miscarriage of justice . . . . .	.5 years	Either way	Attorney General's consent
Impeding a prosecution . . . . .	.5 years	Either way	Report
Threats or bribes as to information . . . . .	.5 years	Either way	Report
False admission of driving . . . . .	.2 years, 12 months	Either way	None
False written statements . . . . .	.2 years	Either way	D.P.P.'s consent
Falsely implicating another in an offence . . . . .	.5 years	Either way	D.P.P.'s consent
Wrongful pleading to a criminal charge . . . . .	.2 years	Either way	None
Threats or bribes to induce a plea . . . . .	.5 years	Indictment only	Report
Escaping from custody pending trial . . . . .	.5 years	Either way	None

that any judgment he may have formed of the degree of risk was correct (paragraph 1.9 and clause 33).

- (2) In section 5(2) of the Criminal Law Act 1967 “knowingly” should have the meaning set out in (1) (b) above (paragraph 3.96, and clause 30(2) and Schedule 2, paragraph 1).

(Signed) MICHAEL KERR, *Chairman.*  
STEPHEN M. CRETNEY.  
STEPHEN EDELL.  
W. A. B. FORBES.  
PETER M. NORTH.

J. C. R. FIELDSSEND, *Secretary*

*20th August 1979*



# Draft Administration of Justice (Offences) Bill

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## ARRANGEMENT OF CLAUSES

### PART I

#### INTRODUCTORY

Clause

1. Meaning of "judicial proceedings".
2. Persons and bodies with power to administer oaths.

### PART II

#### OFFENCES RELATING TO ORAL AND DOCUMENTARY EVIDENCE

3. Perjury.
4. False unsworn statements under Evidence (Proceedings in Other Jurisdictions) Act 1975.
5. Misleading interpreting for purposes of judicial proceedings.
6. Defence that proceedings were a nullity.
7. Abolition of power to direct prosecution for perjury.

### PART III

#### OTHER OFFENCES RELATING TO ALL PROCEEDINGS

8. Fabrication, concealment and destruction of evidence.
9. Use of threats to suppress evidence.
10. Use of bribes to suppress evidence.
11. Use of improper persuasion in relation to judicial proceedings.
12. Improper agreements and offers to influence outcome of judicial proceedings.
13. Publication and distribution of false statements alleging corrupt conduct in relation to judicial proceedings.
14. Publication and distribution of statements intended to produce miscarriage of justice.
15. Use of blackmail against parties to judicial proceedings in respect of their conduct of the proceedings.
16. Reprisals against parties in respect of conduct of judicial proceedings.

*Administration of Justice (Offences) Bill*

Clause

17. Provisions supplementary to sections 15 and 16.
18. Reprisals against other persons in respect of conduct in judicial proceedings.
19. Reprisals for attending to be juror or witness.
20. Improper performance of functions of juror.

PART IV

OFFENCES RELATING TO CRIMINAL INVESTIGATIONS AND PROCEEDINGS

*Offence relating only to investigations of and proceedings for arrestable offences*

21. Interference with investigations of and prosecutions for arrestable offences.  
*Offences relating to investigations of and proceedings for arrestable and non-arrestable offences*
22. Suppression of information relating to offences by means of threats and bribes.
23. False implication of offences.
24. False identification of self as driver of motor vehicle.
25. Wrongful pleading to criminal charge.
26. False statements in documents prepared for purposes of criminal investigations.
27. Escape from lawful custody.
28. Use of threats and bribes to induce pleas at trial.

PART V

MISCELLANEOUS AND GENERAL

*Offences*

29. Attempts etc. outside England and Wales to commit offences under Act.
30. Prosecution and punishment of offences etc.
31. Proof of criminal proceedings.

*Interpretation*

32. General provisions as to interpretation.
33. Intention, knowledge and recklessness.
34. Materiality of statements.

*Supplementary*

35. Abolition of common law offences relating to administration of justice.
36. Minor and consequential amendments and repeals.
37. Citation etc.

SCHEDULES:

Schedule 1—Offences.

Part I—Prosecution and punishment.

Part II—Supplementary.

Schedule 2—Minor and consequential amendments.

Schedule 3—Enactments repealed.

*Administration of Justice (Offences) Bill*

DRAFT

OF A

**BILL**

TO

Amend and codify the law relating to perjury and connected offences and to other improper conduct in relation to judicial proceedings and criminal investigations and prosecutions: and for connected purposes.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INTRODUCTORY

Meaning of  
"judicial  
proceed-  
ings".

1955 c. 18.

1955 c. 19.

1957 c. 53.

1976 c. 52.

1. Subject to section 6 below, in this Act "judicial proceedings" means—
- (a) proceedings in England or Wales before any person or body having by law power to hear, receive and examine evidence on oath;
  - (b) proceedings before a court-martial held outside the United Kingdom under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; and
  - (c) proceedings before a Standing Civilian Court established by virtue of section 6 of the Armed Forces Act 1976.

## EXPLANATORY NOTES

### *Clause 1*

1. This clause defines “judicial proceedings” for the purposes of Parts II and III of the Bill in accordance with the recommendation summarised in paragraph 2.43 of the Report.

2. The persons or bodies who under clause 1(a) have power to hear, receive and examine evidence on oath are defined in clause 2.

*Administration of Justice (Offences) Bill*

Persons and  
bodies with  
power to  
administer  
oaths.

2.—(1) Any witness before—

(a) a judge or magistrate;

(b) a court or tribunal;

(c) any other body of persons having by virtue of any rule of law authority to hear, receive and examine evidence;  
or

(d) a person holding a statutory inquiry,  
may be examined on oath.

(2) The power to examine witnesses on oath conferred by subsection (1) above is in addition to any power conferred by any other enactment.

(3) In this Act—

“statutory inquiry” means an inquiry held in pursuance of a duty imposed or in exercise of a power conferred by any Act of Parliament or by any instrument made under an Act of Parliament; and

“tribunal” means—

(a) a tribunal specified at the coming into force of this Act in Part I of Schedule 1 to the Tribunals and Inquiries Act 1971 (tribunals under supervision of Council on Tribunals); and

(b) a tribunal to which this Act is applied by an order under section 15 of that Act (power to amend Act by order) or by any other enactment.

1971 c. 62.

(4) The following subsection shall be inserted after subsection (1) of section 15 of the Tribunals and Inquiries Act 1971—

“(1A) The Lord Chancellor may by order apply the Administration of Justice (Offences) Act 1979 to any such tribunal as may be provided by the order.”.

(5) In section 16 of that Act (which relates to the making of rules and orders)—

(a) in subsection (1), for the word “Any” there shall be substituted the words “Subject to subsection (1A) below, any”; and

(b) the following subsection shall be inserted after that subsection—

“(1A) No order applying the Administration of Justice (Offences) Act 1979 to a tribunal shall be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.”.

## EXPLANATORY NOTES

### Clause 2

1. This clause defines the persons and bodies with power to administer the oath in accordance with the recommendations set out in paragraphs 2.30–2.43 of the Report.

2. *Subsection (1)* provides that a witness may be examined on oath before—

- (a) a judge or magistrate;
- (b) a court or tribunal;
- (c) any other body of persons which by any rule of law has authority to hear, receive and examine evidence; or
- (d) a person holding a statutory inquiry.

Category (c) covers non-statutory bodies which have powers by virtue of the common law or the prerogative to examine evidence. The subsection replaces section 16 of the Evidence Act 1851, which is repealed (see Schedule 3).

3. *Subsection (2)* makes clear that the powers conferred by subsection (1) are in addition to existing statutory powers, such as those conferred on arbitrators under section 12 of the Arbitration Act 1950. Many of the existing provisions are, however, made unnecessary by subsection (1) and are repealed by Schedule 3.

4 *Subsection (3)* defines a “statutory inquiry” and a “tribunal” for the purposes of subsection (1) and other provisions of the Bill specified in the Note to clause 32.

5. *Subsections (4)* and (5) amend the Tribunals and Inquiries Act 1971 to enable an order under section 15 of that Act to apply the Bill to any tribunal specified by the order subject to an affirmative resolution of each House of Parliament.

*Administration of Justice (Offences) Bill*

PART II

OFFENCES RELATING TO ORAL AND DOCUMENTARY EVIDENCE

Perjury.

3.—(1) If—

(a) a person in England or Wales or elsewhere makes a false statement—

(i) in oral evidence given on oath in or for the purposes of judicial proceedings; or

(ii) in an affidavit, statutory declaration or certificate which is authorised by or under an Act of Parliament for use in any such proceedings; and

(b) the conditions specified in subsection (2) below are satisfied, he is guilty of perjury.

(2) The conditions mentioned in subsection (1) above are—

(a) that the statement is material to the proceedings; and

(b) that he intends it to be taken as true but knows it to be false or is reckless whether it is false.

(3) A person is also guilty of perjury if—

(a) he makes a false statement—

(i) in giving oral or written evidence on oath in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (power of High Court to give effect to application for assistance made by court outside England and Wales), or

(ii) in sworn evidence before the Court of Justice of the European Communities; and

(b) the conditions specified in subsection (2) above are satisfied.

(4) A person shall not be liable to be convicted of perjury upon the evidence of one witness as to the falsity of any statement alleged to be false unless that witness's evidence as to the statement's falsity is corroborated by other evidence.

1975 c. 34

## EXPLANATORY NOTES

### *Part II*

The clauses in this Part replace those sections of the Perjury Act 1911 which penalise perjury and other offences relating to the giving of oral and documentary evidence in judicial proceedings. These are dealt with in Part II of the Report.

### *Clause 3*

1. This clause makes new provision for perjury in place of section 1 of the Perjury Act 1911 in accordance with the recommendations summarised in paragraph 2.94 of the Report.

2. *Subsections (1) and (3)* provide that, where the conditions set out in subsection (2) are satisfied, a person commits perjury if he makes a false statement—

(a) in England or Wales or elsewhere—

(i) in oral evidence given on oath in, or for the purposes of, judicial proceedings (subsection (1) (a) (i)); or

(ii) in an affidavit, statutory declaration or certificate authorised by or under statute for use in judicial proceedings (subsection (1) (a) (ii)); or

(b) in evidence given on oath in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (which sets out the powers of the High Court to give effect to applications for assistance made by a court outside England and Wales) (subsection (3) (a) (i)); or

(c) in sworn evidence before the Court of Justice of the European Communities (subsection (3) (a) (ii)).

3. *Subsection (2)* provides that perjury under subsections (1) and (3) is committed only if the statement in question is material to the proceedings. It also specifies the necessary mental element in the offence: the person making the false statement must intend it to be taken as true but know it to be false or be reckless whether it is false.

4. The tests to be applied in determining whether a person “intends”, “knows” or is “reckless” are provided in clause 33 and apply throughout the Bill.

5. *Subsection (4)* provides that a person is liable to conviction for perjury only if there is corroborative evidence of the falsity of a statement alleged to be false, as under the present law.



*Administration of Justice (Offences) Bill*

False  
unsworn  
statements  
under  
Evidence  
(Proceedings  
in Other  
Jurisdictions)  
Act 1975.

**4.—(1) If—**

- (a) a person makes a false statement in giving testimony (whether orally or in writing) otherwise than on oath, in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975; and
- (b) the conditions specified in subsection (2) below are satisfied,

he is guilty of an offence.

**(2) The conditions mentioned in subsection (1) above are—**

- (a) that the statement is material to the proceedings; and
- (b) that he intends it to be taken as true but knows it to be false or is reckless whether it is false.

(3) A person shall not be liable to be convicted of an offence under this section upon the evidence of one witness as to the falsity of any statement alleged to be false unless that witness's evidence as to the statement's falsity is corroborated by other evidence.

## EXPLANATORY NOTES

### *Clause 4*

1. This clause, which replaces section 1A of the Perjury Act 1911, penalises under *subsection (1)* false statements in unsworn testimony given in pursuance of an order under section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, as recommended in paragraph 2.73 of the Report.

2. *Subsection (2)* provides that the offence under subsection (1) is committed only if the statement in question is material to the proceedings. It also specifies the necessary mental element: the person making the false statement must intend it to be taken as true but know it to be false or be reckless whether it is false.

3. *Subsection (3)* provides that a person is liable to conviction for the offence only if there is corroborative evidence of the falsity of a statement alleged to be false.

*Administration of Justice (Offences) Bill*

Misleading interpreting for purposes of judicial proceedings.

5.—(1) If—

(a) a person who has been sworn—

(i) in England or Wales or elsewhere as an interpreter for the purposes of judicial proceedings, or

(ii) in England or Wales as such an interpreter for the purposes of any proceedings before a person or body having by any law other than that of England and Wales power to hear, receive and examine evidence on oath,

interprets in a misleading manner for the purposes of those proceedings; and

(b) the matter interpreted is material to the proceedings; and

(c) when he gives his interpretation, he knows that it is misleading or is reckless whether it is misleading.

he is guilty of an offence.

(2) A person shall not be liable to be convicted of an offence under this section upon the evidence of one witness as to the misleading nature of any interpretation unless that witness's evidence that the interpretation is misleading is corroborated by other evidence.

## EXPLANATORY NOTES

### *Clause 5*

1. This clause penalises misleading interpreting by interpreters in judicial proceedings in accordance with the recommendations in paragraph 2.84 of the Report.

2. *Subsection (1) (a)* provides that a person sworn in England or Wales or elsewhere as an interpreter for the purposes of judicial proceedings, or in England or Wales as an interpreter for the purposes of proceedings elsewhere, commits an offence if he interprets in a misleading manner for the purposes of those proceedings. The offence covers both interpreting from one language to another and interpreting of sign language.

3. By *subsection 1(b) and (c)* an offence is committed only if the matter interpreted is material to the proceedings and if the necessary mental element is present: the interpreter must know when he gives his interpretation that it is misleading or be reckless whether it is misleading.

4. *Subsection (2)* provides that a person is liable to conviction for the offence only if there is corroborative evidence of the misleading nature of the matter interpreted.

*Administration of Justice (Offences) Bill*

Defence that  
proceedings  
were  
a nullity.

**6.** On a prosecution for an offence under this part of this Act it is a defence to prove that the proceedings in which the offence is alleged to have been committed were a nullity.

## EXPLANATORY NOTES

### *Clause 6*

In accordance with the recommendation in paragraph 2.48 of the Report, this clause provides that it is a defence to prove that proceedings in which an offence under clauses 3, 4 or 5 is alleged to have been committed were a nullity.

*Administration of Justice (Offences) Bill*

Abolition of  
power to  
direct  
prosecution  
for perjury.  
1911 c. 6.

**7. Section 9 of the Perjury Act 1911 (which gives certain authorities power to order prosecutions for perjury) shall cease to have effect.**

## EXPLANATORY NOTES

### *Clause 7*

In accordance with the recommendation in paragraph 2.85 of the Report, this clause repeals section 9 of the Perjury Act 1911 which gives certain authorities, including judges of courts of record, power to order prosecutions for perjury.



*Administration of Justice (Offences) Bill*

PART III

OTHER OFFENCES RELATING TO ALL PROCEEDINGS

Fabrication,  
concealment  
and  
destruction  
of evidence.

**8.—(1)** Subject to subsections (2) and (3) below, if a person in England or Wales or elsewhere fabricates, conceals or destroys evidence, intending thereby to influence—

(a) the decision by any person whether or not judicial proceedings should be instituted; or

(b) the outcome of current or future judicial proceedings,  
he is guilty of an offence.

(2) Conduct which is an offence under Part II of this Act is not an offence under this section.

(3) It is not an offence under this section to destroy evidence if its destruction is reasonable in all the circumstances.

(4) The reference in subsection (1)(a) above to the decision by any person whether or not judicial proceedings should be instituted includes—

(a) a reference to the decision whether any matter should be brought before—

(i) a tribunal.

(ii) a body of persons such as is mentioned in section 2(1)(c) above, or

(iii) a statutory inquiry; and

(b) where a matter cannot be brought before a tribunal or before such a body or inquiry unless the tribunal, body or inquiry is constituted for the purpose, a reference to the decision of the person responsible for constituting it as to whether or not it should be constituted.

## EXPLANATORY NOTES

### *Part III*

The clauses in this Part (clauses 8–20) create offences which penalise particular conduct which may occur variously before, during or after civil or criminal proceedings or any other judicial proceedings (as defined by clause 1), in accordance with recommendations made in paragraphs 3.29–3.79 of the Report. The conduct penalised by most of these offences is at present covered by the general common law offence of perverting the course of justice or specific offences at common law, all of which are abolished by clause 35.

### *Clause 8*

1. Clause 8 penalises fabricating or tampering with evidence, as recommended in paragraph 3.33 of the Report.

2. *Subsection (1)* provides that it is an offence to fabricate, conceal or destroy evidence with an intent to influence either the decision whether or not to institute judicial proceedings or the outcome of current or future judicial proceedings.

3. *Subsection (2)* ensures that the offence in clause 8 will not be used where the conduct in issue amounts to perjury or any other offence in Part II of the Bill.

4. *Subsection (3)* provides that it is not an offence under this clause to destroy evidence if to do so is reasonable in the circumstances. Thus the moving of a vehicle after an accident from a highly dangerous position will not constitute this offence even if the person appreciates that by doing so he will make it more difficult to establish in subsequent proceedings exactly where it had come to rest.

5. *Subsection (4)* adapts subsection (1) (a) for the purposes of tribunals, statutory inquiries and non-statutory bodies, the proceedings of which are not “instituted” as they are in the case of the courts. It thereby applies the offence in subsection (1) (a) to cases where—

- (a) a person has to decide whether to make representations to any of the specified bodies (paragraph (a)); and
- (b) a person, usually a Minister or the Secretary of State, has to decide whether one of the specified bodies, such as a statutory inquiry, shall be constituted for a particular purpose (paragraph (b)).

6. The conduct penalised is an offence whether taking place in England or Wales or elsewhere; in this it corresponds to the provision made for perjury in clause 3(1) (a) (i).

*Administration of Justice (Offences) Bill*

Use of threats to suppress evidence. **9.** If a person in England or Wales or elsewhere threatens another, intending thereby to induce him or some other person—

(a) not to give evidence, or

(b) not to give evidence of a particular description,  
in current or future judicial proceedings, he is guilty of an offence.

## EXPLANATORY NOTES

### Clause 9

1. In accordance with the recommendation in paragraph 3.40 of the Report, this clause makes it an offence to threaten a witness to induce him or another not to give evidence in current or future judicial proceedings, or not to give particular evidence in such proceedings.

2. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. This makes it clear that threats made by a person outside England and Wales to a witness abroad or to a witness in England or Wales are covered by this offence.

*Administration of Justice (Offences) Bill*

Use of  
bribes  
to suppress  
evidence.

**10.** If a person in England or Wales or elsewhere—

- (a) gives or agrees or offers to give another person any consideration, intending thereby to induce him or some other person—
  - (i) not to give evidence, or
  - (ii) not to give evidence of a particular description, in current or future judicial proceedings; or
- (b) accepts or agrees or offers to accept any consideration for himself or some other person—
  - (i) not giving evidence, or
  - (ii) not giving evidence of a particular description, he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 10*

1. This clause penalises the use of bribes to suppress evidence in accordance with the recommendation in paragraph 3.40 of the Report.

2. *Clause 10 (a)* makes it an offence for a person to give, to agree or to offer to give consideration to another to induce him or any third party not to give evidence or particular evidence in current or future judicial proceedings.

3. *Clause 10 (b)* makes it an offence for a person to accept, or to agree or offer to accept, a consideration for himself or another not to give evidence or particular evidence in current or future judicial proceedings.

4. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus bribes offered or accepted abroad, or bribes offered abroad to a witness in England or Wales, are covered by this offence.

*Administration of Justice (Offences) Bill*

Use of  
improper  
persuasion in  
relation to  
judicial  
proceedings.

**11.—(1)** If a person in England or Wales or elsewhere brings improper persuasion directly or indirectly to bear on a person of a description specified in subsection (2) below, intending thereby to induce him to influence the outcome of judicial proceedings which either are before him or may come before him, he is guilty of an offence.

(2) The persons mentioned in subsection (1) above are—

- (a) judges and magistrates;
- (b) members and officers of courts and tribunals;
- (c) members of juries;
- (d) members of any such body as is mentioned in section 2(1)(c) above;
- (e) arbitrators; and
- (f) persons holding statutory inquiries.

(3) For the purposes of this section, but without prejudice to the generality of subsection (1) above, the ways in which a person may bring improper persuasion to bear on another include—

- (a) threatening him;
- (b) giving or agreeing or offering to give him any consideration; and
- (c) giving him any information relating to the judicial proceedings in question which is likely to persuade him to influence the outcome of those proceedings in a manner inconsistent with his duty in relation to them.

## EXPLANATORY NOTES

### *Clause 11*

1. This clause penalises improper pressure put on judges, members of juries and others to influence the outcome of current or future judicial proceedings, in accordance with the recommendation in paragraph 3.52 of the Report. So far as it relates to pressure on members of juries, it replaces the common law offence of embracery, which is abolished by clause 35(2).

2. *Subsection (1)* sets out the offence, which penalises improper persuasion directly or indirectly brought to bear on any of the persons specified in subsection (2) with the intention of inducing him to influence the outcome of current or future judicial proceedings before him.

3. *Subsection (2)* specifies the persons in relation to whom improper persuasion is penalised by subsection (1). Officers of courts are specified for the purposes of this clause and clause 12 only if they have the responsibility for taking decisions in judicial proceedings, as for example registrars of the High Court and county courts.

4. *Subsection (3)* provides that improper persuasion includes, although it is not limited to, threats, bribes or offers of bribes, and the giving of information relating to the judicial proceedings in question which is likely to persuade the person given it to influence their outcome in a manner inconsistent with his duty in relation to them.

5. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus improper pressure exerted on a specified person abroad, or from abroad against a specified person in England or Wales, is covered by this offence.



*Administration of Justice (Offences) Bill*

Improper  
agreements  
and offers to  
influence  
outcome of  
judicial  
proceedings.

**12.** If in England or Wales or elsewhere a person of a description specified in section 11(2) above agrees or offers to influence the outcome of judicial proceedings which either are before him or may come before him in a manner inconsistent with his duty in relation to them, he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 12*

1. The offence provided in this clause is the counterpart of that in clause 11. It penalises a judge, member of a jury or any of the other persons specified in clause 11(2) who agrees or offers to influence the outcome of current or future judicial proceedings before him in a manner inconsistent with his duty in relation to those proceedings. It implements the recommendation in paragraph 3.55 of the Report.

2. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus agreements or offers to influence proceedings are penalised if they are made abroad.

*Administration of Justice (Offences) Bill*

Publication  
and  
distribution  
of false  
statements  
alleging  
corrupt  
conduct  
in relation to  
judicial  
proceedings.

**13.—(1)** Subject to subsection (2) below, if—

(a) a person publishes or distributes a false statement alleging—

(i) that a court or tribunal or such a body as is mentioned in section 2(1)(c) above is corrupt in the performance of its functions,  
or

(ii) that any judge, magistrate, arbitrator or person holding a statutory inquiry, any member or officer of a court or tribunal or any member of such a body as is mentioned in section 2(1)(c) above has been corrupt in the performance of his functions in relation to any judicial proceedings which have come before him,  
and

(b) at the time when he publishes or distributes it he intends it to be taken as true but knows it to be false or is reckless whether it is false,  
he is guilty of an offence.

(2) Publication or distribution of such a statement outside England and Wales is not an offence under this section.

## EXPLANATORY NOTES

### *Clause 13*

1. This clause makes it an offence to publish or distribute to the public false statements alleging corrupt conduct by the judiciary or other specified persons. It implements the recommendation in paragraph 3.70 of the Report.

2. *Subsection (1)* penalises anyone who publishes or distributes a false statement alleging that a court or tribunal, or a member of a court or tribunal or other specified persons, are corrupt in the performance of their functions.

3. The publication is an offence only if done with knowledge of or recklessness as to the falsity of the statement, and if there is an intention that the statement be taken as true.

4. *Subsection (2)* provides that no offence is committed under the section if the publication or distribution takes place outside England and Wales.

5. “Publication” and “distribution” are defined in clause 32 as meaning publication or distribution to the public at large.

6. The consent of the Attorney General for the institution of proceedings for this offence is required by Schedule 1, Part II.

*Administration of Justice (Offences) Bill*

Publication  
and  
distribution of  
statements  
intended to  
produce  
miscarriage  
of justice

**14.—(1)** Subject to subsection (2) below, if a person, intending thereby to achieve a miscarriage of justice in any current or future judicial proceedings, publishes or distributes a statement whose publication or distribution creates a risk of a miscarriage, he is guilty of an offence.

**(2)** Publication or distribution of such a statement outside England and Wales is not an offence under this section.

## EXPLANATORY NOTES

### *Clause 14*

1. *Subsection (1)* of this clause penalises anyone who publishes or distributes to the public a statement which thereby creates a risk of a miscarriage of justice, with the intention of achieving such a miscarriage in any current or future judicial proceedings. It implements the recommendation in paragraph 3.79 of the Report.

2. *Subsection (2)* provides that no offence is committed under this section if the publication or distribution takes place outside England and Wales.

3. “Publication” and “distribution” are defined in clause 32 as publication and distribution to the public at large.

4. The consent of the Attorney General for the institution of proceedings for this offence is required by Schedule 1, Part II.

*Administration of Justice (Offences) Bill*

Use of  
blackmail  
against  
parties to  
judicial  
proceedings  
in respect of  
their conduct  
of the  
proceedings.

**15.—(1)** If a person in England or Wales or elsewhere makes any unwarranted demand with menaces that another—

(a) shall not institute judicial proceedings, or

(b) shall withdraw or settle judicial proceedings which he has already instituted,

he is guilty of an offence.

(2) A demand with menaces is unwarranted for the purposes of this section unless the person making it does so in the belief—

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.

(3) It is immaterial whether the menaces relate to action to be taken by the person making the demand.

## EXPLANATORY NOTES

### *Clause 15*

1. This clause penalises unwarranted pressures brought to bear upon parties or prospective parties to judicial proceedings. It is based on section 21 of the Theft Act 1968 (blackmail) and implements the recommendation in paragraph 3.47 of the Report.

2. *Subsection (1)* makes it an offence for anyone to make an unwarranted demand with menaces to another not to institute judicial proceedings, or to withdraw or settle proceedings already instituted.

3. *Subsection (2)* provides that a demand with menaces is unwarranted unless the person making it believes that he has reasonable grounds for making the demand, and that the use of menaces is a proper means of reinforcing the demand.

4. *Subsection (3)* makes it clear that the menaces may relate to something to be done either by the person making the demand or by another.

5. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus, in addition to blackmail abroad, blackmail of a party is an offence if the menaces are made from abroad to a party in England or Wales, or from England or Wales to a party outside England and Wales. The latter situation accords with the position under section 21 of the Theft Act 1968 (blackmail) as determined by *R. v. Treacy* [1971] A.C. 537, while the former settles in relation to the present offence a question raised but not resolved in relation to section 21 by that case.



*Administration of Justice (Offences) Bill*

Reprisals  
against  
parties in  
respect of  
conduct of  
judicial  
proceedings.

**16.** If after the end of judicial proceedings a person in England or Wales or elsewhere takes or threatens to take reprisals against a person who was a party to the proceedings, intending thereby to punish him—

(a) for having instituted them, or

(b) for not having withdrawn or settled them, or

(c) for anything which he did or omitted to do in them,  
he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 16*

1. This clause penalises reprisals against parties after the conclusion of judicial proceedings, in accordance with the recommendation in paragraph 3.75 of the Report. It makes it an offence after proceedings have ended to take or threaten reprisals against a party to those proceedings, with intent to punish him for having instituted them or not having withdrawn or settled them or for anything which he did in them (such as defending or making a counterclaim).

2. The clause penalises reprisals taken in England or Wales or elsewhere. Thus reprisals taken against a party abroad are covered by the offence.

*Administration of Justice (Offences) Bill*

Provisions  
supplemen-  
tary  
to sections  
15 and 16.

17.—(1) Where the Attorney General brings an action on the relation of some other person, that other person (as well as the Attorney General) is to be treated as a party to the action for the purpose of sections 15 and 16 above.

(2) The references in sections 15 and 16 above to the institution and withdrawal of judicial proceedings are to be construed as respectively including references to the bringing of any matter before—

(a) a tribunal;

(b) a body of persons such as is mentioned in section 2(1) (c) above;  
and

(c) a statutory inquiry,

and to the withdrawal of any matter from the cognisance of such a tribunal, body or inquiry; and the reference to a party to proceedings in section 16 above includes a reference to a person who brought any matter before such a tribunal, body or inquiry.

## EXPLANATORY NOTES

### *Clause 17*

1. This clause adapts clauses 15 and 16 for the purpose of particular kinds of judicial proceedings.

2. *Subsection (1)* provides that, where the Attorney General brings a relator action, both he and the person on whose relation it is brought are to be treated as parties for the purpose of clauses 15 and 16.

3. *Subsection (2)* provides, first, that, in relation to the proceedings of tribunals, statutory inquiries and non-statutory bodies, “institution of proceedings” in clauses 15 and 16 is to be construed as the bringing of any matter before those bodies, and “withdrawal of proceedings” as withdrawal of any matter from their cognisance; and, secondly, that the reference to a party to proceedings in clause 16 includes a reference to a person who brought any matter before those bodies. Clauses 15 and 16 are thereby adapted to cases where the acts penalised by them are, for example, done to persons making representations to the bodies specified.

*Administration of Justice (Offences) Bill*

Reprisals  
against other  
persons in  
respect of  
conduct in  
judicial  
proceedings.

**18.**—(1) Subject to subsection (2) below, if in the course of or after the end of judicial proceedings a person in England or Wales or elsewhere takes or threatens to take reprisals against—

(a) a witness in them; or

(b) a person of a description specified in section 11(2) above,  
intending thereby to punish him for anything said, done or omitted by him in the course of the proceedings he is guilty of an offence.

(2) A person alleged to have taken or threatened to take reprisals against a witness in judicial proceedings is not guilty of an offence under this section if he establishes—

(a) that he took or threatened to take the reprisals against the witness to punish him for having given false evidence; and

(b) that the witness knew that the evidence was false at the time when he gave it or was reckless whether it was false.

1892 c. 64.

(3) The Witnesses (Public Inquiries) Protection Act 1892 (which is superseded by this section) shall cease to have effect.

## EXPLANATORY NOTES

### *Clause 18*

1. This clause penalises reprisals against witnesses, members of juries and others, in accordance with the recommendation in paragraph 3.63 of the Report.

2. *Subsection (1)* provides that it is an offence during or after judicial proceedings to take or threaten reprisals against specified persons with intent to punish them for things said or done by them in their respective capacities during those proceedings. The persons specified include witnesses, members of juries, judges and members of tribunals.

3. *Subsection (2)* excludes from the offence reprisals taken to punish a witness for having given false evidence where the witness knew it to be false or was reckless whether it was false.

4. *Subsection (3)* repeals the Witnesses (Public Inquiries) Protection Act 1892, which the present clause supersedes.

5. The clause penalises reprisals taken in England or Wales or elsewhere. Thus reprisals taken against the specified persons abroad are covered by the offence.

*Administration of Justice (Offences) Bill*

Reprisals for  
attending to  
be juror or  
witness.

**19.** If a person in England or Wales or elsewhere takes or threatens to take reprisals against another, intending thereby to punish him—

- (a) for attending or having attended in the Crown Court, the High Court or a county court when summoned for jury service; or
- (b) for attending or having attended a coroner's inquest when summoned as a juror at the inquest; or
- (c) for attending or having attended to give evidence as a witness in any judicial proceedings,

he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 19*

1. This clause penalises reprisals, for example, dismissal by an employer of an employee, taken against a member of a panel of jurors or a member of a jury for attending court on a jury summons, or a witness for attending court to give evidence. It implements the recommendation in paragraph 3.73 of the Report.

2. The clause penalises reprisals taken in England or Wales or elsewhere. Thus reprisals taken against witnesses or members of juries abroad are covered by the offence.



**20. If a person—**

Improper  
performance  
of functions  
of juror.

- (a) takes the oath as a member of the jury in any judicial proceedings when he knows that he has not been selected to be a member of the jury in those proceedings, or
- (b) performs any of the functions of a member of the jury in any judicial proceedings when he knows that he is not a member of the jury in those proceedings,

he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 20*

This clause implements the recommendation in paragraph 3.57 of the Report, and penalises a person who—

- (a) takes the oath as a member of the jury, knowing that he has not been selected to be on the jury; or
- (b) performs any function of a member of the jury, knowing that he is not a member of the jury.

It therefore covers cases where a person substitutes himself for a member of the jury at the beginning or during the course of a trial. The offence replaces the common law offence of personating a juror, which is abolished by clause 35(2).

PART IV

OFFENCES RELATING TO CRIMINAL INVESTIGATIONS AND PROCEEDINGS

*Offence relating only to investigations of and proceedings for arrestable offences*

Interference with investigations of and prosecutions for arrestable offences.

21.—(1) Subject to subsection (2) below,—

(a) where an arrestable offence has been committed; and

(b) a person in England or Wales or elsewhere, other than the person who committed it—

(i) knows of its commission and who committed it, and

(ii) does without lawful authority or reasonable excuse any act, other than the giving of false information, intending thereby to impede the apprehension, prosecution or conviction of the offender,

he is guilty of an offence.

(2) If it is established that an arrestable offence has been committed, a person charged with an offence under this section is to be taken to have known of its commission if he knew of circumstances indicating that an arrestable offence had been committed, regardless of whether he knew the specific offence that had been committed.

(3) If on a trial for an arrestable offence—

(a) the commission of the offence charged or of some other offence of which the accused might on that charge be found guilty is established to the satisfaction—

(i) of the jury, in proceedings on indictment, and

(ii) of the court, in summary proceedings, but

(b) the accused is found not guilty of that offence, he may instead be found guilty of an offence under this section in relation to the offence of which he was acquitted.

## EXPLANATORY NOTES

### *Part IV*

The clauses in this Part (clauses 22–28) create offences penalising particular conduct which may occur during criminal investigations or in the course of criminal proceedings, in accordance with recommendations made in paragraphs 3.91–3.122 of the Report. The conduct penalised by most of these offences is at present covered by the general offence of perverting the course of justice or by statutory offences; the former is abolished by clause 35(1) and the latter are repealed by clause 36 and Schedule 3.

#### *Clause 21*

1. In accordance with the recommendation in paragraphs 3.96 and 3.102 of the Report, clause 21 provides an offence of impeding the investigation of and prosecution for an arrestable offence. It replaces the offence in section 4(1) of the Criminal Law Act 1967, but makes clear that the new offence does not penalise giving false information. This has the effect of reversing the decision relating to section 4(1) in *R. v. Brindley* [1971] 2 Q.B. 300.

2. *Subsection (1)* penalises anyone who without lawful authority or reasonable excuse does any act, other than giving false information, intending to impede the apprehension, prosecution or conviction of another who has committed an arrestable offence, or the investigation of that offence. Subject to subsection (2), the person penalised must know both that the offence has been committed and who committed it.

3. *Subsection (2)* makes clear that it is not necessary for the person penalised to know which particular arrestable offence has been committed.

4. *Subsection (3)* provides that, in a trial for an arrestable offence, if the court is satisfied that the offence charged (or some other offence of which the accused might on that charge be convicted) was committed but find the defendant not guilty of it, he may be convicted under this section of impeding a prosecution in relation to the offence charged (or that other offence). This implements the recommendation in paragraph 4.7 of the Report.

5. “Arrestable offence” is defined in clause 32.

6. The conduct penalised is an offence whether taking place in England or Wales or elsewhere.

7. The consent of the Director of Public Prosecutions is required for the institution of proceedings for this offence by Schedule 1, Part II.

*Administration of Justice (Offences) Bill*

*Offences relating to investigations of and proceedings for arrestable  
and non-arrestable offences*

Suppression  
of  
information  
relating to  
offences by  
means of  
threats and  
bribes.

22.—(1) Where an offence (whether arrestable or not) has been committed and a person in England or Wales or elsewhere, knowing of its commission and intending to impede its investigation or the apprehension, prosecution or conviction of an offender for it—

- (a) threatens another or gives or agrees or offers to give another any consideration to induce him or some other person not to disclose information which he might otherwise disclose or to give information which is false and which he knows to be false, or
- (b) accepts or agrees or offers to accept any consideration for himself or some other person not disclosing information which he might otherwise disclose or giving information which is false and which he knows to be false,

he is guilty of an offence.

(2) The references to consideration in subsection (1) above do not include consideration—

- (a) which is given for not disclosing information, and
- (b) which consists only of the making good of loss or injury caused by the offence or of the making of reasonable compensation for that loss or injury.

(3) If it is established that an offence has been committed, a person charged with an offence under this section is to be taken to have known of its commission if he knew of circumstances indicating that an offence had been committed, regardless of whether he knew the specific offence that had been committed.

## EXPLANATORY NOTES

### Clause 22

1. In accordance with the recommendations in paragraphs 3.105–3.108 of the Report this clause penalises threats and bribes to induce the giving of false information or the non-disclosure of information about offences.

2. *Subsections (1) and (2)* provide that, where an offence (whether arrestable or not) has been committed, it is an offence for a person—

- (a) to threaten another to induce him or someone else to give false information known by the person threatening to be false; or
- (b) to bribe another to induce him or someone else to give false information known by the person bribing to be false; or
- (c) to threaten another to induce him or someone else not to disclose information; or
- (d) to bribe another (where the bribe is anything other than consideration for making good or compensating for loss of injury caused by the offence) to induce him or someone else not to disclose information; or
- (e) to accept a bribe for him or someone else to give information which he knows to be false; or
- (f) to accept a bribe (other than consideration for making good or compensating for loss of injury caused by the offence) for him or someone else not disclosing information.

In each case, the person penalised must, subject to subsection (3), know that an offence has been committed and must intend to impede its investigation or the apprehension prosecution or conviction of the offender. So far as it penalises acceptance of a bribe, the offence replaces section 5(1) of the Criminal Law Act 1967. It is, however, wider than that offence in that the latter penalises acceptance of bribes for non-disclosure of information only in regard to arrestable offences.

3. *Subsection (3)* makes it clear that it is not necessary for the person penalised to know which particular offence has been committed.

4. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus, for example, threatening another outside England or Wales to induce the giving of false information is an offence under this clause.

5. The consent of the Director of Public Prosecutions is required for the institution of proceedings for this offence by Schedule 1, Part II.

*Administration of Justice (Offences) Bill*

False  
implication  
of offences.

**23.—(1)** If a person in England or Wales or elsewhere—

- (a) gives a false indication that some other person has committed an offence which the person giving the indication knows that that other person did not commit; and
- (b) gives the indication intending thereby to induce the person to whom it is given or some other person to pursue a criminal investigation in relation to the person indicated,

he is guilty of an offence.

(2) A person shall not be liable to be convicted of an offence under this section upon the evidence of one witness as to the falsity of an indication alleged to be false unless that witness's evidence as to the indication's falsity is corroborated by other evidence.

## EXPLANATORY NOTES

### *Clause 23*

1. This clause makes it an offence falsely to implicate another in the commission of an offence, and implements the recommendation in paragraph 3.97 of the Report.

2. *Subsection (1)* provides that it is an offence for a person to give a false indication that another person has committed an offence (whether or not arrestable) which he knows that person has not committed, intending criminal investigations to be pursued in relation to him. An “indication” may consist of speech or gesture, or both.

3. *Subsection (2)* provides that a person is liable to conviction for the offence only if there is corroborative evidence of the falsity of the indication.

4. The conduct penalised is an offence whether taking place in England or Wales or elsewhere.

5. The consent of the Director of Public Prosecutions is required for the institution of proceedings for this offence by Schedule 1, Part II.





## EXPLANATORY NOTES

### *Clause 24*

1. In accordance with the recommendation in paragraph 3.101 of the Report, this clause adds a section to the Road Traffic Act 1972 penalising a person who indicates falsely to the police that he was the driver of a motor vehicle when the commission of any endorsable offence by the driver of that vehicle is being investigated. The person so indicating must intend the police to believe that the investigation should be pursued against him. An indication may consist of speech or gesture, or both.

2. The meaning of "intent", which in relation to the other clauses is defined by clause 33, is here incorporated into the added section.

*Administration of Justice (Offences) Bill*

Wrongful  
pleading to  
criminal  
charge.

**25.** If a person charged with a criminal offence pleads to it, knowing that the name in which he has been charged is not his own, or otherwise knowing that he is not the person to be charged, he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 25*

This clause makes it an offence for a person charged with an offence to plead to it in another's name. It covers the situations where—

- (a) the defendant did not commit the offence charged, but pleads in the name of the person who did; and
- (b) the defendant did commit the offence charged, but pleads in the name of a person who did not.

It also covers any similar situation where, for example, a person with one or more aliases pleads to an offence under one or other of them, knowing that it is not his real name. The clause implements the recommendation in paragraph 3.115 of the Report.

*Administration of Justice (Offences) Bill*

False statements in documents prepared for purposes of criminal investigations.

**26.—(1) If—**

- (a) a person in England or Wales or elsewhere makes a statement in a document prepared for the purposes of a criminal investigation, intending the statement to be taken as true but knowing that it is false or reckless whether it is false; and
- (b) it is material to the investigation; and
- (c) he signs the document; and
- (d) the document contains a declaration by him to the effect that the statements in it are true to the best of his knowledge and belief and that he made them knowing that he would be liable to prosecution if he made any statement in the document knowing it to be false or being reckless whether it was false; and
- (e) any additional conditions specified in subsection (2) below are satisfied,

he is guilty of an offence.

**(2) The additional conditions are—**

- (a) the document must give his age, if he is under 18; and
- (b) if he cannot read the document, it must be read to him before he signs it and shall be accompanied by a declaration by the person who so read it to the effect that it was so read.

**(3) A person shall not be liable to be convicted of an offence under this section upon the evidence of one witness as to the falsity of any statement alleged to be false unless that witness's evidence as to the statement's falsity is corroborated by other evidence.**

## EXPLANATORY NOTES

### *Clause 26*

1. In accordance with the recommendations in paragraphs 3.94–3.95 of the Report, this clause creates an offence of making a false statement in a formal document during the course of criminal investigations. It replaces section 89 of the Criminal Justice Act 1967 (false written statements tendered in evidence) but omits the requirement of that offence that the document in question must have been one tendered in evidence in criminal proceedings. In the ordinary course, the document will be a formal witness statement on the standard form used by the police.

2. *Subsection (1)* sets out the basic elements of the offence.

3. *Subsection (2)* sets out further requirements where the person making the statement is under eighteen or cannot read.

4. *Subsection (3)* provides that a person is liable to conviction for the offence only if there is corroborative evidence of the falsity of a statement alleged to be false.

5. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus, for example, a false formal statement made abroad to police investigating an offence, whether arrestable or not, is covered by this offence.

6. The consent of the Director of Public Prosecutions is required for the institution of proceedings for this offence by Schedule 1, Part II.

*Administration of Justice (Offences) Bill*

Escape from  
lawful  
custody.

**27.**—(1) If a person in England or Wales or elsewhere escapes from custody after a lawful arrest to which this section applies, he is guilty of an offence.

(2) This section applies to any arrest in an investigation of an offence under the law of England and Wales.

## EXPLANATORY NOTES

### *Clause 27*

1. In accordance with paragraph 3.122 of the Report, *subsection (1)* of this clause creates an offence of escape from custody as a result of a lawful arrest. It is thus confined to escape at any time up to a sentence of imprisonment imposed at a trial for the offence for which the person was arrested.

2. *Subsection (2)* states that the arrest must have been made in the course of investigating an offence under English law. Unlike clause 26, this requires express mention in this clause to exclude from the offence escape from custody in England or Wales during extradition proceedings for return of a person to another state. This subsection also makes clear that the clause covers an escape abroad by a British subject who is accused of murdering another outside the United Kingdom, such a murder being an offence under the law of England and Wales.

3. Escape under this clause is penalised whether it takes place in England or Wales or elsewhere. It thereby covers escape prior to a court martial abroad (being judicial proceedings under clause 1(b)), and escape while being returned in custody to stand trial in England and Wales.



*Administration of Justice (Offences) Bill*

Use of threats  
and bribes to  
induce pleas  
at trial.

**28.** If a person in England or Wales or elsewhere threatens another or gives or agrees or offers to give him any consideration, intending thereby to induce him to enter a particular plea at his trial on a criminal charge, he is guilty of an offence.

## EXPLANATORY NOTES

### *Clause 28*

1. This clause makes it an offence for a person to threaten or bribe another to induce him to plead in a particular way at his trial for an offence. It implements the recommendation in paragraph 3.119 of the Report.

2. The conduct penalised is an offence whether taking place in England or Wales or elsewhere. Thus the offence covers threats made or bribes given abroad to a person in England or Wales.

*Administration of Justice (Offences) Bill*

PART V

MISCELLANEOUS AND GENERAL

*Offences*

Attempts etc.  
outside  
England and  
Wales to  
commit  
offences  
under Act.

**29.** It is not a defence to a charge—

(a) of attempting to commit an offence under this Act; or

(b) of conspiracy to commit such an offence; or

(c) of incitement to commit such an offence,

to show that some or all of the conduct alleged to constitute the attempt, conspiracy or incitement took place outside England and Wales.

## EXPLANATORY NOTES

### *Clause 29*

1. This clause defines the extent to which an attempt, an incitement or a conspiracy to commit any of the offences created by the Bill is an offence if it takes place outside England and Wales, in accordance with the recommendations in paragraph 3.129 of the Report.

2. The clause has the effect of making it an offence for a person—

- (a) to attempt, to conspire or to incite in any place outside England and Wales to commit anywhere, whether in England or Wales or elsewhere, any of the offences created by the preceding clauses which penalise conduct taking place in England or Wales or elsewhere; and
- (b) to attempt, to conspire or to incite in any place outside England and Wales to commit in England or Wales any of the offences created by the preceding clauses which penalise conduct taking place in England or Wales.

*Administration of Justice (Offences) Bill*

Prosecution  
and punish-  
ment of  
offences etc.

**30.**—(1) Part I of Schedule 1 to this Act shall have effect with regard to the prosecution and punishment of offences against this Act.

(2) The supplementary provisions contained in Part II of that Schedule shall have effect with regard to the offences against this Act there mentioned.

## EXPLANATORY NOTES

### *Clause 30*

This clause, together with Schedule 1, makes provision for the method of prosecution and for the punishment of the offences in the Bill (Part I) and for certain supplementary matters such as the need for consent to prosecution in certain cases (Part II). It implements recommendations contained in paragraphs 4.5, 4.10, 4.12–4.15 and 4.21–4.25 of the Report.

*Administration of Justice (Offences) Bill*

proof of  
criminal  
proceedings.

**31.** On a prosecution for an offence under this Act alleged to have been committed in criminal proceedings a certificate of the nature and result of the proceedings purporting to be signed by the appropriate officer of the court before which they were held shall be sufficient evidence of their nature and result without proof of the signature or official character of the person appearing to have signed the certificate.

## EXPLANATORY NOTES

### *Clause 31*

This clause provides that proof of criminal proceedings in which an offence under the Bill is alleged to have occurred may be by means of a certificate of the nature and result of the proceedings signed by the appropriate officer of the court before which they were held. It is based on section 14 of the Perjury Act 1911, and will be relevant in particular to offences under clauses 3–5 and clauses 25 and 28. It implements the recommendation in paragraph 2.87 of the Report.



*Administration of Justice (Offences) Bill*

*Interpretation*

General provisions as to interpretation.  
1967 c. 58

**32. In this Act—**

“arrestable offence” has the meaning assigned to it by section 2(1) of the Criminal Law 1967, that is to say it means any offence for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of 5 years (or might be so sentenced but for the restrictions imposed by section 29 of the Criminal Law Act 1977), and any attempt to commit such an offence;

“judicial proceedings” has the meaning assigned to it by section 1 above;

“publication” and “distribution” mean publication or distribution to the public at large, and “publish” and “distribute” have corresponding meanings;

“statutory inquiry” has the meaning assigned to it by section 2(3) above;

1977 c. 45.

“statutory maximum” means the prescribed sum within the meaning of section 28 of the Criminal Law Act 1977 (that is to say, £1,000 or another sum fixed by order under section 61 of that Act to take account of changes in the value of money); and

“tribunal” has the meaning assigned to it by section 2(3) above.

## EXPLANATORY NOTES

### *Clause 32*

This clause contains general provisions as to interpretation.

“arrestable offence” is defined for the purposes of clause 21.

“judicial proceedings” is defined for the purposes of Parts I-III of the Bill.

“publication” and “distribution” are defined for the purposes of clauses 13 and 14.

“statutory inquiry” is defined in clause 2(3) for the purposes of clauses 2(1), 8(3), 11(2), 12, 13(1), 17(2) and 18(1).

“statutory maximum” is defined for the purposes of clause 30(1) and Schedule 1, Part I, paragraph 5(a).

“tribunal” is defined in clause 2(3) for the purposes of clauses 2(1), 8(3), 11(2), 12, 13(1), 17(2) and 18(1).

*Administration of Justice (Offences) Bill*

Intention,  
knowledge  
and  
recklessness.

**33.**—(1) A court or jury determining whether a person has committed an offence created by a provision of this Act which employs the verb “to intend” in any of its forms shall use the test specified in subsection (2) below when answering the question whether he intended a particular result of his conduct.

(2) The test mentioned in subsection (1) above is—

Did he either intend to produce the result or have no substantial doubt that his conduct would produce it?

(3) A court or jury determining whether a person has committed an offence created by a provision of this Act which employs the verb “to know” in any of its forms shall use the test specified in subsection (4) below when answering the question whether he knew of any relevant circumstances.

(4) The test mentioned in subsection (3) above is—

Did he either know of the relevant circumstances or have no substantial doubt of their existence?

(5) A court or jury determining whether a person has committed an offence created by a provision of this Act which employs the word “reckless” shall use the test specified in subsection (6) below when answering the question whether he was reckless as to whether any relevant circumstances existed.

(6) The test mentioned in subsection (5) above is—

Did he realise that the circumstances might exist and, if so, was it unreasonable for him to take the risk of their existence?

(7) The question whether it was unreasonable for the person to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct.

## EXPLANATORY NOTES

### *Clause 33*

1. This clause defines the terms “intention” “knowledge” and “recklessness” and their derivations which are requirements of the mental element in many of the offences contained in Parts II, III and IV of the Bill.

2. The definitions are in substance identical to those contained in clauses 2, 3 and 4 of the draft Criminal Liability (Mental Element) Bill appended to the Law Commission’s *Report on the Mental Element in Crime* ((1978) Law Com. No. 89).

3. The clause implements the recommendation in paragraph 1.9 of the Report.

*Administration of Justice (Offences) Bill*

Materiality of statements. **34.** For the purposes of this Act the question whether a statement was material is a question of law.

## EXPLANATORY NOTES

### *Clause 34*

This clause provides that whether a statement is material is a question of law; this question is relevant under clauses 3, 4, 5 and 26, and is discussed in the Report in paragraphs 2.50–2.53.

*Administration of Justice (Offences) Bill*

*(Supplementary)*

Abolition of  
common law  
offences  
relating to  
admini-  
stration  
of justice.

**35.—**(1) Any offence under the common law of England and Wales—  
(a) of perverting the course of justice;  
(b) of attempting to pervert it; or  
(c) of conspiracy or incitement to pervert it,  
is abolished.

(2) In particular the following offences under the common law of England and Wales are abolished, but without prejudice to the generality of subsection (1) above:—

embracery;

personating a juror;

disposing of a corpse with intent to obstruct or prevent a coroner's inquest; and

any distinct offence of perjury or subornation of perjury.

(3) The reference in paragraph (a) of subsection (1) above to any offence of perverting the course of justice includes a reference to any offence of obstructing it or otherwise prejudicing it, and the references in paragraphs (b) and (c) of that subsection to attempting to pervert it and to conspiracy and incitement to pervert it shall be construed accordingly.

## EXPLANATORY NOTES

### *Clause 35*

1. This clause abolishes common law offences relating to the administration of justice, in accordance with the recommendations in paragraph 3.132 of the Report.

2. *Subsection (1)* abolishes the general offences of perverting the course of justice and attempt, conspiracy or incitement to pervert the course of justice.

3. *Subsection (2)* abolishes, without prejudice to the general provisions of subsection(1), specific offences at common law relating to the administration of justice.

4. As explained in paragraph 3.2 of the Report, the common law offence of perverting the course of justice has been referred to in a number of ways, and *subsection (3)* ensures that, in whatever terms the general offence at common law is described, its abolition is effected by subsection (1).



*Administration of Justice (Offences) Bill*

Minor and consequential amendments and repeals. **36.**—(1) The enactments specified in Schedule 2 to this Act shall have effect subject to the amendments set out in that Schedule, being amendments consequential on the foregoing provisions of this Act and minor amendments.

(2) The enactments specified in Schedule 3 to this Act (which include enactments that were obsolete or unnecessary before the passing of this Act) are repealed to the extent mentioned in column 3 of that Schedule.

## EXPLANATORY NOTES

### *Clause 36*

This clause gives effect to the minor and consequential amendments to the statutory provisions specified in Schedule 2 to the Bill, and to the repeal of the provisions specified in Schedule 3, which are recommended in paragraph 3.138 of the Report.

*Administration of Justice (Offences) Bill*

Citation etc. 37.—This Act may be cited as the Administration of Justice (Offences) Act 1979.

(2) This Act shall come into force at the expiry of the period of one month beginning with the date on which it is passed.

(3) This Act does not extend to Scotland or Northern Ireland.

## EXPLANATORY NOTES

### *Clause 37*

This clause provides for the short title, commencement and extent of application of the Bill.

SCHEDULES

SCHEDULE 1

OFFENCES

PART I

PROSECUTION AND PUNISHMENT

1. Column 2 of the Table in this Schedule gives a description of the offences against the provisions of this Act specified in column 1.

2. The word "Indictment" in column 3 indicates in each entry in which it appears that the offence to which that entry relates is triable only on indictment.

3. A person guilty of an offence under this Act which is triable only on indictment shall be liable, on conviction, to a fine or to imprisonment for a term not exceeding the term specified in column 4 of the entry in the Table relating to that offence or to both.

4. The words "Either way" in column 3 indicate in each entry in which they appear that the offence to which that entry relates, if committed by an adult, is triable either on indictment or summarily.

5. A person guilty of an offence under this Act which is triable either on indictment or summarily shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment for a term not exceeding 6 months or both; or
- (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding the term specified in column 4 of the entry in the Table relating to that offence or to both.

TABLE

Provision of Act creating offence (1)	Description of offence (2)	Mode of trial (3)	Maximum punishment (4)
3	Perjury.	Indictment	5 years
4	False unsworn statements under Evidence (Proceedings in Other Jurisdictions) Act 1975	Either way	2 years
5	Misleading interpreting for purposes of judicial proceedings.	Either way	5 years
8	Fabrication, concealment and destruction of evidence.	Indictment	5 years
9	Use of threats to suppress evidence.	Indictment	5 years
10	Use of bribes to suppress evidence.	Indictment	5 years
11	Use of improper persuasion in relation to judicial proceedings.	Indictment	5 years
12	Improper agreements and offers to influence outcome of judicial proceedings.	Indictment	5 years
13	Publication and distribution of false statements alleging corrupt conduct in relation to judicial proceedings.	Either way	2 years

## EXPLANATORY NOTES

### *Schedule 1*

1. Part I of Schedule 1 sets out by way of a Table and explanatory paragraphs provisions for the prosecution and punishment of offences under the Bill, in accordance with the recommendations summarised in paragraph 4.25 of the Bill.
2. The “statutory maximum” fine to which reference is made in paragraph 5 (a) is defined in clause 32.
3. Part II of Schedule 1 provides in paragraphs 6 and 7 for the consent of the Attorney General to the institution of proceedings for two of the offences in the Bill, and for the consent of the Director of Public Prosecutions in the case of four other offences. Recommendations to this effect are set out in paragraph 4.5 of the Report.
4. Paragraphs 8 and 9 contain provisions relating to disqualification from jury service and for retrial of certain proceedings in the event of conviction for certain offences under the Bill. Recommendations to this effect are set out in paragraphs 4.10 and 4.21 of the Report.

*Administration of Justice (Offences) Bill*

Provision of Act creating offence (1)	Description of offence  (2)	Mode of trial  (3)	Maximum punishment  (4)
14	Publication and distribution of statements intended to produce miscarriage of justice.	Either way	5 years
15	Use of blackmail against parties to judicial proceedings.	Indictment	5 years
16	Reprisals against parties to judicial proceedings.	Indictment	2 years
18	Reprisals against other persons concerned in judicial proceedings.	Indictment	2 years
19	Reprisals for attending to be juror or witness.	Indictment	2 years
20	Improper performance of functions of juror.	Either way	2 years
21	Interference with investigations of and prosecutions for arrestable offences.	Either way	5 years
22	Suppression of information relating to offences by means of threats and bribes.	Either way	5 years
23	False implication of offences.	Either way	5 years
25	Wrongful pleading to criminal charge.	Either way	2 years
26	False statements in documents prepared for purposes of criminal investigations.	Either way	2 years
27	Escape from lawful custody.	Either way	5 years
28	Use of threats and bribes to induce pleas at trial.	Indictment	5 years

PART II

SUPPLEMENTARY

6. Proceedings for an offence under section 13 or 14 above shall not be instituted except by or with the consent of the Attorney General.

7.—(1) Proceedings for an offence under any provision of this Act specified in sub-paragraph (2) below shall not be instituted except by or with the consent of the Director of Public Prosecutions.

(2) The provisions of this Act mentioned in sub-paragraph (1) above are—  
 section 21;  
 section 22;  
 section 23; and  
 section 26.

8. Where a person is convicted of an offence under section 12 or 20 above, the court before which he is convicted may order that he shall be disqualified for jury service for such period as may be specified in the order.

9. The jurisdiction to order the issue of a writ of venire de novo shall include jurisdiction to order the issue of such a writ in respect of any proceedings in relation to which a person has been convicted of an offence under section 20 above.

## EXPLANATORY NOTES



*Administration of Justice (Offences) Bill*

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

*Criminal Law Act 1967*

1967 c. 58. 1. The following subsections shall be inserted after section 5(2) of the Criminal Law Act 1967 (wasting police time):—

“(2A) A court or jury determining whether a person has committed an offence under subsection (2) above shall use the test specified in subsection (2B) below when answering the question whether he knowingly made a false report such as is there mentioned.

(2B) The test mentioned in subsection (2A) above is—

Did he either know of the relevant circumstances or have no substantial doubt that the report was false?”

*Fugitive Offenders Act 1967*

1967 c. 68. 2. In paragraph 14 of Schedule 1 to the Fugitive Offenders Act 1967 (description of offences) for the words “subornation of perjury or conspiring to defeat” there shall be substituted the words “obstructing or perverting”.

*Juries Act 1974*

1974 c. 23. 3. The following paragraph shall be added at the end of Part II of Schedule 1 to the Juries Act 1974 (which lists the classes of persons disqualified for jury service):—

“A person who is for the time being disqualified by an order under paragraph 8 of Schedule 1 to the Administration of Justice (Offences) Act 1979”.

## EXPLANATORY NOTES

### *Schedule 2*

1. This schedule contains minor and consequential amendments to three statutes.

2. The amendment to section 5 of the Criminal Law Act 1967 ensures that the term “knowingly” in section 5(2) (wasteful employment of the police) has the same meaning as it has elsewhere in the Bill by virtue of clause 33(3) and (4). This is recommended in paragraph 3.96 of the Report.

*Administration of Justice (Offences) Bill*

SCHEDULE 3

ENACTMENTS REPEALED

Chapter	Short Title	Extent of Repeal
13 & 14 Vict. c. 26.	Piracy Act 1850.	Section 6.
14 & 15 Vict. c. 100.	Evidence Act 1851.	Section 16.
36 & 37 Vict. c. 60.	Extradition Act 1873.	In the Schedule, in the third paragraph, the words "and subornation of perjury, whether under common or statute law".
36 & 37 Vict. c. 88	Slave Trade Act 1873.	Section 22.
45 & 46 Vict. c. 22.	Boiler Explosions Act 1882.	In section 6(4)(d), the words "administer an oath, and".
55 & 56 Vict. c. 64.	Witnesses (Public Inquiries) Protection Act 1892.	The whole Act.
1 & 2 Geo. 5. c. 6.	Perjury Act 1911.	Sections 1 and 1A. In section 7, in subsection (1), the words "or suborns" and in subsection (2) the words "or suborn". In section 8, the words "or any offence punishable as perjury or as subornation of perjury under any other Act of Parliament". Section 9. In section 12(2), the word "suborning" and the words from "or", in the third place where it occurs, to "offence" in the second place where it occurs. In section 13, the words from "or ", in the first place where it occurs, to "perjury", in the third place where it occurs. Section 14. In section 15, subsection (1), and in subsection (2), the definitions of the expressions "oath" and "swear". Section 16(2).
10 & 11 Geo. 6. c. 48.	Agriculture Act 1947.	In section 73(3)(a) the words "on oath, affirmation or otherwise".
11 & 12 Geo. 6. c. 63.	Agricultural Holdings Act 1948.	In Schedule 6, paragraph 8.
12 & 13 Geo. 6. c. 54	Wireless Telegraphy Act 1949.	In Schedule 2, paragraph 3(1)(a).
15 & 16 Geo. 6 & 1 Eliz. 2. c. 55.	Magistrates' Courts Act 1952.	Section 127.
2 & 3 Eliz. 2. c. 70.	Mines and Quarries Act 1954.	In Schedule 3, in paragraph 7(d), the words "to take evidence on oath, and for that purpose to administer oaths, or".

## EXPLANATORY NOTES

### *Schedule 3*

This schedule sets out the enactments repealed. It includes provisions by or under which certain tribunals are given the power to administer the oath, which are made unnecessary by clause 2 of the Bill. Recommendations for the repeal of these provisions are contained in paragraph 2.43 of the Report.

*Administration of Justice (Offences) Bill*

SCH. 3

Chapter	Short Title	Extent of Repeal
3 & 4 Eliz. 2 c. 18.	Army Act 1955.	Section 99A(5).
3 & 4 Eliz. 2. c. 19.	Air Force Act 1955.	Section 99A(5).
6 & 7 Eliz. 2 c. 45.	Prevention of Fraud (In- vestments) Act 1958.	In section 6(5), the words "take evidence on oath, and for that purpose administer oaths, or may,".
8 & 9 Eliz. 2. c. 16.	Road Traffic Act 1960.	Section 249(1)(c).
8 & 9 Eliz. 2. c. 58.	Charities Act 1960.	In section 6(4), the words "evidence may be taken on oath, and" and "administer oaths or may".
9 & 10 Eliz. 2. c. 34.	Factories Act 1961.	In section 84(4)(d), the words "administer an oath and".
1964 c. 14.	Plant Varieties and Seeds Act 1964.	In Schedule 4, paragraph 5(c).
1965 c. 36.	Gas Act 1965.	In Schedule 4, paragraph 9(2)(e).
1965 c. 57.	Nuclear Installations Act 1965.	In the Schedule, in paragraph 4(d), the words "to administer oaths, or".
1965 c. 64.	Commons Registration Act 1965.	In section 19(1)(e), the words "and for authorising the administration of oaths".
1966 c. 28.	Docks and Harbours Act 1966.	Section 52(6)(d).
1967 c. 9.	General Rate Act 1967	Section 76(2)(b) and the word "and" immediately preceding it.
1967 c. 58.	Criminal Law Act 1967	Section 4.
1967 c. 76.	Road Traffic Regulation Act 1967.	Section 5(1) and (5).
1967 c. 80.	Criminal Justice Act 1967.	Section 96(1)(c).
1967 c. 83.	Sea Fisheries (Shellfish) Act 1967.	In section 2(2)(b), the words "if it were tendered in evidence".
1968 c. 73.	Transport Act 1968	In section 9(2)(b), the words "if it were tendered in evidence".
1970 c. 9.	Taxes Management Act 1970	Section 89.
1970 c. 11.	Sea Fish Industry Act 1970	In Schedule 1, the words "administer an oath or".
		In section 20(1), the words from "and the person" onwards.
		In section 52(2), the words "and a witness before the Commissioners may be examined on oath".
		In section 11(1), the words "administer oaths or".

## EXPLANATORY NOTES

*Administration of Justice (Offences) Bill*

SCH. 3

Chapter	Short Title	Extent of Repeal
1971 c. 23. 1971 c. 38.	Courts Act 1971. Misuse of Drugs Act 1971.	In Schedule 8, paragraph 16. In Schedule 3, in paragraph 5(1), the words "the tribunal may administer oaths and".
1972 c. 20. 1972 c. 41.	Road Traffic Act 1972. Finance Act 1972.	Section 187(1)(c). In Schedule 6, paragraph 10(g) and the word "and" immediately preceding it.
1972 c. 68.	European Communities Act 1972.	In section 11(1), paragraph (a) and the words from "Where" to the end of the subsection.
1972 c. 70. 1973 c. 38.	Local Government Act 1972. Social Security Act 1973.	In section 250(2), the words from "and may" onwards. In section 66(8), the words "(including evidence on oath)".
1974 c. 23. 1975 c. 14.	Juries Act 1974. Social Security Act 1975.	Section 18(3). Section 115(4).
1975 c. 34.	Evidence (Proceedings in Other Jurisdictions) Act 1975.	In Schedule 13, in paragraph 5, the words "and for authorising the administration of oaths to witnesses".
1975 c. 64. 1975 c. 68. 1976 c. 52. 1976 c. 70.	Iron and Steel Act 1975. Industry Act 1975. Armed Forces Act 1976. Land Drainage Act 1976.	In section 6(2), the words "section 1(4) of the Perjury Act 1911 or". In Schedule 1, paragraph 1. Section 26(2)(a). In Schedule 3, paragraph 14(a). In Schedule 9, paragraph 15.
1976 c. 83.	Health Services Act 1976.	In section 96(2), the words from "and may" onwards.
1976 c. 83.	Health Services Act 1976.	In section 16(1)(g), the words "and for authorising the administration of oaths to persons so attending".
1977 c. 3. 1977 c. 45.	Aircraft and Shipbuilding Industries Act 1977. Criminal Law Act 1977.	In Schedule 7, paragraph 2(2). In Schedule 2, paragraph 12(a), paragraph 19, in paragraph 22, the words "except paragraph 19" and in paragraph 23 the words "19 and". In Schedule 3, paragraph 14(a), paragraph 26, in paragraph 33, the words "except paragraph 26" and in paragraph 34, the words "26 or".
1978 c. 44.	Employment Protection (Consolidation) Act 1978.	In Schedule 9, in paragraph 1(2)(d), the words "and for authorising the administration of oaths to witnesses".
1979 c. 17.	Vaccine Damage Payments Act 1979.	In section 4(1)(c), the words "and the administration of oaths to such persons".

## EXPLANATORY NOTES



## APPENDIX B

*Organisations and individuals who commented on the Law Commission's Working Paper No. 33, "Perjury and Kindred Offences"*

### *Organisations*

Association of Chief Police Officers of England and Wales

H.M. Customs and Excise

Department of Trade and Industry

General Council of the Bar

Home Office

Inland Revenue

Institute of Legal Executives

Justice

Justices' Clerks' Society

Law Officers Department

The Law Society

Lord Chancellor's Department

Magistrates' Association

Prosecuting Solicitors' Society of England and Wales

Society of Clerks of the Peace of Counties and Clerks of County Councils

Treasury Solicitor's Department

### *Individuals*

Claude C. Allan (Society of Conservative Lawyers)

Professor Edward Griew

W. A. Leitch, C.B.

R. T. Oerton

Professor J. C. Smith

## APPENDIX C

*Organisations and individuals who commented on the Law Commission's Working Paper No. 62, "Offences relating to the Administration of Justice"*

### *Organisations*

Association of Chief Police Officers of England and Wales and Northern Ireland  
Director of Public Prosecutions  
Home Office  
Justice  
Justices' Clerks' Society  
The Law Society  
Magistrates' Association  
National Council of Civil Liberties  
Police Federation  
Police Superintendents' Association of England and Wales  
Prosecuting Solicitors' Society of England and Wales  
Senate of the Inns of Court and the Bar  
Society of Public Teachers of Law

### *Individuals*

Professor Gordon Borrie  
W. A. Leitch, C.B.  
N. V. Lowe  
C. J. Miller  
Alec Samuels  
Professor Glanville L. Williams (in the Criminal Law Review)

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