TRANSPARENCY INTERNATIONAL UK
fighting corruption worldwide

Bribery Bill second reading

TRANSPARENCY INTERNATIONAL UK SUPPORTS THE GOVERNMENT'S BRIBERY BILL AS DRAFTED AND URGES PARLIAMENT TO ENACT IT BEFORE THE GENERAL ELECTION.

SUMMARY

The second reading of the Bribery Bill takes place on **9 December 2009** in the House of Lords.

- Transparency International UK applauds the Government's Bribery Bill introduced in the House of Lords on 19 November.
- The Bill is the product of lengthy and conscientious deliberation. 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.
- Calls to re-open issues that have already been the subject of extensive consultation and carefully crafted compromise would undermine consensus and are likely to prevent the Bill's passage, with undesirable consequences for UK business and the UK's international reputation.

TI-UK therefore commends the Government's Bribery Bill, as presented, for swift enactment in the 5th and final session of this Parliament.

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- Current anti-bribery laws are ineffective and out-of-date.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. 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.

PARTICULAR ISSUES

Some provisions and aspects of the Government's Bill are vulnerable to attempts to re-open issues on which there has already been extensive consultation. This is elaborated below.

The definition of "bribery" (Clauses 1 and 2)

The Government's 2003 Bribery Bill adopted an expanded concept of principal-and-agent as the basis of its offence of bribery, as the century-old existing law has done. The 2003 Joint Parliamentary Committee rejected this as complex and unclear. In 2007/2008, the Law Commission took considerable care to canvass all views on this and possible alternatives, concluding that a test based on improper conduct was the best possible option. It devoted much of its 2008 Report to setting out the reasons for this recommendation, which the Government has adopted in the current Bill. There will no doubt be some adherents to each of the alternatives. What is clear, as the Law Commission found, is that the overwhelming majority of views favoured a conduct-based, rather than a 'dishonesty' or agency-based test of criminality.

The "legitimately due defence" (Clause 5 – Expectation test)

In discussions on the Government's draft Bribery Bill (25 March 2009), some had taken the view that, if bribery was common-place (through customs and practices) in a country, this should be taken into account by prosecutors in determining whether a foreign bribery offence had occurred. Others took the view that such an exception drove a coach-and-horses through the offence, and would allow all sorts of subjective excuses for conferring improper benefits in pursuit of business. They argued against any such defence. The JSC has adopted a pragmatic 'middle-course', whereby the only defence will arise where there is established written law permitting the benefit in question. The Government has accepted this view and has proposed a 'written law' defence - i.e. any local custom

or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.

The "strict liability" corporate offence (Clause 7 - Failure of commercial organisations to prevent bribery)

The Law Commission considered carefully whether to recommend a new offence applying to companies as the OECD Anti-Bribery Convention requires, or to wait until it has completed its next major review of corporate criminal liability, now underway. It concluded that such an offence was appropriate, and pitched it at a relatively uncontroversial level whereby a company could be guilty of 'negligently failing to prevent' bribe-paying. The Government's earlier draft Bribery Bill followed the Law Commission's recommendation. Before the JSC, some argued in favour of a prosecutor having to meet a higher threshold by proving "gross negligence". A wide range of experts and prosecutors considered negligence as irrelevant to the proposed defence, which should turn on whether a company had in place "adequate procedures" to prevent bribes being paid. The Government has accepted the JSC's strong recommendation that strict liability, subject to an "adequate procedures" defence, is the correct starting point, because of the difficulties prosecutors might face in having to prove negligence. If, following the Law Commission's general review of corporate criminal liability, a better solution has emerged, the law can then be changed. Meanwhile, it would be a mistake to weaken this provision of the Bill.

Guidance for companies

The JSC heard requests from a number of business representatives that they required 'official guidance' in order to understand how prosecutors would enforce the new law. Some of these requests are driven by a 'doing business as usual' motive of not wanting to change established sales and promotion practices. It is the case that, in recent years, the US Department of Justice has established a procedure whereby companies can ask for clearance of particular situations, and has provided more general guidance on how US law is applied. But this is based on three decades of prosecution under the 1977 Foreign Corrupt Practices Act. The Government agrees with the JSC's recommendation that some guidance be prepared on key aspects of the Bill, especially on the meaning of the "adequate procedures" defence, and this should not delay the enactment of the Bill. The Government says it intends to publish non-statutory guidance after the Bill receives Royal Assent but before the new bribery offences come into force. This will give companies time to prepare themselves. There is a substantial amount of guidance available from the private sector and others, which will no doubt continue to improve. Any suggestion that enactment of the Bill be deferred pending the formulation of the guidance should be strongly resisted.

Security Services (Clause 12 - Defence for certain bribery offences: legitimate purposes)

The Government's earlier draft Bribery Bill provided for authorisation by the Secretary of State for bribery by UK security services. The JSC heard that the OECD Working Group on Bribery had never encountered any law anywhere that expressly authorised bribery. The JSC opposed the proposal on the ground that the Bribery Bill was not the appropriate vehicle to extend the security services' powers to contravene the criminal law. The Government has responded to the JSC's recommendations in two ways: (a) instead of giving a wide authorisation to the security services to pay bribes, there is now a more limited defence to prosecution; and (b) Section 12 identifies specific areas where benefit-giving might be considered to be for public good: e.g. police transactions with informers, military actions in the course of armed conflict and security services. TI-UK would on balance prefer the Clause 12 to be omitted; but accepts that the Government has responded positively to the JSC's recommendations.

The "national security exception"

Since the decision in December 2006 to discontinue the criminal investigation of payments made in connection with the Al-Yamamah contract, the Government has argued that "national security" could somehow prevail over the public interest in the rule of law. The House of Lords avoided making any ruling on the point when the *Corner House/Campaign Against the Arms Trade* case came before it in June 2007; but some have argued that it is vital that the new bribery law should put into law the commitment made by the UK in Article 5 of the OECD Anti-Bribery Convention, whereby all parties agree that economic or commercial interests, diplomatic relations or personal embarrassment must not influence decisions on prosecutions. This issue was closely connected with the 100-year old provision that no prosecution for corruption could be commenced against an official without the consent of the Attorney General, a practice inconsistent with the OECD Anti-Bribery Convention. The JSC recommended that Article 5 "must, at a minimum, be enshrined in guidelines applying to all prosecutors." The Government has now issued guidance to the CPS requiring compliance with Article 5, and will shortly do the same for the SFO. However, the Attorney General's powers of consent in respect of prosecution remain under review, and the Government has expressly noted its intention to retain power in respect of cases involving national security. However unwelcome, this issue has become separated from the Bribery Bill, and is largely irrelevant to enactment in its present form.

BACKGROUND TO THE BRIBERY BILL: EVENTS OF THE LAST DECADE

- 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.
- 0n 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.

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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