



House of Lords  
House of Commons

Joint Committee on the Draft  
Bribery Bill

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# Draft Bribery Bill

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## The Joint Committee on the draft Bribery Bill

The Joint Committee on the draft Bribery Bill was appointed by the House of Commons and the House of Lords on 11 May 2009 to examine the draft Bribery Bill and report to both Houses by 21 July 2009.

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Mr Alistair Carmichael (*Liberal Democrat, Orkney and Shetland*)  
Mr Geoffrey Cox (*Conservative, Torridge and West Devon*)  
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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet away from Westminster, to meet at any time (except when Parliament is prorogued or dissolved), to appoint specialist advisers, and to make Reports to the two Houses.

### Publication

The Report and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Joint Committee (including press notices) are on the Internet at:  
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### Committee staff

The staff of the Joint Committee were drawn from both Houses and comprised Emily Commander (Commons Clerk), Christine Salmon Percival (Lords Clerk), Simon Fuller (Legal Adviser), Paul Simpkin (Senior Committee Assistant), Dilys Tonge (Committee Assistant), Michelle Garratty (Committee Assistant), Claudia Rock (Committee Assistant), Michelle Owens (Team Manager), Sam Colebrook (Committee Support Assistant) and George Fleck (Office Support Assistant). This inquiry was run from the Scrutiny Unit in the Committee Office, House of Commons.

## **Contacts**

All correspondence should be addressed to the Clerk of the Joint Committee, House of Commons, 7 Millbank London SW1P 3JA. The telephone number for general enquiries is 020 7219 8387. The Joint Committee's email address is [briberybill@parliament.uk](mailto:briberybill@parliament.uk).

Media inquiries should be addressed to Jessica Bridges-Palmer on 020 7219 0724.



# Contents

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<b>Report</b>	<i>Page</i>
<b>Summary</b>	<b>5</b>
<b>1 Introduction</b>	<b>7</b>
<b>2 Background</b>	<b>8</b>
The need for law reform	8
The draft Bribery Bill	10
The Defence Industry: a case study	13
<b>3 The offences of bribing and being bribed</b>	<b>15</b>
Clarity of the “improper” performance test	15
Scope of “improper” performance	18
(a) Too broad?	18
(b) Too narrow?	19
“Improper” performance: our view	20
Cultural differences	20
Knowledge and intention: clause 2	21
Overlapping offences	23
<b>4 Bribery of foreign public officials</b>	<b>25</b>
“Legitimately due”	25
A “reasonable belief” defence	28
<b>5 Negligent failure by organisations</b>	<b>31</b>
Too complex and narrow?	31
Gross negligence?	34
A civil regime?	35
The “adequate procedures” defence	36
(a) Meaning	36
(b) Senior officers	37
Subsidiaries, joint ventures and syndicates	39
<b>6 Guidance</b>	<b>42</b>
(a) Status	42
(b) Content	44
(c) Timing	46
(d) A formal advisory service?	46
<b>7 Special Cases</b>	<b>48</b>
Facilitation payments	48
Corporate hospitality	50
Offset	52
<b>8 Jurisdiction</b>	<b>54</b>
Individuals	54

Companies	54
Overseas Territories and Crown Dependencies	56
Scotland	57
<b>9 The Attorney General</b>	<b>58</b>
Powers of consent	58
Powers of delegation	60
<b>10 Article 5, OECD Convention</b>	<b>61</b>
<b>11 Penalties</b>	<b>63</b>
Unlimited fine	63
Confiscation	63
Debarment	64
Other penalties	65
<b>12 The Security Services</b>	<b>66</b>
<b>13 Privilege</b>	<b>69</b>
Background	69
Evidence of need for legislation on privilege	70
The public interest test	72
The compromise in 2003	73
The case for consistency	74
<b>14 Wider issues</b>	<b>77</b>
Enforcement and deterrence	77
Impact on the private sector	80
Review	81
Time allocated for pre-legislative scrutiny	81
<b>Conclusions and recommendations</b>	<b>83</b>
<b>Annex 1</b>	<b>90</b>
Review of the Draft Bribery Bill Impact Assessment by the House of Commons Scrutiny Unit	90
Introduction	90
Analysis of the IA	91
IA Summary: Analysis and Evidence (p2)	91
Evidence Base: Background and reasons for Government Intervention (pp 3-4)	92
Evidence Base: Policy Objectives (pp 4-6)	92
Evidence Base: Criminal Justice Costs (pp 7-8)	93
Evidence Base: Costs on the private sector (pp 8-9)	94
Other issues: further consultation of business	95
Other issues: Competition Assessment	95
Other issues: post implementation review	96
<b>Annex 2</b>	<b>97</b>

FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS—LAY PERSON'S GUIDE PUBLISHED BY THE US DEPARTMENT OF JUSTICE	97
Introduction	97
Background	97
Enforcement	98
Antibribery Provisions	98
Third Party Payments	100
Permissible Payments and Affirmative Defenses	101
Facilitating Payments for Routine Governmental Actions	101
Affirmative Defenses	101
Sanctions Against Bribery	102
Civil	102
Other Governmental Action	102
Private Cause of Action	103
Guidance from the Government	103
<b>Formal Minutes</b>	<b>104</b>
<b>Witnesses</b>	<b>115</b>
<b>List of written evidence</b>	<b>117</b>



## Summary

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We strongly support the draft Bribery Bill. It represents an important, indeed overdue, step in reforming the United Kingdom's bribery laws, which have been a source of criticism at home and abroad for more than thirty years. We also welcome the draft Bill's publication for pre-legislative scrutiny, but we are disappointed that the Government has given us so little time to carry out our task. Our dissatisfaction will be shared by many others if the Government does not now find time promptly to introduce a Bribery Bill that reflects the changes that we have proposed.

We support the two proposed offences of bribing (clause 1) and being bribed (clause 2), including the "improper" performance test that has been developed by the Law Commission. The proposals have, to this extent, overcome the hurdle that defeated the draft Corruption Bill in 2003. We do, however, acknowledge concerns about the test's potential to catch conduct that should properly be viewed only as a civil wrong. We ask the Government to address this issue.

The specific offence of bribing foreign public officials (clause 4) represents an important step in putting the United Kingdom's compliance with its international obligations beyond doubt, particularly those owed to the Organisation for Economic Co-operation and Development. In order to achieve this goal, we recommend that the draft Bill be amended to make it clear that an advantage is not "legitimately due" unless required or permitted by a "written law". On balance, we accept the Government's decision to reject the Law Commission's proposed defence for individuals who held a reasonable, but wrong, belief that an advantage was legitimately due.

We particularly welcome the proposed offence that targets companies and partnerships which fail to prevent bribery by persons performing services on their behalf (clauses 5 to 6). The current law has proven wholly ineffective and in need of reform. However, we are concerned by the draft Bill's focus on whether a "responsible person" was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place. This introduces a narrow and complex solution to a pressing problem. We therefore recommend the removal of the need to prove negligence under clause 5(1)(c). While it would lead to the commercial organisation being strictly liable, subject to an adequate procedures defence, nevertheless we do not believe this would be unfair, particularly given the parallel with the approach taken in other leading countries. A commercial organisation is well placed to demonstrate the adequacy of its anti-bribery procedures.

We endorse the substantial penalties that are available under clause 11, since the draft Bill must have teeth to be effective. The Government must, however, address the injustice that is risked by debarring companies from entering public contracts on an automatic and perpetual basis. This policy undermines the effectiveness of the draft Bill.

We also endorse calls for official guidance on some elements of the draft Bill, particularly the meaning of "adequate procedures". A clause should be added to the draft Bill giving the Government power to approve guidance prepared by appropriate bodies. This tested model for issuing guidance could build on the growing expertise in the private sector, thus limiting

the burden on Government.

There are disadvantages to piecemeal reform of parliamentary privilege (clause 15). It raises complex constitutional issues that might be better addressed through a future Parliamentary Privileges Bill. Parliament must not resolve an issue of this importance in conflicting ways, as was initially and unacceptably proposed under the Parliamentary Standards Bill. We therefore call for clause 15 to be omitted.

We agree with the Government that the Attorney General's power to direct prosecuting authorities should remain in place without being reformed by the draft Bill. Since this power will remain in place, we are satisfied that the power of consent should be transferred from the Attorney General to the Directors of the prosecuting authorities (clause 10). Any broader reform of the Attorney General's Office, including her power of direction, must await comprehensive proposals being pursued in the future.

We are not persuaded that the draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. We heard no persuasive evidence that the domestic intelligence agencies needed an authorisation to bribe, and we also question whether the proposals are compliant with the UK's international obligations. As a result, we ask the Government to omit clauses 13 and 14.

While the draft Bill is not a cure for the many challenges contributing to corruption both within the United Kingdom and in relation to international business, we believe that it is an essential step forward. It should create an improved platform for the Government and the business community to build upon the increasing global commitment to tackle bribery. But the Government must focus on the need for rigorous enforcement, including the resources this will require. We believe it is an investment that is well worth making.

# 1 Introduction

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1. The draft Bribery Bill was published by the Ministry of Justice on 25 March 2009 for pre-legislative scrutiny. Following a series of avoidable delays our Joint Committee was formed on 11 May with a deadline of reporting on the draft Bill by 21 July.

2. We have sought a wide range of evidence to inform our report. Over a five week period we heard oral evidence from 37 witnesses and in total received 61 written submissions. We are grateful to all those who have contributed their views, including the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), the United States Department of Justice and several parliamentary select committees with a longstanding interest in the draft Bill. We also commissioned an analysis of the Impact Assessment published with the draft Bill from the House of Commons Scrutiny Unit, which is published as Annex 1 to our report.

3. We acknowledge our gratitude to the Committee's two specialist advisors, Professor Peter Alldridge of Queen Mary, University of London and Professor Michael Clarke of the Royal United Services Institute.

4. Although some of the provisions in the draft Bill apply to Scotland, it is largely limited in extent to England, Wales and Northern Ireland. We trust that the Government will continue to work closely with the Scottish Executive on these issues, particularly in view of their shared interest in meeting the United Kingdom's international obligations.

## 2 Background

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5. The World Bank estimates that around a trillion dollars' worth of bribes are paid each year.<sup>1</sup> This adds 10% to the cost of doing business globally and as much as 25% to the cost of procurement contracts in developing countries.<sup>2</sup> We were told by Global Witness, among others, that these financial costs translate into human suffering through the diversion of resources, the distortion of free markets and damage to society:

Bribery undermines the rule of law and the principle of fair competition and entrenches bad governance in such countries, hindering their efforts to alleviate poverty and often contributing to instability and human rights abuses [... It] is not a victimless crime or a regrettable but unavoidable cost of business for companies overseas. It is a morally poisonous and economically destructive crime which contributes, directly and indirectly, to poverty and human suffering.<sup>3</sup>

6. The United Kingdom routinely ranks as one of the least corrupt countries in the world, but it has not escaped damaging scandals affecting British industry and politics.<sup>4</sup> The International Chamber of Commerce (UK) told us that bribery inside the UK tended to be viewed as less of a problem than bribery by businesses competing in the international arena, while James Maton of the UK Anti-Corruption Forum stated that bribery by UK companies was not commonplace.<sup>5</sup> He emphasised, however, that “there is a minority, perhaps a significant minority, that are engaged in corrupt practices and there is probably a larger number of companies that do not have adequate anti-corruption procedures, systems and controls”.<sup>6</sup> Some estimates place the overall annual cost of corruption to the UK economy as high as £13.9 billion.<sup>7</sup>

### The need for law reform

7. Bribery has been illegal under UK domestic law for centuries. A process of *ad hoc* reform has led to a “patchwork” of offences under the common law, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.<sup>8</sup> There have been few developments in the law for over 90 years, aside from the jurisdiction of these offences being extended in 2001 to include acts done abroad by UK citizens and companies.<sup>9</sup>

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1 Department for International Development, Press Release, available at <http://www.dfid.gov.uk/Media-Room/News-Stories/2009/New-draft-Bribery-Bill-to-support-international-fair-trade/>

2 Impact Assessment, p3; Department for International Development, Press Release, available at <http://www.dfid.gov.uk/Media-Room/News-Stories/2009/New-draft-Bribery-Bill-to-support-international-fair-trade/>

3 BB35

4 See the annual perceptions of corruption index published by Transparency International, available at [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008#pr](http://www.transparency.org/news_room/in_focus/2008/cpi2008#pr)

5 See the annual perceptions of corruption index published by Transparency International, available at [http://www.transparency.org/news\\_room/in\\_focus/2008/cpi2008#pr](http://www.transparency.org/news_room/in_focus/2008/cpi2008#pr); Q227 (James Maton)

6 Q227 (James Maton)

7 Association of Chief Police Officers, *The nature, extent and economic impact of fraud in the UK*, February 2007, available at <http://www.acpo.police.uk/asp/policies/Data/Fraud%20in%20the%20UK.pdf>

8 Q76 (Colin Nicholls QC)

9 Anti-Terrorism, Crime and Security Act 2001, Part 12

8. The Law Commission recently described the law of bribery as “riddled with uncertainty and in need of rationalisation”.<sup>10</sup> All witnesses supported the case for reform, reflecting calls that were first made by the Royal Commission on Standards in Public Life more than thirty years ago.<sup>11</sup> Particular criticisms of the current law include: the use of inconsistent terminology; an artificial divide between the public and private sectors; and a focus on whether or not an individual is acting as an agent on behalf of a principal, a concept which is both complex and leaves gaps in the law.<sup>12</sup>

9. Few individuals have been prosecuted under the existing bribery legislation in recent years, although a number of allegations have been pursued as part of a fraud charge. We also note that no company has ever been convicted under the current law, aside from Mabey and Johnson Ltd which recently pleaded guilty to making corrupt payments after self-reporting them to the Serious Fraud Office.<sup>13</sup> This does not reflect the scale of the problem represented by bribery and may, in part, be attributed to the difficulty in gathering evidence to support a prosecution.<sup>14</sup> While the new Overseas Anti-Corruption Unit of the City of London Police is starting to have an impact, the Serious Fraud Office told us that inadequacies in the law had stood in the way of securing a conviction on several occasions since 2005.<sup>15</sup> The UK Anti-Corruption Forum added that:

the current complexity and uncertainty makes it difficult not only to prosecute bribery, but also for the public and business properly to understand the law, and for businesses efficiently to train staff.<sup>16</sup>

Pressure for reform has been growing at an international level since the United States introduced the Foreign Corrupt Practices Act (FCPA) in 1977.<sup>17</sup> The “lay person’s guide” to this Act is included as Annex 2 to our report. The United Kingdom has since joined other nations in negotiating anti-bribery conventions in its role as a member of the Organisation for Economic Co-operation and Development (OECD), the Council of Europe, the European Union and the United Nations.<sup>18</sup> Each convention is different in scope but they share the common aim of raising standards and creating a level playing field on which businesses compete solely on the basis of merit.

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10 Law Commission, *Reforming Bribery*, No 313, November 2008, para 1.1

11 Royal Commission on Standards in Public Life, Cm 6524, 1976; since repeated in 1995 by the Committee on Standards in Public Life, Cm2850.

12 Law Commission, *Reforming Bribery*, No 313, November 2008, paras 2.23 to 2.33; Joint Committee on the draft Corruption Bill, HL 157, HC 705, July 2003, paras 10-14

13 Serious Fraud Office, Press Release, 10 July 2009, available at [http://www.sfo.gov.uk/news/prout/pr\\_630.asp?id=630](http://www.sfo.gov.uk/news/prout/pr_630.asp?id=630)

14 BB14

15 Further information on the Overseas Anti-Corruption Unit is available at <http://www.cityoflondon.police.uk/CityPolice/ECD/anticorruptionunit/guiltypleatobribery.htm>; BB47

16 BB04, para 5

17 BB57, para 5 (United States Department of Justice)

18 Organisation for Economic Cooperation and Development (OECD) Convention on combating bribery of foreign public officials in international business transactions; First and Second Protocols to the Convention on the protection of the European Communities’ financial interests; Council of Europe Criminal Law Convention on Corruption, together with its Additional Protocol; European Union Convention on the fight against corruption involving officials of the European Communities or officials of member states of the European Union; Council of Europe Civil Law Convention on Corruption; United Nations Convention Against Corruption.

10. The OECD's Working Group prepared reports in 2003, 2005 and 2007 that have been particularly critical of "deficiencies" in the UK's bribery laws.<sup>19</sup> Most recently, in October 2008, the Group stated that it was "disappointed and seriously concerned with the unsatisfactory implementation of the [OECD] Convention by the UK". It called on the UK Government to enact, among other things, "modern bribery legislation and establish effective corporate liability for bribery as a matter of high priority".<sup>20</sup> It warned that:

failing to enact effective and comprehensive legislation undermines the credibility of the UK legal framework and potentially triggers the need for increased due diligence over UK companies by their commercial partners or Multilateral Development Banks.<sup>21</sup>

At no stage has the Government accepted that the UK is non-compliant with any of its international obligations, but it has acknowledged that failure to implement law reform could "bring into question the UK's commitment to the [OECD] Convention".<sup>22</sup>

11. The first significant step towards reform was taken by the Law Commission in the late 1990s, leading to the publication by the Government of a draft Corruption Bill for pre-legislative scrutiny in 2003. It was heavily criticised by the Joint Committee that was appointed to carry out this task, primarily due to the continued reliance of the draft Bill on the agent – principal relationship.<sup>23</sup> The current Criminal Law Commissioner, Professor Horder, described the 2003 Bill as quite "cautious and conservative".<sup>24</sup> It was not proceeded with and, although some of its elements have re-emerged in the new draft Bill, an alternative approach has been sought.

### **The draft Bribery Bill**

12. The draft Bribery Bill is based largely on a second set of proposals developed by the Law Commission, which launched a consultation exercise in 2007 resulting in a report published in October 2008.<sup>25</sup> Among other things the draft Bill would:

- Repeal the existing common law and statutory bribery offences and replace them with two general offences of bribing and being bribed (clauses 1 and 2);
- Introduce a specific offence of bribing foreign public officials (clause 4);
- Create a new criminal offence for companies and partnerships that negligently fail to prevent bribery by persons performing services on their behalf (clauses 5 and 6); and

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19 OECD Working Group on Bribery, United Kingdom: Phase 2bis, report on the application of the Convention on combating bribery of foreign public officials in international business transactions and the 1997 recommendation on combating bribery in international business transactions, Executive Summary, available at <http://www.oecd.org/dataoecd/23/20/41515077.pdf>

20 Ibid

21 Ibid, Executive Summary

22 Impact Assessment, p3

23 Joint Committee on the draft Corruption Bill, July 2003, HL157, HC705

24 Q7

25 Law Commission, *Reforming Bribery*, No 313, November 2008, available at <http://www.lawcom.gov.uk/docs/lc313.pdf>

- Make supplementary provision for the jurisdiction of the offences (clause 7), the application of parliamentary privilege (clause 15), the role of the Attorney General (clause 10) and the powers of the security services (clauses 13 to 14).

13. The general reaction to the draft Bill has been positive. For instance, the OECD’s Legal Director, Nicola Bonucci, stated that it represents an “important improvement and will enhance the credibility of the UK legal framework”.<sup>26</sup> Some business and legal representatives, however, gave the draft Bill a more cautious welcome. This included Gary Campkin of the Confederation of British Industry who maintained that the draft Bill needed “quite a lot of work” to resolve legal and practical issues.<sup>27</sup>

14. There was general recognition that the draft Bill should be introduced promptly in view of what the Ministry of Justice described as the “protracted and faltering history to proposals for reform”.<sup>28</sup> For instance, Transparency International UK stated that although the Bill was not perfect, “it is far more important to have legislation that effectively modernises, brings up to date and [makes] compliant our law on bribery than the precise detail of the Bill [*sic*]”.<sup>29</sup>

15. Others preferred to highlight the risk of legislating in haste before repenting at leisure.<sup>30</sup> For instance the law firm, Clifford Chance, stated:

Attempts to reform the UK law on bribery are long overdue, and there is now an urgent need for progress to be made. However, it is equally important that the new law be clear and that it should not cast its net indiscriminately over acts where there is no criminal intent [...While] the credit crisis is likely to cause an increase in crimes of fraud and corruption, it would still be a mistake to introduce legislation which, because of a lack of clarity, or an overly mechanistic approach, places unrealistic and onerous burdens on companies.<sup>31</sup>

The Attorney General, Baroness Scotland of Asthal, emphasised the high priority given to the Bill by the Government, although she noted that pressure on the legislative timetable was a challenge to be overcome.<sup>32</sup> The Secretary of State for Justice, Jack Straw MP, told us that he was determined to secure the Bill’s enactment before the next general election, including, if needed, introduction in the current parliamentary session for “carry over” into the next session.<sup>33</sup>

**16. We welcome the draft Bribery Bill as an important opportunity to modernise the criminal law of bribery; this will assist in fulfilling the United Kingdom’s international obligations more effectively. We urge the Government to introduce the Bill as soon as**

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26 Q475

27 Q167

28 BB52

29 Q521

30 *Bribery: Corporate Liability under the Draft Bill 2009*, 2009 Criminal Law Review 479, p487

31 BB05, para 37

32 Q621

33 Q555

**possible in view of its protracted and faltering history and to take full account of our recommendations.**

## The Defence Industry: a case study

We took evidence from representatives of the defence industry to explore attitudes and experiences in one of the sectors historically associated with corruption. In particular, a series of scandals surrounded Lockheed Martin in the 1970s concerning payments to foreign officials to gain contracts for the sale of military aircraft. Since then other defence companies, both in the US and Europe, have been accused of engaging in corrupt practices. The Al Yamamah contracts entered into by BAE Systems in 1985 sold Tornado aircraft to Saudi Arabia in a deal that was eventually worth more than £43 billion. It became particularly controversial after 2001 with allegations of illegal payments being made. The Serious Fraud Office opened an investigation into these allegations in 2004, then halted it in 2006 as we outline in chapter 10. As a consequence of the political controversy surrounding this, and other, allegations BAE Systems initiated its own report into business ethics. The result was the report of the Woolf Committee, which set out a number of principles and recommendations that apply to defence companies operating in the global environment<sup>34</sup>.

Lord Robertson, the former Defence Secretary and Secretary General of the North Atlantic Treaty Organisation, viewed the level of competition and the high value of contracts as the combined source of the historic problem in the defence industry. He described bribery as being “both morally indefensible but also hugely wasteful and unfair in the international market place”.<sup>35</sup>

The Society of British Aerospace Companies told us that the culture within the defence industry had been cleaned up over the previous 20 years.<sup>36</sup> Alan Garwood of BAE Systems stated: “one of the things we have learned is that the reputation of our company and how we are seen to do business is as important as what we do”. He emphasised that trade tainted with corruption is not worth having: “it is bad for Britain and for British industry to take business on those terms”.<sup>37</sup>

Thales UK, BAE Systems and Lockheed Martin described the strict anti-bribery procedures that they now have in place.<sup>38</sup> The carefully drawn recommendations of the Woolf Committee, which many of our witnesses viewed as an extremely valuable contribution to the development of best practice, have provided the impetus for a number of defence companies to review their policies on a range of ethical issues and instigate new procedures. Many of these involve policies to insulate the companies from pressures of bribery. In particular, BAE Systems, following the controversies over the Al Yamamah arms deal, instigated the Woolf Committee investigation and has now tried to go further than the Woolf recommendations to make itself the market leader among defence companies in ethical practices and a resistance to pressures, and allegations, of bribery. We note, however, that the real test of whether the industry has embraced a new culture will

34 Woolf Committee, *Business ethics, global companies and the defence industry: Ethical business conduct in BAE Systems plc - the way forward*, May 2009, available at [http://217.69.43.26/woolf/Woolf report 2008.pdf](http://217.69.43.26/woolf/Woolf%20report%202008.pdf)

35 Q141

36 Q224 (Derek Marshall)

37 Q313

38 BB24; BB27; BB28; Q290 (Alan Garwood)

depend on old habits being abandoned permanently. Only time will tell.

There are signs of real progress. In particular, we applaud the efforts of all those involved in developing common industry standards (CIS) across the defence sector in Europe and the United States. While Lord Robertson highlighted that this does not yet represent a truly global commitment, it is a valuable step towards creating a level playing field on which businesses engage in a “fair battle” for trade.<sup>39</sup>

The Defence Manufacturers Association re-iterated Lord Robertson’s view that ultimately the aim is to make good business ethics a “competitive advantage”:

“if foreign governments make it clear that they will only do business with companies who sign up to the CIS [common industry standards] or other comparable industry standards, then that is a competitive advantage and that drives out those companies who do not sign up to such standards.”<sup>40</sup>

Transparency International UK’s Defence Programme Director, Mark Pyman, stated that the governments which purchase from defence companies are routinely calling for the United Kingdom to be “clearer and stronger on defence anti-corruption”.<sup>41</sup> We hope that the Government and the defence industry heed this call by continuing to develop a firm and effective response.

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39 Qq147 and 155; Q271

40 Q229

41 Q552

## 3 The offences of bribing and being bribed

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17. The two proposed offences of bribing (clause 1) and being bribed (clause 2) apply to individuals who offer or accept, directly or indirectly, an “advantage” of any kind in connection with the “improper” performance of the recipient’s functions. The functions can include acts of a public nature and, among other things, any act connected to a business, trade, profession, or in the course of employment in both the public and private sectors (clause 3(1)).

18. The offences are divided into six separate “cases” or scenarios. Under each the prosecution has to prove an objective test of “improper” performance based on whether a “reasonable person” would consider that the recipient had breached an expectation of “good faith”, “impartiality” or “trust” (clause 3). As considered below in para 19, knowledge or intention of improper performance must also be proven by the prosecution in four of the statutory cases under clauses 1 and 2 (cases 1 to 4).

### Clarity of the “improper” performance test

19. The task of creating a legal test that clearly and predictably differentiates wrongful bribes from legitimate payments proved too much for the 2003 draft Corruption Bill. There was no shortage of alternative proposals put forward during the most recent consultation exercise in 2007.<sup>42</sup> The Law Commission argues that its proposed improper performance test “strike[s] an acceptable balance between the need for simplicity of expression, and the need for certainty in obligation”, before adding:

A jury will be perfectly capable of deciding whether or not there was an expectation that R [the recipient] would act in good faith or impartially, or was in a position of trust, and if so, whether R failed to live up to expectations or betrayed the position of trust.<sup>43</sup>

20. In order to ensure that the provision is fully understood by businesses and other affected parties, the Law Commission has suggested the following “lay summary” for clauses 1 to 3:

Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position;

Do not misuse your position in connection with payments (or other favours) for yourself or others.<sup>44</sup>

21. The Directors of Public Prosecutions and the Serious Fraud Office and the Head of the Overseas Anti-Corruption Unit of the City of London Police endorsed the Commission’s view that terms such as “good faith” could be applied by a jury satisfactorily, based in part

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<sup>42</sup> Law Commission, *Reforming Bribery*, No 313, November 2008, paras 3.78 to 3.225

<sup>43</sup> BB06, para 06

<sup>44</sup> Law Commission, *Reforming Bribery*, No 313, November 2008, para 3.227

on their experience that juries had not found it difficult to apply tests framed in similar language under the Fraud Act 2006.<sup>45</sup> The law firm, DLA Piper, also stated that it did not anticipate difficulty in explaining the proposed offences to businesses that would then need to comply with the law.<sup>46</sup> Particularly strong support was offered by Dimitri Vlassis, Chief, Crimes Convention Section in the Division for Treaty Affairs at the United Nations, and Colin Nicholls QC of Three Raymond Buildings who considered that the use of a test involving good faith, impartiality and trust could become a model for bribery laws in other countries.<sup>47</sup>

22. On the other hand, relatively widespread concern about the workability of the test was expressed by business and some legal representatives. For instance, both the Confederation of British Industry and the International Chamber of Commerce (UK) viewed it as “unrealistic” to expect businesses to adopt a “quasi-judicial role” by stepping into the shoes of a “reasonable person” under the draft Bill’s objective test.<sup>48</sup> Professor Horder sought to counter this argument by emphasising that this is precisely what businesses are already required to do when assessing potential liability for negligence or gross negligence.<sup>49</sup>

23. The main objection to the new provision, however, centred on the terms used in clause 3, including the potential vagueness of “good faith”, “impartiality” and “trust”. The Law Commission decided against giving these terms a strict legal meaning, having been influenced by representations from the senior judiciary that these should not be linked to their civil law equivalents.<sup>50</sup> Lawrence Hammond of Thales UK, among others, called for the clarification of the terms, either on the face of the Bill or through guidance:

[I]f those particular concepts are not to have their civil law meanings and connotations the question is what meanings do they have [...] One thing that businesses want is to stay out of the courts and therefore clarity of their obligations in advance [is important].<sup>51</sup>

24. Professor Horder argued that clauses 1 to 3 used “ordinary English words” which a jury should be trusted to apply with “common sense”, although he considered that additional guidance could be issued about their meaning.<sup>52</sup> Jeremy Cole of the law firm Lovells did not agree that the language was clear, and stated that the “over-complicated” and “distracting sub-tests” should be removed, leaving an unqualified test of “improper” performance:

These terms [such as “good faith”, “impartiality”, etc] seem to serve the function of glosses on the core question of whether the function was performed properly. As such, they add little and introduce scope for confusion. If a judge feels that the

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45 Q369 (Keir Starmer QC); Q369 (Richard Alderman); Q369 (Detective Chief Superintendent Steve Head)

46 BB20

47 BB56, para 1.14;

48 BB03, paras 34 to 36; BB7, para 9

49 Q10

50 Law Commission, *Reforming Bribery*, No 313, November 2008, paras 3.88 to 3.98

51 Q327

52 BB06, para 2;

particular case being tried would be more easily understood by the jury if a term such as ‘good faith’ were used in summing up, then that judge would be free to use it. A judge should not be forced to explain, nor should a jury be forced to consider, every case in those terms.<sup>53</sup>

25. The benefits of using an unqualified test were doubted by Professor Horder, who stated that it increased the risk of uncertainty and inconsistency:

For a start, too few cases are litigated in the higher courts for such a policy to get off the ground; and in any event, this is not an appropriate area for piecemeal common law development.<sup>54</sup>

He also rejected the alternative of adding detailed “stipulative definitions” to provide greater certainty on the grounds that this would risk making the law too complex, rigid and potentially subject to argument about unforeseen gaps.<sup>55</sup>

26. The Confederation of British Industry was joined by the International Chamber of Commerce (UK), among others, in calling for an amendment to clarify that “all the circumstances” can be taken into account when assessing the expectations of a reasonable person:

We believe that [the] situation would be significantly improved if Clause 3, sub-clause 8, had the phrase ‘in all the circumstances’ added. It would therefore read, ‘For the purposes of this section, the test of what is expected is a test of what a reasonable person would expect in all the circumstances’. This would ensure that evidence pertaining to all the circumstances would be admissible & it would avoid the criminalisation of activity that was a genuine mistake or misunderstanding, or where the activity involves bona fide corporate hospitality or promotion.<sup>56</sup>

27. We also considered the alternative of retaining the current legal term “corruptly” as the test to differentiate between bribes and legitimate payments. The Director of Public Prosecutions stated that the test had worked adequately in practice, although he noted that the small number of cases and a wide range of charging options might have masked potential difficulties associated with this test.<sup>57</sup> Professor Horder accepted that “corruptly” had the attraction of simplicity, but stated that it was a “very vague term” the meaning of which had been subject to inconsistent decisions.<sup>58</sup> In particular, the Law Commission concluded that a “lack of clarity surrounding this critical adverb weakens the effective application of the [current] law”.<sup>59</sup> Colin Nicholls QC and Bond, the UK membership body for non-governmental organisations working in international development, expressed their preference for the approach taken in the draft Bill.<sup>60</sup>

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53 BB39, para 1.4

54 BB06, para 2

55 Q10

56 BB46, para 4; BB23

57 BB48; Q370 (Keir Starmer QC)

58 Q10

59 BB06, para 2; Law Commission, *Reforming Bribery*, No 313, November 2008, para 2.33

60 BB56; Q76 (Colin Nicholls QC); BB33

28. Jeremy Carver of Transparency International UK emphasised that the Law Commission’s proposals represented the outcome of years of compromise on differing views over the best way forward. He was sceptical whether, in view of this, it would be prudent to introduce significant amendments.<sup>61</sup> We note that no witness pressed for the Bill to be abandoned in favour of starting again. The improper performance model also gained widespread support during the consultation process and, according to Professor Horder, broadly reflects the law in several other countries including France, Germany and Italy.<sup>62</sup> The concept of an advantage being “undue” or “improper” is itself rooted in various international agreements, including the OECD and UN conventions.<sup>63</sup>

## Scope of “improper” performance

29. It is important that the draft Bill, like any criminal legislation, does not catch conduct that in common acceptance should not be viewed as criminal. Equally, it must not leave any gap which allows a plainly wrongful act to remain outside the criminal law.

### (a) Too broad?

30. The Law Commission’s proposals are intended to avoid catching simple breaches of contract or minor tortious wrongs.<sup>64</sup> While the Law Commission acknowledged that there will remain “grey areas”, it considered that appropriate outcomes would be achieved by the “improper” performance test. For example:

- Paying a security guard a higher salary to leave their existing job in order to work for a competitor might amount to the tort of wrongful interference with contractual relations, but would not in the Law Commission’s view be a bribe because there would be no breach of impartiality or trust;
- Paying a security guard to turn a blind eye while a theft takes place would also amount to the tort of wrongful interference with contractual relations, but would amount to a bribe because there would be a breach of a position of trust.

31. We considered the scenario of a senior banker being asked by a rival bank to induce his or her trading team to join that rival in return for increased remuneration, including whether or not this would breach an expectation of good faith. James Maton of the UK Anti-Corruption Forum agreed that it would be caught by the offence and stated that this illustrated the potential for the draft Bill to criminalise acts that are “best dealt with in the civil courts”.<sup>65</sup> While the same potential was acknowledged by Monty Raphael of the law firm Peters and Peters, he also observed that it is difficult for offences to apply satisfactorily to every type of “conduct or delinquency”.<sup>66</sup> He considered that prosecutorial discretion

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61 Q521

62 BB15; Q510 (Nicola Bonucci; William Yiu Wah Loo)

63 UNCAC, Articles 5, 15 and 16; OECD Convention, Article 1

64 A “tortious” wrong refers to any form of civil liability under the law of tort, including wrongful interference with contractual relations. See the Law Commission, *Reforming Bribery*, No 313, November 2008, paras 3.158 to 3.161; No 185, paras 5.32 to 5.35

65 Q265

66 Q349

should be relied upon to ensure that criminal charges were pursued only where appropriate.<sup>67</sup>

32. Professor Horder noted that such concerns could be addressed by the insertion of a “for guidance” provision in the draft Bill, as follows:

‘In relation to “improper performance”, a person shall not be found guilty under clauses x to x simply in virtue of having committed a wrong in civil law’; or, less pointedly,

‘In relation to “improper performance” the jury should be directed to take into account whether the defendant’s acts amounted to no more than a civil wrong.’<sup>68</sup>

He did not, however, consider that inserting such a provision would be particularly helpful, given his view that the main solution to the potential problem was to trust the “collective common sense of judges and jurors”.<sup>69</sup> On the specific example of the senior banker, he stated that whether such an action would be caught by the Bill’s provisions would depend on the circumstances:

If the other firm has said simply, ‘look, there will be advantages for all of you in coming here in salary terms’, then I don’t see a jury finding bribery, or even a judge leaving a case for the jury to consider.

However, it is certainly possible – and not in my view wrong – for the jury to have a harder look if the banker has received a specific secret commission to persuade his or her fellow traders to switch firms. In principle, is it wrong for the judge/jury to consider that a genuine candidate for bribery? I don’t believe that it is.<sup>70</sup>

### **(b) Too narrow?**

33. There are examples of gaps in the current law that would be addressed under the draft Bill. For instance, we note the position of Parliament itself in our chapter on parliamentary privilege. We heard arguments, however, that two scenarios in particular would not be covered by the draft Bill:

- A member of the public who is paid to vote for a particular candidate during an election may not be subject to an expectation of good faith, impartiality or trust;<sup>71</sup>
- An agreement between two Boards of Directors to divide up market share between themselves may also not give rise to an expectation of good faith, impartiality or trust.

34. The Law Commission stated that these kinds of issue would be caught by other (more appropriate) criminal offences forming part of competition or electoral law.<sup>72</sup> Professor

67 Q349; Q351

68 BB12, para 2

69 BB12, para 2

70 BB12, para 1

71 Law Commission, *Reforming Bribery*, No 313, November 2008, para C17

72 BB06, para 4; Law Commission, *Reforming Bribery*, No 313, November 2008, para C17

Horder argued that there were therefore no remaining gaps, provided that the draft Bill was seen as one part of the wider range of offences available to prosecutors.<sup>73</sup> Several witnesses agreed, including the Director of Public Prosecutions.<sup>74</sup> ( We note in particular the overlap between bribery and conspiracy to defraud).

### **“Improper” performance: our view**

**35. We endorse the “improper” performance test that has been developed by the Law Commission to distinguish bribes from legitimate conduct under the two proposed offences of bribing (clause 1) and being bribed (clause 2). In particular, the reliance on a reasonable person’s expectation of “good faith”, “impartiality” and “trust” represents a careful balance between simplicity, certainty and effectiveness. It also takes into account the approach adopted in other countries and international anti-bribery conventions.**

**36. We do not consider that the proposals in the draft Bill, taken together with existing criminal offences, will leave any gaps in the law. We do, however, acknowledge the concern that conduct which ought to be viewed as a civil wrong may, in future, be criminalised. The limited time for completing our inquiry has prevented us from exploring possible solutions to this problem, although we note the potential for developing an effective “avoidance of doubt” provision. The Government must address this issue before introducing the Bill into Parliament in order to minimise the need for reliance on prosecutorial discretion and maximise certainty for all those who will be asked to comply with, and enforce, the new law.**

### **Cultural differences**

37. A discrete, but important, issue concerns the circumstances in which different cultural practices can be taken into account under the “reasonable person’s” expectation of good faith, impartiality and trust. In particular, the standards of conduct in the United Kingdom and European Union are not “universally recognised”.<sup>75</sup> The draft Bill avoids these challenges to a great extent by adopting an alternative test in relation to the bribery of foreign public officials under clause 4, addressed below (in chapter 4). However the offences under clauses 1 to 3 will apply to acts abroad within the private sector and (potentially) acts in the public sector, including attempts to influence candidates standing for public office overseas.<sup>76</sup>

38. The Law Commission has stated that individuals should not be able to escape conviction simply because their otherwise criminal conduct amounts to a tolerated practice abroad.<sup>77</sup> On the other hand it accepts that some cultural norms, including the extent to which one country entertains more lavishly than another, should be taken into account as part of the test of whether an expectation of good faith, impartiality or trust has been

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73 Q53; Law Commission, *Reforming Bribery*, No 313, November 2008, para C17

74 Q107 (Professor Wells); BB39, para 2; BB51

75 Law Commission, *Reforming Bribery*, No 313, November 2008, para 5.99 citing HM Council of Circuit Judges

76 Q15

77 Q22

breached.<sup>78</sup> This leaves a difficult dividing line to be drawn. The Director of the Serious Fraud Office anticipated that expert evidence on local practices and conditions would routinely be called as part of this exercise.<sup>79</sup> We note that this could substantially increase the cost and complexity of a trial.

39. Colin Nicholls QC warned that taking account of cultural differences could lead to “gaps” emerging in the law.<sup>80</sup> Concerns of this kind led Monty Raphael to draw an analogy with a “single criminality” approach under which a British juror would apply British standards irrespective of the cultural context in which the offence took place.<sup>81</sup> The Director of Public Prosecutions stated that he was “slightly uncomfortable with it being an English or British test”. He favoured an approach based on the emerging “international law of accepted behaviour” or a test that at least took account of “some factors” which differ between countries:

I would approach it on the basis that it is a test which is not tied to the local conditions where the function is exercised. It is objective in the sense that it is outside those local conditions. That allows some regard to be had to the sorts of approaches there are around the world.<sup>82</sup>

40. The Law Commission stated that one possibility was requiring juries to apply the standards of a “person of moral integrity”. It nonetheless accepted that the issue would need to be addressed, through the development of guidelines for juries.<sup>83</sup> Continuing uncertainty over the approach of the draft Bill to this issue led Jeremy Cole to propose the provision of an explanatory note spelling out the test to be adopted. For the same reason Professor Wells suggested that it might be desirable to add an “avoidance of doubt” provision on the face of the Bill.<sup>84</sup>

**41. While we accept that it may occasionally be appropriate to consider cultural variations on issues such as hospitality, a careful line needs to be drawn. The draft Bill must in general prevent individuals from relying on local customs to justify corrupt practices, otherwise its effectiveness will be seriously undermined. We see merit in the Law Commission’s proposal that jurors should apply the standards of a “person of moral integrity”. Nevertheless, the evidence that we received revealed continuing uncertainties over what this would mean in practice. The Government should clarify its intended approach to the important and difficult matter of cultural variations before the Bill is introduced.**

## Knowledge and intention: clause 2

42. The active bribery offence (clause 1) requires an individual to know or intend that the recipient has improperly performed, or will improperly perform, their functions. With the

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78 Law Commission, *Reforming Bribery*, No 313, November 2008, para 3.116

79 Q379 (Keir Starmer QC)

80 Q85

81 Q357

82 Q376 (Keir Starmer QC)

83 Law Commission, *Reforming Bribery*, No 313, November 2008, paras 3.178 to 3.179

84 Q93; BB39, para 1.1(c)

exception of case 3, there is no requirement for knowledge or intention under the passive bribery offence (clause 2, cases 4 to 6). This has the effect that a recipient can be convicted of being bribed under clause 2 based on an objective assessment of their fault, but without proof of subjective wrongdoing.

43. A number of witnesses described clause 2 (cases 4 to 6) as an “absolute” or strict liability offence, which they viewed as being inconsistent with the seriousness of a bribery conviction.<sup>85</sup> In particular, Clifford Chance highlighted that it risked catching individuals for an act which “may flow from a misunderstanding, or a mistake [...] rather than from any criminal intent” and was therefore potentially non-compliant with human rights legislation.<sup>86</sup> Similarly, Louise Delahunty of Simmons and Simmons stated that the lack of intention in cases 4 to 6 offended “basic principles” and set a potentially dangerous precedent.<sup>87</sup>

44. Proof of knowledge or intention (under cases 4 to 6) was regarded as “superfluous” by Professor Horder. He noted that a strong majority of those who responded on this issue as part of the Law Commission’s consultation were in favour of the approach taken by the draft bill:

[I]t is vital that companies know what they can and cannot do, in seeking to secure business from other companies and from Governments. In that regard, as I said to the Committee, P’s [i.e. the payer’s] acting on an intention that R [i.e. the recipient] should behave improperly provides the ‘line in the sand’ that must not be crossed.

However, when it comes to R’s conduct, matters are different because R is occupying a role (customs officer; judge, European sales manager, managing director; security guard etc) which is partly defined by its good faith, or trust, or impartiality requirements. That has the following consequence.

To insist that the prosecution prove that R knew that he or she was not meant to depart from these obligations is a bit like asking the prosecution to show, in a case where a nurse has stolen from a patient, that the nurse was aware that it was a breach of trust in the nurse-patient relationship to steal from patients. To require proof of that would be superfluous.<sup>88</sup>

The Secretary of State for Justice described it as “wholly improbable” that an individual could improperly perform their functions without knowledge or intention. He joined Professor Horder in stating that prosecutorial discretion and broad sentencing powers could be used to prevent injustice if such an “exceptional” situation should arise.<sup>89</sup>

45. The Attorney General agreed.<sup>90</sup> She also emphasised that this approach was an important part of changing the culture in which taking a bribe is seen as acceptable.<sup>91</sup> As Monty Raphael of Peters and Peters stated:

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85 BB03, para 39 (International Chamber of Commerce (UK)); BB07, para 8 (Confederation of British Industry)

86 BB05, para 12

87 BB05, para 12; Q344

88 BB12, para 3

89 Q566 (Jack Straw MP); BB12 (Professor Horder)

90 BB60

[I]t is meant to deter people, either public officials or those in a position of trust, fiduciary positions, from holding their hands out. This is meant to [make people] think twice before they ask [for] or receive anything [...] I do not see the harm in that.<sup>92</sup>

**46. On balance we support the provisions in the draft Bill that enable a person to be convicted of being bribed (clause 2) without proof of knowledge or intention, notwithstanding that subjective fault should ordinarily be required by the criminal law. This policy forms an important part of changing the culture in which taking a bribe is viewed as acceptable. In particular, we think that it should encourage anyone who is expected to act in good faith, impartially or under a position of trust, to think twice before accepting an advantage for their personal gain.**

## Overlapping offences

47. The criminal law includes a wide range of offences that are likely to overlap with the proposed bribery offences under the draft Bill. These include:

- The common law offences of misconduct in public office and conspiracy to defraud;
- Dishonesty offences under the Theft and Fraud Acts;
- Corruption at elections under the Political Parties, Elections and Referendums Act 2000 and the Representation of the People Act 1983, including its offence of bribery (s.113);
- The sale of honours under the Honours (Prevention of Abuses) Act 1925.

48. The Law Commission decided to concentrate on developing new proposals for bribery rather than undertaking a broader rationalisation of the law. It stated that some degree of overlap with other offences was “unavoidable” and best resolved by prosecutors deciding on the appropriate charge before commencing criminal proceedings.<sup>93</sup> Several witnesses agreed with this approach, dwelling in particular on the benefit of retaining some narrowly focused offences and on the danger that any more ambitious project for reform would result in delay.<sup>94</sup>

49. The Public Administration Select Committee urged us, however, to consider whether the Honours (Prevention of Abuses) 1925 represented a particularly ripe candidate for consolidation.<sup>95</sup> This was in light of the Law Commission’s assessment that the draft Bill’s offences were “sufficiently broad” to catch the 1925 Act’s offences.<sup>96</sup> Professor Horder

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91 Q674: This is not contradicted by the need for intention under case 3 of clause 2. The purpose of case 3 is to fill the vacuum that would otherwise exist under cases 4 to 6 in circumstances where the recipient accepted an advantage while intending (but not proceeding) to improperly perform their functions.

92 Q348

93 Law Commission, *Reforming Bribery*, No 313, November 2008, HC35; see also pp5-12 and 179-189

94 For example see BB51

95 BB17

96 Law Commission, *Reforming Bribery*, No 313, November 2008, para C32

accepted that there might be potential to repeal the 1925 Act but only, if at all, once some time had passed “to see if, indeed, other legislation is now necessary”. He stated that the Act could be reviewed in due course by the Law Commission’s Statute Law Repeals Division.<sup>97</sup>

**50. Once the operation of a Bribery Act has become established, the Government should ask the Law Commission to review the Honours (Prevention of Abuses) Act 1925 to determine whether it remains necessary in light of the new offences.**

## 4 Bribery of foreign public officials

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51. Clause 4 introduces a specific offence of bribing foreign public officials. This is absent from the current law, which subsumes this form of bribery within the general criminal offences. There has been universal support for the inclusion of a specific offence, particularly in view of the UK's obligations under the OECD Convention.<sup>98</sup> The text of Article 1 of the Convention reads as follows:

### The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

In broad terms, clause 4 would make it an offence to provide any advantage to a foreign official with the intention of influencing them in order to obtain or retain business, except where the advantage was “legitimately due”.

### “Legitimately due”

52. An advantage is legitimately due under clause 4(3): “if, and only if, the law applicable to F [i.e. the official] permits or requires F to accept it”. In other words, it would be an offence unless the local law applying to the foreign official permitted the advantage to be received by him or her.

53. Several concerns were expressed about this test. They included the practical difficulties arising from juries being asked to reach decisions in accordance with a foreign law. For instance, the Director of Public Prosecutions stated that it would introduce a “heavy evidential burden”. The International Chamber of Commerce (UK) added:

There must be considerable doubt whether an English jury – or indeed an English court – is a suitable instrument for deciding in a criminal case what a foreign law [provides].<sup>99</sup>

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<sup>98</sup> We note that clause 1 and clause 4 overlap in any situation where a bribe is paid to a foreign public official. We also note that encouraging, assisting or attempting to commit an offence under the draft Bill would also be a secondary offence under the Serious Crime Act 2007, among other provisions.

<sup>99</sup> BB03

54. The unqualified reference to the “law” was also viewed by many as unhelpfully vague. The Director of Public Prosecutions called for the Bill to “spell out” its meaning, while the OECD and a number of lawyers questioned whether it risked leaving loopholes that were open to abuse, including:

- Bribes that are authorised as part of an enforceable contract;<sup>100</sup>
- Occasions when the law is silent about whether a particular practice is prohibited or permitted, particularly under the tradition of common law countries where legal permission is generally assumed unless expressly withdrawn;<sup>101</sup> and
- Scope for defendants being able to rely on cultural norms and practices, which the legitimately due test had been intended to prevent.<sup>102</sup>

55. A solution that was suggested by many witnesses was to amend clause 4 by introducing a “written law” test in line with the commentary on the OECD Convention. This defines the written law as including statutes, regulations and case law, while excluding local custom or tolerance.<sup>103</sup> It is plain that the Law Commission intended the “law” to be given this meaning and the Attorney General believed that the courts would interpret it in that way.<sup>104</sup> Jeremy Cole of Lovells stated:

A ‘written law’ test not only excludes such arguments [as the risk of cultural norms being admissible] but provides businesses with far greater certainty.<sup>105</sup>

56. A small number of witnesses favoured removing the legitimately due test altogether. For instance, the OECD’s Legal Director, Nicola Bonucci, stated that he knew of no law that permitted public officials to accept an advantage above their salary; that only five out of 38 states which are parties to the OECD Convention had included a specific written law exemption; and never to his knowledge had the exception been raised during proceedings. His personal view was that the test was “useless” and best removed.<sup>106</sup> Jeremy Carver of Transparency International UK agreed, particularly given concerns that “special laws” can be passed and hidden including directions in a centralised state, although we note that the OECD’s Working Group discourages recognition of laws that have not been “publicly endorsed”.<sup>107</sup>

57. A larger number of witnesses opposed abandoning the legitimately due test. For instance, Professor Horder stated that it represented a narrow but important qualification, broadly in line with the approach of most OECD states. On this point he cited a leading commentator, Professor Zerbes, in support.<sup>108</sup> While accepting that the exception might

100 Qq484, 487; BB03; BB56 , para A6 and 2.15

101 Qq 478, 487, 20; BB31, para 31

102 BB39, para 4.4

103 BB31; Q478

104 Qq 30, 675

105 BB39, para 4.4

106 Q478; Q487

107 Q530; BB31, para 32

108 BB21: “Most of the signatory states have indeed implemented the [OECD] Convention to the effect that payments or other benefits which are made in conformity with a strict legal basis are not criminalised” citing Professor Zerbes in *The OECD Convention on Bribery: A Commentary*, 2007 Ed. M.Pieth, L.Low and P.Cullen, pp104-5.

have limited use in practice, Professor Horder considered it necessary to respect states' "legislative freedom of action" and to avoid "gold-plating" the law.<sup>109</sup>

58. Professor Horder also maintained that dropping "legitimately due" would remove the fault element from the offence and would therefore risk non-compliance with the presumption of innocence under Article 6(2) of the European Convention on Human Rights.<sup>110</sup> In a similar vein, the Attorney General called for its retention as a clear test that distinguishes bribes from legitimate advantages.<sup>111</sup> Louise Delahunty was concerned that dropping this test might turn the offence in clause 4 into a "strict liability offence".<sup>112</sup>

59. A small number of examples were provided of the kind of situations in which a written law exception might apply. For instance, the Secretary of State for Justice referred to "offset" or "planning gain" scenarios under which a company pays for infrastructure projects (such as building schools or hospitals) as part of a wider commercial agreement.<sup>113</sup> Professor Horder noted that this is "the kind of practice which, if permitted by law, we would think absolutely appropriate and the right way to match up doing business and actually doing good".<sup>114</sup>

60. The US Department of Justice drew our attention to one case that it had been asked to advise upon in relation to the equivalent "written law" test under the Foreign Corrupt Practices Act. It concerned a company that had been required to provide technical and management training to officials under a Pakistani law as part of a joint venture with the Pakistan government.<sup>115</sup> The Department of Justice authorised training to be given to officials up to the value of \$250,000 per year. Nicola Bonucci stated that public officials may not benefit personally under a legitimate "offset" and therefore no issue would arise.<sup>116</sup> The OECD Secretariat acknowledged, however, that any offset which incidentally benefitted an official alongside other members of the public was likely to meet the Working Group's approval if permitted by a written law.<sup>117</sup>

61. Professor Horder also drew attention to the possibility of foreign laws permitting "standard fees or tariffs" to be paid directly to public officials, rather than into a general fund, including to officials such as notaries.<sup>118</sup> The Confederation of British Industry offered additional examples of conduct that risked, in its view, being wrongfully criminalised if the legitimately due test were removed.<sup>119</sup> Monty Raphael of Peters and

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109 BB21

110 BB21

111 Q677 (Baroness Scotland of Asthal)

112 BB40, para 5.1

113 Qq 568, 569 (Jack Straw MP)

114 Q26

115 BB57, para 11

116 Q493; see also Q490

117 BB31, para 55

118 BB21

119 BB46, para 17

Peters also favoured retaining the test for the “very few cases” where it could be made out.<sup>120</sup>

62. Another alternative was proposed by The Corner House. It recommended that “legitimately due” should be replaced with a more flexible approach that took into account the legitimacy of the advantage that is conferred rather than focusing on its strict legality under a local law. For this purpose The Corner House recommended using the term “improper”, which would build on clauses 1 to 3 and fall in line with the use of this term under the UN and OECD Conventions.<sup>121</sup> The aim was to ensure that giving an official a justifiable advantage (such as modest and proportionate corporate hospitality, as addressed in chapter 7 below) would not be criminalised. For similar reasons the International Chamber of Commerce (UK) called for the terms “undue” (as used in the OECD Convention) or “corruptly” (as used in the US Foreign Corrupt Practices Act) to be included in the draft Bill, but in addition to the “legitimately due” test.<sup>122</sup>

63. These proposals were opposed by Professor Horder and the Attorney General. In particular, these broad terms were viewed as risking the effectiveness of clause 4 and as increasing the scope for taking cultural norms into account.<sup>123</sup> Jeremy Cole of Lovells also opposed the use of broad terms to exempt “all permutations of payments that are made in international commerce” on the grounds that their use risked causing more harm than good by broadening the narrow gateway established by a written law test.<sup>124</sup>

**64. The proposed offence of bribing foreign public officials (clause 4) represents an important step in putting the United Kingdom’s compliance with its international obligations beyond doubt. To ensure that this goal is achieved, we recommend that the reference in clause 4 to the “law” be replaced with a reference to the “written law”, meaning statutes, regulations and case law. This amendment should remove the potential for loopholes to emerge, while providing greater certainty to prosecutors, jurors and businesses alike. It should also provide an appropriately narrow gateway restricting the circumstances in which advantages can legitimately be provided to foreign public officials.**

## A “reasonable belief” defence

65. The Law Commission originally proposed a defence for any person who mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official’s local law.<sup>125</sup> The Government decided not to include this defence in the draft bill.

66. Professor Horder stressed that he understood the Government’s decision, but noted rare examples under the legal system of England and Wales in which mistake of the law

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120 BB51

121 The OECD considered the use of the term “improper” or “undue” to be acceptable but cautioned against any further qualification using terms such as “good faith”, “impartiality” etc, due to concerns that this may render it narrower than its Convention: BB31, para 46

122 BB36

123 BB21

124 BB39, para 4.18

125 Law Commission, *Reforming Bribery*, No. 313, November 2008, paras 7.22-7.49

can operate as a defence. He also stated that mistake of a foreign law may legitimately be treated in a different way to a mistake of domestic law, before adding:

[I]n practice this defence would not be run very often, but when it was run it [would be] perfectly reasonable for a firm to say, ‘Well, look, the biggest law firm in the world has given us this advice that it is perfectly lawful to make this payment, what can we do? We can only rely on that’. That is important because we are talking about convicting someone of a pretty serious offence. The taint of corruption is pretty significant.<sup>126</sup>

67. Many business and legal representatives agreed. For instance, the law firm Herbert Smith stated that a dearth of legal authorities in some countries can lead to advice being heavily qualified, leaving quick decisions to be made on a “best guess” basis:

We fail to see why public policy should require that individual’s actions be criminalised and for the individual to then to rely on a prosecutor’s discretion, on whether with hindsight, the public interest requires a prosecution.<sup>127</sup>

68. Although the Director of Public Prosecutions accepted that prosecutorial discretion offered a “workable” solution given that genuine mistakes and misunderstandings are factors under the Code for Crown Prosecutors, he preferred the option of adding a statutory defence in the interests of “transparency and accountability”.<sup>128</sup> Clifford Chance also stated that prosecutorial discretion offered little comfort to firms which faced a legal duty to file reports under money laundering legislation.<sup>129</sup> The International Chamber of Commerce (UK) suggested that the defence might be a helpful addition to the “written law” test, since juries are “much more suited to find whether a reasonable attempt to ascertain foreign law had been made rather than to decide upon the law itself”.<sup>130</sup>

69. The Government’s decision to drop the defence followed objections from the OECD. Its Working Group considered that such a defence would be open to abuse and would contradict the general stance of the UK legal system, under which mistake of the law is no excuse.<sup>131</sup> The OECD’s Legal Director, Nicola Bonucci, highlighted the danger of abuse by stating “it is not difficult [...] to get bad legal advice if you want it.”<sup>132</sup>

70. The Secretary of State for Justice stated that removing the defence represented the “correct balance” between being fair to defendants and providing “so many rabbit holes” that they could unduly escape conviction.<sup>133</sup> He emphasised that prosecutorial discretion and the good sense of jurors could be trusted to ensure that genuine mistakes were not punished by conviction. Several witnesses agreed, including Transparency International UK, The Corner House and Monty Raphael, who stated:

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126 Q56

127 BB49, para 13

128 Q394; Q400; Q401 (Keir Starmer QC)

129 BB05, para 25

130 BB03, para 13

131 OECD Phase 2 *bis* report, above, para 62

132 Q501

133 Q576

[A] responsible corporation doing business overseas will always if it is in any doubt, and there will be very few occasions when it can be left in any doubt as to whether what is being asked for is a bribe, will seek local legal advice. Where they have sought local advice and the instructions have been good, the advice has been unambiguous and they have followed the advice to the letter, it is inconceivable that they will be prosecuted.<sup>134</sup>

**71. The Law Commission’s proposal for a “reasonable belief” defence raises a range of difficult and competing interests. We are, in particular, sensitive to the challenges faced by those who conduct business under unfamiliar laws abroad. But we also appreciate the concerns of those who view the defence as inconsistent with the United Kingdom’s international obligations and the policy aims of the draft Bill. On balance, we support the Government’s decision to reject the defence.**

## 5 Negligent failure by organisations

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72. Clauses 5 and 6 propose a new offence for companies and partnerships that negligently fail to prevent bribery by persons who are performing services on their behalf. At present, a company can only be convicted under corporate liability principles where a senior officer who is its “controlling mind” is responsible for key elements of the offence (under what is known as the “identification” doctrine). The Director of Public Prosecutions described it as “almost impossible” to prosecute successfully under this principle.<sup>135</sup> It has attracted criticism from the OECD’s Working Group for not being “effective, proportionate and dissuasive”.<sup>136</sup>

73. Some surprise was expressed by the business community at clauses 5 and 6, since the Law Commission had initially decided not to pursue these proposals pending its ongoing review of the way that companies are held accountable under the criminal law as a whole. However, the Law Commission reversed its decision in light of the Woolf Committee’s conclusion that boards of directors must take an active role in preventing bribery. It also followed the recommendations of the Serious Fraud Office, which highlighted the need to tackle corporate liability given its view that bribes are most often paid in order to benefit a commercial organisation.<sup>137</sup>

74. Under the proposed offence a “responsible person” must be found negligent for failing to prevent an act of bribery. Clause 5(3) defines a responsible person to be anyone (other than the briber) whose “functions” included preventing bribes being paid in connection with the business. The draft Bill treats any “senior officer” as the responsible person where no-one else has been allocated this function. Significantly, a defence is available where “adequate procedures” were in place to prevent bribery (clause 5(4)).

### Too complex and narrow?

75. Several witnesses were concerned by what they viewed as an uncomfortable relationship between negligence (as a fault element) and adequate procedures (as a defence), asking whether this artificially separated out two versions of the same thing.<sup>138</sup> Professor Horder accepted that in most cases the two issues will merge, but favoured separate steps to create a balance “whereby a company would not be liable when its systems were perfectly adequate but there was a failure solely by an individual”. He gave the example of an isolated failure by a “responsible person” who had been “tempted by an offer from a rival company to go and join them and so is not paying proper attention”.<sup>139</sup>

76. A more sustained criticism related to the need to prove fault on the part of an individual within the company, rather than focusing on the company’s collective failure to maintain adequate procedures. In particular, Professor Wells listed the steps that this

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135 BB16, para 9

136 OECD Phase 2 *bis* report, above, para 92

137 Response of the Serious Fraud Office to the Law Commission Consultation paper No 185, *Reforming Bribery*, cited in the OECD Phase 2 *bis* report, above, para 75

138 For instance BB05, para 36

139 Q60

approach entailed (proving bribery, identifying a responsible person, proving they were negligent, and then countering an adequate procedures defence), before describing clause 5 as a “narrow and complex solution to a pressing problem”.<sup>140</sup> Monty Raphael of Peters and Peters was also concerned that linking “negligence” to a specific individual unfairly risked the introduction of a variable standard:

the test can differ between individuals and a more qualified person may be judged more harshly on the basis that they would be expected to operate at a higher level of diligence.<sup>141</sup>

77. PricewaterhouseCoopers noted that references in the draft Bill to a “responsible person” could be given a wide range of meanings, both broad and narrow. For instance, it questioned whether a general obligation placed on every line manager, or even on every employee, to be vigilant for evidence of wrongdoing risked making every member of staff a responsible person: “we recommend more clarity here, perhaps distinguishing between explicitly assigned responsibilities (carrying a more onerous duty of care) and implicitly defined responsibilities (carrying a less onerous duty of care)”.<sup>142</sup>

78. We considered a number of alternatives put forward by Professor Wells, in particular removing the need to prove a responsible person’s negligence, thus leaving the company strictly (or vicariously) liable for bribes paid on its behalf, subject to an adequate procedures defence.<sup>143</sup> This was supported by a number of witnesses including Transparency International UK, officials from the OECD and also Professor Sullivan, who described clauses 5 and 6 as a “half-baked compromise”.<sup>144</sup>

79. We were informed about a number of jurisdictions which impose corporate criminal liability in a way that is at least as strict as Professor Wells’s proposal, including the United States, Australia, Switzerland, Finland, Italy and Austria.<sup>145</sup> Examples were also provided of analogous strict liability offences under health and safety legislation and money laundering regulations.<sup>146</sup>

80. Under Professor Wells’s proposal it would be necessary to reconsider the burden of proof in relation to the adequate procedures defence:

- The commercial organisation could be required to raise the defence as part of an “evidential” burden, but leave the “probative” burden on the prosecution to establish the inadequacy of the organisation’s procedures beyond reasonable doubt;
- Alternatively, the commercial organisation could be required to raise the defence and also bear the “probative” burden of establishing the adequacy of procedures on the balance of probabilities.

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140 “Bribery: Corporate Liability under the Draft Bill 2009”, 2009 Criminal Law Review 479; Q121

141 BB51

142 BB32

143 “Bribery: Corporate Liability under the Draft Bill 2009”, 2009 Criminal Law Review 479

144 Ibid; Qq 113, 510; 536

145 BB15; Qq 116, 510

146 For instance BB15, para 1

81. Professor Wells described it as a “matter for debate”, but both she and Colin Nicholls QC preferred the probative burden being placed on the organisation due to:

- The organisation’s greater access to information about the anti-bribery procedures that it had in place; and
- the policy aims of the Conventions from which the offence is drawn.<sup>147</sup>

82. We were advised by the Joint Committee on Human Rights that a “reverse burden” of the type proposed by Professor Wells posed little risk of violating the presumption of innocence under Article 6(2) of the European Convention on Human Rights.<sup>148</sup> However, Louise Delahunty and Lawrence Hammond of BAE Systems considered it fairer to require the prosecution, rather than the organisation, to bear the probative burden, particularly as the Serious Fraud Office has the power to request information on the procedures that were in place.<sup>149</sup>

83. Professor Horder acknowledged the greater simplicity of dropping negligence as an element of the offence, but he did not believe that it would be fair to convict a company for the criminal act of its employee or agent without requiring the prosecution to prove that the company was itself at fault. He distinguished bribery as a “step up” in seriousness from any existing strict liability offence under health and safety or other legislation:

[It] is very different from attributing causal consequences, like earwigs in tins or deaths occurring on ships or wherever it may be, to a company [...] You can only fairly, in my view, connect a deliberate act of bribery by an employee or agent to a company via the company’s own fault, if I could put it that way, or here we have got it as ‘a responsible person or number of persons’.<sup>150</sup>

The Directors of the Serious Fraud Office and Crown Prosecution Service agreed, as did business representatives including the International Chamber of Commerce (UK).<sup>151</sup> Jeremy Cole of Lovells viewed the requirement to prove negligence as an important layer of protection for business, while questioning whether the benefits of Professor Wells’s alternatives were overstated, given that “consideration of whether procedures were adequate will still lead to asking virtually the same questions”.<sup>152</sup>

84. The Attorney General did not rule out the benefits of removing the need to prove negligence, but urged caution:

This Clause has to balance the concerns of business, who are facing potential criminal liability where none had existed before, against the wider public policy imperative of tackling bribery. It appears to me that the Clause as drafted strikes a satisfactory balance, but there may be other ways of achieving the same ends. The Committee mentions the possibility of a model based on vicarious liability with a due

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147 Qq 116 to 120; BB56

148 BB61

149 Q539

150 Q64

151 Qq 181, 184 and 389

152 BB39, para 4.19

diligence defence, which I think has been advocated by Professor Celia Wells. I do not have strong views on which approach is taken, but it may be thought unwise to depart to a significant extent from the general law on corporate liability by removing the need to prove fault on the part of the company, in advance of the findings of the Law Commission’s review of the subject as a whole.<sup>153</sup>

85. For completeness, we note that the International Chamber of Commerce (UK), among others, was concerned that clause 5(1)’s test of being “negligent in failing to prevent” introduced an absolute obligation to stop bribery altogether. This raised an underlying fear that a company risked being punished for any bribe that slipped through the net, irrespective of the circumstances.<sup>154</sup> We note, however, the Law Commission’s previous elaboration on the meaning of negligence:

a [responsible] person is negligent if he fails to exercise such care, skill and foresight as a reasonable man in his situation would exercise.<sup>155</sup>

This definition does not create an absolute obligation that will be breached automatically when a bribe is paid. On the contrary, it imposes an obligation on the responsible person(s) to take *reasonable* steps to prevent bribery. The Attorney General rejected calls to further define “negligence” on the basis that it is a “well-established concept” that could be applied “with the greatest degree of ease”.<sup>156</sup>

## Gross negligence?

86. There was broad agreement among business and some legal representatives that “negligence” represented an insufficiently high threshold for a bribery conviction. This led to calls for a test of “gross negligence”, “recklessness” or both. For instance, a body that represents the General Counsel of leading companies, GC100, stated:

Unlimited fines and debarment from tendering for public contracts are real consequences of the new offence. As a basis for criminal liability, negligence is not generally sufficient to establish liability for serious offences. The only offence for which negligence is arguably sufficient is public nuisance, and the most recent corporate offence which is analogous is corporate manslaughter, where “gross negligence” is the required threshold [...] The appropriate test in this case should be that of “gross negligence”. This would apply where the standards of behaviour fall well below what could reasonably be expected, and is a more realistic test for an offence with such serious consequences.<sup>157</sup>

87. There was strong opposition to this proposal from non-business witnesses and others, including the Secretary of State for Justice, the Attorney General and the Director of the Serious Fraud Office. In particular, the Director of Public Prosecutions stated that it would “substantially reduce the incentive for companies to put in place stringent anti-bribery

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153 BB60

154 BB03, para 19; BB07, para 20

155 Law Commission, Consultation No 31, *The Mental Element in Crime*, 1970

156 Q684 (Baroness Scotland of Asthal)

157 BB10, para 2.3 (see also Appendix 3)

procedures” while impeding prosecutions in a way that might “stifle, perhaps terminally, the policy intentions we understand to be behind the creation of the corporate liability provisions”.<sup>158</sup> We note that more can be done to ensure that fines are proportionate and debarment is non-mandatory, as addressed below.

## A civil regime?

88. We considered the option of introducing a civil regulatory regime under which companies would be fined for failing to prevent bribery unless adequate procedures were in place. This would have left the development of criminal corporate liability to the Law Commission’s broader review of the subject. It would also have been broadly analogous with the Financial Services Authority’s power to penalise companies that breach its third regulatory principle, including by failing to prevent bribery:

A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.<sup>159</sup>

We note, however, that a civil regime received little support during the Law Commission’s consultation.<sup>160</sup> Its critics stated that it would lack deterrence value and, in any event, would require a criminal offence to be available as a punishment of last resort.<sup>161</sup> The Ministry of Justice emphasised its potential cost, while Professor Horder was concerned that it would increase bureaucracy.<sup>162</sup> The OECD also warned against the conflicting message that would be sent through criminalising individuals but not companies.<sup>163</sup> Monty Raphael stated that it would represent a “soft option” which would continue to leave a corrupt company in greater fear of the US Foreign Corrupt Practices Act than UK law.<sup>164</sup> We also note that the European Commission has stated that civil or administrative penalties would be insufficient to comply with the UK’s international obligations to the European Union.<sup>165</sup>

**89. We support the Government’s proposals for a new offence that targets companies and partnerships which fail to prevent bribery by persons acting on their behalf. The current law has proven wholly ineffective and in need of reform. However, we are concerned by the focus on whether a “responsible person” was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place. In our view, clauses 5 and 6 introduce a narrow and complex solution to a pressing problem. We therefore recommend the removal of the need to prove negligence under clause 5(1)(c). While it would lead to the commercial organisation being strictly liable, subject to an adequate procedures defence, nevertheless we do not believe this would be unfair, particularly given the parallel with the approach taken in**

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<sup>158</sup> BB48, para 2

<sup>160</sup> Further information is available at <http://fsahandbook.info/FSA/htm/handbook/PRIN/2/1>

<sup>160</sup> Law Commission Consultation, *Reforming Bribery*, No 185, November 2008, para 6.70

<sup>161</sup> BB37; Q365

<sup>162</sup> Impact Assessment, p6; BB37

<sup>163</sup> BB59

<sup>164</sup> Q365

<sup>165</sup> European Commission’s report on Article 9 of the Council Framework Decision 2003/568/JHA, 22 July 2003, COM (2007) 328, 18 June 2007, p111

other leading countries. A commercial organisation is well placed to demonstrate the adequacy of its procedures, preferably on a probative burden of proof.

90. We do not accept the merits of increasing the threshold of the offence to “gross negligence” or the introduction of an alternative civil enforcement regime, since neither will satisfy the policy aims of the draft Bill.

## The “adequate procedures” defence

### (a) Meaning

91. There was near-unanimous agreement in evidence that the meaning of “adequate procedures” in clause 5 will require amplification through guidance. For instance, Professor Horder stated:

The OECD were understandably anxious that there should be greater clarity over what would count as an 'adequate system' [...] There is a case for saying that, even if it reaches the statute book, this clause should not be brought into force until some work has been done with the CBI, other business representatives, anti-corruption experts, and others, to hammer out some basic standards and procedures.<sup>166</sup>

92. The content and status of guidance is addressed more generally below, in Chapter 6. However, we note two important points that emerged on the meaning of the phrase “adequate procedures” in clause 5:

- **First, it must be interpreted in a flexible and proportionate way depending on the size and resources of the company, alongside the ethical risks associated with the industry, geographical area and the types of transaction concerned.**
- **Second, it must depend on what a commercial organisation is doing in practice rather than in theory.**

93. As part of taking a flexible approach, it is clear that the impact on small businesses will need to be carefully reviewed.<sup>167</sup> Professor Horder warned about the “classic regulatory dead end” under which businesses are forced to “tick-box” without there being a clear link to the effectiveness of the measures concerned.<sup>168</sup> The Federation of Small Businesses called for this to be avoided through “clear and accessible” guidance on the practical steps to be taken:

Is it enough to merely have had a conversation with a colleague or to have factored certain proposals into a staff handbook or is there a need for a written and documented evidence trail? For small businesses, that obviously begins to get more difficult when you have only got a handful of employees and you are very tight for time and resources.<sup>169</sup>

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<sup>166</sup> BB01, para 3

<sup>167</sup> Q171 (Rosina Robson, Federation of Small Businesses)

<sup>168</sup> BB01, para 3

<sup>169</sup> BB08, pp 1-3; Q207 (Rosina Robson)

In this respect, we note the “light-touch” approach endorsed by the Impact Assessment for small firms in low risk sectors where it may be sufficient to demonstrate that “anti-bribery principles have been fully communicated to its workforce”.<sup>170</sup> We return to the impact of clause 5 on commercial organisations later in this chapter.

### **(b) Senior officers**

94. The adequate procedures defence is not available where a “senior officer” is negligent in their role as a responsible person (clause 5(5)). As the Law Commission explained:

The existence of this defence is an important limitation on liability for the offence. It shows that our concern is to direct the criminal law at companies that fail to make continuing and systematic efforts to ensure that active bribery is not committed on their behalf, even when the risk of that happening may be high. Our focus is not on ethically well-run companies which have made an error (albeit culpable) in a particular case leading to the commission of bribery by someone providing services on their behalf. However, the defence should not be available when the negligence that led to the failure to prevent bribery being committed was attributable to a director of the company (or equivalent person) him or herself.<sup>171</sup>

95. A good deal of criticism was directed at the lack of certainty about the meaning of “senior officer” which is defined to include any “director, manager, secretary or other similar officer of the body corporate” (clause 5(7)). The term “manager”, in particular, has an uncertain meaning within the workplace. The UK Anti-Corruption Forum noted that it could include “quite junior” levels of employee.<sup>172</sup>

96. These concerns led the International Chamber of Commerce (UK), and others, to state that an expansive interpretation would lead to the defence being “robbed of any real content”.<sup>173</sup> The same could be said to a lesser extent about the meaning of “secretary”, which the Secretary of State for Justice confirmed is intended to be limited to the traditional notion of a senior-level “company secretary”.<sup>174</sup>

97. Professor Horder highlighted the need for clarity, particularly given the different definition of “senior management” that is used under the Corporate Manslaughter and Corporate Homicide Act 2007: “It is not desirable for companies to have to grapple with many different understandings in law, for the purpose of different offences, of who is ‘in charge’”.<sup>175</sup>

98. Both Herbert Smith and Thales UK recommended that the draft Bill incorporate the definition of senior management that is used under corporate manslaughter legislation, namely:

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170 Impact Assessment, p9

171 Law Commission, *Reforming Bribery*, No 313, November 2008, paras 6.6 to 6.7

172 BB04, para 16(b)

173 BB03, para 21

174 Q615 (Jack Straw MP)

175 BB06, para 9

‘senior management’, in relation to an organisation, means the persons who play significant roles in— (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities (section 1(4)).<sup>176</sup>

The Secretary of State for Justice explained that the draft Bill’s definition of “senior officer” was “lifted from the Fraud Act 2006 [... while t]he Corporate Manslaughter and Corporate Homicide Act has used a different approach. We need to think about it”.<sup>177</sup>

99. Other witnesses called for the “senior officer” exception to be dropped rather than simply clarified, with the effect that negligence by a senior officer would be a matter to be considered as part of the adequate procedures defence. For instance, Clifford Chance stated that the exception risked creating a negative incentive to appoint lower level employees to the post of “responsible person” as a way of ensuring that the defence remained available. Several witnesses, including GC100, also commented that the senior officer exception worked in contradiction to the US Federal Sentencing Guidelines, which require high level personnel to be responsible for preventing bribery in order to qualify for sentencing credit.<sup>178</sup> Herbert Smith, among others, argued that the exception served no useful purpose since a court would be unlikely to find the organisation’s procedures to be adequate where a senior officer acted negligently in designing or implementing those procedures.<sup>179</sup>

100. Professor Horder rejected the idea that the exception created a negative incentive since senior officers who employ a “dog to bark [...] must make sure the dog barks properly”.<sup>180</sup>

Any Board that appointed someone to supervise, and then conveniently forgot all about the issue, would find themselves looking at a justified claim that they had failed to ensure truly adequate procedures were in place.<sup>181</sup>

This argument did not satisfy the law firm, DLA Piper:

As the draft currently stands, we seem to fall into a circular argument. If you do appoint a senior officer you lose the defence, if you don't appoint a senior officer the defence will still be available but you might then be guilty of not having ‘adequate procedures’ if you do not have a senior officer in charge. This tortuous clause appears to be an attempt to avoid imposing strict liability on a company where an employee or agent has paid a bribe but in doing so the requirements for the adequate procedures defence have become confusing to say the least.<sup>182</sup>

101. However, Professor Wells stated that the senior officer exception could be retained under her proposal for strict or vicarious liability by replacing clause 5(5) (which creates the exception) with an “avoidance of doubt” provision along the following lines: “For the

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177 Q330

177 Q614 (Jack Straw MP)

178 BB10; BB46, para 12

179 BB49

180 BB06, para 10

181 BB06, para 8

182 BB20

avoidance of doubt, the defence of adequate procedures does not apply where the failure to prevent the offence is attributable to the negligence, neglect or fault of one or more senior officers”.<sup>183</sup>

While accepting that this potentially re-introduces the complexity involved in proving negligence in any case involving a senior officer, she added:

[I]n many cases (those where the senior officers have not been at fault in relation to the specific bribe) the complexity will be removed altogether [...and] it is hard to imagine that the procedures could be shown to be adequate where senior officers were negligent in the implementation or monitoring of any procedures. The avoidance of doubt clause puts that into concrete form to save lengthy and expensive legal argument.

Under Professor Wells’s proposal it would, in essence, become a choice for the prosecution either to prove that a senior officer had been negligent (upon which the defence would not apply), or leave the issue to be resolved as part of the adequate procedures defence (under which any failure by a senior officer would then be relevant to the broader issue of “adequacy”).

102. On a related point, the Federation of Small Businesses stated that many small companies would have no option other than to appoint a senior officer to be responsible for anti-bribery procedures. This was viewed as unfair, since small business would automatically be unable to rely on the defence given the senior officer exception.<sup>184</sup> Professor Horder rejected this argument since “a small firm with no middle management must take responsibility for compliance at directorial level”. He re-iterated the Law Commission’s proposals that failure by senior management should be a bar to the defence being available.<sup>185</sup>

**103. The adequate procedures defence does not apply where a “senior officer” is negligent in performing their role as a responsible person by virtue of clause 5(5). It is hard to imagine any circumstances in which the procedures would be adequate where a senior officer was at fault. In line with our recommendation to remove the requirement to prove negligence, we further recommend that clause 5(5) be removed. This would leave the role that has been played by senior officers to be determined as part of the adequate procedures defence. It would also reflect difficulties identified in relation to the meaning of the term “senior officer”.**

## **Subsidiaries, joint ventures and syndicates**

104. The new corporate offence applies only in relation to bribes paid by persons who are “performing services for or on behalf” of the commercial organisation and “in connection with” that organisation’s business (clause 5(1)). An official at the Ministry of Justice has stated that “all the circumstances” would need to be considered to determine whether a subsidiary was acting on behalf of its parent, but that ownership alone would not be viewed

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<sup>183</sup> BB22

<sup>184</sup> BB08, para 2

<sup>185</sup> BB01

as sufficient to mean that a subsidiary was performing services within clause 5(1).<sup>186</sup> This raises two issues. The first is whether the Government has adopted the correct approach by excluding subsidiaries from automatically being covered by the draft Bill. As James Maton of the UK Anti-Corruption Forum explained:

The difficulty is that there is a conflict between a feeling that it is wrong to have the holding company liable for the acts of foreign joint ventures, subsidiaries, or whatever they may be, in circumstances where there is no control over those activities and the conflicting view that the payment of bribes through subsidiaries is a relatively common way of meeting the payment of bribes, and that is the difficulty with those two competing problems. Not having some source of responsibility at head company level does potentially leave a very significant gap in the law and an obvious route for the payment of bribes.<sup>187</sup>

105. There are strongly held views on both sides of the line, with business representatives particularly keen to ensure that subsidiaries are not automatically being covered by the draft Bill, while academics and some enforcement agencies being equally keen to ensure that their omission does not lead to loopholes emerging.<sup>188</sup> The limited time that was available to complete our inquiry has prevented us from focusing on this issue in more detail. However, **we note that a parent company’s liability for a subsidiary is one of the issues due to be considered as part of the Law Commission’s general review of corporate criminal liability and we anticipate that the Law Commission’s conclusions will valuably inform future debate on this difficult issue.**

106. A second issue is whether the draft Bill achieves the Government’s aim of excluding subsidiaries (among other legal entities) except where a subsidiary is actually performing services on the parent’s behalf. Some witnesses considered that the draft Bill risked creating an automatic liability for subsidiaries, joint ventures and syndicates, notwithstanding the lack of control over the activities of those entities. Several amendments were proposed by witnesses, including to:

- Limit clause 5(1) to cases where the commercial organisation “controls” the subsidiary, joint venture or syndicate under an ownership interest of 50% or more;<sup>189</sup>
- Limit clause 5(1) to cases where there is either “control” (as above) or “knowledge” of bribery;<sup>190</sup>
- Limit clause 5(1) so that a subsidiary is treated as performing services on behalf of its parent only in circumstances where the parent wholly owns the subsidiary;<sup>191</sup>
- Limit clause 5(1) so that a parent company will only be liable for its subsidiary where it pays a bribe in connection with a business that is being operated by the

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186 Q583 (Michael des Tombe)

187 Q255

188 BB03, paras 31 and 47 (iv); BB07, para 28; Q140, BB33, para 4.4; BB48, para 6, BB47, para 5

189 BB23; BB39; BB15; BB19, para 6.5

190 Q358

191 BB15

parent company, rather than a business that is being operated by the subsidiary on its own behalf.<sup>192</sup>

107. Several witnesses viewed guidance as the appropriate solution, rather than an amendment to the Bill. For instance, James Maton of the UK Anti-Corruption Forum stated that what businesses need is certainty above all else and that therefore there should be “sensible guidelines, which describe in some detail what companies should be doing in relation to foreign subsidiaries and joint ventures, depending on their degree of control and the degree of shareholding in those companies”.<sup>193</sup> Clifford Chance agreed, and a Ministry of Justice official stated that the Government might consider this request.<sup>194</sup> We note that any of the proposals for an amendment, above, could effectively be achieved through suitable guidance to that effect. We therefore return to this issue in Chapter 6 below, on guidance.

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192 BB07, para 28;

193 Q255; see also BB05, paras 34 to 35

194 BB05, paras 34 to 35; Q538

## 6 Guidance

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108. As we have noted above, there was widespread agreement that guidance will be needed on the provisions in the draft Bill. There was, however, less consensus over its status, content and delivery. We also note the distinction drawn by some witnesses between guidance on prosecution policy and guidance on compliance issues. We address this distinction below.

### (a) Status

109. A large number of private sector organisations already provide *informal* guidance and advice on tackling corruption. We benefited from receiving many helpful examples. Yet there was a widely shared concern that commercial organisations will lack certainty about what is expected from them under the draft Bill unless there is *official* guidance of some kind. For instance, Louise Delahunty of Simmons and Simmons noted the “plethora” of international sources of advice. She stated that Government was best placed to bring clarity to the situation.<sup>195</sup> The UK Anti-Corruption Forum added that it was costing companies large amounts of money to develop policies and seek advice on a fragmented basis.<sup>196</sup>

110. The Director of Public Prosecutions accepted that centrally issued guidance on prosecution policy could be prepared by prosecutors under the superintendence of the Attorney General. He anticipated that it would outline the approach that prosecutors would take under the proposed offences, while noting that no other department could provide guidance of this kind since it would undermine prosecutorial independence.<sup>197</sup> BG Group Plc, in particular, endorsed the value of a clear statement on prosecutorial practice.<sup>198</sup> There is clearly scope for this to be explored.

111. However, the Director of Public Prosecutions drew a clear distinction between prosecutorial practice and “compliance” issues such as the meaning of “adequate procedures”. He considered that the second type of issue would be best addressed by informal industry-led guidance which prosecutors and juries would then take into account when deciding whether to charge or convict.<sup>199</sup>

112. The Director of Public Prosecutions was joined by the Attorney General and the Director of the Serious Fraud Office in calling for realism about what can be achieved through guidance in general, emphasising that no single document can cover every situation.<sup>200</sup> The prosecutors therefore favoured broad principles over detailed rules.<sup>201</sup> Although the Director of the Serious Fraud Office stated that prosecutors could discuss a lot with organisations about prosecution policy, he was sceptical about the introduction of

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195 Q339

196 Q248 (James Maton)

197 BB48, para 3

198 BB19

199 BB48, para 3(d)

200 BB60, Q414 (Richard Alderman)

201 BB48

official guidance more generally.<sup>202</sup> The Attorney General agreed.<sup>203</sup> Transparency International UK was also concerned about guidance becoming “a forum for the attempted erosion of the impact of the Bill”.<sup>204</sup>

113. We were informed about the detailed official guidance that is prepared in the United States by the Department of Justice.<sup>205</sup> The Secretary of State for Justice drew a distinction between arrangements in the US where, in broad terms, the Attorney General’s functions are combined with those of our Ministry of Justice.<sup>206</sup> In particular, we note that there is scope in the United States to enter into deferred prosecution agreements, non-prosecution agreements and also to approach sentencing and mitigation in a more flexible manner, including in relation to debarment, which we address below in Chapter 11.<sup>207</sup> The limited time available to carry out our inquiry has precluded us from exploring these differences in greater detail. While the UK may be moving in part towards a similar approach, we note the significant differences that remain. The Secretary of State for Justice stated:

I am very far from clear whether we as a department would publish guidance. There will be guidance published generally and people will write text books about this, guide books, and so on, but in terms of authoritative guidance [...that] would be impossible for the Ministry of Justice. What I am willing to do [...] is to talk to the Attorney as well as to business organisations about how we try and find a solution here. We have to be quite imaginative about this, and we have got to take in our traditions, but that is what I undertake to do.<sup>208</sup>

114. A number of witnesses suggested an intermediate approach under which professional bodies prepared guidance which was then given an official status through its recognition by the Government. The guidance would be admissible as evidence in relation to whether an offence had been committed. Herbert Smith stated that a similar approach has worked well under the Money Laundering Regulations, which provide that:

- (2) In deciding whether a person has committed an offence under paragraph (1), the court must consider whether he followed any relevant guidance which was at the time—
- (a) issued by a supervisory authority or any other appropriate body;
  - (b) approved by the Treasury; and
  - (c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

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202 Q414; BB47

203 BB60

204 Q528

205 BB57; BB19

206 Q584

207 BB59

208 Q584

(3) In paragraph (2), an “appropriate body” means any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.<sup>209</sup>

Louise Delahunty of Simmons and Simmons, among others, called for a similar provision to be added to the draft Bill. Herbert Smith believed it would “promote and publicise best practice [... and] ease the burden considerably on organisations trying to comply with the proposed legislation”.<sup>210</sup>

115. On the other hand the prosecutors, including the Attorney General, argued that compliance guidance of this kind is best suited to heavily regulated areas such as money laundering, as opposed to bribery. However, we note that the Government’s former Anti-Corruption Champion endorsed the “practical toolkit” developed by the defence sector to help small businesses implement its Common Industry Standards.<sup>211</sup>

116. PricewaterhouseCoopers, among others, recommend that guidance should be given a clear role in determining whether an offence had been committed without, in general, being mandatory.<sup>212</sup> Other witnesses suggested that guidance could be prepared (or authorised) by the Department of Business, Innovation and Skills, or by a new body equivalent to the Health and Safety Executive.<sup>213</sup>

**117. We support calls for official guidance to be prepared on key aspects of the draft Bill in the interests of promoting certainty. It would, in particular, help commercial organisations to stay within the law and remove the excuse from those who do not. We therefore recommend the introduction of a new clause giving the Government power to approve guidance prepared by appropriate bodies, in line with the model that already exists under the Money Laundering Regulations. We believe that this represents a workable solution that will build on the growing expertise within the private sector, while limiting the burden on Government.**

## **(b) Content**

118. The meaning of “adequate procedures” was by far the most common issue on which witnesses called for official guidance. For instance, Lord Robertson stated: “guidance should accompany the Bill and should be seen as an important part of its interpretation, so there has to be some clear and authoritative guidance as to what constitutes ‘adequate procedures’”.<sup>214</sup> It was also firmly backed by Professor Horder:

I would not be confident about letting this offence loose on the general public unless and until there has been adequate guidance agreed so that there is public confidence, business confidence in how this is going to work.<sup>215</sup>

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209 BB49, paras 6-7

210 BB49, para 6

211 BB60

212 BB32

213 BB20 (DLA); Q248; Q327; BB40, para 1.7

214 Q202

215 Q67

119. The Director of the Serious Fraud Office stated that, at a minimum, such procedures should entail the creation of “a robust compliance tool kit to assess how successful the company has been in mitigating risk including”:

- a clear statement of an anti-corruption programme fully and visibly supported at the highest levels in the company (what is prohibited behaviour, etc)
- a clear and personalised reporting structure from the CEO down to all managers
- a code of ethics
- principles that are applicable regardless of local laws or culture
- individual accountability
- a policy on gifts and hospitality and facilitation payments
- a policy on outside advisors/third parties, including vetting and due diligence
- training – to enable staff to comment and input
- robust maintenance - auditing/updating/evaluation/actions.

The wide range of private sector protocols that we received during our inquiry illustrated the ways in which these basic principles could be fleshed out in a flexible and practical way for business.<sup>216</sup>

120. More generally, the UK Anti-Corruption Forum reflected the broad range of views of our witnesses on the content of guidance when it stated:

What must it contain? What the components are for a proper compliance programme, what adequate procedures, systems and controls are, what is needed internally by way of training and so on, what is needed in relation to foreign subsidiaries and joint ventures, and it must deal with difficult issues, such as facilitation payments and hospitality.<sup>217</sup>

Other witnesses also raised a range of additional issues – for instance, the International Chamber of Commerce (UK) added the treatment of commercial agents to this list.<sup>218</sup> We note that guidance is one of several issues that will require a co-ordinated response with the Scottish Executive and the Governments of the Overseas Territories and Crown Dependencies.

**121. Official guidance on how to comply with the provisions of the draft Bill should, at a minimum, cover the meaning of “adequate procedures”. The process of sanctioning guidance should provide an opportunity for professional bodies to work alongside Government in identifying any further areas in which clarification is required. These could include, for instance, questions about the application of the draft Bill to subsidiaries, joint ventures and commercial agents.**

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216 BB10; BB24; BB27; BB28; BB30; BB32; BB45; BB50

217 Q248 (James Maton)

218 Q176 (Andrew Berkeley)

### (c) Timing

122. There are competing interests over the timing of guidance. The Director of the Serious Fraud Office expressed his concern about protracted delays pending the preparation of “very detailed” protocols: “the important thing for investigators and prosecutors is to have the new offences which we can then implement”.<sup>219</sup> In contrast, the Confederation of British Industry and ThalesUK were keen for official guidance to be available before the new offences came into force.<sup>220</sup>

**123. There is no reason why the preparation of official guidance should delay the passage of a Bribery Bill. It should, however, be available for use before the offences come into force in order to give businesses time to prepare for its introduction.**

### (d) A formal advisory service?

124. The Attorney General in the United States is required to provide an advisory service responding to requests about whether a proposed action will be lawful pursuant to the Foreign Corrupt Practices Act 1977. There is a rebuttable presumption that acting in accordance with the advice will mean that no offence has been committed. A number of witnesses called for an equivalent service to be included in the draft Bill.<sup>221</sup> For instance, Philip Bramwell of BAE Systems Plc stated:

This is of immense value to companies looking for certainty about how conduct would be treated and about the efficacy of their proposed approach to compliance. It is especially useful around mergers and acquisitions and new businesses that may have an uncertain history.<sup>222</sup>

125. The Director of the Serious Fraud Office stated that there are occasions when his office will discuss points of general principle with companies under its “policy of engagement”, including in relation to proposed mergers, but he drew a clear line at providing a formal advisory service:

What we are not prepared to do – it would be quite inappropriate for investigators and prosecutors – would be for a company to come to us and say they are about to do business in such and such a country with such and such people.<sup>223</sup>

The Attorney General and the Director of Public Prosecutions agreed, noting the differences between the criminal justice systems in the United States and the United Kingdom which we identified above. Professor Wells viewed an advisory service as an “unnecessary public expense”.<sup>224</sup>

126. Professor Horder offered tentative support to the idea of creating an independent body to provide an advisory service:

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<sup>219</sup> Q414 (Richard Alderman)

<sup>220</sup> BB46 para 9; Q333 and 334;

<sup>221</sup> Q206 (Andrew Berkeley); BB19, para 6.3

<sup>222</sup> Q305

<sup>223</sup> Q399 (Richard Alderman)

<sup>224</sup> Q80

[I]f I could start from a slightly different view, were we to have in this country an anti-bribery body, a commission, a semi-official body of some sort, charged with giving this kind of advice I could well see as being appropriate [...] Were we to have somebody charged with giving advice of this kind I think that would be very much of benefit both publicly and to companies and would give them reassurance.<sup>225</sup>

127. We are aware of examples of this type of independent body, such as Hong Kong's Independent Commission Against Corruption (ICAC). In particular, the ICAC's Corruption Prevention Department created an Advisory Services Group in 1986 which has since advised over 3,000 private companies. The lack of time available to carry out our inquiry has prevented us from exploring this body in any detail, although we understand that its services are focused on compliance procedures aimed at minimising the risk of corruption rather than the risk of a prosecution arising from prospective action.<sup>226</sup> The Secretary of State for Justice stated that he could envisage non-Government bodies providing advice on compliance, but dismissed the potential for such a body to provide anything approaching the semi-binding advice obtained in the United States.<sup>227</sup> The Director of Public Prosecutions and the Attorney General were also concerned about an independent (but official) body advising on prosecutorial issues on the grounds that it would risk undermining the independence of prosecutors, who would ultimately need to take the final decision about whether to charge a company.<sup>228</sup>

128. The Director of the Serious Fraud Office, among others, also raised the potential resource implications of an advisory service: "there would be a natural temptation to seek advice on each transaction so as to show compliance with the adequate procedure. This would be unmanageable".<sup>229</sup> The US Department of Justice was unable to provide information about the costs of providing its service, although we were informed that it receives fewer than five requests for an opinion in an average year<sup>230</sup>.

**129. We acknowledge that a formal advisory service similar to that provided in the United States and Hong Kong, could have great benefit. We note, however, that differences between our criminal justice systems prevent direct analogies being drawn and mean that it would in practice be difficult to establish such a service. We are therefore not persuaded that the Government should seek to establish an equivalent in the United Kingdom. We are particularly concerned about its potential impact on the independence of prosecutors.**

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226 Q66

226 Further information is available at [http://www.icac.org.hk/en/checks\\_and\\_balances/ac/acc/index.html](http://www.icac.org.hk/en/checks_and_balances/ac/acc/index.html)

227 Q587 (Jack Straw MP)

228 BB48; BB60

229 BB47, para 4b

230 BB57, para 19

## 7 Special Cases

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### Facilitation payments

130. A “facilitation payment” refers to the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they perform their duty, either more promptly or at all. This type of payment is illegal under the current law, but there is a general understanding that a prosecution is unlikely for an offence involving such small amounts of money. The position is different in the United States and several other OECD member states where anti-corruption legislation includes a specific exception or defence for small facilitation payments.

131. Under the provisions of the draft Bill, facilitation payments will usually continue to be illegal. This is because a facilitation payment is likely to be “improper” under the general offences, while not being “legitimately due” under the foreign official offence, at least in the absence of authorisation under a local written law.<sup>231</sup> The law firm, Reynolds Porter Chamberlain, expressed “grave concerns” that UK business would be put at a competitive disadvantage compared to businesses from states – such as the US – where a legal exception was provided. It called for the draft Bill to include a defence similar to that in the US. It also noted that reliance on prosecutorial discretion caused difficulties for organisations with reporting obligations under the Proceeds of Crime Act 2002.<sup>232</sup> Several other witnesses agreed.<sup>233</sup>

132. A defence for facilitation payments was strongly opposed by Professor Wells on grounds of principle: “by including a specific defence there is a danger that they are endorsed as legitimate.[...] The message of the Bill that bribery is wrong would be diluted”.<sup>234</sup> Transparency International UK added: “it would be inconceivable that a Bill modernising and reforming the UK law on bribery should step backwards on this point”.<sup>235</sup>

133. We also note information provided by the OECD Secretariat outlining the practical difficulties that have been encountered in those states that operate a defence for facilitation payments, rather than relying on prosecutorial discretion.<sup>236</sup> Professor Horder elaborated:

[W]e were troubled actually by the definition of this notion of what constitutes ‘small’ in certain contexts, what counts as a ‘facilitation payment’. It seems like something ready made for litigation up and down the courts [...] payments made by way of facilitation and so on will have to show up in a company’s accounts somewhere and they must be in a position, at least, to say what those payments were. I think that that will, in the nature of things, keep so-called ‘facilitation payments’ in

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231 BB14

232 BB34, para 3

233 Q337 (Lawrence Hammond, Philip Bramwell); Q222 (Andrew Berkeley)

234 BB15

235 BB54

236 BB31, paras 10-13

check [...] and we just carry on as we always have, only prosecuting where the public interest demands that you prosecute.<sup>237</sup>

134. There are undoubtedly difficult and unanswered dilemmas facing business, as Lord Robertson illustrated: “stevedores on the docks of a country say they will not unload your ship unless a payment is made to their union or to their corporate organisation, what do you do? You say, ‘No. We will just let our ships lie there’[?]”.<sup>238</sup>

135. These dilemmas were manifest in the fact that the UK Anti-Corruption Forum’s members were unable to reach consensus on the approach that should be taken. While the Forum is strongly in favour of treating facilitation payments as an offence for acts within the UK, it noted the need for caution in the international arena:

It is an extraordinarily difficult problem and [...] here is a range of opinion from those who feel that facilitation payments should be outlawed to those who feel that they should not be a matter for the criminal law [...] Very often, the person who is paying the facilitation payment is, in effect, the victim of extortion and very often that is junior employees in quite difficult situations with traffic police or immigration officers, or whatever it may be.<sup>239</sup>

136. The Forum was united, however, in calling for the issue to be tackled “head-on”: “whatever regime is put into place [...] there need[s] to be certainty as to the circumstances in which they will be prosecuted and in which they will not, and detailed guidance is necessary”.<sup>240</sup> Transparency International UK stated that the best approach was for prosecutors to develop “sensible criteria” that could evolve in light of experience.<sup>241</sup>

137. Prosecutors were generally content with this approach. For instance, the Director of the Serious Fraud Office endorsed “prosecutorial discretion, backed by appropriate guidance”:

Facilitation payments will be unlawful [...] but] small facilitation payments are unlikely to concern the SFO unless they are part of a larger pattern (when, by definition, they would no longer be small facilitation payments) where their nature and scale has to be evaluated [...] The SFO considers, like Lord Woolf and a number of UK corporates, that any facilitation is unjustifiable and should be removed because these payments cut across transparency and openness. They also render a corporate (and other corporates) more vulnerable to demands for larger bribes. They are a major contributor to the belief that bribery is a necessary part of business culture.<sup>242</sup>

**138. We agree with the Government that facilitation payments should continue to be criminalised. A specific defence risks legitimising corruption at the thin end of the wedge. At the same time we recognise that business needs clarity about the**

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237 Q23

238 Q156

239 Q267 (James Maton)

240 Q267 *ibid*

241 BB54

242 BB14

**circumstances in which facilitation payments will be prosecuted, particularly given the difficult situations that can arise. Therefore the basic principles of prosecution policy, which we would expect to adhere firmly to the concept of proportionality, must be made clear. But we would not welcome guidance that was so detailed that it effectively introduced a defence into the law.**

## Corporate hospitality

139. It is generally accepted that corporate hospitality is a legitimate part of doing business at home and abroad, provided that it remains within appropriate limits. The main offences draw those limits around whether or not there has been improper conduct, as outlined above. The Director of the Serious Fraud Office believed that this was a sensible approach, since “most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct. This would therefore not trigger the general offences”.<sup>243</sup>

140. Professor Horder stated that there was an additional layer of protection under clause 1 since it requires proof that the person giving the hospitality intended the recipient to be improperly influenced. For instance, he illustrated the difference between holding a “getting to know you” session and buying someone a flat in Central London: the latter would show an intention to improperly influence someone, namely to gain a contract other than on the merits. The Director of the Serious Fraud Office added: “there is a quite clear distinction that I am sure juries will be able to make between inexpensive, modest hospitality offered to many and lavish hospitality that might be offered to a very small number of people in the hope of getting a contract”.<sup>244</sup>

141. The situation is altogether different under clause 4 (bribery of foreign public officials) where the “improper” test is replaced with different criteria:

- First, an advantage must be offered or given to a foreign official;
- Second, there must be an intention a) to influence the official and b) to obtain or retain business; and
- Third, the advantage must not be permitted under the local written law applying to the official.

142. There was a difference of opinion about whether these criteria would routinely criminalise modest hospitality in light of the unlikelihood that a local written law would exist. For instance, the Director of the Serious Fraud Office stated that modest hospitality might fall outside the offence because there might be no intention to influence in these circumstances.<sup>245</sup> Professor Horder, however, took a different view:

In clauses 1 and 2, it is always open to the provider to say that he or she did not, in providing hospitality etc, intend to induce the recipient to behave improperly. That line of argument is not open under clause 4, because the offence is ‘influence’ based not ‘impropriety’ based. Clearly, any hospitality may ‘influence’ a foreign public

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243 BB14

244 Q376 (Richard Alderman)

245 BB14

official, often perfectly legitimately. An example would be when a hospitality showcasing event shows how much better organised and committed the relevant organisation is to provide goods and services etc., and the official is influenced by that.<sup>246</sup>

143. Following Professor Horder's analysis would mean that hospitality would be routinely caught by clause 4. He stated that this was not an "inherent weakness" in the design of the draft Bill given that prosecutorial discretion can differentiate the good from the bad:

There could not possibly be any public interest in prosecuting for bribery, when the influence secured over the official was perfectly proper. However, a company might have a hard time justifying taking officials on a foreign skiing trip, if the idea is simply to set out their wares and illustrate their reliability as a company. Even that example would be different if the company was a skiing equipment manufacturer seeking to secure a contract to supply an Alpine Army division, or the like.<sup>247</sup>

144. BG Group Plc told us that it is periodically required to meet the expenses of a foreign official visiting one of its plants or attending a technical training course. It called for greater certainty to be provided under clause 4 through a statutory defence for "reasonable and bona fide" expenses spent promoting or performing part of its business. A defence of this kind exists in the United States and in Canada.<sup>248</sup>

145. A statutory defence was viewed by Professor Horder as an "unworkable" solution:

Imposing a limit on corporate hospitality would be a very, very difficult, and probably unworkable, thing to do [... because] it all depends on the nature of what you are offering, what other people are doing, what you can afford. There are a very, very broad range of considerations [...] so you would have to be very careful about how you set out that definition, I do not regard that as a very promising route to go down.<sup>249</sup>

146. As we noted in chapter 4 above, The Corner House and the International Chamber of Commerce (UK) both proposed the broader solution of adding the words "improper", "undue", or "corrupt" to clause 4 as a way of excluding legitimate hospitality and other conduct that they viewed as justifiable. This was opposed by the Attorney General, who favoured hospitality being addressed through prosecutors applying on the public interest test.<sup>250</sup> It was also opposed by Professor Horder:

Might it not be said, then, that 'improperly' should be tacked on as an adverb after 'influence', so as to distinguish legitimate from illegitimate hospitality? [... T]he answer is 'no', because that would inevitably re-introduce questions about whether cultural norms and expectations can make a payment 'proper', and that is exactly the result that this offence is designed to prevent.<sup>251</sup>

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246 BB21

247 Ibid

248 BB31, paras 50-51

249 Q41

250 BB60

251 BB21

147. Corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits. The general offences impose an appropriate limit on this activity under the “improper” performance test. However, the main limit under clause 4 is based on prosecutorial discretion. We are content with this and call on the Government to reassure the business community that it does not risk facing prosecution for providing proportionate levels of hospitality as part of competing fairly in the international arena.

## Offset

148. “Offset” refers to the established practice of companies providing industrial, commercial or other economic benefits as part of winning a state-funded contract. For instance, an offset might require the company to build schools, improve the transport network or make a technology transfer. It is a particularly common feature of contracts in the defence industry, which led the Woolf Committee to conclude:

Offset represents a key area of ethical and reputational risk. Defence companies will often employ third party advisers to assist them in both the development of the Offset package as part of the procurement process and in the subsequent delivery of individual projects. This can expose the company to similar ethical and reputational risks regarding bribery and corruption as does the use of Advisers on the main contract. Offset contracts need to clearly demonstrate value for money if they are not to generate suspicions and allegations that their purpose is to hide a payment to a third party, and due diligence undertaken to ensure anyone involved in, or related to, the awarding of the main contract does not receive financial benefit from an Offset contract.<sup>252</sup>

149. A Ministry of Justice official stated that any offset arrangement that advantages particular individuals will be lawful under clauses 1 and 2 provided there is no issue of improper performance; and by analogy it would also be lawful under clause 4 provided it is permitted under a local law.<sup>253</sup> However, the tougher issue which the Woolf Committee identified (and which businesses will have to resolve as part of maintaining “adequate procedures”) is how to monitor whether the arrangements represent a genuine offset as opposed to the illegitimate siphoning of funds to a particular individual. As Lord Robertson stated:

It is not a coincidence that a lot of what is offered in terms of offset happens to be a factory in the prime minister’s own constituency if they have a constituency-based system. These are grey areas that are very difficult to pin down. Stacks of money in a black plastic bag are relatively easy to deal with but offset programmes can be finessed in a way that is very difficult to see.<sup>254</sup>

150. Philip Bramwell of BAE Systems also made us aware of the difficulties posed by offset to companies, including those with significant levels of resource:

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252 Woolf Committee, *Business ethics, global companies and the defence industry*, May 2008, para 3.45

253 Q601 (Michael des Tombe)

254 Q153

[T]here are significant risks associated with offset because credits are awarded by government departments in return for work done. They may not be linear with the cost of the work. We are currently yet again revising thoroughly our offset processes and policies to ensure that we apply the same standards to offset as we do to business winning generally. I do not expect offset to decline, because it is a feature that government buyers of defence equipment wish to see and indeed stipulate in their contracts.<sup>255</sup>

151. We see merit in official guidance addressing “offset”, given that it is one of the key ethical risks identified by the Woolf Committee, while recognising that it can have a proper place in commercial negotiation.

## 8 Jurisdiction

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### Individuals

152. Under the current law, an individual of any nationality can be convicted of a bribery offence under the draft Bill where any of the relevant acts or omissions took place inside the UK. Where none of the relevant acts or omissions took place inside the UK, an individual can only be convicted of a bribery offence if they are a citizen, which for these purposes includes British Overseas citizens.<sup>256</sup> **The draft Bill would extend the jurisdiction of the new offences to include actions by anyone who is “ordinarily resident” anywhere in the UK (clause 7(4)). We welcome this proposal, which ensures that individuals cannot live within the UK without being subject to the same criminal law as citizens.**

### Companies

153. The jurisdiction of the new offence for commercial organisations that fail to prevent bribery includes any company (or partnership) that is incorporated (or formed) in England, Wales or Northern Ireland. It also includes any company or partnership that “carries on business, or part of a business” in any of those countries. This creates an ambitious and far-reaching jurisdictional test for the new offence. It has been welcomed by the OECD, among others: “such coverage is necessary, since foreign bribery is often committed by multinational enterprises that operate in multiple jurisdictions around the world”.<sup>257</sup>

154. These provisions have, however, attracted criticism for creating jurisdiction over foreign companies without the need for this jurisdiction to be connected to the bribe other than through some (potentially unrelated) part of its business being carried out inside England, Wales or Northern Ireland. Herbert Smith cited the example of a French company paying a bribe in the far East, and stated:

These proposals extend the jurisdiction beyond that enjoyed even by the US authorities under the FCPA [Foreign Corrupt Practices Act]. We are not sure these consequences were intended and would consider that in the situation outlined above it should be a matter for the French Courts to take jurisdiction over.<sup>258</sup>

155. Professor Horder viewed the US as a “special case” that is justified in taking broad jurisdiction over its criminal law in view of its “political and legal power”.<sup>259</sup> He stated that the Government’s proposal for broad jurisdiction under clause 5 was “reasonable” but he warned about the risk of “tit for tat legislation”.<sup>260</sup>

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256 Anti-terrorism, Crime and Security Act 2001, s109

257 BB31, para 5

259 BB49

259 BB06, para 7

260 Q68

[I]f we were to start taking jurisdiction over companies based in, say, tyrannical regimes, just because those companies did business here, what would be to stop those regimes using that as a justification for doing likewise vis-à-vis British companies? The result would be that British business people would be liable to find themselves arrested and imprisoned in those regimes [...] We did not find that an attractive prospect, but the Government feels the risk ought to be shrugged off.<sup>261</sup>

156. Herbert Smith called for an amendment to narrow clause 5 so that it only applies to foreign companies when the bribe benefits that part of their business carried on in England, Wales or Northern Ireland.<sup>262</sup> However, the Director of the Serious Fraud Office viewed the wide jurisdictional reach of clause 5 as an important part of creating a level playing field internationally. Both he and the Director of Public Prosecutions emphasised the potential for resolving any clash in jurisdiction by entering prosecution agreements and liaising with foreign law enforcement agencies on an *ad hoc* basis. The Secretary of State for Justice agreed.<sup>263</sup> We also believe that this is an appropriate way to proceed.

157. However, **there are two matters that the Government must consider clarifying in relation to the jurisdiction of clause 5 prior to the Bill's introduction:**

- **The meaning of “carries on a business” and “part of a business”.** The Director of Public Prosecutions stated: “It is not clear on the face of the draft Bill what ‘carries on business’ means. We wonder whether a foreign body without a place of business in EWNI [England, Wales or Northern Ireland] would be a ‘relevant commercial organisation’”.<sup>264</sup> We note that there are a variety of other legal terms that are already used to determine jurisdiction, such as the concept of “establishment” under the EC Regulation on Insolvency Proceedings 1346/2000.
- **The need to prove an offence under clauses 1, 2 or 4 as part of proving an offence under clause 5.** In particular, the policy aim of the draft Bill is to prevent a company being able to stay at arms length from corruption by using a commercial agent who operates outside the UK. The draft Bill aims to address this potential loophole through clause 7(5) which states that it does not matter where the acts took place for the purpose of establishing an offence under clause 5. However, it is unclear whether this overrides clause 5(2) which limits any offence under clauses 1, 2 and 4 to acts that take place within, or by a person connected to, England, Wales or Northern Ireland. We note the comments of the Director of Public Prosecutions and Lovells on this issue, which could be addressed by an appropriate amendment to the draft Bill.<sup>265</sup>

158. We also note that the OECD encourages the Government to consider extending jurisdiction to any company with its “seat” or principal place of business within the territory.<sup>266</sup> This approach is taken in France, Greece, Italy and the US.<sup>267</sup> The UK Anti-

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261 BB06, para 7

262 BB49

263 Q606 (Jack Straw MP)

264 BB48

265 BB48, para 5; BB39, paras 4.28 to 4.29

266 BB31, para 4

267 BB31, para 4

Corruption Forum also called for the jurisdiction to extend to any company that is listed on a stock exchange inside the UK, or which has received public funds from the UK through the Department for International Development or otherwise, or which negligently failed to prevent bribery where one or more steps took place inside the jurisdiction.<sup>268</sup>

**159. We note that a range of options has been proposed for extending the jurisdiction of clause 5, and anticipate that the Law Commission’s review of corporate criminal liability will valuably inform the Government’s consideration of them.**

## Overseas Territories and Crown Dependencies

160. The draft Bill takes nationality jurisdiction over individuals who are British Overseas citizens (clause 7(4)), but not companies that are incorporated in an Overseas Territory or a Crown Dependency. This reflects a difference that exists under the current law.<sup>269</sup> The OECD has previously urged the UK to extend the draft Bill to include companies incorporated in those territories, such as the Cayman Islands, the British Virgin Islands, Bermuda and Gibraltar. Bond, the UK membership body for non-governmental organisations working in international development, believes that the lack of provision in relation to such companies represents a “major loophole” given that a significant number of parent companies are based in those territories.

161. Professor Horder stated that the UK cannot force those territories to accept any law made by Parliament, though additional pressure could be applied to bring a territory’s law into line with the UK. The Secretary of State for Justice added:

Whilst we are responsible for the overseas relations of the Crown Dependencies and also for those of the British Overseas Territories, neither the British Overseas Territories nor the Crown Dependencies are part of the United Kingdom.[...] We would only legislate in respect of the Crown Dependencies where their government systems had broken down. I am perfectly clear that the Crown Dependencies, when and if we have legislation on the statute book, will go ahead and implement equivalent legislation. That normally happens and I will be very strongly encouraging them to do so. There is a similar but not exactly the same situation with the British Overseas Territories. Again it is a matter for them, although if governance is breaking down – and there is a case in point at the moment – we can seek to impose direct rule.<sup>270</sup>

**162. We hope that the Government will succeed in its aim of ensuring that Crown Dependencies and British Overseas Territories bring their laws into line with the proposals in the draft Bill, including clause 5. The size and significance of the corporate community in some of those jurisdictions makes this a task that should be pursued vigorously.**

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<sup>268</sup> BB04, para 20

<sup>269</sup> Anti-terrorism, Crime and Security Act 2001, s109

<sup>270</sup> Q603 (Jack Straw MP)

## Scotland

163. We noted in the introduction to our report that the extent of the draft Bill is largely limited to England, Wales and Northern Ireland. There are, however, some provisions which apply to the UK in its entirety. This creates at least one anomaly in relation to the draft Bill's jurisdictional reach. In particular, the offences under clauses 1, 2 and 4 apply to companies incorporated anywhere in the UK, while clause 5 only applies to companies incorporated in England, Wales or Northern Ireland. Herbert Smith states: "a Scottish company incorporated in Scotland but which does not do business in whole or in part in England and Wales or Northern Ireland, could not be guilty of an offence under clause 5, but could however be guilty of an offence under clauses 1, 2 or 4, regardless of whether or not there is any connection to England or Wales".<sup>271</sup> The Government should work with the Scottish Executive to ensure that no such anomaly finds its way into the statute books.

**164. We are surprised that the Government has not reached an agreement with the Scottish Executive about the approach to be taken, given the length of time that the draft Bill has been subject to consultation and the importance of meeting the UK's international obligations, and we urge that this be brought to a conclusion without further delay.**

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271 BB49, para 15

## 9 The Attorney General

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### Powers of consent

165. Clause 10 would remove the requirement to obtain the consent of the Attorney General before commencing criminal proceedings for a statutory bribery offence. In its place there would be a requirement to obtain the consent of the Director of the Crown Prosecution Service, the Serious Fraud Office, or Revenue and Customs Prosecutions. This reflects requests made by the OECD's Working Group and the Council of Europe's monitoring body, GRECO, which view the Attorney General as being too close to the political heart of Government to provide the independence offered by the Directors.<sup>272</sup> The proposal is strongly endorsed by The Corner House and Transparency International UK, among others.<sup>273</sup>

166. The Government's decision to include clause 10 in the draft Bill represents a small piece of a much wider debate on the reform of the Office of the Attorney General. In particular, the Attorney published a consultation paper on the future of her role in July 2007 following the launch of the Government's Green Paper: *The Governance of Britain*.<sup>274</sup> It raised complex constitutional questions concerning her core functions as:

- Legal advisor to the Government;
- Minister with superintendence for the prosecuting authorities and shared responsibility for criminal justice policy; and
- Guardian of the public interest.

167. Detailed legislative proposals were subsequently published as part of the draft Constitutional Renewal Bill in March 2008. Among them were proposals to transfer consent from the Attorney General to the Directors in relation to a wide range of offences, including the current statutory bribery offences.<sup>275</sup> Those proposals set out the same aim as clause 10 of the draft Bill but in a more comprehensive way. In particular, the 2008 draft Bill included proposals to reform of one of the Attorney General's most significant powers, the non-statutory power of direction that enables the Attorney to intervene in any prosecutorial decision taken by a prosecuting authority.

168. This power strongly divides opinion over the correct balance to be achieved between prosecutorial independence and parliamentary accountability. Those who favour its restriction or removal highlight the fact that it has not been used in recent years and that it is not universally acknowledged to exist. The power is, however, viewed by past Attorneys General, among others, as a "nuclear option" of last resort where a fundamental difference of opinion might have arisen on a matter of great importance. The draft Constitutional Renewal Bill proposed formalising the power of direction by reducing it to statute, but also

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272 The Group of States Against Corruption (GRECO); BB38; OECD Phase 2 bis report, above, paras 119-129

273 BB55; Q539 and Q541

274 Ministry of Justice, *The Governance of Britain*, Cm 7170, July 2007; *The Governance of Britain – A Consultation on the Role of the Attorney General* (Cm 7192), July 2007

275 Constitutional Renewal Bill, Cm 7342-11, clause 7

narrowing it by restricting directions to any case where the Attorney General considered its use to be necessary to safeguard national security.

169. Views on the proposals in the draft Constitutional Renewal Bill were mixed. The House of Commons Justice Committee broadly welcomed the proposed amendments to the powers of consent and direction, while calling for more radical reform of the Attorney General's advisory role.<sup>276</sup> The Joint Committee on the draft Constitutional Renewal Bill was also content with the transfer of consent (akin to clause 10 of the draft Bribery Bill), but only in circumstances where the power of direction remained untouched and unrestricted:

We sympathise with the Government's concern to ensure operational independence for the prosecutorial authorities, but we are not convinced that removing the Attorney General's power to give a prosecution direction is an appropriate route for achieving this. We were impressed by the strength of the evidence we received that the "nuclear option" of being able to stop a prosecution must be retained, and that the most appropriate person to exercise it is the Attorney General, as she is directly accountable for its exercise to Parliament. Removing this power would mean that the Attorney would have responsibility without power.<sup>277</sup>

170. We asked the Attorney General whether clause 10 of the draft Bill risked undermining parliamentary accountability by leaving her responsible for prosecutorial decisions but without the power to intervene. She did not agree, given her general powers of superintendence and her ongoing preparation of a future protocol that will formalise the Attorney General's relationship with the prosecutorial Directors.<sup>278</sup> We further questioned whether powers of superintendence would still suffice if the power of direction was lost or restricted. The Attorney General acknowledged the strength of opinion on both sides over this issue. She stated her view that powers of direction were no longer necessary in view of the proposed protocol, before adding:

It is important to remember that the draft Bribery Bill contains no provision in this regard. Should the draft Bill in its current form become law, the consent function in relation to bribery cases will pass from me to the prosecuting authorities, but my power of direction will remain unchanged. It appears to me that the power of direction and the wider constitutional position of the Attorney General should be addressed in the context of the draft Constitutional Renewal Bill, rather than this Bill.<sup>279</sup>

**171. The Attorney General's powers of consent and direction raise complex constitutional issues that lie at the heart of ensuring parliamentary accountability for the criminal justice system. We agree with the Government that the power of direction should remain in place without being reformed by the draft Bribery Bill. Since this**

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<sup>276</sup> House of Commons Justice Select Committee, *Draft Constitutional Renewal Bill, (provisions relating to the Attorney General)*, Session 2007-08, HC 698, paras 41 to 52

<sup>277</sup> Joint Committee on the draft Constitutional Renewal Bill, HC 551/HL 166, July 2008, para 114

<sup>278</sup> Qq 626-629 (Baroness Scotland of Asthal)

<sup>279</sup> BB60. At the time the Committee conducted its Inquiry it was expected that the Government would publish detailed proposals for reforming the Office of the Attorney General in the Constitutional Renewal Bill. Following the conclusion of our Inquiry, the Government published the Constitutional Reform and Governance Bill which did not contain any such proposals.

power will remain in place, we are satisfied that the power of consent should be transferred from the Attorney General to the Directors of the prosecuting authorities (clause 10). Any broader reform of the Attorney General's Office, including her power of direction, must await comprehensive proposals being pursued in the future.

## Powers of delegation

172. Without reaching a firm conclusion on the draft Bill's proposal to transfer consent, we note that there is potential under clause 10 for any prosecutorial decision to be delegated from the Director of the prosecuting agency to a lower level employee or prosecutor. These decisions would currently be taken by the Attorney General or Solicitor General personally. The decisions are few in number and have the potential to raise issues of considerable complexity and sensitivity.

173. The Confederation of British Industry called for the draft Bill to include a restriction preventing delegation to anyone other than a "senior official": "we believe that delegation of consent to a specific person, persons of a specified description or related to specified circumstances in sub-clause 3 should only be made to someone of sufficient seniority".<sup>280</sup> The Attorney General stated that prosecutors require a degree of flexibility, but also noted:

These issues are very important, so one would expect that, if the matter were to be taken by a Director or the DPP or otherwise, there would be an appropriate degree of seniority in taking that decision.<sup>281</sup>

In her view, the best way to restrict the inappropriate delegation of powers of consent would be through the forthcoming prosecutors' protocol. The Attorney General stated that the protocol could include an express limit on delegation to "nominated and identified individuals" only.<sup>282</sup>

**174. Any transfer of consent from the Attorney General to the Directors of the prosecuting authorities should limit the Directors' power to delegate their role in relation to bribery cases to senior postholders who are nominated and identified under the protocol for prosecutors.**

175. On a separate note, we draw attention to section 53 of the Serious Crime Act 2007 which requires the Attorney General's consent prior to commencing proceedings in certain circumstances where there is an international element to the offence. The transfer of consent to the Directors under clause 10 does not extend to amending the 2007 Act, which would lead to an inconsistency under the draft Bill. The Director of Public Prosecutions described it as an "anomaly" which the Secretary of State for Justice stated would be addressed either under the draft Bill or under the forthcoming Constitutional Renewal Bill.

**176. The transfer of consent to the Directors under clause 10 of the draft Bill does not extend to amending section 53 of the Serious Crime Act 2007, leading to an inconsistency in the draft Bill. We recommend that the Government address this anomaly in the forthcoming Bribery Bill.**

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<sup>280</sup> BB07, para 31

<sup>281</sup> Q626 (Baroness Scotland of Asthal)

<sup>282</sup> Q636 (Baroness Scotland of Asthal)

## 10 Article 5, OECD Convention

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177. Article 5 of the OECD Convention states: “Investigation and prosecution of the bribery of a foreign public official [...] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.<sup>283</sup>

178. The OECD’s Working Group has been highly critical of the UK’s failure to give Article 5 an adequate status under domestic law, stating that “it must apply with full force and effect in [the domestic] sphere, both as a practical and legal matter”.<sup>284</sup> It has stopped short of calling for Article 5 to be enshrined in primary legislation but its Secretariat asked the Government to “clarify the status of Article 5 of the Convention in domestic law and to ensure that it applies effectively to all investigators and prosecutors at all stages of a foreign bribery case”.<sup>285</sup>

179. Whenever it arose, Article 5 was discussed in the shadow of the judicial review proceedings concerning the decision of the then Director of the Serious Fraud Office to halt an investigation into BAE Systems Plc over the Al Yamamah defence contracts. The Divisional Court held that the Director had failed to protect the rule of law by succumbing to a threat made by a Saudi official that intelligence sharing arrangements would be withdrawn unless the investigation was abandoned<sup>286</sup>. The House of Lords reversed this decision on the grounds that the Director was entitled to base his decision on the threat to public safety that would arise by continuing the investigation.<sup>287</sup>

180. The pressure group that brought the application for judicial review, The Corner House, described Article 5 as “completely unenforceable”.<sup>288</sup> It stated that nothing less than giving it full legislative status would prevent the Government from “abusing national security to close down embarrassing situations”:

[P]rimary legislation would allow the courts to decide on the meaning of Article 5 and not leave interpretation of Treaty obligations to a prosecutor or, indeed, to the executive. It is really important that the courts should be able to have a say in the interpretation of those particular clauses.<sup>289</sup>

181. The Attorney General stated that the more appropriate way of giving effect to Article 5 would be by means of its inclusion under a code or protocols applying to all prosecutors:

[I]t is something which the DPP [i.e. Director of Public Prosecutions] has already included in the [Crown Prosecutors’] guidelines. Also, there is of course every

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283 Available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf>

284 Phase 2 *Bis* report, para 108

285 BB31, para 21

291 [2008] EWCH 714 (Admin)

287 [2008] UKHL 60

288 BB13, para 12

289 Q542 and Q544

possibility that, in the guidance that I give through the Attorney General's guidelines, this is something that could be highlighted too, but it is important to remember that Article 5 has purchase not just on these issues, but generally in the work that a prosecutor will do, and we do think that putting it in the prosecutorial guidelines is the correct place for Article 5 to sit.<sup>290</sup>

182. Jeremy Carver of Transparency International (UK) agreed: "What I do want to see, which ought to be quite sufficient, is that the code of practice for prosecutors firmly and unequivocally recognises Article 5 as a necessary element of the decision when they exercise their discretion. That way they can be properly tested by the courts".<sup>291</sup>

**183. Article 5 of the Organisation for Economic Co-operation and Development's Convention must, at a minimum, be enshrined in guidelines applying to all prosecutors. Confidence in the criminal justice system will be undermined unless this important principle is both protected and respected. We recommend that the Attorney General take the earliest opportunity to ensure that this happens.**

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290 Q624 (Baroness Scotland of Asthal)

291 Q543

## 11 Penalties

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184. Clause 11 introduces the following penalties:

- A maximum ten year sentence of imprisonment for individuals who commit an offence under clauses 1 (bribing), 2 (being bribed) and 4 (bribing a foreign public official); and
- An unlimited fine for any company or partnership that is convicted of an offence under clause 5 (negligently failing to prevent bribery).

### Unlimited fine

185. The explanatory notes that accompany the draft Bill do not explain the way in which the unlimited fine will be assessed. This has caused significant concern amongst the members of GC100, who call for clarification on “the way in which the Courts should approach the level of the fine i.e. would they be referable to turnover, the value of the contract, the profit, the quantum of the bribe or some other criterion[?]”<sup>292</sup> The Confederation of British Industry states that the fine should be assessed in a way that is proportionate and “based on turnover of the business so that small businesses are not unfairly penalised”.<sup>293</sup>

### Confiscation

186. A bribery conviction under the draft Bill triggers the court’s power to impose a confiscation or civil recovery order under the Proceeds of Crime Act 2002. These powers can be used to recover all the proceeds of a crime, which can have a particularly punitive effect in relation to bribery offences. Take for example an individual who makes a buyout offer worth £15 million to a company’s shareholders, and who pays a bribe of £50,000 to a Chief Executive to secure their endorsement of the buyout. That individual risks losing the entire value of the company and its assets if he acquires it due to the bribe succeeding. That is, the penalty for paying a bribe of £50,000 could be as high as £15 million.

187. The 2003 Joint Committee on the draft Corruption Bill considered a similar example and concluded: “both Houses may wish to consider whether this [penalty] is wrong in principle and whether it would be a violation of the First Protocol to the ECHR”.<sup>294</sup> The Ministry of Justice stated that the courts could be relied upon not to operate confiscation powers in a way that contravenes human rights legislation. However, GC100 re-iterated the importance of the combined powers to fine and to confiscate being exercised in a way that remains “proportionate and reasonable”.

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<sup>292</sup> BB10, para 2.4

<sup>293</sup> BB08, p3

<sup>295</sup> Draft Corruption Bill, HL 157, HC 705, July 2003, para 161

## Debarment

188. Under the Public Contracts Regulations 2006 (which give effect in the UK to EU law) a company will be automatically and perpetually debarred from competing for public contracts where it is convicted of a corruption offence. While debarment can be an effective penalty in appropriate circumstances, the rigid policy that is imposed by the Regulation creates problems. For instance, GC100 stated that the penalty risks being disproportionate since neither the seriousness of the offence nor any mitigating factors can be taken into account.<sup>295</sup> The consequences of debarment can be severe, as Jeremy Cole of Lovells explained:

Some of these businesses survive on [public sector] procurement work. If they get a criminal conviction, their business could collapse overnight.<sup>296</sup>

189. GC100 further states that there is no scope for “self cleansing” under the Regulation, which means that a company might face debarment for acts that took place many years in the past.<sup>297</sup> We note that debarment is discretionary in the United States and that there is a process for “self-cleansing” to remove the skeleton from a corporation’s cupboard. This is established by Presidential Direction and Executive Order No 12549 and 12689. In particular, suspension and debarment determinations are made by the Suspending Official of the relevant government agency subject to consulting a Department of Justice prosecutor.<sup>298</sup> No such discretion exists in UK law.

190. A broader impact concerns the Serious Fraud Office’s intention to encourage companies to self-report bribery with the aim of accepting a civil recovery order in place of a criminal conviction.<sup>299</sup> The recent conviction of Mabey & Johnson Ltd reflects this policy beginning to work.<sup>300</sup> However, Jeremy Cole of Lovells and the UK Anti-Corruption Forum doubted whether any company would self-report in circumstances where it faced perpetual debarment in the event that the prosecutor decided to pursue criminal proceedings:

[... the company] will have no incentive to undertake internal audit and co-operate with the authorities. On the contrary, it may be encouraged to conceal the offence [...] corruption will be driven underground, when preventing corruption is best achieved by bringing it out into the open.<sup>301</sup>

191. The Secretary of State for Justice acknowledged the problems posed by debarment and told us that he would look into ways of addressing the issue. The UK Anti-Corruption Forum stated that short-term options included finding ways of limiting debarment to a short period of time. We note that clause 23(2) of the Regulation can be used to side-step debarment where the relevant public body considers there to be “overriding requirements”,

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295 BB10

296 Q339

297 BB10

298 BB57, para 15

299 BB14

300 Further information is available at [http://www.sfo.gov.uk/news/prout/pr\\_630.asp?id=630](http://www.sfo.gov.uk/news/prout/pr_630.asp?id=630)

301 BB04; Q339

although we question whether this can be used to adequate effect. The Forum stated that, in the medium to long term “we need a proper European debarment regime which works and which takes account of the severity of the offence and mitigating circumstances, and that could only be agreed at the European level”.<sup>302</sup>

## **Other penalties**

**192. We support the penalties available under the draft Bill, including the power to impose unlimited fines on companies and a maximum ten year sentence of imprisonment for individuals. The draft Bill must have teeth. However, the Government must:**

- **Clarify the way in which the unlimited fine will be assessed;**
- **Ensure that civil powers of confiscation and recovery will operate in a way that is proportionate and reasonable; and**
- **Take action at a European level to prevent companies being automatically and perpetually debarred following a conviction, while exploring shorter-term measures to prevent disproportionate penalties being imposed in the meantime. The Government must ensure that the UK reaches a position where debarment is discretionary, if self-reporting is to work effectively in practice.**

## 12 The Security Services

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193. Clauses 13 and 14 would give the Secretary of State power to prior-authorise acts of bribery by the Security Service (known as MI5), the Secret Intelligence Service (known as MI6), and Government Communications Headquarters (GCHQ) where “necessary” for the proper discharge of their functions, either within the United Kingdom or overseas.<sup>303</sup> The Secretary of State must be satisfied that “satisfactory arrangements” are in place to monitor the disclosure of information and any subsequent acts that take place. We note that the power of authorisation would not extend to bribery of foreign public officials under clause 4, or to any equivalent offence under clause 1.

194. The proposal is based in large part on the Secretary of State’s existing power to authorise the Secret Intelligence Service to commit criminal offences and civil wrongs of any kind under the Intelligence Services Act 1994. The key differences are that:

- The Security Service and GCHQ would for the first time be able to gain an authorisation to bribe;
- The Secret Intelligence Service would be in the same position as present, except that the 1994 Act would be narrowed to remove the power to bribe foreign public officials; and
- The 1994 Act is limited to acts overseas while the draft Bill applies to acts anywhere.

195. The Secretary of State for Justice justified the proposal by reference to the increased scrutiny of the security services:

the intelligence and security agencies now are the subject of a very high degree of statutory control, they are statutory bodies and their work is then subject to detailed invigilation by the various commissioners who are all retired members of the senior judiciary, and they have staff as well. So you have got the Surveillance Commissioner, the Intelligence Service Commissioner and the Intercept Commissioner looking at various aspects of their work and, for example, in terms of the Intercept Commissioner, crawling over warrants and checking whether they were authorised properly, and so on, and going back to the role of the Secretary of State if the Commissioner feels that they have not been.<sup>304</sup>

We received little evidence to support this change, other than from the police and the Serious Fraud Office. Neither of these organisations considered that they needed similar powers of authorisation themselves.<sup>305</sup>

196. We did, however, hear objections to this proposal on legal and principled grounds. For instance, we were told by the OECD’s Legal Director, Nicola Bonucci, that these provisions may represent the only law in the world sanctioning bribery, which Jeremy

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<sup>303</sup> The Secretary of State must also ensure that no action goes beyond what is “necessary” and “reasonable” in the circumstances: clause 13(6)

<sup>304</sup> Q592

<sup>305</sup> BB14; BB58

Carver of Transparency International UK described as a “very impressive” reason to drop clauses 13 and 14 from the draft Bill.<sup>306</sup>

197. Further, in 2003, the Joint Committee on the draft Corruption Bill reviewed a similar power which it viewed as potentially non-compliant with the UK’s international obligations.<sup>307</sup> The basis for the Joint Committee’s concern can be summarised in broad terms as follows:

- None of the Conventions on bribery include an *express* exemption that permits bribery by security services;
- Any statutory power that is introduced to authorise acts of bribery must therefore be based on an *implied* exemption to the UK’s international obligations;
- An implied exception is likely to be limited to protecting national security and fighting serious crime;
- The statutory functions of the security services include, but also go beyond, these two purposes, namely by including a third purpose of protecting the UK’s economic interests;
- Any authorisation to bribe in the UK’s economic interests therefore risks non-compliance with the UK’s international obligations.

198. The 2003 Joint Committee called for the Government to reconsider its options, including the potential for narrowing the power of authorisation so that it excluded any act of bribery in pursuance of the UK’s economic interests (i.e. by limiting the power to protecting national security or fighting serious crime).<sup>308</sup> The Government has not taken up this option, which the Secretary of State for Justice dismissed in oral evidence:

the coverage of this clause matches the functions of the Intelligence and Security Agencies and I think it would be very curious if, through this Bill, we sought to restrict the activities of the agencies more narrowly than that which has been provided in the primary legislation by Parliament.<sup>309</sup>

199. The Government has decided to take the alternative route of excluding bribery of foreign public officials from the 1994 Act and from the draft Bill’s power of authorisation. This removes any risk of non-compliance with the OECD Convention, since that convention is limited to bribery of this kind. It does not, however, reduce the risk of non-compliance under the UK’s broader convention obligations to the United Nations, the Council of Europe and the European Union.

200. The Attorney General emphasised that she could only offer an initial view, but she concluded that clause 13 would comply with the UK’s convention obligations without imposing a restriction of the type proposed by the 2003 Joint Committee:

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306 Q527

307 First Report of the Joint Committee on the Draft Corruption Bill, Session 2002-03, HL 157/HC 705, paras 140-154

308 Above, para 154

309 Q592

I do appreciate the concern that an exemption for the intelligence services that is applicable to activities intended to protect the country's economic interests, and not just to safeguard national security and combat serious crime, may be incompatible with these instruments

[... however] I do not see Clause 13 as being inconsistent with the principles or provisions of these instruments. Taken with Clause 14, it contains several important safeguards – only necessary and reasonable action can be authorised, the authorisation must be given by the Secretary of State personally or (in cases of urgency) by a senior official, and authorisations are time-limited. It should also be remembered that our intelligence services, unlike those of many other countries, are regulated by statute, accountable to Parliament, and subject to external scrutiny by independent Commissioners.<sup>310</sup>

201. Dimitri Vlassis of the United Nations disagreed. He noted the potential for an implied exception in limited circumstances but offered his view that clause 13 would not comply with the United Nations' Convention. We did not receive specific evidence on this issue from the Council of Europe or the European Union, but similar issues potentially arise.<sup>311</sup>

202. Transparency International UK told us that any decision to pursue these proposals should be taken through a more appropriate piece of legislation:

While we welcome the Government's openness in acknowledging that bribery may be used by the security services, we have the gravest doubts as to whether any worthwhile long-term national interest is served. If the security services can make a case for such an 'opt-out', they should present it for appropriate parliamentary scrutiny; and it should form no part of any general law of bribery.<sup>312</sup>

**203. We heard no persuasive evidence of a need for the domestic intelligence agencies to be granted an authorisation to bribe. Neither are we persuaded that this draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. Finally, we note continuing doubt about whether clause 13 complies with the United Kingdom's international obligations, despite the fact that this issue was raised as long ago as 2003. For all these reasons we recommend that the Government remove clauses 13 and 14.**

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310 BB60

311 Council of Europe Criminal Law Convention on Corruption, together with its Additional Protocol; European Union Convention on the fight against corruption involving officials of the European Communities or officials of member states of the European Union; Council of Europe Civil Law Convention on Corruption

312 BB54

## 13 Privilege

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### Background

204. Parliamentary privilege is an expression of the principle that Parliament has the right to control all aspects of its own affairs. Just as, once an Act has been passed, its interpretation and application is properly left to the courts, so the courts do not seek to interfere in the parliamentary proceedings by which a law is enacted. Free speech within Parliament is one of the protections offered by privilege. This is set out in Article IX of the Bill of Rights 1689, which states that “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament”.

205. Unlike in some continental jurisdictions where privilege attaches to Members themselves, in this country Article IX of the Bill of Rights represents a collective privilege for Parliament and is not intended to protect Members from the criminal law. As a result of historical accident, however, Members are exempted from the current statutory corruption offences. This is because neither the House of Commons nor the House of Lords is a public body for the purposes of the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906. By contrast, the common law of bribery has been generally held to apply to Members of Parliament, following a decision by Buckley J in relation to allegations of corruption against a Member, Harry Greenway, in 1992 (although this decision was not tested on appeal). The draft Bribery Bill rectifies this anomaly by applying the proposed bribery offences to Members.

**206. Under the provisions of the draft Bribery Bill, Members of both Houses of Parliament can be convicted of bribery. This is entirely proper: bribery is a very serious offence and Members should be subject to the same criminal laws as everyone else.**

207. There is some concern, however, that convictions for bribery might nonetheless be prevented where there is a need for the prosecution to rely on evidence in the form of parliamentary proceedings, which are protected by privilege. In a debate on the Parliamentary Standards Bill, introduced into the House of Commons on 23 June 2009, the Secretary of State for Justice told a Committee of the Whole House that “there is a general acceptance that prosecuting a Member of Parliament for bribery will necessitate a carve-out of elements of the Bill of Rights”.<sup>313</sup> This is a position that is supported by the Council of Europe’s Group of States against Corruption (GRECO), which notes in written evidence that “the only issue that appears to exist is Article 9 of the Bill of Rights, which prevents evidence being given in court that questions proceedings in Westminster [... we therefore] recommended that corruption offences be exempted from the application of Article 9 of the Bill of Rights”.<sup>314</sup> Clause 15 of the draft Bill attempts to remove any evidential difficulty by waiving the protections of privilege afforded to Members of Parliament who are accused or co-accused of bribery offences. This would mean that proceedings in Parliament relating the “words or conduct” of accused or co-accused Members could be used as evidence in court.

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313 HC Deb, 1 July 2009, column 373 (Jack Straw)

314 BB38

208. No precise definition of a “proceeding in Parliament” exists. Since, by virtue of its inclusion in the Bill of Rights the term is part of statute law, it is the courts which interpret its meaning with reference to particular cases. It is generally taken to include debates on the floor of the House and evidence taken by select committees, but there are many grey areas, including, for example, correspondence between Members and others.<sup>315</sup>

209. In a well-known case in the United States, *US v Brewster*, a distinction was made between the taking of a bribe, which was not held to be a proceeding in Parliament, and the act that the bribe was intended to influence, namely: “it is the taking of the bribe, and not the performance of any illicit compact that is the criminal act under the statute. The speech or debate Clause interposes no obstacle to this type of prosecution. The guilty act is the acceptance of the bribe, and that is complete without performance”.<sup>316</sup> The same point was made to us in oral evidence by the Clerk of the House of Commons, who referred us to evidence given in 2003 by the then Director of Prosecutions to the Joint Committee on the draft Corruption Bill: “saying things about people is not evidence; facts are evidence”.<sup>317</sup> Similarly, in evidence to the Commons Justice Select Committee, Speaker’s Counsel said that “I think it is true to say in the law on corruption in this country you do not have to prove that the corrupt design was carried out, you simply have to show it was entered into. As far as corruption is concerned I would have thought in many cases it simply is not necessary – it is nice for the prosecution but it is not necessary – to adduce evidence of what happened in the proceedings”.<sup>318</sup> Nevertheless, we acknowledge concerns that privilege could in some circumstances prevent the prosecution from relying on evidence which may be relevant to determining whether a Member of either House has attempted to alter the course of proceedings in Parliament in return for payment or other advantage.

210. Reference to things said in Parliament is not entirely precluded by Article IX. There is a theoretical distinction to be drawn between the simple citation of a debate or other parliamentary proceeding in court, which would be allowed, and the attempt to question or impeach it, which would not be. However, in practice this distinction is difficult to maintain since material cited by one party in court is likely to be questioned by the opposing party.

## Evidence of need for legislation on privilege

211. Like the 2003 Joint Committee on the draft Corruption Bill before us, we endeavoured to test the accuracy of the claim that waiving privilege would be “necessary” in order to facilitate prosecutions in some bribery cases.<sup>319</sup> The 2003 Joint Committee observed that:

The Committee has received little evidence that any MPs and peers have avoided prosecution for corruption either because of their status or because parliamentary proceedings cannot be questioned in court. As the Joint Committee on Parliamentary Privilege noted in 1999, “there are very few instances of corruption

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315 Erskine May, *Parliamentary Practice*, 23<sup>rd</sup> Edition, p110

316 HL157, HC705 (2002-03), Ev 45, DCB 11, para 26 (*United States v. Brewster*, 506 F.2d. 62 (D.C.Cir.1974))

317 Q457, HL157, HC705 (2002-03), Q112 (Sir David Calvert-Smith)

318 House of Commons Justice Select Committee, Seventh Report, Session 2008-09, Constitutional Reform and Renewal: Parliamentary Standards Bill, HC791, Q22 (Michael Carpenter)

319 HC Deb, 1 July 2009, column 373 (Jack Straw MP)

involving Members of Parliament”. The Attorney General could not identify any occasions in which MPs or peers have escaped prosecution because of the provisions of Article IX of the Bill of Rights 1689. We have been told there have been very few cases in other comparable jurisdictions.<sup>320</sup>

This point was reiterated in oral evidence to us by the Clerk of the House of Commons and by the Attorney General, who told us that “there has been no recent case of an MP or a peer seeking to behave in a way that was sanctionable with parliamentary privilege being an impediment to pursuing those issues”.<sup>321</sup>

212. It is far from clear that privilege has proved to be an impediment to conviction even in cases where it has been cited as such. Earlier this year the police announced that they would not launch a full investigation into a serious complaint against four Peers, which arose out of allegations made in the *Sunday Times* on 25 January 2009 following a ‘sting’ operation by undercover journalists. One of two reasons cited for this was that “there are very clear difficulties in gathering and adducing evidence in these circumstances in the context of Parliamentary Privilege”.<sup>322</sup> In written evidence the Clerk of the Parliaments states that “none of the peers offered themselves to table amendments, or engage in any activities which would be covered by parliamentary privilege [...] parliamentary privilege had little or no bearing on the case. It is difficult to see either how parliamentary privilege could have impeded a police investigation, or how clause 15 of the Draft Bill would have assisted such an investigation or any subsequent prosecution”.<sup>323</sup>

213. A Ministry of Justice official raised the perceived lack of demand for parliamentary proceedings to be used as evidence in court to justify the inclusion of clause 15 in the draft bill, saying that “we think it is going to be the very rare circumstance in which we will actually need to lift parliamentary privilege. On that basis we think the very narrow lifting is justified, because it is unlikely to happen”.<sup>324</sup> Similarly, in written evidence to us, the Joint Committee on Human Rights notes that “in the light of the limited number of cases where bribery might be alleged, in our view, the limited impact on privilege is likely to be proportionate to the beneficial impact of these proposals on public conduct, including the conduct of MPs and Peers”.<sup>325</sup>

214. The opposite argument can be made on the same grounds, namely that because no occasion on which there was a need to rely on proceedings in Parliament to secure a conviction has been identified, no case can be made for setting aside parliamentary privilege. In 2003 a former Clerk of the House of Commons compared a similar provision in the draft Corruption Bill to using “a mighty sledgehammer to crack an almost invisible nut”.<sup>326</sup>

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320 HL157, HC 705 (2002-03), para 105

321 Qq 446 and 649

322 See the Metropolitan Police statement at [http://cms.met.police.uk/news/major\\_operational\\_announcements/mps\\_statement\\_re\\_lords\\_allegations](http://cms.met.police.uk/news/major_operational_announcements/mps_statement_re_lords_allegations).

323 BB11

324 Q612

325 BB61

326 HL157, HC 705 (2002-03), Q234

## The public interest test

215. The different conclusions reached by witnesses on the question of need rely on differing calibrations of a public interest test which attempts to weigh the benefits to the public at large of free speech in Parliament against the need to secure convictions of the corrupt. This test was considered in 1999 by a Joint Committee on Parliamentary Privilege, which concluded that a “minimal encroachment” on parliamentary privilege was appropriate to address the “serious and insidious” offence of bribery.<sup>327</sup> In oral evidence to us, the Clerk of the Parliaments said that, in his view, “the balance comes down in favour of allowing proceedings to take place in accordance with clause 15”.<sup>328</sup> The same conclusion was reached in 2003 by the Joint Committee on the draft Corruption Bill.

216. The need to regain and retain public confidence in the integrity of Parliament is one of the factors cited by witnesses who have reached the above view. The 2003 Joint Committee noted that “Parliament should be aware of the implications of legislating in ways which make it appear as though the only place where one could lawfully act in corrupt ways is in the Houses of Parliament”.<sup>329</sup> The Attorney General told us that “public confidence is of the utmost importance if we are going to be able to have a democratic system which people respect. It would be a very difficult thing indeed if [...] there was evidence which [was] available which might assist in a significant way a prosecution, but, because of parliamentary privilege, we were debarred from using it”.<sup>330</sup>

217. The term “privilege” implies a benefit to Members of Parliament that is unavailable to everyone else. In fact, as the Clerk of the House of Commons explained to the Commons Justice Select Committee, privilege is intended as a protection for the wider public:

the main reason why privilege is important is what, on the continent, is called ‘functional immunity’. Parliaments have to be free, and members have to be free, to debate things without fear that matters that they might raise on behalf of their constituents might then be challengeable in the courts. [...] If there was not that freedom, Parliament could not really function effectively.<sup>331</sup>

He used this as the basis for arguing that clause 15 of the draft bill should be excluded. Similarly, in a debate in the Commons on the Parliamentary Standards Bill, Gerald Howarth MP said that:

If we understand the significance of parliamentary sovereignty and the public do not, and we knowingly impair it, we will damage hugely the interests of our constituents and our ability to serve them. It is nothing to do with protecting us, but with safeguarding the fundamental rights of the British people and our powers in this place to represent them. We must not allow the Bill to impair that fundamental principle. If we do so, we do grave damage to our constituents.<sup>332</sup>

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<sup>327</sup> First Report of the Joint Committee on Parliamentary Privilege, Session 1998-99, HL 43, HC 214, para 167

<sup>328</sup> Q451

<sup>329</sup> HL157, HC 05 (2002-03), para 118

<sup>330</sup> Q649

<sup>331</sup> House of Commons Justice Select Committee, Seventh Report, Session 2008-09, *Constitutional Reform and Renewal: Parliamentary Standards Bill*, HC791, Q2 (Dr Malcolm Jack)

<sup>332</sup> HC Deb, 1 July, Column 345 (Gerald Howarth MP)

218. Some witnesses have argued that even the removal of privilege in certain specified cases will have a disproportionately inhibitive effect on all parliamentary proceedings. In evidence to the 2003 Joint Committee on the draft Corruption Bill, Sir William Mackay said that if “the motives of a Member of either House in making a speech in the Chamber came under scrutiny in a court, [...] Members not under suspicion might find their motives challenged. Such a prospect could have the most chilling effect on every speech every Member of both Houses might make”.<sup>333</sup> Jacqy Sharpe, Principal Clerk of the Table Office in the House of Commons made the same point in relation to witnesses appearing before select committees: “in what witnesses say before Parliament they do deserve protection so that they can feel they can say freely what they believe and know that they will not have any legal consequences of that”.<sup>334</sup> The Clerk of the House of Commons told the Commons Justice Select Committee that the “chilling effect” of a privilege waiver would also “hamper the ability of House officials to give advice to Members”.<sup>335</sup> It is important to note here that none of these witnesses questioned the seriousness of bribery offences, or the need to secure convictions of the corrupt. Rather, they were concerned that the measures proposed were disproportionate to the hypothetical evidential problem in relation to the new offences.

### The compromise in 2003

219. On this matter views on both sides are frequently expressed in very strong terms although, as the Secretary of State pointed out, “these issues are not black and white: they are matters of judgement”.<sup>336</sup> The 2003 Joint Committee on the draft Corruption Bill attempted to balance competing public interests by recommending that, whilst privilege should be waived in relation to Members who were defendants or co-defendants in corruption cases, “the balance of public interest” meant that privilege should remain intact in relation to other Members and witnesses.<sup>337</sup> This position was supported by the Liaison Committee in the House of Commons, which was concerned to protect the rights of witnesses before select committees in particular. The Government eventually decided in favour of the Joint Committee’s recommendation and clause 15 of the current draft Bill applies the waiver of privilege only in the case of a Member who is a defendant or co-defendant in a bribery case. Proceedings in Parliament relating to witnesses and other Members would retain the protection of privilege.

220. Whilst we understand the delicate balancing act which led to the compromise recommended by the 2003 Joint Committee, narrowing the waiver of privilege in the manner that it suggested would have two undesirable consequences:

- a) There would be an imbalance between the treatment of accused Members on the one hand and other Members and witnesses on the other. Whereas the words of an accused witness spoken before a select committee could not be used as evidence against them,

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333 HL157, HC 705 (2002-03), Ev 44, para 19

334 Q455

335 House of Commons Justice Select Committee, Seventh Report, Session 2008-09, Constitutional Reform and Renewal: Parliamentary Standards Bill, HC791, Ev 12

336 Q608

337 HL157, HC 705 (2002-03), para 135

the words of an accused Member could be. Thus clause 15 may not remove all the evidential problems that any removal of privilege undertakes to address.

- b) Accused Members would be unable to rely on the words of other Members or witnesses spoken during proceedings, even if they were exculpatory. We sought advice on whether this constituted a breach of Article 6 of the European Convention on Human Rights which states that “everyone is entitled to a fair and public hearing” and goes on to declare that it is one of the minimum rights of the accused “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. The Joint Committee on Human Rights told us that, in its view, “there is a significant risk that breaches of Article 6 ECHR could arise as a result of the operation of clause 15”.<sup>338</sup>

221. The Attorney General suggested that the possibility of an unfair trial was an issue which could be addressed by means of prosecutorial discretion or, if it was too late for that, “it would be open to the court to stop the case as an abuse of process”.<sup>339</sup> We do not consider that it is satisfactory for a law to be enacted in the knowledge that it could give rise to breaches of Article 6 of the European Convention on Human Rights with the discretion of prosecutors as main safety net. This conclusion leaves open two options: the removal of clause 15 from the draft bill or its widening, to allow proceedings in relation to any Member or witness to be used as evidence in bribery cases.

## The case for consistency

222. During the course of our proceedings, the Government introduced its Parliamentary Standards Bill into the Commons. Clause 10 of the bill as introduced made provision to waive privilege in relation to the work of a new Independent Parliamentary Standards Authority, the work of a Commissioner for Parliamentary Investigations or specific legal proceedings against any Member of the House of Commons, as follows:

### **10 Proceedings in Parliament**

No enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent—

- (a) the IPSA from carrying out any of its functions;
- (b) the Commissioner from carrying out any of the Commissioner’s functions;
- (c) any evidence from being admissible in proceedings against a member of the House of Commons for an offence under section 9.<sup>340</sup>

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338 BB61

339 BB60

<sup>340</sup> The numbering of the clause containing the offences has changed, following amendments to the Bill in the House of Commons.

No exception was made in the clause for proceedings in relation to a witness or non-accused Member and, in that respect, the clause was more widely drawn than clause 15 of the draft Bribery Bill.

223. During debate in Commons Committee of the Whole House on the Parliamentary Standards Bill, the Secretary of State for Justice reminded the Committee of the need to consider clause 10 in the context of the provisions set out in clause 15 of the draft Bribery Bill.<sup>341</sup> The adoption of a consistent approach to the issue of parliamentary privilege across the statute is important because it reduces the potential for confusion, particularly on the part of Members and witnesses, who need to be clearly aware of their position in relation to Article IX of the Bill of Rights when they are participating in proceedings in Parliament. The “chilling” effect of a privilege waiver would be all the more pronounced were any uncertainty about the scope of the waiver to be introduced. Furthermore, by legislating inconsistently on the issue of privilege, Parliament would risk the unnecessarily broad erosion of constitutional principles by means of competing precedents. Although there have been several recent attempts to waive privilege in relation to specific offences, there are many offences for which no curtailment of privilege has yet been envisaged. Were clause 15 of the draft Bribery Bill to become law, courts would be able to use parliamentary proceedings in evidence for bribery offences but not for arguably equally serious fraud offences, to give one example.

**224. In view of the importance of the freedoms parliamentary privilege is designed to protect, we believe that attempts to legislate on this matter should be consistent with each other. Clause 15 of the draft bill is based on the conclusions of the Joint Committee on the Draft Corruption Bill in 2003, which was not the case with the Parliamentary Standards Bill as introduced in the Commons. Inconsistency risks confusion in the operation and application of the law and could bring about the unnecessarily broad erosion of fundamental constitutional principles by means of competing precedents. For this reason we believe it is unacceptable that the draft Bribery Bill should take a different approach to privilege from that taken in the Parliamentary Standards Bill, particularly as the two bills deal with overlapping areas of law.**

225. On 1 July, a Committee of the Whole House in the Commons voted to remove clause 10 of the Parliamentary Standards Bill. It was subsequently omitted from the Parliamentary Standards Bill. Ministers have made clear they will respect the decision of the House. **In order to achieve consistency with the Parliamentary Standards Bill, we recommend that the Government leave out clause 15 of the draft Bribery Bill.**

226. It is clear that, even if the potential evidential problems posed by the existence of parliamentary privilege are not addressed in legislation on bribery and parliamentary standards there is a substantial body of opinion which demands that that they are addressed elsewhere. Both the 1999 and 2003 Joint Committees recommended the introduction of a separate Parliamentary Privileges Bill to provide a comprehensive code setting out the scope of privilege. This approach would avoid both the anomaly of parliamentary privilege being waived in the case of bribery but not of arguably equally insidious offences and the accidental undermining of the principle of privilege by means of

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341 HC Deb, 1 July 2009, Column 400 (Jack Straw MP)

its steady leaking away. The argument for such a Bill is made in written evidence by the Clerk of the House of Commons:

The experience of the Defamation Act of 1996, intended to address one perceived anomaly of parliamentary privilege, has led to others. The provision of Section 13 of the Act was later held to undermine the collective right of the House to immunity in respect of proceedings by allowing an individual Member to waive privilege. Other difficulties of a practical nature where more than one Member was involved led the Joint Committee to recommend repeal of the Section. Other encroachments on parliamentary privilege suggest that a piecemeal approach to defining and defending the Houses' legitimate right to function effectively is no longer sufficient.<sup>342</sup>

227. A precedent for a Parliamentary Privileges Act has existed in Australia since 1987. The Clerk of the House of Commons and the Clerk of the Parliaments supported the case for such legislation during our inquiry. In early July the Commons Justice Select Committee reported that “the evidence given on the merits of having a Parliamentary Privilege Act and consider that this is an appropriate time for this proposal to be further considered”.<sup>343</sup> The Secretary of State, on the other hand, told us that “we do not have a plan for a Parliamentary Privileges Bill”, and the Ministry of Justice notes that the Australian Act is “not without its critics”.<sup>344</sup>

**228. The issue of parliamentary privilege has arisen in relation to several pieces of legislation and draft legislation in recent years. Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so. This issue was examined in considerable detail by the 1999 Joint Committee on Parliamentary Privilege, which concluded that a Parliamentary Privileges Act was required. We believe that, should the Government deem it necessary, such an act would be the most appropriate place to address the potential evidential problems in relation to bribery offences.**

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342 BB09

343 House of Commons Justice Select Committee, Seventh Report, Session 2008-09, Constitutional Reform and Renewal: Parliamentary Standards Bill, HC791, para 6

344 Q607

## 14 Wider issues

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### Enforcement and deterrence

229. At the start of this report we argued that new legislation to combat bribery was long overdue and should be introduced as soon as possible. Not only would a Bribery Act enable the UK to meet its international obligations, it could also have a strong deterrent effect on companies and individuals who might otherwise have paid bribes. The legislation will only act as a deterrent, however, if those who bribe are convinced that their compliance with the law is being closely monitored and any offenders will be punished. Professor Horder told us that “this Bill will stand or fall, not necessarily perhaps by how it is phrased, but by whether or not, and the degree to which, it is enforced”.<sup>345</sup>

230. Insofar as enforcement results in convictions for bribery, we attempted to establish whether a Bribery Act would be likely to generate additional prosecutions. The partial Impact Assessment produced to accompany the draft bill itself states that the Government envisages only 1.3 additional prosecutions per year for bribery offences as a result of any legislation enacted, although, as the analysis in Annex 1 shows, it is far from clear how these calculations were made. Global Witness commented in written evidence that this figure “suggests that the Bill will not act as a successful deterrent. Only properly enforced legislation will successfully disincentivise bribery”.<sup>346</sup> Similarly, in oral evidence, Monty Raphael stated:

it does not appear that whoever drafted the impact statement feels it is going to have much of an impact because there are going to be so few additional prosecutions, so one wonders why it is there at all other than for some unworkable cosmetic purpose which is far from desirable.<sup>347</sup>

231. Evidence suggests that the disincentive effect on companies of the Foreign Corrupt Practices Act in the United States has been so marked because of the effective enforcement of the law by the authorities, leading to a substantial number of prosecutions.<sup>348</sup>

232. We accept, however, that an increase in the number of prosecutions for bribery would not necessarily be a good gauge of the success of legislation. Professor Horder suggested to us that the aim of the draft bill was not to raise conviction rates but to change corporate culture to ensure that bribery occurred less often:

we have tried, I think, to provide a set of provisions where in the existing system, as it is, the distribution of resources, the difficulty of proof and so on and so forth, this will actually meaningfully end in some better practice being adopted, but without a complete revolution.<sup>349</sup>

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345 Q37

346 BB35

347 Q364; See also Annex 1

348 BB35

349 Q37

This view was reiterated by the Secretary of State, who said: “I do not think one should measure the success of the legislation by whether there are scores and scores of prosecutions because, with a bit of luck, this legislation would have a strong deterrent and chilling effect, so it would change behaviour”.<sup>350</sup>

233. Nonetheless, other witnesses did suggest that a lack of sufficient resources rather than the anticipation of a sudden cultural change may be responsible for the Government’s modest estimate for the increase in prosecutions as a result of legislation. The Director of Public Prosecutions told us that “there would be an additional need for resources if there were significantly more investigations undertaken by the police as a result of these proposals”.<sup>351</sup> Similarly, the City of London Police Overseas Anti-Corruption Unit told us that “the level of resource, currently available, has been sufficient to obtain the results identified thus far” but noted that an intelligence assessment would be required to identify the level of additional resources needed to combat corruption overseas.<sup>352</sup> The Serious Fraud Office did not give us an indication of the level of additional resource needed, or of whether it was available, instead telling us that “the SFO is facing budget reductions in line with other departments. The challenge for us is to improve our efficiency so that we are able to deliver much more than before”.<sup>353</sup>

234. At a speech to the 5<sup>th</sup> European Forum on Anti-Corruption, the Secretary of State said:

clearly, there needs to be a credible threat of successful investigations and prosecutions. To that end we have devoted £6 million to two anti-corruption teams in the Metropolitan Police, and have nearly doubled the size of the dedicated unit in the Serious Fraud Office.<sup>354</sup>

We are not clear on what that £6 million will be spent if not to increase the number of additional prosecutions possible beyond 1.3 per year.

### *Securing compliance*

235. However many prosecutions occur as a result of the proposed legislation, we accept the Government’s view that the primary aim of a Bribery Act should be to deter companies from committing bribery in the first place. To make this happen resources need to be targeted not just at investigations and prosecutions but at the companies which are charged with ensuring their own compliance with the law. At the most basic level, this means generating sufficient publicity to make companies aware of their new responsibilities. Reynolds Porter Chamberlain told us that an Act arising from the draft Bill would need to be given wide publicity “to ensure that all UK businesses are aware of the need to prevent bribery and meet this regulatory burden”.<sup>355</sup> The Government’s partial Impact Assessment takes account of a one-off budget for “awareness raising” of £50,000.<sup>356</sup> As the

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350 Q560

351 BB16

352 BB58

353 BB14

354 Information on this conference can be found at [http://www.americanconference.com/anticor\\_fcpa/5th\\_European\\_Forum\\_on\\_Anti-Corruption.htm](http://www.americanconference.com/anticor_fcpa/5th_European_Forum_on_Anti-Corruption.htm)

355 BB34

356 Impact Assessment, p 2

Government has not provided any analysis to determine how this figure has been arrived at, we are unable to assess the sufficiency of this amount.<sup>357</sup> If, however, the primary aim of the legislation is to deter companies from bribing, it would be logical to publicise it as widely as possible within the business community. We think it unlikely that £50,000 would make a significant difference to levels of awareness in companies doing business in the UK.

236. It is not sufficient simply to ensure that companies are aware of their obligations with respect to legislation on bribery: compliance also needs to be monitored. The Government's partial Impact Assessment, however, states that the corporate offence set out in clauses 5 and 6 "does not prescribe any specific additional measures which a company must adopt and there will be no compliance monitoring process".<sup>358</sup> The Crown Prosecution Service told us that the lack of a significant increase in the number of prosecutions for bribery offences was "rather less because of shortcomings in the law [...] than because of the difficulty in obtaining evidence in the first place".<sup>359</sup> If difficulties in obtaining evidence are the main barrier to prosecution, it seems odd that the Government is not intending to monitor compliance with the law, since this would be one of the primary means by which offences could be identified, as well as systems corrected before any breach in the law occurred. Global Witness told us that the lack of monitoring meant that:

there is no obligation on companies to report bribes by their employees and no onus on the authorities to monitor whether or not companies' anti-bribery mechanisms are 'adequate' or not. Once again it seems that there is little incentive for compliance.<sup>360</sup>

**237. The Government's partial Impact Assessment suggests that bribery legislation would only result in an additional 1.3 prosecutions for bribery per year. This would be an indicator of success if it reflected vastly increased diligence and compliance on the part of companies. We would be troubled if this low estimate were better explained by a lack of resources available to enforce the legislation. We recommend that the Government prepare a complete Impact Assessment for any legislation that is subsequently introduced, including an assessment of the additional resources required for effective enforcement by way of publicity, monitoring of compliance and investigations. Without committing adequate resources to tackle bribery, the Government's legislation will not have the required deterrent effect.**

**238. The Government's impact assessment should also include a fuller analysis of the damage caused by bribery to economic and social development, to democracy and the rule of law, to individual members of the community and to businesses themselves, particularly through the distortion of competition, the diversion of scarce resources to purchase inferior products, and the harm to personal and national reputations at home and abroad. These underlying economic and human costs, felt most directly and disproportionately by the poor, must not be overlooked.**

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<sup>357</sup> See analysis of the Impact Assessment at Annex 1

<sup>358</sup> Impact Assessment, p 9

<sup>359</sup> BB16

<sup>360</sup> BB35

## Impact on the private sector

239. The draft Bribery Bill was published alongside a partial Impact Assessment. In a memorandum to the Committee, the Ministry of Justice explained that there was only a “limited opportunity” for the Government to prepare a detailed Impact Assessment and that the decision had been taken to “publish the proposals as draft legislation and to develop the impact assessment further once it was published”.<sup>361</sup>

240. The House of Commons Scrutiny Unit prepared an analysis of the Government’s Impact Assessment, which is published as Annex 1 to our report. The analysis identifies many areas in which the Assessment requires more work. Of these, the analysis of the impact of the legislation on businesses was identified by several witnesses as being particularly deficient. The Assessment states that the new corporate offence will result in additional public sector costs of approximately £2 million per year, based on an additional 1.3 prosecutions and three additional confiscation proceedings brought by the Serious Fraud Office.<sup>362</sup> The Assessment also estimates additional private sector costs of approximately £3 million per year “for legal advice and possibly the preparation and communication of guidance to staff” before noting that “the impact on any individual company will depend in each case on the business sector, the degree to which it is engaged in high risk markets and the size of the company”.<sup>363</sup> Nonetheless the Assessment also states that overall the draft Bill will have a positive impact on competition as bribery “distorts free and fair competition in the market” and “hurts honest companies”.<sup>364</sup>

241. This analysis of the costs and benefits of the legislation was disputed by witnesses from the corporate sector. The Confederation of British Industry stated that “it is clear that the Impact Assessment very significantly under-estimates the cost and activity related to the operation of the draft bill”.<sup>365</sup> Similarly, the International Chamber of Commerce (UK) told us that the costs set out by the Government were “wrong by many orders of magnitude”, using recent litigation involving AON Ltd as a case study.<sup>366</sup> Guidance produced by the Defence Manufacturers’ Association and the Society of British Aerospace Companies also highlights that “the costs of defending an allegation of corruption (even if not prosecuted) could be as much as £10m”.<sup>367</sup> The Federation of Small Businesses argued that “greater clarity is needed around the costs for small businesses in the [Ministry of Justice] impact assessment along with clear and more detailed information about the specific impact on small businesses”.<sup>368</sup>

**242. The Government’s partial Impact Assessment of the draft Bill leaves out much of the analysis needed to justify its conclusions and in particular takes only minimal account of the impact of the proposed legislation on the private sector. We recommend that the Government publishes a much more detailed Impact Assessment at the same**

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361 BB43

362 Impact Assessment, pp 7-8 and BB 14

363 Impact Assessment, p 8

364 Impact Assessment, pp 2-3

365 BB07

366 BB03

367 SBAC and DMA Guidance, p 6. This can be found at: <http://www.sbac.co.uk/pages/83675783asp>

368 BB08

**time that the Bill is introduced into Parliament, taking account of all the points raised in Annex 1 to this report and paying particular attention to the impact of the legislation on business, especially small businesses.**

## Review

243. The Government's partial Impact Assessment for the draft Bill states that there will be a review of the effectiveness of any resulting Act after a period of three to five years, in line with guidelines set out by the Cabinet Office and endorsed by the Liaison Committee of the House of Commons. Although the Federation of Small Businesses suggested that a review of the impact of the legislation on small businesses might be more appropriate after a period of two years, we are satisfied that the period set down by Government would allow a sufficient amount of time for the effect, if any, of the legislation to become apparent.<sup>369</sup>

244. We are, however, uncertain about how the effectiveness of the legislation will be measured, given the lack of appropriate indicators set out in the partial Impact Assessment and the Explanatory Notes that accompany the draft Bill. Given the Government's lack of emphasis on increasing the prosecution rate for bribery, it is difficult for us to assess what success would look like. **We welcome the commitment of the Government, set out in its partial Impact Assessment for the draft Bill, to review the impact of the legislation after a period of three to five years. We recommend, however, that in its revised Impact Assessment the Government generates a comprehensive set of performance indicators so that the criteria against which the legislation is being assessed are clearly understood.**

## Time allocated for pre-legislative scrutiny

245. The Cabinet Office's *Guide to Legislative Procedure* sets down a minimum period of three months for a pre-legislative scrutiny inquiry. The draft Bribery Bill was published on 25 March 2009 and, in the Orders of Reference set out for a Joint Committee appointed to consider the draft Bill, the Government set a reporting deadline of 21 July 2009. This would have allowed nearly four months for a Joint Committee to carry out its work: hardly a relaxed timetable, but one which nonetheless would have given the Committee adequate time to conduct thorough pre-legislative scrutiny of the draft bill.

246. Unfortunately, the business managers in both Houses took some considerable time to nominate Members to a Joint Committee, with Members only being nominated in the House of Lords on 11 May 2009. This left a bare ten weeks for us to meet for the first time; issue a call for evidence; agree a programme of witnesses; take oral evidence; consider written evidence; and agree a report. Nearly seven weeks were lost to the pre-legislative scrutiny process before the Joint Committee was even appointed. This repeats a pattern established in earlier years and commented on by the Commons Liaison Committee in its report on *The Work of Committees in 2007-08*:

[W]e welcome the fact that draft bills were published earlier in the 2007-08 session than has sometimes been the case in the past. It is however regrettable that, having

succeeded in this aim, the process of appointing joint committees to examine them was held up in the 'usual channels'.<sup>370</sup>

**247. We regret that we were given a bare ten weeks to conduct pre-legislative scrutiny of this important draft Bill. We recommend that, in order to demonstrate its respect for the process, the Government ensure that future Joint Committees are established sufficiently promptly to allow for a minimum scrutiny period of twelve weeks from the first meeting of the committee appointed to undertake scrutiny.**

# Conclusions and recommendations

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## Background

1. We welcome the draft Bribery Bill as an important opportunity to modernise the criminal law of bribery; this will assist in fulfilling the United Kingdom's international obligations more effectively. We urge the Government to introduce the Bill as soon as possible in view of its protracted and faltering history and to take full account of our recommendations (Paragraph 16)

## The offences of bribing and being bribed

2. We endorse the “improper” performance test that has been developed by the Law Commission to distinguish bribes from legitimate conduct under the two proposed offences of bribing (clause 1) and being bribed (clause 2). In particular, the reliance on a reasonable person's expectation of “good faith”, “impartiality” and “trust” represents a careful balance between simplicity, certainty and effectiveness. It also takes into account the approach adopted in other countries and international anti-bribery conventions. (Paragraph 35)
3. We do not consider that the proposals in the draft Bill, taken together with existing criminal offences, will leave any gaps in the law. We do, however, acknowledge the concern that conduct which ought to be viewed as a civil wrong may, in future, be criminalised. The limited time for completing our inquiry has prevented us from exploring possible solutions to this problem, although we note the potential for developing an effective “avoidance of doubt” provision. The Government must address this issue before introducing the Bill into Parliament in order to minimise the need for reliance on prosecutorial discretion and maximise certainty for all those who will be asked to comply with, and enforce, the new law. (Paragraph 36)
4. While we accept that it may occasionally be appropriate to consider cultural variations on issues such as hospitality, a careful line needs to be drawn. The draft Bill must in general prevent individuals from relying on local customs to justify corrupt practices, otherwise its effectiveness will be seriously undermined. We see merit in the Law Commission's proposal that jurors should apply the standards of a “person of moral integrity”. Nevertheless, the evidence that we received revealed continuing uncertainties over what this would mean in practice. The Government should clarify its intended approach to the important and difficult matter of cultural variations before the Bill is introduced. (Paragraph 41)
5. On balance we support the provisions in the draft Bill that enable a person to be convicted of being bribed (clause 2) without proof of knowledge or intention, notwithstanding that subjective fault should ordinarily be required by the criminal law. This policy forms an important part of changing the culture in which taking a bribe is viewed as acceptable. In particular, we think that it should encourage anyone who is expected to act in good faith, impartially or under a position of trust, to think twice before accepting an advantage for their personal gain. (Paragraph 46)

6. Once the operation of a Bribery Act has become established, the Government should ask the Law Commission to review the Honours (Prevention of Abuses) Act 1925 to determine whether it remains necessary in light of the new offences. (Paragraph 50)

### **Bribery of foreign public officials**

7. The proposed offence of bribing foreign public officials (clause 4) represents an important step in putting the United Kingdom's compliance with its international obligations beyond doubt. To ensure that this goal is achieved, we recommend that the reference in clause 4 to the "law" be replaced with a reference to the "written law", meaning statutes, regulations and case law. This amendment should remove the potential for loopholes to emerge, while providing greater certainty to prosecutors, jurors and businesses alike. It should also provide an appropriately narrow gateway restricting the circumstances in which advantages can legitimately be provided to foreign public officials. (Paragraph 64)
8. The Law Commission's proposal for a "reasonable belief" defence raises a range of difficult and competing interests. We are, in particular, sensitive to the challenges faced by those who conduct business under unfamiliar laws abroad. But we also appreciate the concerns of those who view the defence as inconsistent with the United Kingdom's international obligations and the policy aims of the draft Bill. On balance, we support the Government's decision to reject the defence. (Paragraph 71)

### **Negligent failure by organisations**

9. We support the Government's proposals for a new offence that targets companies and partnerships which fail to prevent bribery by persons acting on their behalf. The current law has proven wholly ineffective and in need of reform. However, we are concerned by the focus on whether a "responsible person" was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place. In our view, clauses 5 and 6 introduce a narrow and complex solution to a pressing problem. We therefore recommend the removal of the need to prove negligence under clause 5(1)(c). While it would lead to the commercial organisation being strictly liable, subject to an adequate procedures defence, nevertheless we do not believe this would be unfair, particularly given the parallel with the approach taken in other leading countries. A commercial organisation is well placed to demonstrate the adequacy of its procedures, preferably on a probative burden of proof. (Paragraph 89)
10. We do not accept the merits of increasing the threshold of the offence to "gross negligence" or the introduction of an alternative civil enforcement regime, since neither will satisfy the policy aims of the draft Bill. (Paragraph 90)
11. We note two important points that emerged on the meaning of the phrase "adequate procedures" in clause 5:
  - First, it must be interpreted in a flexible and proportionate way depending on the size and resources of the company, alongside the ethical risks

associated with the industry, geographical area and the types of transaction concerned

- Second, it must depend on what a commercial organisation is doing in practice rather than in theory. (Paragraph 92)
12. The adequate procedures defence does not apply where a “senior officer” is negligent in performing their role as a responsible person by virtue of clause 5(5). It is hard to imagine any circumstances in which the procedures would be adequate where a senior officer was at fault. In line with our recommendation to remove the requirement to prove negligence, we further recommend that clause 5(5) be removed. This would leave the role that has been played by senior officers to be determined as part of the adequate procedures defence. It would also reflect difficulties identified in relation to the meaning of the term “senior officer”. (Paragraph 103)
  13. We note that a parent company’s liability for a subsidiary is one of the issues due to be considered as part of the Law Commission’s general review of corporate criminal liability and we anticipate that the Law Commission’s conclusions will valuably inform future debate on this difficult issue. (Paragraph 105)

## Guidance

14. We support calls for official guidance to be prepared on key aspects of the draft Bill in the interests of promoting certainty. It would, in particular, help commercial organisations to stay within the law and remove the excuse from those who do not. We therefore recommend the introduction of a new clause giving the Government power to approve guidance prepared by appropriate bodies, in line with the model that already exists under the Money Laundering Regulations. We believe that this represents a workable solution that will build on the growing expertise within the private sector, while limiting the burden on Government. (Paragraph 117)
15. Official guidance on how to comply with the provisions of the draft Bill should, at a minimum, cover the meaning of “adequate procedures”. The process of sanctioning guidance should provide an opportunity for professional bodies to work alongside Government in identifying any further areas in which clarification is required. These could include, for instance, questions about the application of the draft Bill to subsidiaries, joint ventures and commercial agents. (Paragraph 121)
16. There is no reason why the preparation of official guidance should delay the passage of a Bribery Bill. It should, however, be available for use before the offences come into force in order to give businesses time to prepare for its introduction. (Paragraph 123)
17. We acknowledge that a formal advisory service similar to that provided in the United States and Hong Kong, could have great benefit. We note, however, that differences between our criminal justice systems prevent direct analogies being drawn and mean that it would in practice be difficult to establish such a service. We are therefore not persuaded that the Government should seek to establish an equivalent in the United

Kingdom. We are particularly concerned about its potential impact on the independence of prosecutors. (Paragraph 129)

## Special cases

18. We agree with the Government that facilitation payments should continue to be criminalised. A specific defence risks legitimising corruption at the thin end of the wedge. At the same time we recognise that business needs clarity about the circumstances in which facilitation payments will be prosecuted, particularly given the difficult situations that can arise. Therefore the basic principles of prosecution policy, which we would expect to adhere firmly to the concept of proportionality, must be made clear. But we would not welcome guidance that was so detailed that it effectively introduced a defence into the law. (Paragraph 138)
19. Corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits. The general offences impose an appropriate limit on this activity under the “improper” performance test. However, the main limit under clause 4 is based on prosecutorial discretion. We are content with this and call on the Government to reassure the business community that it does not risk facing prosecution for providing proportionate levels of hospitality as part of competing fairly in the international arena. (Paragraph 147)

## Jurisdiction

20. The draft Bill would extend the jurisdiction of the new offences to include actions by anyone who is “ordinarily resident” anywhere in the UK (clause 7(4)). We welcome this proposal, which ensures that individuals cannot live within the UK without being subject to the same criminal law as citizens. (Paragraph 152)
21. There are two matters that the Government must consider clarifying in relation to the jurisdiction of clause 5 prior to the Bill’s introduction:
  - The meaning of “carries on a business” and “part of a business”.
  - The need to prove an offence under clauses 1, 2 or 4 as part of proving an offence under clause 5. (Paragraph 157)
22. We note that a range of options has been proposed for extending the jurisdiction of clause 5, and anticipate that the Law Commission’s review of corporate criminal liability will valuably inform the Government’s consideration of them. (Paragraph 159)
23. We hope that the Government will succeed in its aim of ensuring that Crown Dependencies and British Overseas Territories bring their laws into line with the proposals in the draft Bill, including clause 5. The size and significance of the corporate community in some of those jurisdictions makes this a task that should be pursued vigorously. (Paragraph 162)
24. We are surprised that the Government has not reached an agreement with the Scottish Executive about the approach to be taken, given the length of time that the

draft Bill has been subject to consultation and the importance of meeting the UK's international obligations, and we urge that this be brought to a conclusion without further delay. (Paragraph 164)

## The Attorney General

25. The Attorney General's powers of consent and direction raise complex constitutional issues that lie at the heart of ensuring parliamentary accountability for the criminal justice system. We agree with the Government that the power of direction should remain in place without being reformed by the draft Bribery Bill. Since this power will remain in place, we are satisfied that the power of consent should be transferred from the Attorney General to the Directors of the prosecuting authorities (clause 10). Any broader reform of the Attorney General's Office, including her power of direction, must await comprehensive proposals being pursued in the future. (Paragraph 171)
26. Any transfer of consent from the Attorney General to the Directors of the prosecuting authorities, or otherwise, should limit the Directors' power to delegate their role in relation to bribery cases to senior postholders who are nominated and identified under the protocol for prosecutors. We call on the Attorney General to implement this recommendation before any of the proposed offences enter into force. (Paragraph 174)
27. The transfer of consent to the Directors under clause 10 of the draft Bill does not extend to amending section 53 of the Serious Crime Act 2007, leading to an inconsistency in the draft Bill. We recommend that the Government address this anomaly in the forthcoming Bribery Bill (Paragraph 176)

## Article 5, OECD Convention

28. Article 5 of the Organisation for Economic Co-operation and Development's Convention must, at a minimum, be enshrined in guidelines applying to all prosecutors. Confidence in the criminal justice system will be undermined unless this important principle is both protected and respected. We recommend that the Attorney General take the earliest opportunity to ensure that this happens. (Paragraph 183)

## Penalties

29. We support the penalties available under the draft Bill, including the power to impose unlimited fines on companies and a maximum ten year sentence of imprisonment for individuals. The draft Bill must have teeth. However, the Government must:
  - Clarify the way in which the unlimited fine will be assessed;
  - Ensure that civil powers of confiscation and recovery will operate in a way that is proportionate and reasonable; and

- Take action at a European level to prevent companies being automatically and perpetually debarred following a conviction, while exploring shorter-term measures to prevent disproportionate penalties being imposed in the meantime. The Government must ensure that the UK reaches a position where debarment is discretionary, if self-reporting is to work effectively in practice. (Paragraph 192)

## The Security Services

30. We heard no persuasive evidence of a need for the domestic intelligence agencies to be granted an authorisation to bribe. Neither are we persuaded that this draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. Finally, we note continuing doubt about whether clause 13 complies with the United Kingdom's international obligations, despite the fact that this issue was raised as long ago as 2003. For all these reasons we recommend that the Government remove clauses 13 and 14. (Paragraph 203)

## Privilege

31. Under the provisions of the draft Bribery Bill, Members of both Houses of Parliament can be convicted of bribery. This is entirely proper: bribery is a very serious offence and Members should be subject to the same criminal laws as everyone else. (Paragraph 206)
32. In view of the importance of the freedoms parliamentary privilege is designed to protect, we believe that attempts to legislate on this matter should be consistent with each other. Clause 15 of the draft bill is based on the conclusions of the Joint Committee on the Draft Corruption Bill in 2003, which was not the case with the Parliamentary Standards Bill as introduced in the Commons. Inconsistency risks confusion in the operation and application of the law and could bring about the unnecessarily broad erosion of fundamental constitutional principles by means of competing precedents. For this reason we believe it is unacceptable that the draft Bribery Bill should take a different approach to privilege from that taken in the Parliamentary Standards Bill, particularly as the two bills deal with overlapping areas of law. (Paragraph 224)
33. In order to achieve consistency with the Parliamentary Standards Act 2009, we recommend that the Government leave out clause 15 of the draft Bribery Bill. (Paragraph 225)
34. The issue of parliamentary privilege has arisen in relation to several pieces of legislation and draft legislation in recent years. Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so. This issue was examined in considerable detail by the 1999 Joint Committee on Parliamentary Privilege, which concluded that a Parliamentary Privileges Act was required. We believe that, should the Government deem it necessary, such an act would be the most appropriate place to address the potential evidential problems in relation to bribery offences. (Paragraph 228)

## Wider issues

35. The Government's partial Impact Assessment suggests that bribery legislation would only result in an additional 1.3 prosecutions for bribery per year. This would be an indicator of success if it reflected vastly increased diligence and compliance on the part of companies. We would be troubled if this low estimate were better explained by a lack of resources available to enforce the legislation. We recommend that the Government prepare a complete Impact Assessment for any legislation that is subsequently introduced, including an assessment of the additional resources required for effective enforcement by way of publicity, monitoring of compliance and investigations. Without committing adequate resources to tackle bribery, the Government's legislation will not have the required deterrent effect.. (Paragraph 237)
36. The Government's impact assessment should also include a fuller analysis of the damage caused by bribery to economic and social development, to democracy and the rule of law, to individual members of the community and to businesses themselves, particularly through the distortion of competition, the diversion of scarce resources to purchase inferior products, and the harm to personal and national reputations at home and abroad. These underlying economic and human costs, felt most directly and disproportionately by the poor, must not be overlooked. (Paragraph 238)
37. The Government's partial Impact Assessment of the draft Bill leaves out much of the analysis needed to justify its conclusions and in particular takes only minimal account of the impact of the proposed legislation on the private sector. We recommend that the Government publishes a much more detailed Impact Assessment at the same time that the Bill is introduced into Parliament, taking account of all the points raised in Annex 1 to this report and paying particular attention to the impact of the legislation on business, especially small businesses. (Paragraph 242)
38. We welcome the commitment of the Government, set out in its partial Impact Assessment for the draft Bill, to review the impact of the legislation after a period of three to five years. We recommend, however, that in its revised Impact Assessment the Government generates a comprehensive set of performance indicators so that the criteria against which the legislation is being assessed are clearly understood. (Paragraph 244)
39. We regret that we were given a bare ten weeks to conduct pre-legislative scrutiny of this important draft Bill. We recommend that, in order to demonstrate its respect for the process, the Government ensure that future Joint Committees are established sufficiently promptly to allow for a minimum scrutiny period of twelve weeks from the first meeting of the committee appointed to undertake scrutiny. (Paragraph 246)

# Annex 1

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## Review of the Draft Bribery Bill Impact Assessment by the House of Commons Scrutiny Unit

### *Key points*

- A *partial* Impact Assessment (IA) has been provided. Further explanation is required as to why it is not complete;
- The average annual cost of the provisions of the draft Bill is estimated at £4.1 million, including £2.1 million to fund additional enforcement activities by the Serious Fraud Office (and others) and £2 million for additional private sector defence costs. This is based on an additional 1.3 criminal prosecutions and three extra civil recovery proceedings per year due to the draft Bill. The basis of these figures and cost estimates is insufficiently explained;
- There is no detailed explanation of the impact on the private sector beyond the estimated additional defence costs of £2 million. In particular:
  - The financial and practical impact on small and medium sized businesses arising due to the new corporate offence (i.e. negligently failing to prevent bribery) is not quantified;
  - A Competition Assessment was not undertaken as part of the IA, and there is no evidence supporting the Impact Assessment's statement that the draft Bill will improve the competitiveness of UK companies;
- There is a one-off budget for awareness training of £50,000. The intended use and sufficiency of this budget could be explored further;
- There will be no compliance monitoring process to assess private sector compliance with the new discrete corporate offence.

### *Introduction*

The House of Commons Scrutiny Unit provides specialist help to select committees and joint committees of both Houses, especially in the fields of financial and performance reporting and pre-legislative scrutiny of draft bills. For more information about its work, see [www.parliament.uk/scrutiny](http://www.parliament.uk/scrutiny). The Unit provides an analysis of impact assessments to assist committees with their scrutiny of draft bills.

The following review relates to the partial Impact Assessment produced by the Ministry of Justice (MoJ) in support of the draft Bribery Bill.

## *Analysis of the IA*

An IA provides a framework for departments to analyse the likely impacts of policy changes and draft bills, including a cost-benefit analysis. The MoJ estimates that the total annual cost of the provisions of the draft Bill is £4.13 million. However, it does not provide a range for this estimate. A one-off transitional cost of £50,000 is also anticipated for “awareness raising”. No monetary benefits are estimated, although non-monetised benefits are highlighted by the MoJ (p2). The related Equality Impact Assessment states that, based on a range of existing evidence, no equality issues have been identified associated with the implementation of the draft Bill.

Guidance by the Department for Business, Enterprise and Regulatory Reform (BERR) outlines a number of minimum requirements for an IA.<sup>371</sup> These include:

- the rationale for the proposal;
- details of the costs and benefits of the policy change;
- consideration of the options; and
- the consultation summary.

While a consultation summary is not provided in the IA for the draft Bill,<sup>372</sup> the structure of the IA broadly conforms to BERR guidance with major headings clearly set out.

However, the IA is short and only partial; the “Summary: Intervention & Options” page indicates that the IA is at the “draft implementation” stage. It is understood the Bill Team intend to send the Joint Committee a paper explaining why the IA is currently only partial; this will include information on ongoing work to assess the draft Bill’s impact.<sup>373</sup>

The following sections examine the key issues identified by the Scrutiny Unit’s analysis of the IA and draws out some aspects that the Joint Committee may wish to explore further, including suggestions for how the IA may be improved during pre-legislative scrutiny. Questions and suggestions the Joint Committee may wish to put to the Bill Team are in bold.

### *IA Summary: Analysis and Evidence (p2)*

The average annual cost of £4.13 million (of which £2 million is private sector defence related) is calculated “on the basis of 1.3 additional prosecutions a year”. However, **it is unclear:**

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<sup>371</sup> Note: this analysis was prepared before the creation of the new Department for Business, Innovation and Skills. The guidance on Impact Assessments is available at: <http://www.berr.gov.uk/files/file44544.pdf>

<sup>372</sup> It is stated that this is because of the range of consultations previously carried out in relation to the reform of the law on bribery (p4). No further formal consultation process on the impact of the draft Bill is anticipated.

<sup>373</sup> This paper was subsequently received and is printed with the written evidence submitted to the Joint Committee as BB43.

- **On what basis the net cost to the private sector has been calculated.**
- **What assumptions were made in calculating total costs to the public and private sector on the basis of 1.3 additional prosecutions a year; and**
- **Whether the cost estimates are subject to any sensitivities/margins of error.**

Pending clarification of these points, there may be implications for the ‘Net Benefit Range’ field, which is not completed in the IA. Notably, BERR’s IA guidance specifically states that “spurious accuracy in the presentation of the cost and benefit figures should be avoided with ranges used where appropriate”.<sup>374</sup>

It is also stated that there will be a one-off transitional cost of £50,000 for “awareness raising”. However, the IA does not detail the basis on which this figure is calculated.

**How was the one-off cost of £50,000 for “awareness raising” calculated, and will this be sufficient to inform all UK companies of the implications associated with the new legislation? How will this money be used?**

Additionally, it is stated that implementation would go beyond the minimum EU requirements. However, the case for this is not provided in the Evidence Base, as is required by BERR’s guidance on IAs.<sup>375</sup>

### ***Evidence Base: Background and reasons for Government Intervention (pp 3-4)***

This section of the IA initially outlines the risks posed by bribery:

Bribery distorts free and fair competition in the market, with over £1,000 billion (\$1 trillion) worth of bribes paid globally each year. It hurts honest companies and increases the cost of business both domestically and internationally, adding up to 10% to the total cost of doing business globally and up to 25% to the cost of procurement contracts in developing countries. Although comparatively rare in the UK, corruption remains an insidious threat globally and is particularly harmful where it affects trade and development in the developing world, with a negative impact on foreign direct investment equivalent to an extra 20% in tax.

However, the IA fails to provide the source of these figures. The DFID press release issued on publication of the draft Bill states that these figures are World Bank estimates.<sup>376</sup> **It is recommended that any future version of the IA adequately sources supporting data.** This section of the IA also mentions OECD criticism of the existing UK law on bribery; neither is this sourced.

### ***Evidence Base: Policy Objectives (pp 4-6)***

The IA suggests that the new discrete corporate offence contained within the draft Bill is “intended particularly to combat the use of bribery in high value transactions in

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<sup>374</sup> *ibid.* para 28

<sup>375</sup> *ibid.* para 39

<sup>376</sup> DFID Press Release, “New draft Bribery Bill to support international fair trade”, 26 March 2009

international markets” (p5). On this basis, the IA assumes that in “most cases” the activities of small and medium sized enterprises (SMEs) will not fall within the main focus of enforcement activity. While this may be an acceptable assumption, the Joint Committee may wish to enquire as to whether there is any evidence that UK-based SMEs do, in some cases, tender for larger scale public procurement internationally. It is notable that in recent years, the UK Government has actively encouraged SMEs to tender for domestic public procurement through a range of measures.<sup>377</sup>

**In relation to the new discrete corporate offence, what evidence is there for the IA’s assertion that in “most cases” the activities of SMEs will not fall within the main focus of enforcement activity?**

The subsection ‘Policy Options’ is the only area where the policy options considered are discussed in any detail. However, there is little detail on the potential costs and benefits of these two options. In particular, the IA states that Option (iii), establishing a regulatory framework overseen by a regulatory authority with powers to impose administrative penalties for non-compliance, would be “very costly to the public purse” (p6). It would be useful for the IA explicitly to quantify the potential costs of creating and maintaining such a framework and regulatory authority. Notably, the Financial Services Authority (FSA) already has a statutory duty to promote market confidence and reduce financial crime by “authorised persons” within the financial services sector (i.e. banks, insurers, etc).<sup>378</sup> To this end it has regulatory powers to impose fines to combat overseas bribery and corruption by UK companies operating within this sector.<sup>379</sup>

The IA also states that such a framework would impose an additional burden on business, citing the example of the Trade Description Act 1968 which is estimated to impose £35 million of administrative burdens on complying firms per annum (note: the source of this figure is not provided). It would have been useful for the IA to quantify the potential burden to businesses of this option.

**What assessment has the MoJ made of the monetary costs and benefits to Government and the private sector of options (i) and (iii)?**

***Evidence Base: Criminal Justice Costs (pp 7-8)***

Regarding the general offences and the new discrete offence of bribing a foreign public official, the IA states that (p7):

Based upon our analysis of bribery offences and given the fact that the new proposed general offences and the new discrete offence of bribing a foreign public official are reformulation of existing criminality we do not expect any significant additional burden on the CJS (police, prosecution, courts and prison).

The Joint Committee may wish to ask for additional details of the analysis used to come to this conclusion. Equally, while the IA notes that an increase in the maximum penalty from

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<sup>377</sup> See for example: HM Treasury, *Accelerating the SME economic engine: through transparent, simple and strategic procurement*, November 2008

<sup>378</sup> *Financial Services and Markets Act 2000*, section 2

<sup>379</sup> *ibid.* section 206

seven to ten years imprisonment will “have some limited impact on sentences handed down”, it would be useful for the IA to explicitly state what this impact will be (in terms of prison places and associated costs).

**What is the evidence for the assertion in the IA that the draft Bill’s general offences and the new discrete offence of bribing a foreign public official will only have minimal cost implications for the criminal justice system?**

On the new discrete corporate offence the IA states that, based on existing statistics (p7):

[...] there would be only around 1.3 additional prosecutions a year (1 SFO prosecution per year and 1 CPS prosecution in a 3 year period) arising from the introduction of the new corporate offence.

The costs overall to SFO is estimated at £1m for prosecution (counsel/witness) and £1m for investigations. SFO would expect to recover most court costs from the company upon conviction.

However, the IA does not provide the source, methodology or assumptions on which these figures are based. Furthermore, while the paragraph above states that most court cost would be recovered, the net extra expense to the Serious Fraud Office (SFO) is still put at £1.5 million.

It is also stated that the SFO estimates that the new discrete corporate offence would lead to three extra civil recovery/monitoring orders on companies per year. It is, however, unclear on what this estimate is based, or what the net cost will be (taking into account recovered costs) of these additional three orders.

The IA also notes (p8):

Corporate cases can be among the more complex and lengthy to investigate and prosecute [...] The award of costs against the Crown is a possibility in failed prosecutions and could be equally as expensive.

**Has the MoJ made any estimates of the cost to the criminal justice system of failed prosecutions under the new discrete corporate offence?**

***Evidence Base: Costs on the private sector (pp 8-9)***

The IA does not provide detailed quantitative analysis of the potential impact of the draft Bill on businesses, and in particular SMEs. An estimated cost to the private sector of approximately £2 million annually for defence legal costs, arising from criminal or civil proceedings is provided. It is unclear, however, how this estimate has been calculated and indeed how this corresponds. The IA assessment also asserts that (p8):

[...] most, if not all, large companies already have established systems of corporate governance in place which address the prevention of bribery either directly or indirectly by means of strategies, guidance and/or codes of conduct. The few that currently do not address bribery would be capable of being readily directed to provide effective supervision.

SMEs may not have previously addressed the need for anti-bribery measures. However, industry standards increasingly require this, with detailed sector-specific initiatives in the defence, oil and gas, mining, construction and pharmaceutical sectors. Companies meeting these various standards should already have access to the adequate systems defence without incurring additional costs.

Statistics are not provided to support the suggestion that most companies have existing systems in place to prevent bribery, and potential costs incurred for those that do not is not provided. In particular, the Joint Committee may wish to question why the IA does not address and quantify the potential costs to SMEs, those businesses which are most likely not to have adequate systems in place.

**What will the costs be to companies that do not have anti-bribery measures in place within their system of corporate governance, particularly SMEs? How will such companies be “readily directed” in order to ensure effective supervision?**

### ***Other issues: further consultation of business***

The IA states that the MoJ will:

[...] continue working with representatives of business at all levels, such as the Confederation of British Industry, International Chamber of Commerce and the Federation of Small Businesses, following the publication of the draft Bill to address any concerns about the impact of the new corporate offence. In particular, we will consider the scope to reduce familiarisation and implementation costs by targeted awareness raising and guidance on anti-bribery procedures, if appropriate on a sectoral basis. Members of business organisations representing SMEs may benefit for free legal advice from those organisations. We can also consolidate guidance and good practice already in existence. Guidance on broad principles and best practice models, while not statutory guidance, is likely to be of particular value in minimising the additional costs to SMEs and companies operating in low-risk sectors and markets.

BERR’s guidance on IAs states that one purpose of their publication is to ensure affected parties are given an opportunity to identify potential unintended consequences, primarily through the IA’s consultation process.<sup>380</sup> However, it is unclear the approach identified in the quote above will enable businesses, and particularly SMEs, equivalent opportunity to voice any concerns on the impact of business from the draft Bill that would come from a formal and open consultation process. This is particularly pertinent given the lack of quantitative analysis in the IA of the effect on the private sector.

### ***Other issues: Competition Assessment***

Within the Evidence Base, under the heading ‘Benefits’, the IA states that (p9):

[...] the enhancement of the UK reputation as consequence of these reforms will allow UK business to compete more successfully in international markets, as there will be those who choose to do business with UK companies precisely because we

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<sup>380</sup> BERR guidance on Impact Assessments, para 2

have a no-bribery reputation, and the costs and style of doing business are more transparent.

However, the IA does not include a formal Competition Assessment. No evidence is provided to support the assertion that the draft Bill will have a positive effect on UK companies' international competitiveness; while it may be reasonably assumed that such legislation will make the UK a more attractive place to do business for some international companies, it is also possible that some companies may find such additional regulation to be a reason to not conduct business with UK companies. Therefore, **the Committee may wish to recommend that a formal Competition Assessment is undertaken as part of any primary legislation resulting from the draft Bill.**

### ***Other issues: post implementation review***

The IA states that the legislation would be reviewed between three to five years after it comes into effect (p1). However, regarding the new discrete corporate offence, the IA states that there will be no monitoring process of compliance by companies to adopt anti-bribery measures (p9).

**Why will an assessment of the compliance of the private sector to the new discrete corporate offence not be included in the review process?**

## Annex 2

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### FOREIGN CORRUPT PRACTICES ACT: ANTIBRIBERY PROVISIONS—LAWYER'S GUIDE PUBLISHED BY THE US DEPARTMENT OF JUSTICE

#### Introduction

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, et seq., to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct.

The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

*This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.*

#### Background

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have

gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. See Convention and Commentaries on the DOJ web site.

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the antibribery provisions.

## Enforcement

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers.

## Antibribery Provisions

### *Basic Prohibition*

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

**A. Who**—The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an “issuer,” a & “domestic concern,” or a foreign national or business.

An “issuer” is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as “issuers,” and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves “domestic concerns,” who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

**B. Corrupt intent**—The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The *offer* or *promise* of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

**C. Payment**—The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

**D. Recipient**—The prohibition extends only to corrupt payments to a *foreign official, a foreign political party or party official, or any candidate* for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official," such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official."

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for "facilitating payments for routine governmental action" (see below).

**E. Business Purpose Test**—The FCPA prohibits payments made in order to assist the firm in *obtaining or retaining business* for or with, or *directing* business to, any person. The Department of Justice interprets "obtaining or retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

### **Third Party Payments**

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "*knowing*" includes *conscious disregard and deliberate ignorance*. The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official."

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

*You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.*

## **Permissible Payments and Affirmative Defenses**

The FCPA contains an explicit exception to the bribery prohibition for “facilitating payments” for “routine governmental action” and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

### ***Facilitating Payments for Routine Governmental Actions***

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a “routine governmental action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

*Actions “similar” to these are also covered by this exception.* If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

“Routine governmental action” does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

### ***Affirmative Defenses***

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are “affirmative defenses,” the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

## Sanctions Against Bribery

### *Criminal*

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher—the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may not be paid by their employer or principal.

### *Civil*

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

### *Other Governmental Action*

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

### ***Private Cause of Action***

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

### **Guidance from the Government**

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Mark F. Mendelsohn, Deputy Chief, Fraud Section, at (202) 514-1721; Charles Duross, Assistant Chief, Fraud Section, at (202) 353-7691; or Hank Walther, Assistant Chief, Fraud Section, at (202) 307-2538 .

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

### ***United States Department of Justice***

## Formal Minutes

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*Extract from the House of Lords Minutes of Proceedings of Monday 30 March 2009*

**Draft Bribery Bill** The Lord President (Baroness Royall of Blaisdon) moved that it is expedient that a joint committee of Lords and Commons be appointed to consider and report on the draft Bribery Bill presented to both Houses on 25 March (Cm 7570) and that the committee should report on the draft Bill by 21 July. The motion was agreed to and a message was sent to the Commons.

*Extract from the Votes and Proceedings of the House of Commons of Monday 27 April 2009*

Draft Bribery Bill (Joint Committee)

Resolved, That this House concurs with the Lords Message of 30 March, that it is expedient that a Joint Committee of Lords and Commons be appointed to consider and report on any draft Bribery Bill presented to both Houses.

That a Select Committee of twelve Members be appointed to join with the Committee appointed by the Lords to consider the draft Bribery Bill (Cm 7570).

That the Committee should report by 21 July 2009.

That the Committee shall have power—

- (i) to send for persons, papers and records;
- (ii) to sit notwithstanding any adjournment of the House;
- (iii) to report from time to time;
- (iv) to appoint specialist advisers;
- (v) to adjourn from place to place within the United Kingdom; and

That Mr David S. Borrow, Mr Alistair Carmichael, Mr Geoffrey Cox, Mary Creagh, Mr Jonathan Djanogly, Mr Bruce George, Linda Gilroy, Dr Brian Iddon, Martin Linton, Mr Virendra Sharma, Dr Desmond Turner and Jeremy Wright be members of the Committee.—(Ms Diana R. Johnson.)

*Extract from the House of Lords Minutes of Proceedings of Monday 11 May 2009*

**Draft Bribery Bill** The Chairman of Committees moved that the Commons message of 28 April be considered and that a Committee of twelve Lords members be appointed to join with the Committee appointed by the Commons to consider and report on the draft Bribery Bill presented to both Houses on 25 March (Cm 7570) and that the Committee should report on the draft Bill by 21 July 2009;

That the following members be appointed to the Committee:

L. Anderson of Swansea	L. Mayhew of Twysden
V. Colville of Culross	E. Onslow
L. Goodhart	L. Sheikh
L. Grabiner	L. Thomas of Gresford
B. Henig	B. Whitaker
L. Lyell of Markyate	L. Williamson of Horton;

That the Committee have power to agree with the Committee appointed by the Commons in the appointment of a Chairman;

That the Committee have power to send for persons, papers and records;

That the Committee have power to appoint specialist advisers;

That the Committee have power to adjourn from place to place within the United Kingdom;

That the Committee have leave to report from time to time;

That the reports of the Committee from time to time shall be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee shall, if the Committee so wishes, be published; and

That the Committee meet with the Committee appointed by the Commons on Tuesday 12 May at 10.30am in the Boothroyd Room, Portcullis House.

The motion was agreed to and a message was sent to the Commons.

## Tuesday 12 May 2009

Present:

Lord Anderson of Swansea	Mr David S Borrow
Viscount Colville of Culross	Mr Jonathan Djanogly
Lord Goodhart	Mr Bruce George
Baroness Henig	Linda Gilroy
Lord Lyell of Markyate	Dr Brian Iddon
Lord Mayhew of Twysden	Martin Linton
Earl of Onslow	Mr Virenda Sharma
Lord Thomas of Gresford	Dr Desmond Turner
Baroness Whitaker	Jeremy Wright
Lord Williamson of Horton	

Members' interests: The full lists of Members' interests as recorded in the Commons Register of Members' Interests and Lords Register of Interests are noted.

Lord Anderson declared that he was a non-practising barrister and a Board member of a charity.

Lord Colville declared that he was previously a Circuit Judge and currently an Assistant Surveillance Commissioner.

Lord Goodhart declared that he was a member of Transparency International.

Baroness Henig declared that she was Chairman of the Security Industry Authority and President of the Association of Police Authorities.

Lord Lyell declared that he was a former Attorney General and Solicitor General.

Lord Thomas declared that he was a QC and had defended bribery cases, and further that he had recently been in Hong Kong working with the Independent Commission Against Corruption.

Baroness Whitaker declared that she was in receipt of a civil service pension.

Lord Williamson declared that he was a former civil servant and former official at Whitbread plc.

Mr David S Borrow declared that he had close constituency interests with BAE Systems and had had visited Thales with the Industry and Parliament Trust.

Mr Bruce George declared that he was head of a non-governmental organisation connected to standards in government.

Linda Gilroy declared that she had constituency interests in defence and had been on a fellowship with BAE in 1999 to 2000.

Jeremy Wright declared that he was a non-practising barrister.

It is moved that Lord Colville of Culross do take the Chair.—(*Mr Bruce George*)

The same is agreed to.

The Orders of Reference are read.

The Joint Committee deliberate.

*Ordered*, That Strangers be admitted during the examination of witnesses unless otherwise ordered.

*Ordered*, That the uncorrected transcripts of evidence given, unless the Committee otherwise order, be published on the internet.

The call for evidence is agreed to [see note, below].

*Ordered*, That Professor Peter Alldrige be appointed a Specialist Adviser.

*Ordered*, That the Joint Committee be adjourned to Thursday 14 May at 10.30 am.

### **Call for evidence**

## **NEW JOINT COMMITTEE ON THE DRAFT BRIBERY BILL ESTABLISHED**

### **First oral evidence session and call for written evidence announced**

The new Committee set up to scrutinise the Draft bribery Bill has today met for the first time and elected Viscount Colville of Culross as Chairman.

The Committee is today calling for evidence to be submitted on the provisions of the draft Bill. The Joint Committee comprises 12 MPs and 12 peers and will take oral and written evidence on the draft Bribery Bill, culminating in a report of recommendations to Parliament and Government, expected by 21<sup>st</sup> July 2009.

**The first evidence on the Draft Bill will be heard this Thursday, May 14<sup>th</sup>, with Professor Jeremy Horder, Criminal Commissioner of the Law Commission.** The session will begin at 10.30 am

The Committee would like to invite written submissions to assist it in its scrutiny of the draft Bill. The areas it will examine include:

- The background to the draft Bill, including the reasons for the shift in approach from the current law and the 2003 draft Corruption Bill (Cm 5777, 2003).
- The proposed new offences of bribing (clause 1) and being bribed (clause 2), together with the functions that they cover (clause 3), including:
  - i) Clarity: whether the draft Bill clearly states what types of conduct and behaviour will be punishable as bribery using terms and concepts that will be readily understood and predictably applied by police, prosecutors, jurors, businesses and the public etc.;
  - ii) Scope: whether the scope of the draft Bill is adequate to capture all the circumstances in which bribery should be deemed to have occurred without capturing conduct that should be considered innocent.
  - iii) Special cases: whether the offences adequately address special or difficult issues such as facilitation payments, lobbying versus trading in influence, corporate hospitality and commission payments;
- The proposed new offence of bribing foreign public officials (clause 4), including:
  - i) International obligations: the extent to which it ensures compliance with the UK's international obligations, particularly the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.
  - ii) Clarity and scope: whether the clarity and scope of the offence is appropriate, including the test of whether an advantage was "legitimately due" under the foreign law applying to the official.
- The proposed new offence for commercial organizations that negligently fail to prevent bribery (clause 5), namely:
  - i) Justification: the evidence of need for regulation in this area;
  - ii) Impact: the impact on businesses, particularly small businesses, of such regulation, together with the effect on the UK's competitiveness;
  - iii) Clarity: the clarity and predictability of the offence, including the terms that are used such as "negligence" and "adequate procedures";
- Whether the extra-territorial reach of the offences (clauses 5(7) and 7) is appropriate, including the new corporate offence's application to any company or partnership from anywhere in the world that is carrying on business (or part of a business) in the UK.
- The benefits and disadvantages of the removal of the requirement for the Attorney-General's consent for prosecution of bribery offences (clause 10), together with the remaining powers of direction that are unaffected by the draft Bill.
- The penalties proposed in relation to the new offences.
- Whether the exemptions from prosecution proposed for the intelligence services are appropriate and workable.

- Whether parliamentary privilege should be narrowed as part of a balance between convicting the corrupt and protecting free speech in Parliament. If so, whether the proposals are workable and otherwise appropriate.
- Whether the changes that have been made by the Government to the Law Commission's recent draft Bill (HC 928, November 2008) are appropriate.
- Compliance with the Human Rights Act 1998.
- Whether there are any specific changes that should be made to improve the draft Bill, together with any other issues that ought to be addressed.

#### **Deadline for submissions**

Submissions, which should be original and not copies of papers written for the Government consultation or any other inquiry, must be received by **Wednesday 17th June**. However, owing to the short timetable the Committee is working to, papers received by the *beginning of June* are most likely to influence the work of the Committee.

#### **Oral evidence**

The programme of oral evidence sessions will be announced soon. It will be available, together with the written and oral evidence received, on the website:

### **Thursday 14 May 2009**

Members present:

Viscount Colville of Culross, in the Chair

Lord Goodhart	Mr David S Borrow
Baroness Henig	Mr Alistair Carmichael
Lord Mayhew of Twysden	Mr Jonathan Djanogly
Lord Thomas of Gresford	Mr Bruce George
Baroness Whitaker	Martin Linton
Lord Williamson of Horton	Dr Desmond Turner
	Jeremy Wright

The proceedings of Tuesday 12 May are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB01-02 and BB17-18 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

The following witness is examined:

Professor Jeremy Horder, Criminal Commissioner, Law Commission

*Ordered*, That the Joint Committee be adjourned to Wednesday 20 May at 9.45 am.

### **Wednesday 20 May 2009**

Viscount Colville of Culross, in the Chair

Lord Anderson of Swansea	Mary Creagh
Lord Goodhart	Mr Jonathan Djanogly

Baroness Henig  
 Lord Mayhew of Twysden  
 Earl of Onslow  
 Lord Sheikh  
 Lord Thomas of Gresford  
 Baroness Whitaker

Linda Gilroy  
 Martin Linton  
 Jeremy Wright

The proceedings of Thursday 14 May are read.

The Joint Committee deliberate.

*Ordered*, That Memorandum number BB03 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

*Ordered*, That Professor Michael Clarke be appointed a Specialist Adviser.

The following witnesses are examined:

Colin Nicholls QC, Professor Celia Wells, University of Durham and Professor Bob Sullivan, University College London

*Ordered*, That the Joint Committee be adjourned to Tuesday 2 June at 3.30 pm.

## Tuesday 2 June 2009

Mr Bruce George, in the Chair

Lord Goodhart  
 Baroness Henig  
 Lord Lyell of Markyate  
 Lord Mayhew of Twysden  
 Earl of Onslow  
 Lord Thomas of Gresford  
 Baroness Whitaker  
 Lord Williamson of Horton

Mr David S Borrow  
 Mr Alistair Carmichael  
 Mr Geoffrey Cox  
 Mr Jonathan Djanogly  
 Linda Gilroy  
 Dr Brian Iddon  
 Martin Linton  
 Dr Desmond Turner

The proceedings of Wednesday 20 May are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB04 – BB08 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

Mr David S Borrow declared that he had close constituency interests with BAE Systems and had had visited Thales with the Industry and Parliament Trust.

Linda Gilroy declared that she had constituency interests in defence and had been on a fellowship with BAE in 1999 to 2000.

The following witnesses are examined:

Rt Hon Lord Robertson of Port Ellen

Gary Campkin, Head of International Policy, Confederation of British Industry, Andrew Berkeley, Adviser, International Chamber of Commerce UK, Rosina Robson, Senior Policy Adviser, Federation of Small Businesses

Derek Marshall, Director of Defence and Homeland Security, Society of British Aerospace Companies, Brinley Salzmann, Exports Director, Defence Manufacturers' Association, James Maton, Partner, Edwards Angell Palmer and Dodge UK (on behalf of the UK Anti-corruption Forum)

*Ordered*, That the Joint Committee be adjourned to Thursday 11 June at 10.30 am.

### Wednesday 3 June 2009

Mr Bruce George, in the Chair

Lord Goodhart	Mr David S Borrow
Lord Lyell of Markyate	Mr Alistair Carmichael
Lord Mayhew of Twysden	Mr Geoffrey Cox
Earl of Onslow	Mr Jonathan Djanogly
Lord Thomas of Gresford	Linda Gilroy
Baroness Whitaker	Martin Linton
Lord Williamson of Horton	Jeremy Wright

The proceedings of Tuesday 2 June are read.

The Joint Committee deliberate.

*Ordered*, That Memorandum number BB09 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

The following witnesses are examined:

Philip Bramwell and Alan Garwood, BAE Systems, Lawrence Hammond, Solicitor, Thales UK, Stephen Ball, Chief Executive Officer, Lockheed Martin UK

Jeremy Cole, Bribery and Corruption Taskforce Co-ordinator, Lovells, Louise Delahunty, Partner in Crime, Fraud and Investigation, Simmons and Simmons, Monty Raphael, Head of Fraud and Regulatory, Peters and Peters

*Ordered*, That the Joint Committee be adjourned to Wednesday 10 June at 3.30 pm.

### Wednesday 10 June 2009

Viscount Colville of Culross, in the Chair

Lord Anderson of Swansea	Mr David S Borrow
Lord Goodhart	Mr Geoffrey Cox
Lord Lyell of Markyate	Mr Jonathan Djanogly
Lord Mayhew of Twysden	Mr Bruce George
Earl of Onslow	Linda Gilroy
Lord Sheikh	Dr Brian Iddon
Lord Thomas of Gresford	Dr Desmond Turner
Baroness Whitaker	
Lord Williamson of Horton	

The proceedings of Wednesday 3 June are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB10-BB11 and BB14-BB16 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

The following witnesses are examined:

Mr Keir Starmer, Director of Public Prosecutions, Mr Richard Alderman, Director, Serious Fraud Office and Detective Chief Superintendent Steve Head, Association of Chief Police Officers Portfolio Holder for Overseas Corruption and Bribery

Dr Malcolm Jack, Clerk of the House of Commons, Ms Jacqy Sharpe, Principal Clerk of the Table Office, House of Commons, Mr Michael Pownall, Clerk of the Parliaments, Dr Christopher Johnson, Clerk of the Journals, House of Lords

*Ordered*, That the Joint Committee be adjourned to Thursday 11 June at 10.30 am.

### Thursday 11 June 2009

Viscount Colville of Culross, in the Chair

Lord Goodhart	Mr David S Borrow
Baroness Henig	Mr Jonathan Djanogly
Lord Lyell of Markyate	Mr Bruce George
Lord Mayhew of Twysden	Linda Gilroy
Earl of Onslow	Dr Brian Iddon
Lord Sheikh	Martin Linton
Lord Thomas of Gresford	
Baroness Whitaker	
Lord Williamson of Horton	

The proceedings of Wednesday 10 June are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB12-BB13 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

Mr Bruce George declared that he was head of a non-governmental organisation connected to standards in government.

Lord Goodhart declared that he was a member of Transparency International.

Baroness Whitaker declared that she was a member of the Advisory Council of Transparency International.

The following witnesses are examined:

Dimitri Vlassis, Chief, Crimes Convention Section, Treaty and Legal Affairs branch, Division for Treaty Affairs, United Nations, Nicola Bonucci, Director of Legal Affairs, Organisation for Economic Co-operation and Development, Christine Uriarti, General Counsel, Anti-Corruption Division, Organisation for Economic Co-operation and Development and William Yiu Wah Loo, Policy Analyst, Anti-Corruption Division,

Mark Pyman, Director, Defence Programme and Jeremy Carver, Board Member, Transparency International UK, Nick Hildyard, Co-director, The Corner House, Sarah Sexton, Co-director, The Corner House

*Ordered*, That the Joint Committee be adjourned to Wednesday 17 June at 2.30 pm.

### Wednesday 17 June 2009

Viscount Colville of Culross, in the Chair

Lord Anderson of Swansea	Mr David S Borrow
Lord Goodhart	Mr Geoffrey Cox
Lord Mayhew of Twysden	Mr Jonathan Djanogly
Earl of Onslow	Mr Bruce George
Lord Thomas of Gresford	Linda Gilroy
Baroness Whitaker	Dr Brian Iddon
Lord Williamson of Horton	Martin Linton
	Dr Desmond Turner

The proceedings of Thursday 11 June are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB19–BB29 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

The following witnesses are examined:

Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, Michael Des Tombe, Legal Adviser and Roderick Macauley, Bill Team Manager, Ministry of Justice

*Ordered*, That the Joint Committee be adjourned to Thursday 25 June at 9.45 am.

### Thursday 25 June 2009

Viscount Colville of Culross, in the Chair

Lord Anderson of Swansea	Mr Geoffrey Cox
Lord Goodhart	Linda Gilroy
Baroness Henig	Dr Brian Iddon
Lord Lyell of Markyate	Martin Linton
Lord Mayhew of Twysden	
Lord Sheikh	
Baroness Whitaker	
Lord Williamson of Horton	

The proceedings of Wednesday 17 June are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB30 – BB50 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

The following witness is examined:

Rt Hon Baroness Scotland of Asthal, Attorney General

*Ordered*, That the Joint Committee be adjourned to Monday 29 June at 3.30 pm.

## Monday 29 June 2009

Viscount Colville of Culross, in the Chair

Lord Anderson of Swansea	Mr David S Borrow
Lord Goodhart	Mr Geoffrey Cox
Baroness Henig	Mr Jonathan Djanogly
Lord Lyell of Markyate	
Lord Mayhew of Twysden	
Baroness Whitaker	
Lord Williamson of Horton	

The proceedings of Thursday 25 June are read.

The Joint Committee deliberate.

*Ordered*, That Memoranda numbers BB51 – BB58 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

*Ordered*, That the Joint Committee be adjourned to Thursday 16 July 2009 at 10 am.

## Thursday 16 July 2009

Viscount Colville of Culross, in the Chair

Lord Goodhart	Mr Alistair Carmichael
Baroness Henig	Mr Bruce George
Lord Lyell of Markyate	Martin Linton
Lord Mayhew of Twysden	Dr Desmond Turner
Earl of Onslow	
Lord Thomas of Gresford	
Baroness Whitaker	
Lord Williamson of Horton	

The proceedings of Monday 29 June are read.

The Joint Committee deliberate.

A draft Report is proposed by the Chairman.

It is moved that the draft Report before the Committee be read.

The same is agreed to.

Paragraphs 1 to 241 are agreed to.

The Summary is agreed to.

The Committee agreed that the draft Report be the report of the Joint Committee.

*Ordered*, That Memoranda numbers BB59 – BB61 submitted to the Joint Committee be reported to the House of Commons for publication on the internet.

*Ordered*, That certain papers be appended to the Minutes of Evidence.

*Ordered*, That the provisions of Standing Order 134 (Select Committee (reports)) of the House of Commons apply to the report.

*Ordered*, That the Chairman make the report to the House of Lords and Mr Bruce George make the report to the House of Commons.

*Ordered*, That the Joint Committee be now adjourned.

# Witnesses

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## Thursday 14 May 2009

**Professor Jeremy Horder**, Criminal Commissioner, Law Commission

## Wednesday 20 May 2009

**Mr Colin Nicholls QC**, **Professor Celia Wells**, Professor of Criminal Law, University of Bristol, and **Professor Robert Sullivan**, University College, London

## Tuesday 2 June 2009

**Rt Hon Lord Robertson of Port Ellen**

**Gary Campkin**, Head of International Group, Confederation of British Industry, **Andrew Berkeley**, Adviser, International Chamber of Commerce UK, and **Rosina Robson**, Senior Policy Adviser, Federation of Small Businesses

**Derek Marshall**, Director of Defence and Homeland Security, Society of British Aerospace Companies, **Brinley Salzmann**, Exports Director, Defence Manufacturers Association, and **James Maton**, Partner, Edwards Angell Palmer and Dodge UK (on behalf of the UK Anti-corruption Forum)

## Wednesday 3 June 2009

**Philip Bramwell and Alan Garwood**, BAE Systems, **Lawrence Hammond**, Solicitor, Thales UK, and **Stephen Ball**, Chief Executive Officer, Lockheed Martin UK

**Jeremy Cole**, Bribery and Corruption Taskforce Co-ordinator, Lovells, **Louise Delahunty**, Partner in Crime, Fraud and Investigations, Simmons and Simmons, and **Monty Raphael**, Head of Fraud and Regulatory, Peters and Peters

## Wednesday 10 June 2009

**Keir Starmer**, Director of Public Prosecutions, **Richard Alderman**, Director, Serious Fraud Office, and **Detective Chief Superintendent Steve Head**, Association of Chief Police Officers Portfolio Holder for Overseas Corruption and Bribery

**Dr Malcolm Jack**, Clerk of the House of Commons, **Jacqy Sharpe**, Clerk of the Table Office, House of Commons, **Michael Pownall**, Clerk of the Parliaments, and **Dr Christopher Johnson**, Clerk of the Journals, House of Lords

## Thursday 11 June 2009

**Dimitri Vlassis**, Chief, Crimes Convention Section, Treaty and Legal Affairs Branch, Division for Treaty Affairs, United Nations, **Nicola Bonucci**, Director of Legal Affairs, **Christine Uriarte**, General Counsel, Anti-Corruption

Division, and **William Yiu Wah Loo**, Policy Analyst, Anti-Corruption Division, Organisation for Economic Co-operation and Development

**Jeremy Carver**, Board Member, and **Mark Pyman**, Director, Defence Programme, Transparency International UK, **Sarah Sexton**, Co-Director, The Corner House, and **Nicholas Hildyard**, Co-Director, The Corner House

### **Wednesday 17 June 2009**

**Rt Hon Jack Straw MP**, Lord Chancellor and Secretary of State for Justice, **Mr Michael des Tombe**, and **Mr Roderick Macauley**, Ministry of Justice

### **Thursday 25 June 2009**

**Baroness Scotland of Asthal QC**, Attorney General

## List of written evidence

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- 1 Professor Jeremy Horder (BB 01)
- 2 Ministry of Justice (BB 02)
- 3 ICC United Kingdom (BB 03)
- 4 UK Anti-Corruption Forum (BB 04)
- 5 Clifford Chance LLP (BB 05)
- 6 Professor Jeremy Horder (BB 06)
- 7 CBI (BB 07)
- 8 Federation of Small Businesses (BB 08)
- 9 Clerk of the House of Commons (BB 09)
- 10 GC 100 (BB 10)
- 11 Clerk of the Parliaments (BB 11)
- 12 Professor Jeremy Horder (BB 12)
- 13 The Corner House (BB 13)
- 14 Serious Fraud Office (BB 14)
- 15 Professor Wells (BB 15)
- 16 Director of Public Prosecutions (BB 16)
- 17 Chairman of the Public Administration Select Committee (BB 17)
- 18 Chairman of the International Development Committee (BB 18)
- 19 BG Group (BB 19)
- 20 DLA Piper UK LLP (BB 20)
- 21 Professor Jeremy Horder (BB 21)
- 22 Professor Wells (BB 22)
- 23 ICC (BB 23)
- 24 BAE Systems (BB 24)
- 25 Professor Jeremy Horder (BB 25)
- 26 Norton Rose LLP (BB 26)
- 27 Thales UK (BB 27)
- 28 Lockheed Martin UK (BB 28)
- 29 The Corner House (BB 29)
- 30 UK Anti-Corruption Forum (BB 30)
- 31 OECD (BB 31)
- 32 PricewaterhouseCoopers LLP (BB 32)
- 33 BOND (BB 33)
- 34 Reynolds Porter Chamberlain LLP (BB 34)
- 35 Global Witness (BB 35)
- 36 ICC (BB 36)
- 37 Professor Jeremy Horder (BB 37)
- 38 GRECO (BB 38)
- 39 Jeremy Cole (BB 39)
- 40 Louise Delahunty (BB 40)
- 41 Ministry of Justice (BB 41)

- 42 Ministry of Justice (BB 42)
- 43 Ministry of Justice (BB 43)
- 44 Ministry of Justice (BB 44)
- 45 DMA and SBAC (BB 45)
- 46 CBI (BB 46)
- 47 Serious Fraud Office (BB 47)
- 48 Director of Public Prosecutions (BB 48)
- 49 Herbert Smith LLP (BB 49)
- 50 Interchange Solutions (BB 50)
- 51 Monty Raphael (BB 51)
- 52 Ministry of Justice (BB 52)
- 53 Ministry of Justice (BB 53)
- 54 Transparency International (UK) (BB 54)
- 55 The Corner House (BB 55)
- 56 Colin Nicholls QC (BB56)
- 57 US Department of Justice (BB57)
- 58 DCS Stephen Head (BB 58)
- 59 OECD (BB 59)
- 60 Attorney General (BB 60)
- 61 Chairman of the Joint Committee on Human Rights (BB61)