

Thus, notwithstanding the wide ambit of persons who may commit official misconduct, a charge of official misconduct may be brought in a Misconduct Tribunal only when the person involved is a prescribed person. Members of the QPS are prescribed persons but members of the Legislative Assembly are not, neither membership of the Legislative Assembly nor the Legislative Assembly itself having been the subject of a declaration by regulation made under subsection 39(2)(b). As things stand, there can be no proceedings in a Misconduct Tribunal for official misconduct committed by a member of the Legislative Assembly.

The jurisdictional limitation on Misconduct Tribunals and the fact that two of the three signatories to the MOU were members of the Legislative Assembly sharpen the focus on subsections 155(1) and (2) and place at the centrepiece of our review the question whether either provision was breached by any person or persons.

We now turn to examine s.155 in detail.

SECTION 155 EA - INTERPRETATIONAL ISSUES

Reprint No. 3 of the EA, as in force on and from 18th December 1995, sets out s.155 as follows:-

"Bribery

155:(1) A person must not -

- (a) ask for or receive; or
- (b) offer, or agree, to ask for or receive;

property or a benefit of any kind (whether for the person or someone else) on the understanding that the person's election conduct (as defined in subsection (3)) will be influenced or affected.

Maximum penalty - 85 penalty units or 2 years imprisonment.

(2) A person must not, in order to influence or affect another person's election conduct (as defined in subsection (3)), give, or promise or offer to give, property or a benefit of any kind to the other person or a third person.

Maximum penalty - 85 penalty units or 2 years imprisonment.

(3) In this section -

"**election conduct**" of a person means -

- (a) the way in which the person votes at an election; or
- (b) the person's nominating as a candidate for an election; or
- (c) the person's support of, or opposition to, a candidate or a political party at an election."

By virtue of subsections 14(2)(a) and 35C(1) of the Acts Interpretation Act 1954 ("AIA"), the heading to s.155, the word "Bribery", is part of that section.

Section 155 gives rise to numerous issues of statutory interpretation. We have devoted a good deal of time to researching these issues as thoroughly as we can. Some of the issues are complex and beyond straightforward resolution. However, to advise on the questions addressed to us, it has been necessary for us first to resolve these interpretational issues before attempting to apply the law as

stated in the section to the facts.

We propose at this point to state in detail our conclusions on these issues of interpretation.

Section 155 - A Corporation May Offend

By virtue of s.46 AIA, a provision of an Act relating to offences punishable on indictment or summary conviction applies to bodies corporate as well as individuals. Thus s.155 may apply to the conduct of corporations.

It was contended in submissions that only a natural person may offend against s.155. Both subsections 1 and 2 prohibit "a person" from engaging in certain conduct. Subsection 32D(1) AIA provides that a reference in an Act to a person generally includes a reference to a corporation as well as an individual. This definition is repeated in s.36 AIA where "person" is defined as including an individual and a corporation. The definition is not an inflexible rule and will yield when context or subject matter otherwise indicates or requires: s.32A AIA. There is nothing in the context or subject matter of s.155 which requires an interpretation of "A person" at the commencement of each of subsection 1 and subsection 2 which excludes a corporation.

Whilst each subsection does stipulate a mental element, it is now well settled that the state of mind of an employee may in certain circumstances be the state of mind of the corporation which employs him and that a corporation may commit

an offence via its employee in such circumstances: Tesco Supermarkets Ltd v. Nattrass [1972] AC 153, 173D. We conclude that a corporation may offend against subsections 155(1) and (2).

Section 155 - Mutuality not Required

Subsections 155(1) and (2) create two separate offences. Speaking broadly, subsection 1 prohibits soliciting an electoral bribe and subsection 2 prohibits giving an electoral bribe. In many instances, a transaction between two persons may constitute an offence by one of them against subsection 1 and by the other against subsection 2. However, s.155 does not expressly require that a breach of either subsection is dependent upon a contemporaneous breach of the other subsection. There is no express requirement of mutuality in this respect.

Nor is there a requirement in s.155 that the briborous intention of one person be reciprocated by the other person. In this regard, s.155 is similar to the common law of bribery which does not require that a corrupt intention exist in the mind of both parties to the offer, solicitation, or passage, of the bribe. It is sufficient if the intent exists in the mind of either person, the one having the corrupt intention being guilty: R v. Allen (1992) 27 NSWLR 398, 401-2; R v. Herscu (1991) 55 A Crim R 1.

Section 155 - The Mental Elements

The Express Mental Elements

Each of subsections 155(1) and (2) contain phrases which refer to states of mind.

In the case of subsection 1, a person who by conduct answers the description in paragraphs (a) or (b) thereof, must so act "on the understanding that (his or her) election conduct will be influenced or affected" in order to offend against the subsection. In the case of subsection 2, a person who gives, promises or offers to give property or a benefit can offend against the subsection only if he or she does so "in order to influence or affect another person's election conduct".

"On the Understanding"

The expression "on the understanding" refers to the basis on which the person receives or requests property or a benefit. It involves knowledge by the person receiving the same or making the request that the property or benefit is or will be given for the purpose of influencing the person's election conduct. The words do not require an intention on the part of the donee that his or her election conduct actually be influenced. This interpretation is consistent with the decisions in S v. Van Der Westhuisen [1974] (4) SA 61; R v. Carr 40 Crim App R 188; and R v. Mills 68 Crim App R 154 (obiter). Furthermore, this expression does not require that the person to whom the request is made should respond positively to it or intend to do so. Accordingly, the "understanding" is limited to knowledge in the mind of the requester. There is no basis for reaching a different conclusion where the person merely receives property or a benefit believing that its purpose is to influence his or her election conduct, no prior request for it having been made. Of course, if the donee knew that the property or benefit was given in circumstances where the donor had no such purpose, that would not constitute the necessary "understanding" within the meaning of

the expression. This conclusion is consistent with authorities from other jurisdictions: R. v. Allen supra; Sims v. State (1917) 189 S.W. 883. It is also consistent with the reasoning of Mackenzie J in relation to s.87 of the Criminal Code in R v. Herscu supra at p.40 as approved in R v. Smith [1993] 1 Qd.R. 561.

"In Order to Influence or Affect"

This phrase constitutes a mental element which requires the offender to act (that is, give or promise or offer to give property or a benefit) with the purpose of influencing or affecting another person's election conduct. The words "in order to" bear the meanings "with a view to the bringing about of (something)" or "for the purpose of (some prospective end)": Shorter Oxford English Dictionary. In the present context to say one acts with a purpose probably connotes a desire or wish to bring about the result: see He Kaw Teh v. The Queen (1985) 157 CLR 523 per Brennan J at p.569.

The purpose which constitutes the mental element must be directed to the result of influencing another's election conduct. It will not be sufficient for the offender to act with a different purpose while knowing or foreseeing the relevant result to be a probable or even a certain consequence.

If the person acts with more than one purpose in mind it is sufficient if the relevant purpose be one of those. It is not necessary to seek a dominant purpose. In DPP v. Luft [1977] AC 962 at 983, Lord Diplock, with whose speech the other Lords agreed, made the following observations:

"To speak of a dominant intention suggests that a desire to achieve one particular purpose can alone be causative of human actions; whereas so many human actions are prompted by a desire to kill two birds with one stone. For my part I prefer to omit the adjective "dominant". In my view the offence under [the Representation of the People Act 1949 (UK), s.63] is committed by the accused if his desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense."

Lord Diplock's conclusion was adopted in Scott v. Martin (1988) 14 NSWLR 663 at 672.

No Implied Mental Element

Each of subsections 155(1) and (2) contain phrases which refer to states of mind. In the case of subsection 1, a person who by conduct answers the description in paragraphs (a) or (b) thereof must so act "on the understanding that (his or her) election conduct will be influenced or affected" in order to offend the subsection. In the case of subsection 2, a person who gives, promises or offers property or a benefit can offend the provision only if he or she does so "in order to influence or affect another person's election conduct".

These states of mind are the express mental elements for which the subsections respectively provide. Submissions have been made to the effect that another or a further, but not express, mental element is incorporated within each subsection. The submissions have their origin in common law conceptions of bribery. The following is a summary of the nature of the further mental element canvassed

in submissions.

Submissions of Counsel Assisting

Written - Joint Opinion (page 11)

"Mens rea" equivalent to "corruptly" meaning "wrongfully" imported via the heading "bribery."

Oral T.4963-4 (Reply)

"When there's some element of impropriety, that is conduct regarded by the community generally as contrary to proper standards. The 'impropriety' one could use the word perhaps, dishonesty or corruption or something of that kind. The actual epithet does not greatly matter ... So whether you say that the question is - under s.155 for bribery, you're looking at whether the conduct was improper, corrupt, dishonest; one would seem to have to look at it by first of all objective standards - what would the community say it was when we talk about the community, reasonable and honest people in the community. Now, we would submit that really is the path, and it probably doesn't make much difference in the end."

Submissions on behalf of Cooper

Written - Opinion (p.10)

"An identifiable element of corruption".

Oral T.4857

An intention to influence conduct; an intention to give that benefit.

Submissions on behalf of Borbidge

Written - A corrupt purpose or corrupt intent ... doing

something knowing it is wrong or doing it with the object and intention of doing that which the law intends to forbid (p.9).

An intention to confer the benefit to influence the vote (p.11).

Oral

T.4680-2.

The plain language of the section requires an intention to influence or affect (relies on heading to s.155 merely as confirming this mental element).

Submissions on behalf of OPS Senior Executives

Oral

T.4667-9.

"It would be necessary to show that the conduct in question was lacking in integrity or dishonest; that is, improper according to normally received standards of honest conduct, and it would be necessary, in a nutshell, in our submission, to show that it's conduct deserving of criminal punishment."

It will be noted that there is little symmetry in these submissions as to content of the suggested further mental element. Some of the submissions are quite unclear in themselves; for example, the first mentioned oral submissions identify a mental element of dishonesty or corruption and treat that as the same as impropriety, a term more appropriately referable to the quality of conduct judged by objective standards than to a mental element. The last-mentioned submissions are similar in this respect. We note that the third-mentioned written submissions (at p.9) hint at a further mental element which later in the written submissions (at p.11) and in oral submissions is described in terms co-extensive with, and in substance the same as, the express mental element in the

subsections.

In this diversity of submissions, it is difficult to discern any statement which clearly articulates the further mental element suggested. We have come to the view that there is no other or further mental element to be implied in subsections 1 and 2 and for the following reasons.

The suggestions of such an element appear to be based on a common law meaning, and/or dictionary definitions, of bribery, such as the definitions in the Oxford Dictionary namely:-

"4. The act or practice of giving or accepting money or some other payment with the object of corruptly influencing the judgment or action; the offer or acceptance of bribes; spec. The application of such influences to gain votes at parliamentary or other election."

"'Bribing' is defined as 'the action of the verb 'bribe'; a. thieving b. extortion and c. corruption by bribes."

The suggestions have drawn on meanings and definitions such as this to identify a corrupt intent as a mental element of bribery. That element must be acknowledged but at the same time, its meaning should be understood. Useful expositions of the meaning of the adverb "corruptly" are to be found in a number of authorities dealing with that word in statutory electoral offence provisions.

- In Cooper v. Slade (1858) 6 H.L. Cas. 746; 10 ER 1488, the House of Lords

was required to consider the meaning of s.2 of the Corrupt Practices Prevention Act 1854 as follows:-

"Every person who shall, directly or indirectly, by himself, or by any other person, give or agree to give, or promise any money or valuable consideration to any voter, in order to induce any voter to vote, or refrain from voting, etc., or shall *corruptly* do any such act as aforesaid, on account of any voter having voted or refrained from voting, ...".

The case concerned both limbs of the section, that is, conduct before and conduct after an election. It does not appear to have been submitted - certainly it was not canvassed by the judges - that the first limb contained any mental element beyond that expressed, namely, an intention to induce a voter so to act. Only the second limb contained the word "corruptly". Willes J interpreted "corruptly" as meaning:

"not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. ... The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence" (at p.1499).

Lord Cranworth said at p.1504:

"I cannot give the word 'corruptly', as there used, referring to a payment after voting, any other meaning than a payment in violation of that which the statute was passed to prohibit". (at p.1504). See also Lord Wensleydale at p.1505.

- In Mugliston v. Dillon (1891) 13 ALT 44, the Full Court of Tasmania considered the Electoral Act offence of corrupt treating. At p.47, the Chief Justice (the other judges concurring) observed:

"With reference to treating, it must, in the language of the Electoral Act, be corruptly done. This word does not mean wickedly or dishonestly or anything of that sort, with the object and intention of doing that which the legislature plainly means to forbid."

We draw from these authorities the proposition that, in this context, the word "corruptly" means intending by the briberous act to do what the law prohibits, for example, inducing a person to vote, or influencing or affecting a person's electoral conduct, depending on the wording of the statute. This meaning has been given to the word "corruptly" in a similar statutory setting: R v. Smith (1959) Cr.App. R.55; R v. Wellburn and Others (1979) 69 Cr.App. R.254; R v. Parker 82 Cr.App. R.69; R v. Kelly (1989) 52 C.C.C. (3d) 137, 152-155 and the cases there cited.

The modern trend in drafting electoral offence provisions has been against using the word "corruptly": for example, Commonwealth Electoral Act s.158; Parliamentary Electorate and Elections Act 1912 (NSW) s.147; Constitution Act Amendment Act 1958 (Vic) s.241; Electoral Act 1992 (Qld) s.155. By contrast, the trend has been towards using phrases such as "in order to influence or affect"

(Commonwealth, Queensland) and "in order to induce" (NSW, Vic). In the few Australian cases dealing with provisions of this kind, it has never been held that a further mental element additional to that which the statute expresses is an element of the offence: Woodward v. Maltby [1959] VR 794; Scott v. Martin supra. This approach reflects the approach taken by the House of Lords to the first limb of s.2 of the 1854 Act in Cooper v. Slade, supra.

"To influence or affect" not synonymous with "to change"

What is required in order "to influence or affect"? Obviously, if a person is induced by the gift, promise or offer of a benefit to change his or her vote or support, that will suffice. However, the question arises as to whether a benefit given, promised or offered for the purpose of maintaining a person's pre-existing voting intention or support is encompassed by the expression "to influence or affect".

There is clear authority for the proposition that it is an offence to give a bribe for the purpose of encouraging a person to do his or her duty (Williams v. R (1979) 23 ALR 369, 374) or to exercise a discretion so as to reach what, from an objective standpoint, is the correct result (R v. Patel [1944] AD 511; approved in Herscu, supra, at 18 and 47-49). The argument was developed in the following passage from Lavenstein (1919) TPD 348 cited by Mackenzie J in Herscu at 48-49:-

"If the official has a discretion, what the law requires of an official is to exercise that discretion with sole regard to the public interest. That is his duty. That is the act he has to do. When once he

exercises his discretion with regard to the private interests of any individual, he is doing an act in conflict with his duty. ..."

The same considerations apply where a person is given, promised or offered a benefit to maintain support for a political party. The purpose is that the election behaviour be influenced, in the sense that the person act conformably with the wishes or interests of the individual or entity giving, promising or offering the benefit, and not independently.

Election Conduct Need Not be Influenced or Affected

Although the mental element in each of subsections 1 and 2 concerns influencing or affecting a person's election conduct, neither subsection requires as an element of the offence that that person's election conduct actually have been influenced or affected by the briborous conduct.

Section 155 - "Property or a Benefit of any Kind"

Origins and Uses of the Expression

Both subsections 155(1) and (2) contain the expression "property or a benefit of any kind". Subsection (1) may be breached only if a person asks for, receives, or offers or agrees to ask for or receive "property or a benefit of any kind". Subsection(2) may be breached only if a person gives, promises or offers to give "property or a benefit of any kind".

The expression "property or benefit of any kind" has long been a feature of

Queensland bribery and corruption legislation: see Criminal Code sections 87 (official corruption), 103 (electoral bribery), 120 (judicial corruption) and 121 (official corruption relating to offences). It appears to have been coined by Sir Samuel Griffith. In all probability, he favoured it as a more comprehensive expression than expressions such as "money" or "valuable consideration". Those more narrow expressions had been used in The Corrupt Practices Prevention Act 1854 (UK) s.2 in defining electoral bribery and later in The Corrupt and Illegal Practices Prevention Act 1883 (UK). They were also used in the bribery provision in The Elections Act of 1885 (Qld), to which Griffith referred in drafting the Criminal Code and which was repealed upon enactment of the Criminal Code in 1899: Draft of a Code of Criminal Law pp.45-47.

It may be noted that the same expression is used extensively in the corruption provisions of the Crimes Act 1914 (Commonwealth). It has been a feature of that legislation since 1914: see sections 32, 33, 37, 44, 73. This is explained by the fact that that Act was based on the Criminal Code: Parliamentary Debates (Cwth) Vol. LXXV pp.264-5. However, the bribery provisions of the Commonwealth Electoral Act 1918, upon enactment, contained a different expression, namely, "valuable consideration, advantage, recompense, reward, or benefit": see s.156. The original electoral offence provisions in that Act were repealed and replaced in 1983: Commonwealth Electoral Legislation Amendment Act 1983 s.114. In the new s.158, now renumbered s.326, the expression "property or benefit of any kind" is used in lieu of the expression originally enacted.

Section 155 was enacted in 1992. At the same time, the Criminal Code was amended to exclude the application of Chapter 14 thereof (sections 98 to 117 inclusive) to elections for the Legislative Assembly: EA s.197. There is one difference between the expression as found in other statutes and the expression in s.155 and that is the insertion in s.155 of the definite article "a" before the word benefit. We do not attach any significance to this.

Notwithstanding its rather extensive use legislatively, the meaning of the expression "property or benefit of any kind" as used in any of these statutory contexts, has received little judicial attention. It appears never to have been subjected to extensive consideration by the courts. In academic writings, it has been given passing reference only: see Lanham anons, Criminal Fraud, p.212.

Meaning of the Expression

The expression is not a composite description of the one thing; rather, it refers to two categories of things: property and benefits. The adjectival phrase "of any kind" arguably qualifies both "property" and "a benefit". On this basis, the expression encompasses "property of any kind" and "a benefit of any kind". The phrase may qualify only "a benefit". In this case nothing turns on whether it qualifies both or "a benefit" only.

Property

The word "property" is defined in s.36 AIA as follows:-

"Any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."

This definition applies to s.155 "except so far as the context or subject matter otherwise indicates or requires": s.32A AIA. It may be noted that "property" is defined for the purposes of the Criminal Code as including "every thing, animate or inanimate, capable of being the subject of ownership" (s.1). This definition applies to sections 87, 103, 120 and 121 of the Criminal Code. Notwithstanding this and the history of electoral offence legislation in Queensland, the definition of "property" in AIA is, in our view, the applicable definition for the purposes of s.155.

Benefit

By contrast, the word "benefit" is not defined in the AIA or elsewhere for the purposes of the EA including s.155. It is not a legal term of art with an ascertained legal meaning. The Macquarie Dictionary offers four meanings for the word as a noun, only one of which is relevant, namely, "anything that is for the good of a person or thing". The Oxford Dictionary gives as the ordinary meaning "advantage, profit, good".

Like so many other words, the word "benefit" in s.155 takes its meaning from context and subject matter. The governance of meaning by context and subject matter in this connection is recognised in R. v. Smith [1993] 1 Qd.R. 541 in the following observations of Thomas J at p.560:-

"There is nothing in the context of the section which requires the word to be read in other than its natural sense ... In the context of a section aimed against official corruption, there is every reason to think that it was intended that public officers should be deterred from trading official favours for such rewards ..."

The conceptions of "property" and "property of any kind" are very comprehensive ones, apt to include all categories of property and interests in property. It may be assumed that the conception of "a benefit of any kind" was purposely included in s.155 to extend both subsections 1 and 2 beyond property to benefits of a non-proprietorial kind. In Smith, Thomas J, at p.560, rejected an argument which sought to restrict the meaning of benefit in s.121 of the Criminal Code (official corruption) to a proprietorial benefit. We think that "a benefit" in s.155 should be similarly interpreted. We note that the word when used in other statutory settings has been interpreted to include non-proprietorial advantages, for example:

- in Smith supra - prostitution services to policemen (Criminal Code, s.121);
- in Yates v. Wilson (1982) 22 FCR 397, 400 - financial advantage obtained by the non-collection of sales tax (Crimes Act, s.29A(2));
- Davidson v. Director of Public Prosecutions (1988) 93 FLR 388 - financial benefit of obtaining an assessment of income tax less than the amount properly assessable (Crimes Act, s.29B).

A common feature of these benefits, whether of a financial nature or not, is that they are directly given to or received by an identified and, usually, single person. However, apart from illustrating the potentially broad scope of the meaning of the word "benefit" in any statutory setting, these authorities render little assistance in interpreting the meaning of the word in s.155.

It is obvious to say it, but the subject matter of the EA is elections for members or a member of the Legislative Assembly and the subject matter of s.155, as the heading to that section states, is bribery. Thus the context in which the expression "a benefit of any kind" is placed is an electoral bribery offence provision. If the expression "a benefit of any kind" were to be given as broad a meaning as "any advantage whatsoever", it would be capable of including advantages of a non-personal nature in the sense of advantages enjoyed by the public at large or by relatively large groups of persons, and advantages which flow indirectly from action by a person. On a broad interpretation, a promised reduction in taxes could be said to benefit taxpayers at large by increasing their disposable income. A promised improvement in the working conditions of nurses could be said to benefit individual nurses directly and, arguably, also the population at large indirectly by fostering an efficient and enthusiastic nursing workforce.

To interpret "a benefit of any kind" so broadly can lead to the absurd conclusions that promises such as these are illegal as election bribes. That kind of conclusion confronts the contemporary democratic electoral process in which politicians and

political parties run on platforms which consist of promises of action in government. If s.155 were to be interpreted so as to prohibit this kind of conduct, then the achievement of an informed electorate and informed political debate would be threatened. It is inconceivable that consequences of this kind were intended. An interpretation of the expression which prohibits conventional democratic conduct of this kind must be rejected. It cannot be imagined that such conduct was perceived by the legislature to be a mischief which s.155 was enacted to overcome. Submissions on behalf of represented parties rejected such a broad interpretation: Joint opinion, pp.10-11; written submissions on behalf of Borbidge, pp.11-12; Opinion, p.10; Submissions on behalf of Cooper, T.4863. In our view, subject matter and context demand that the expression "benefit of any kind" be interpreted so as to exclude advantages of the kind discussed in the immediately preceding paragraphs. It may be noted by way of illustration that in a quite different statutory context, the word "benefit" was given an interpretation which would avoid an absurd and unjust result: Hilton v. Federal Commissioner of Taxation (1992) 38 FCR 170, 176-8.

Election Promises

Subsection 14A(1) AIA directs that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. To propose that a purpose of the EA is to facilitate free and democratic elections for the Legislative Assembly or that the purpose of s.155 is to prohibit electoral bribery may be correct but does not reveal a purpose or purposes which offers or offer a great deal of assistance in defining precisely

the boundary between benefits which should be, and therefore are, caught by s.155 and those which should not be, and therefore are not, caught by it.

Legislatures and courts in other jurisdictions have attempted to cater for the legitimate election campaign promise by a number of different techniques.

The Commonwealth Electoral Act expressly provides that the electoral bribery provision, s.326, "does not apply in relation to a declaration of public policy or a promise of public action": subsection 326(3). Given its widest meaning, s.326 might have prohibited campaign promises of this kind but for the exception.

The Model Penal Code (US) which has been adopted as the basis of bribery legislation in a number of jurisdictions in the United States, seeks to resolve the issue in the definitions of "benefit" and "pecuniary benefit" in Art. 240 "Bribery and Corrupt Influence". Article 240.1 deals with bribery in official and political matters and, relevantly, provides as follows:-

"A person is guilty of bribery ... if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

- (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or
- (2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or
- (3) any benefit as a consideration for a violation of a known legal

duty as public servant or party official ...".

It can be seen that paragraph (1) alone has an application to electoral bribery, paragraphs (2) and (3) being concerned with judicial and official bribery.

Paragraph (1) prohibits bribery of a voter by a pecuniary benefit. The word "benefit" is defined in Art. 240 to mean:-

"Gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, *but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support to oppose.*" (Our emphasis).

(Note that the exception in this definition applies only to a promised advantage and is clearly focused on election promises.)

"Pecuniary benefit" is a narrower concept limited to a benefit "in the form of money, property, commercial interests or anything else the primary significance of which is economic gain."

These definitions characterise a benefit for electoral bribery purposes in terms of economic gain and exclude advantages promised generally to a group or class of voters as a consequence of public measures which a candidate undertakes to support or oppose.

Aside from legislative definitions of benefit, judicial interpretations which

exclude from electoral bribery advantages to flow from promised action which the candidate, if elected to office, could properly undertake in the discharge of that office, have been adopted by United States courts in construing electoral bribery statutes. In Stebbins v. White 235 Cal. Rptr. 656 (Cal. App. 3 Dist. 1987) the Californian Court of Appeals was required to consider whether White's promise to help secure the release of the voter's brother from jail if the voter would vote for White was a "promise to pay, lend or contribute ... (a) valuable consideration". In holding that it was, the court observed at p.668:-

"... White's promise to the voter to endeavour to free his brother from custody in return for his vote did not relate to the proper administration of the office of city counselman. ... A candidate cannot lawfully promise to render a valuable service for a voter in return for his vote when that service is unconnected with the proper discharge of an office holder's duties and responsibilities. Such a promise to render a valuable service unrelated to the office sought in return for a vote crosses the line between campaign rhetoric and election bribery."

In the course of the judgment, the court cited the following passage from a decision of the Supreme Court of California, Bush v. Head (1908) 154 Cal. 277 at p.283:-

"It is, of course, not every promise of pecuniary benefit to the voter that is in violation of the statute. A promise by a candidate to limit the cost of maintaining an office by administering it economically is no more than an undertaking to perform his duty, and is clearly not in conflict with the statute. But the promise here made went further than this. By it the candidate held out to the voters as an inducement, not the proper and efficient administration of the office, but the destruction, at least for a time, of an office created by law."

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A rather different judicial technique can be seen in the approach of some US courts to the interpretation of electoral bribery statutes which use the expression "to corruptly influence" the casting of a vote. The technique, which focuses on intention rather than benefit, is illustrated in the following passage from the judgment of Schwartz J in Trushin v. State of Florida Fla. App. 384 So. 2d 668 (1980) at p.676:-

"Nor is there any possibility that a candidate may be punished for making a promise as to the official actions he would take if elected. Campaign rhetoric of this kind is simply not uttered with the criminal intent explicitly required by the statute. See Adair v. McElreath 167 Ga. 207, 145 S.E. 841 (1928); see also Douglass v. County of Baker 23 Fla. 419, 2 So. 776 (1887)."

The statutory formulations in subsection 326(3) and in the Model Penal Code have similarities, but are not precisely the same. Subsection 326(3) raises its own interpretational issues which have not as yet been considered judicially: for example, what precisely is connoted by "a promise of public action"? Does it require that the promise be made publicly; or is it sufficient that, however made, it promise public action? Is "public action" any action as a public official in the proper discharge of that official's duties and responsibilities; or has it some other meaning?

The definition of "benefit" in the Model Penal Code is not entirely free of interpretational issues. However, in our opinion, it offers the most useful

assistance in identifying criteria that mark out those advantages which, in this context, fall outside the ambit of "benefit" in s.155. On our analysis, the exception identifies the following criteria.

The first is that where the election promise is to advantage a group or class of persons, the promise is to benefit the members of the group or class generally - no one member or small clique of members is singled out to be specially advantaged. This criterion derives support from the language of s.155. Subsection (2) refers to a "promise ... to give ... a benefit of any kind to the other person or a third person". Equivalent words are to be found in subsection (1). The singular may be read as including the plural: s.32C AIA. However, the person or persons must be ascertained and be particularised by name in the charge. The expression "other person or a third person" does not extend to the world at large or to unincorporated groups which are not persons at law. Accordingly, the first criterion is consistent with the constraints placed upon the form of any charge by the words of the section.

The second criterion is that the promise is to confer advantage by way of measures taken as part of the normal processes of government. The legislature could not have intended that this electoral bribery provision would strike at promises by candidates and political parties to undertake measures in the course of the proper discharge of public office.

Where a gain or advantage exhibits these criteria, it is not, in our opinion,

within the scope of benefit for the purposes of s.155.

There are two further matters that we wish to mention. The first is that we have not adopted as a criterion of benefit, as the Model Penal Code does for electoral bribery, primacy of economic gain. A qualification in those terms is not required by the subject matter or context of s.155 and would potentially exclude the application of the section to some kinds of benefits when it would be illogical or inappropriate to do so: for example, the services or favours considered in Smith and Stebbins supra.

The second matter is that the US Supreme Court has had occasion to consider the constitutional validity of state electoral bribery legislation. In Brown v. Hartlage 456 U.S. 45 (1982), the question presented was whether the First Amendment to the US Constitution, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law". According to the Kentucky Court of Appeals, the announcement breached a Kentucky electoral bribery statute. Explaining the impact of the First Amendment, the Supreme Court observed at pp.53-4:-

"When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate State interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression."

One legitimate State interest canvassed was the State's interest in prohibiting vote buying. Speaking of that interest, the court said at pp.55-56:-

"It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed 'indispensable to decisionmaking in a democracy,' First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978); and the 'maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot."

The court then proceeded to countenance some "private arrangements" as constitutionally lawful and some as not. As to these, it said at p.56:-