



Bribery Bill Committee briefing House of Commons

**TRANSPARENCY INTERNATIONAL UK URGES PARLIAMENT TO
ENACT THE GOVERNMENT'S BRIBERY BILL BEFORE THE
GENERAL ELECTION.**

SUMMARY

The Committee stage of the Bribery Bill takes place on 16 March. This briefing addresses the marshalled list of amendments to the Bribery Bill to be moved at Committee.

- The Bill has received widespread cross-party support throughout its passage through the House of Lords. It is the product of lengthy and conscientious deliberation over many years. It follows closely the 2008 recommendations of the Law Commission and the excellent report and recommendations of the all-party Joint Scrutiny Committee (JSC).
- The Bill represents the best possible consensus that can be attained among a wide range of stakeholders on a modern, effective legal framework to prosecute bribery and make the United Kingdom (UK) compliant with the 1997 OECD Anti-Bribery Convention.
- It has been thoroughly debated in the House of Lords. Virtually all the amendments now tabled were discussed and either withdrawn or rejected there. Calls to re-open issues that have already been the subject of extensive consultation and carefully crafted compromise would undermine consensus and will prevent the Bill's passage, with undesirable consequences for UK business and the UK's international reputation. All main parties claim to want the Bill enacted in this parliamentary session.
- There appears to be only one issue that threatens to prevent the Bill's enactment before Easter. This concerns Section 13 of the Bill (Defence for certain bribery offences: legitimate purposes) and the need for prior authorisation for the security services and military to act in ways that would otherwise constitute offences under the new law. The government has introduced a last-minute amendment in response to the Lords' requirement for prior authorisation. It would be irresponsible for this issue to derail the Bill's enactment.

TI-UK urges the swift enactment of the Bribery Bill before Easter.

CLAUSES 1 AND 2

Clause 1: Offences of bribing another person

Amendment by Jonathan Djanogly on 4 March 2010, with alternate inserts, so as to qualify the entire clause by the requirement for the prosecution to prove that the defendant was either "acting with corrupt intent" or "acting with dishonesty".

Amendment 1: Page 1, line 3, after "if" insert "acting with corrupt intent"

Amendment 2: Page 1, line 3, after "if" insert "acting with dishonesty"

Clause 2 Offences relating to being bribed

Amendment by Jonathan Djanogly on 4 March 2010, with alternate inserts, so as to qualify the entire clause by the requirement for the prosecution to prove that the defendant was either "acting with corrupt intent" or "acting with dishonesty".

Amendment 3: Page 2, line 2, after "if" insert "acting with corrupt intent"

Amendment 4: Page 2, line 2, after "if" insert "acting with dishonesty"

TI- UK recommendation: amendments 1,2, 3, 4 - do not agree

Justification: Similar amendments were not accepted in the House of Lords. The proposed amendments would take the law back to its vague and inadequate state of which such strong and consistent criticisms have been made since the Law Commission first reported in 1998.

CLAUSE 4

Improper performance to which bribe relates

Amendment by Jonathan Djanogly on 4 March 2010:

Amendment 5: page 3, line 10, after 'expectation', insert 'with corrupt intent'.

Amendment 6: page 3, line 13, at end insert 'and demonstrates corrupt intent'.

TI- UK recommendation: amendments 5 and 6 - do not agree

Justification: These amendments were proposed, debated and withdrawn in the House of Lords. The extra words would create confusion and complicate the task of prosecutors. If a function or activity is performed in breach of a relevant expectation, it should not be necessary to prove corrupt intent.

CLAUSE 6

Bribery of foreign public officials

Amendment by Jonathan Djanogly on 4 March 2010, so as to qualify the entire clause by the requirement for the prosecution to prove that the intention to influence was done "corruptly".

Amendment 7: page 3, line 42, after 'to', insert 'improperly'.

Amendment 8: page 3, line 42, after 'to', insert 'corruptly'.

Amendment 9: page 4, line 3, after 'an', insert 'undue'.

Amendment 10: page 4, line 5, at end insert 'improper'.

Amendment 11: page 4, line 12, at end insert—
'(3A) It shall be a defence if P reasonably believed at the time of the alleged offence that F or the third party to whom the financial or other advantage was given was required or permitted to accept it under the domestic law of the jurisdiction in which F or the third party operates.'

TI-UK recommendation: amendments 7 to 11 - do not agree

Justification: Amendments 7-10 are similar to the amendments proposed by Jonathan Djanogly to Clauses 1 and 2 (above), and suffer from the same weaknesses: they add nothing but confusion to the definition of the offence and would create additional obstacles to prosecution of offences under the Bill. These points were considered in depth by the Law Commission, the Joint Committee and the House of Lords, and were considered unnecessary.

Amendment 11 resurrects the 'reasonable belief defence' which was disfavoured by the Joint Committee. Clause 6 3(b) makes it clear that the bribery offence applies unless the written law applicable to the recipient of the bribe expressly permits the offer, promise or gift. Amendment 11 would significantly weaken the prospect of prosecution of foreign bribery.

The primary purpose of Clause 6 is to give effect to the UK's obligations under the OECD Anti-Bribery Convention, and these amendments are inconsistent with it. They should be opposed.

CLAUSE 7

Failure of commercial organisations to prevent bribery

Amendment by Jonathan Djanogly on 4 March 2010:

Amendment 12: Page 5, line 8, leave out "adequate" and insert "reasonable"

TI- UK recommendation: amendment 12 - do not agree

This amendment would weaken the 'adequate procedures' defence in Clause 7. Companies that have sensible anti-bribery systems in place have nothing to fear from this

Clause. The amendment would have the unfortunate effect of encouraging companies to adopt weaker compliance systems. The amendment should be opposed.

CLAUSE 8

Meaning of associated person

Amendments by Jonathan Djanogly on 4 March 2010:

Amendment 13: Page 6, line 3, leave out from "circumstances" to end and insert 'including but not limited to—
a) the extent of C's influence over A,
b) the degree to which A was able to act autonomously of C,
c) the particular circumstances of any joint venture or consortium arrangements, both documented and arising by virtue of the parties' conduct, between A and C, and
d) the nature of the relationship between A and C.'

TI-UK recommendation: do not agree

Justification: The proposed amendment does not add any value to Clause 8. Sub-clause (4) in any case makes it clear that "all the relevant circumstances" will be taken into account in assessing the relationship between a company and its associate(s). It is not clear why these need to be spelt out as proposed in the amendment.

CLAUSE 9

Guidance about commercial organisations preventing bribery

Amendment by Jonathan Djanogly on 4 March 2010:

Amendment 14: page 6, line 10, after 'section 7(1)', insert 'at least 30 business days prior to sections 1, 2 and 6 coming into force'.

TI-UK recommendation: do not agree

Justification: TI-UK does not see a need for this amendment since the Government has already indicated that the Guidance will be in place before the bribery offences come into force.

CLAUSE 10

Consent to prosecution

Amendments by Jonathan Djanogly on 4 March 2010:

Amendment 15: page 6, line 22, leave out paragraphs (a) to (c) and insert 'the Attorney General'.
Amendment 16: page 6, line 27, leave out paragraphs (a) and (b) and insert 'the Attorney General'.
Amendment 17: page 6, line 29, leave out subsections (3) to (5) and insert—
'(3A) The powers of consent conferred by this section shall be non-delegable by a Director of the organisations specified in subsection (1) and such powers may not be exercised by individuals other than those specified in subsection (1).
(3B) Where consent to proceedings for an offence under this Act is forthcoming under subsections (1) and (2), the organisation whose Director has consented to proceedings will be solely responsible for the undertaking of such proceedings in relation to that alleged offence.'

TI-UK recommendation: amendments 15, 16, 17: do not agree

Justification: These amendments fundamentally impair the entire Bill, taking the law back to the discredited system of political interference in prosecution in conflict with the United Kingdom's treaty obligations. They would replace the need for consent to prosecute from the competent officials making such decisions in the normal course, with that of the Attorney General.

It should be recalled that the need for political consent to prosecute was introduced in the much derided 1906 Act which for the first time subjected politicians and officials to prosecution for bribery. Its putative justification was to prevent irresponsible private prosecutions. It has been evident for years that the power to withhold consent had no purpose other than for political, commercial or other inappropriate expediency. The OECD Working Group on Bribery, in successive formal reviews of the UK's (non-) performance of its obligations under the Anti-Bribery Convention, has pointed to this as being contrary to the Convention, a view reinforced by the conduct of the then Attorney General in relation to the decision to abandon the criminal investigation of the Al-Yamamah project and in relation to the "loans-for-honours" affair. The Government has accepted that the practice had to change; and the Bill formally transferred the power of consent to the three competent Directors.

Nevertheless, the Bill leaves in place the formal authority of the Attorney General. The Joint Committee was satisfied with this arrangement, which was confirmed in the Bill. TI-UK is strongly opposed to these amendments.

CLAUSE 11

Penalties

Amendment by Jonathan Djanogly on 4 March 2010:

Amendment 17: Page 7, line 27, leave out Clause 11.

TI-UK Recommendation: do not agree

Justification: The amendment would delete the whole provision setting penalties for the four bribery offences, without - seemingly - replacing them with anything else. It has been evident for years that the penalties available in the rare successful prosecutions for bribery under the present law are woefully inadequate. The Anti-Bribery Convention commits the United Kingdom to criminalise bribery with persuasive penalties, i.e. to remove all incentives to bribe. This clause in the Government's Bill starts to redress that weakness, and should be retained.

Proposed insertion of new clauses by Jonathan Djanogly

Amendments by Jonathan Djanogly on 4 March 2010:

Amendment 18:

Annual strategy report

To move the following Clause:—

'The Secretary of State shall make provision for the publication of an annual report to be issued by the Government which shall set out as a minimum—

- a) the Government's anti-bribery objectives and strategies for the coming year as well as the milestones to be used to assess the success of such strategies;
- b) an assessment of the success of the preceding year's strategies and objectives by way of measurement against pre-determined milestones as expressed in the preceding year's report;

- c) details of the advisory services that may be used by commercial organisations on a without prejudice basis on the details of how they may be contacted, and
- d) the fee to be paid for the use of such advisory services.’

TI-UK recommendation: amendment 18 – do not agree

Justification: Although TI-UK approves of effective monitoring of the implementation of the Bill, we doubt that this amendment is the best way to achieve this. Parliamentary oversight of the Bill’s enforcement can be exercised through other means. TI-UK has encouraged the Government to publish a comprehensive strategy for combating international and domestic corruption, going further than those issued by the "Corruption Champion" and covering areas such as money laundering. The strategy should set specific targets against which progress should be reported on a bi-annual basis to Parliament. What other criminal offence requires statutory monitoring?

Amendment 19:

Advisory service

To move the following Clause:—

‘(1) The relevant government department shall make provision for a service which shall respond to specific enquiries from any commercial organisation on a without prejudice basis concerning the adequacy of its procedures for the purposes of section 7(2) of this Act.

(2) A response under subsection (1) shall not prevent the Attorney General or relevant Director from consenting to proceedings under section 10 of this Act.’

TI- UK recommendation: amendment 19 – do not agree

Justification: A similar amendment was not accepted in the House of Lords. TI-UK believes that it would suffice for the Government to issue Guidance to assist companies. The Joint Committee was not persuaded that an advisory service should be provided, expressing particular concern about its impact on the independence of prosecutors (para. 129). That conclusion is manifestly correct: a useful advisory service may emerge from a sufficient period of operation of the new law and responsible conduct of businesses applying it.

Amendment 20:

Advisory service – fee

To move the following Clause:—

‘(1) The advisory service provided by a government department shall be entitled to charge those commercial organisations making specific enquiries pursuant to section [Advisory service] above, a fee.

(2) The Secretary of State shall determine the fee payable under subsection (1) on an annual basis and the amount so determined will be detailed in the annual strategy report published pursuant to section [Annual strategy report].’

TI-UK Recommendation: do not agree

Justification: TI-UK is opposed to the establishment of an advisory service, which will bureaucratise enforcement of the law. It follows from this that TI-UK is also opposed to this amendment.

Amendments 21, 22, 23:

21 - Facilitation payments

To move the following Clause:—

'A person is not guilty of an offence under sections 1, 2 or 6 if the offer, promise or giving of a financial or other advantage is—

- a) necessary to expedite a routine government action or to prevent damage to an important commercial interest,
- b) reasonable in amount given the circumstances,
- c) a single payment,
- d) considered customary in the situation by those usually subject to such routine government action, and
- e) the person has no other reasonable alternative in the circumstances to expedite the action referred to in paragraph (a).'

22 Hospitality payments

To move the following Clause:—

'A person is not guilty of an offence under sections 1, 2 or 6 if the offer, promise or giving of a financial or other advantage is a reasonable hospitality payment as specified in the guidance to be provided pursuant to section 9.'

23 Extortion payments

To move the following Clause:—

'A person is not guilty of an offence under sections 1, 2 or 6 if the offer, promise or giving of a financial or other advantage is the subject of an act of extortion as specified in the guidance to be provided pursuant to section 9.'

TI-UK recommendation: amendments 21, 22, 23 – do not agree

Justification: Issues related to facilitation, hospitality and extortion payments have been considered exhaustively by the Law Commission and the Joint Committee. Both saw no reason to recommend any exemption for such payments. TI-UK supports this position. Facilitation payments are bribes by another name. British companies do not need to pay them to operate effectively; and an unambiguous law will strengthen companies' ability to refuse when asked for such bribes. Many leading companies already outlaw them. In a 2002 survey, TI found that the UK was one of nine OECD member states which had already criminalised facilitation payments - the others are Belgium, Finland, Italy, Luxembourg, Netherlands, Norway, Slovenia and Spain. It would be inconceivable that a Bill modernising and reforming the UK law on bribery should step backwards on this point. TI-UK would expect that prosecutors would develop sensible criteria for assessing when prosecution was justified, and these too, would evolve in the light of experience.

Hospitality has been abused as a cover for bribery over many years; and responsible companies regulate such matters internally so as to ensure that any hospitality offered falls within lawful criteria. Most countries, including the United Kingdom, have rules governing acceptance of hospitality and it should form no part of United Kingdom law to subvert these by excusing businesses that do not conform to these rules. TI-UK would expect the "adequate procedures" that companies will (or do already) maintain to deal with all these matters. Express provisions in the Bill will add layers of confusion, and excuse for misconduct.

Amendment 24:

Exclusion from prosecution under other statutes

To move the following Clause:—

'An individual or other person prosecuted for an offence under this Act shall not be subject to proceedings under the provisions of the Proceeds of Crime Act 2002 or other statute by virtue of the acts or omissions which gave rise to the proceedings under this Act.'

TI-UK recommendation: do not agree

Justification: This amendment seems designed to weaken enforcement of the main law. Practice in the United States and elsewhere has shown that bribery is often accompanied by other offences such as falsification of accounts. Why should it not be open to prosecutors to select those offences that most clearly fit the facts of the case? Why should bribe-payers be immunised from prosecution in respect of other offences committed?

CLAUSE 13

Defence for certain bribery offences: legitimate purposes

Amendments by David Howarth on 4 March:

Amendment 25: page 9, line 1, leave out Clause 13.

Amendment 26: page 9, line 4, leave out 'any function of' and insert 'functions relating to national security by'.

TI-UK recommendation: amendments 25 and 26 – do not agree

Justification: TI-UK has sympathy for the desire to narrow the scope of the defence for certain bribery offences, and shares the primary objection of many in the House of Lords to introducing statutory defences to ostensibly "official" bribery. Nevertheless, we do not favour re-opening issues that could prevent the Bill from being enacted before Easter. TI-UK therefore does not support these amendments.

Amendment 27: page 9, line 22, leave out paragraph (b).

TI-UK recommendation: amendment 27 - do not agree

Justification: Although TI-UK has sympathy for this amendment which would remove offences relating to the acceptance of bribes from the scope of the defence, we fear that it would lead to protracted debate that could prevent the Bill from being enacted before Easter. TI-UK therefore does not support the amendment.

Amendment 28: page 9, line 7, at end insert ' , provided that the defence shall not apply in any case where the intention or the effect of the bribe is to induce the purchase of weapons or other defence equipment'.

Amendment 29: page 9, line 2, at beginning insert 'Subject to subsection (1A),'

Amendment 30: page 9, line 7, at end insert—
'(1A) But the defence shall not be available if the person's conduct was necessary only for the exercise of functions specified under—
a) section 1(3) of the Security Service Act 1989;
b) section 1(2)(b) of the Intelligence Services Act 1994;
c) section 3(2)(b) of the Intelligence Services Act 1994.'

TI-UK recommendation: amendments 28, 29 and 30 – do not agree

Justification: TI-UK has sympathy for these amendments that would prevent possible abuse of the defence and rule out its application to any functions related to safeguarding the national economic interest. The defence would therefore only be available in relation to functions related to national security. However, since the amendments are likely to lead to protracted debate that could prevent the Bill from being enacted before Easter, TI-UK does not support the amendments.

Amendments by Claire Ward on 12 March

Amendment 31: Clause 10, page 6, line 37, leave out subsections (6) to (14).

Amendment 32: Clause 13, page 9, line 4, leave out ‘the Security Service, the Secret Intelligence Service or GCHQ’ and insert ‘an intelligence service’.

Amendment 33: Clause 13, page 9, line 7, at end insert—

‘(1A) The head of each intelligence service must ensure that the service has in place arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(a).

(1B) The Defence Council must ensure that the armed forces have in place arrangements designed to ensure that any conduct of—

(a) a member of the armed forces who is engaged on active service, or

(b) a civilian subject to service discipline when working in support of any person falling within paragraph (a), which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(b).

(1C) The arrangements which are in place by virtue of subsection (1A) or (1B) must be arrangements which the Secretary of State considers to be satisfactory.’.

Amendment 34: Clause 13, page 9, line 16, at beginning insert “‘civilian subject to service discipline” and’.

Amendment 35: Clause 13, page 9, line 16, leave out ‘has’ and insert ‘have’.

Amendment 36: Clause 13, page 9, line 18, at end insert—

“‘head” means—

(a) in relation to the Security Service, the Director General of the Security Service,

(b) in relation to the Secret Intelligence Service, the Chief of the Secret Intelligence Service, and

(c) in relation to GCHQ, the Director of GCHQ, “intelligence service” means the Security Service, the Secret Intelligence Service or GCHQ.’.

TI-UK Recommendation: Amendments 31,32,33,34,35,36: do not agree

Justification: TI-UK continues to share the prevailing view of the House of Lords that the authorisation provided for in 10 (6) to (14) should be required - as it is in other cases where a balance has to be struck between necessity and legality. Since these amendments are likely to lead to protracted debate that could prevent the Bill from being enacted before Easter, TI-UK does not support them.

BACKGROUND AND JUSTIFICATION

Transparency International UK, along with many others, has been urging for a dozen years the enactment of new, effective anti-bribery legislation. TI-UK believes the Government's Bribery Bill must now be enacted swiftly because:

- Current anti-bribery laws are ineffective and out-of-date. The laws date from 1889, 1906 and 1916. UK law enforcement needs a law that is fit for purpose in order to do its job properly.
- It will finally make the UK compliant with the OECD Anti-Bribery Convention.
- In the absence of a strong legal framework against bribery, UK businesses are more vulnerable to requests for bribes, adherence to high corporate standards is more difficult, and, according to the OECD Working Group on Bribery, they may suffer from increased due diligence costs incurred by business partners.
- The business community, extensively consulted by TI-UK and others, is strongly in favour of a new anti-bribery law. Bribery adds up to 10% to the cost of business transactions overseas. Effective anti-bribery legislation will create a level playing field for clean businesses. This is crucial if the UK is to remain competitive in the current economic climate.
- The UK's international business reputation was severely harmed by the termination of the SFO's investigation of the Al Yamamah Saudi defence deal, and the ill-explained 'settlement' of BAES' prosecution in respect of many other international contracts. In the 2009 TI Corruption Perceptions Index, the UK's score remained at an all-time low of 7.7 for the second year running. In 2006 it was 8.4.
- Bribery should not be tolerated either at home or abroad. It has real victims. It disproportionately affects the poor and is a persistent threat to development and democracy.
- By putting its own house in order, the UK is in a better position to encourage good governance in countries that receive UK aid. The UK will also be able to use its influence to encourage major emerging economies to stop their own companies paying bribes.

- In December 1997, the UK signed the OECD Anti-Bribery Convention, committing all parties to criminalise the payment of bribes to foreign public officials. The Government claimed that existing UK laws were compliant with the Convention; but has consistently failed each official review of compliance by the OECD peer review process.
- In 1998, the Law Commission submitted its first review on the law of corruption, recommending that existing law was out of date, confusing and required wholesale reform and replacement with a new Bill, which it annexed to its report.
- In June 2000, Jack Straw MP, as Home Secretary, promised to introduce a law to criminalise foreign bribery in order to comply with the 1997 OECD Convention.
- In November 2001, a new section was added to the Anti-Terrorism, Crime and Security Act whereby existing law on bribery was expressly extended to foreign public officials.
- The Government introduced an anti-corruption Bill in 2003. This was strongly criticised by the Joint Parliamentary Committee that scrutinized the Bill. The Government rejected the Committee's recommendations; but no further action was taken on the Bill.
- In 2005, the Home Office embarked on a further public consultation on corruption law and only published its response in 2007.
- In March 2007, following strong criticism by the OECD Working Group on Bribery, the Government asked the Law Commission to undertake a further review and make proposals for a new law.
- In 2006, a private members bill drafted by TI-UK was introduced and passed in the House of Lords. This was to demonstrate that it was possible to draft a simple but effective anti-corruption Bill.
- In October 2008, the OECD Working Group on Bribery issued a report that was strongly critical of the UK's continued failure to adopt modern anti-bribery legislation that would make it fully compliant with the OECD Convention.
- The Law Commission's proposals, including a new draft Bribery Bill, were published on 20 November 2008.
- On 25 March 2009, the Ministry of Justice published a draft Bribery Bill for joint scrutiny. A Joint Committee of Parliament took extensive evidence on the draft Bill and published its report on 28 July 2009.
- On 19 November 2009, the Government's revised Bribery Bill was introduced in the House of Lords by Lord Bach; and on 20 November 2009, the Government published its response to the Joint Committee's report.
- The Bribery Bill passed the House of Lords on 8 February 2010 and had its Second Reading in the House of Commons on 3 March 2010.

ABOUT TRANSPARENCY INTERNATIONAL UK

We define corruption as 'the abuse of entrusted power for private gain'. Corruption hurts everyone whose life, livelihood or happiness depends on the integrity of people in a position of authority.

Transparency International UK is the UK Chapter of the world's leading non-governmental anti-corruption organisation, Transparency International (TI). With more than 90 Chapters worldwide, and an international secretariat in Berlin, TI has unparalleled global understanding and influence. TI-UK:

- Raises awareness about corruption
- Advocates legal and regulatory reform at national and international levels
- Designs practical tools for institutions, individuals and companies wishing to combat corruption
- Acts as a leading centre of anti-corruption expertise in the UK.

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