

TRANSPARENCY INTERNATIONAL (UK)

the coalition against corruption



15 March 2007

CORRUPTION BILL - BACKGROUND NOTE

I. Background

1. UK laws on corruption are largely based on a trio of statutes passed in 1889, 1906 and 1916. These combined with the common law offence of bribery provided an increasingly unsatisfactory basis on which to prosecute cases of corruption.
2. Local authority scandals in the 1960s led to reports by the Redcliffe-Maud and Salmon Committees. The governments of the day welcomed their recommendations and did nothing to implement them.
3. Incidents in the 1990s renewed concern over standards in public life, leading to the appointment of the Nolan Committee. In his first report in 1995, Nolan called for the Law Commission to take on the task of clarifying the law of bribery and consolidating the statute law as recommended by Salmon.
4. The Law Commission published a consultation paper in January 1997, and the Home Office published its own views in June 1997, recommending the creation of a single offence of corruption, and suggesting that the results from the Law Commission and developments in international *fora* might lead to the formulation of new legislation early in 1998.
5. The Law Commission's review of corruption law was laid before Parliament on 2nd March 1998. It was a comprehensive report, with detailed proposals, and appending a model Bill reflecting these. (The 2003 Corruption Bill departed from these in certain respects.)
6. The Law Commission noted that its work had dealt with the domestic law of corruption, whereas there had been major progress at the Organisation for Economic Cooperation and Development in 1997, where the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-bribery Convention) had been concluded for signature in December 1997. The Law Commission noted that its recommendations took no account of the Convention.
7. The OECD Anti-bribery Convention required all States party to the Convention to criminalise the bribery of foreign officials, and introduced a variety of other measures aimed at eliminating bribery in international business and at monitoring whether States had given effect to their obligations. The EU

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announced that all its members intended to ratify the Convention by the end of 1998.

8. The UK does not ratify a Convention until its domestic law is compliant with the obligations of the Convention. The Trade Minister informed the House of Commons (like statement in the Lords) in 1998 that UK law was consistent with the OECD Anti-bribery Convention. A different opinion was taken by DFID; but the inter-departmental committee responsible for coordinating the government's position failed to agree. The UK ratified the Convention, which entered into force early in 1999.
9. Phase 1 monitoring of State's implementation of the Convention's requirement proceeded immediately. Only two, out of 36, States failed the Phase I monitoring: Japan and the UK. Japan responded by introducing legislation.
10. Meanwhile, the Home Office had failed to respond to the Law Commission's strong recommendation for reform and modernisation. After a delay of more than two years, the Home Secretary (Jack Straw) published a short White Paper: *Raising Standards and Upholding Integrity: The Prevention of Corruption* in June 2000. The Government largely accepted the Commission's recommendations and proposed to bring forward legislation modelled on the Commission's own draft. The Home Secretary also promised that UK citizens would be triable for corruption offences committed abroad, as the OECD Anti-bribery Convention required. But the Government proposed no legislation in the 2000 Queen's Speech.
11. The events of 11 September 2001 triggered early legislation to address terrorism. As the Anti-Terrorism, Crime and Security Bill was in parliament, a new Part XII was introduced with the sole object of extending the unsatisfactory and out-of-date UK laws on domestic corruption to such offences committed by UK nationals and companies abroad. It was never more than a temporary measure, until comprehensive legislation could be introduced.
12. The Government eventually introduced its own Corruption Bill in March 2003. It largely followed the Law Commission model; but relied very heavily on an extended concept of agency, whereby almost any relationship between two persons can be described as that of agent and principal, from which certain consequences flow. The fact that most relationships are not agencies either in law or in general parlance made the basic provisions of the Bill obscure and confusing.
13. A Joint Parliamentary Committee was appointed to consider the Bill on 24th March 2003, and took views and evidence from government departments, lawyers, enforcement agencies, business, NGOs and professional groups. The Committee published its report on 31st July 2003. The Report was critical of much of the Government's Bill, concluding: "*Our overall conclusion, however, is that by adopting only the agent/principal approach the Bill does not proceed on the right basis and that corrupt acts outside that relationship ought to be included in the Bill.*" The Committee set out its recommendations for what the Bill should say.

14. The Government waited until December 2003 before responding to the Joint Committee: with few exceptions, rejecting the Committee's recommendations and persisting in its principal/agent approach. Apart from indicating that it intended to maintain its Bill, no action was proposed.
15. A further two years passed. In December 2005, the Home Office issued yet another Consultation Paper, despite the wealth of submissions and evidence provided to the Joint Committee (and previously in response to the June 2000 White Paper.). The paper sought views on the use of 'bribery' instead of 'corruption', the definition of 'corruptly', separation of public and private sectors and whether it should re-present the 2003 Corruption Bill despite the Joint Committee's criticisms, but amended to include the few that it accepted. On 5 March 2007, the Government announced that it was referring the whole matter back to the Law Commission, which is expected to undertake a further consultation and make its recommendations in late 2008.

Note on TI(UK)'s role in the Corruption Bill

It has never been an objective of TI(UK) to present or promote legislation: that is the task of government and parliament. TI(UK)'s aims are to promote understanding of the effects of corruption and encourage means whereby it can be eliminated from international business transactions. Thus, its primary concern was UK compliance with the OECD Anti-bribery Convention, and a variety of other European and international conventions and instruments designed to improve compliance with higher standards of integrity.

Frustrated at the shockingly slow rate of progress in giving effect to the UK's international obligations and the effect of continuing rampant corruption on development, parliamentarians asked TI(UK) how the law might sensibly be changed. It needs care, and, as the above summary shows, the task has been overlaid with an enormous volume of paper and recommendations.

II. SUMMARY OF CLAUSES IN THE CORRUPTION BILL

Context

1.1 The remainder of this Note follows broadly the sequence of clauses in the Corruption Bill (the Bill or this Bill). Where appropriate, it includes a comparison with provisions in the Government's Draft Corruption Bill 2003 (HMG Bill) – such comparisons are italicised.

1.2 Following a long period of government inactivity and the rejection of the recommendations of the Joint Parliamentary (scrutiny) Committee (JPC), TI(UK) decided to produce its own draft legislation. It was satisfied that new legislation could be clear and effective and ought to relate to the needs of this century and not be confined to the definition of bribery. It set about producing a Corruption Bill that is clear and comprehensive.

1.3 The HMG Bill lacks clarity, in several clauses to the point of being unintelligible to those by whom it most needs to be understood – the public, business and non-specialist police and prosecutors. It would therefore have been ineffective. Corruption offences are not essentially complex. The lack of clarity in the HMG Bill derived from:-

- dogmatic insistence on capturing the whole law in a single offence;
- placing a strained and artificial interpretation on the concept of agency;
- an only partly successful attempt to eliminate the distinction between public and private sector corruption;
- insufficient attention to the overriding need for the law to apply to international corruption and the UK's international obligations.

1.4 The HMG Bill also allowed small facilitation payments for the first time in the UK and reinforced the unfortunate perception of potential political interference through the requirement for the Attorney-General's consent to prosecute any corruption offence (see para 2.2).

1.5 This Bill presents a balance combining two or three general offences of corruption with a small number of specific offences suited to likely corruption scenarios in the UK. This follows the practice in recent international anti-corruption conventions, such as the Council of Europe Criminal Law Convention and the UN Convention. The general and specific offences are readily intelligible – from first reading the text, the mischief to be targeted is clear. This may be contrasted with clauses 5, 6 and 7 of the HMG Bill, with which the JPC and the then Director of Public Prosecutions struggled. Under this Bill, prosecutors would be free to use whichever offence most closely fits the facts.

1.6 Moreover, this Bill, unlike the HMG Bill, does not repeal common law corruption offences, but follows the recent precedent of the Fraud Act in preserving tried and trusted offences until experience is gained of the new offences.

PART 1

OFFENCES

Main corruption offences

1 General corruption offences

This clause embraces the basic “active” and “passive” bribery offences.

The starting point for the Bill’s definition of the bribery offences was the proposal of the JPC. *The HMG Bill had based its provisions on a highly complex definition (Clause 5) of what was meant by “corruptly”. It was locked into a concept that the essence of the offence was a breach of a bond of loyalty existing between persons deemed to be agents and principals according to an equally complex definition (Clause 11). The Law Commission’s conclusion that corruption should not be treated as an offence of dishonesty, led to confused law reform proposals. Ordinary people would take the view that corruption is essentially dishonest.*

The JPC’s proposal was much more readily intelligible, but still involved defining “corruptly”. The draftsmen of this Bill thought it better to concentrate on the action of giving or receiving an advantage with the intention of influencing a person to exercise a function “improperly”. The definitions of “advantage”, “exercise a function” and “improperly” in Clause 7 are straightforward and designed to capture all the aspects of timing, third party involvement, failure to exercise a function that have been identified as possible defects in existing laws. In particular, “improperly” includes breach of any duty including “any duty to act in good faith or impartially”, a concept that a well directed jury would easily recognise and determine according to the notions of ordinary people.

It is believed that the wording of Clause 1 would have avoided the legal problem encountered by the SFO in the recent case (where it prematurely cancelled its investigation of allegations of bribery involving the authorities in Saudi Arabia) of proving the absence of authorisation for the recipient to receive a payment. This would certainly have been strengthened by Clause 3 and the definition of “foreign public official” in Clause 7.

If parliamentary counsel should identify any important element not covered in this offence, doubtless he or she could suggest suitable amendments that could be dealt with in Committee, but it is hoped that the essential simplicity of these offences will be preserved.

2 Corrupt transactions involving agents

This clause creates a separate offence, closely modelled on the Clause 1 general offence, that focuses on the improper exercise of a function in a person’s capacity as an agent. It was decided to include this separate agency offence because historically the 1906 Act offence (based on agency) has been the most generally used for prosecutions. As in the 1906 Act, agency here refers to the normally recognisable agency relationship as understood under English law (see definition of “agent” in Clause 7). *It is very different from the so-called “agency construct” employed in the HMG Bill. Agency in that Bill was artificially stretched beyond its normal boundaries*

and was made fundamental to the new corruption offences – the biggest single factor in the HMG Bill’s complexity and confusion.

3 Bribery of foreign public officials

This clause creates a specific offence that would, for the first time, manifestly fulfil the requirements of the OECD Convention. The definition of foreign public official follows closely the definition in the Convention. Part 12 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act), probably does not apply existing law to members of parliament and judges and there would be difficulties in applying it to officials of public international organisations. This clause will be good news in re-establishing the UK’s credibility with the OECD Working Group on Bribery which has criticised the UK for not addressing this point. It will place beyond doubt the intention to comply and will simplify as far as possible prosecution of UK nationals and UK incorporated companies for “exporting” bribery.

The HMG Bill had no equivalent clause. Although it contained Clause 13 of this Bill (Corruption committed outside the UK), the effect would have been to export the complexity and confusion of the HMG Bill definition of bribery into prosecutions for foreign bribery raising serious additional hurdles in cross-border mutual legal assistance and judicial cooperation.

4 Foreign bid-rigging

Bid-rigging does not fit neatly into the normal ways in which corruption offences are expressed. The JPC took the view that the HMG Bill did not cover the practice (para 87 of the JPC Report). In Para (14) of the Government’s Reply to the JPC Report, it was claimed that this would be covered by the offence of bid-rigging under the Enterprise Act 2002 (Part 6 – cartel offence – section 188(2)(f) and (5)). This was plainly wrong in an international context, because the Enterprise Act cartel offences apply only to the UK. This clause applies only outside the UK and in addition to procurement of goods, services and works, includes competition for direct foreign investment and privatisation.

This offence is expressed in terms that accord with the remainder of the Bill. It is included as a “corruption” offence and therefore attracts extra-territorial jurisdiction under Clause 13. The maximum prison term for this offence would be five years to match the Enterprise Act offence – see clause 16(2).

The HMG Bill contains no equivalent clause.

5 Corruption in sport

This offence is designed to safeguard the integrity of sporting events by penalising cheating by “fixing” – major fixing in terms of the outcome of a match, game or contest (eg procuring a loss), or micro-fixing in terms of discrete parts of a match, game or contest. The activity is frequently rooted in betting and is linked to organised crime. It does not fit well into normal concepts of bribery. With London hosting the 2012 Olympics, it will send out an important message. The Gambling Act 2005 contains provisions against cheating in betting that will come into force in September 2007. Encouraged by the Sports Minister, a number of sporting bodies have signed

up to a voluntary code against fixing. To be taken really seriously, there should be a specific criminal offence.

Depending on the facts of each case, offending action could constitute conspiracy to defraud, or one of a range of dishonesty offences. If a public official is implicated, it could give rise to the common law offence of misconduct in public office. Nothing in this clause removes or diminishes any of those offences where the facts would make one or more of them appropriate. However, any interference with the integrity of a sporting event is referred to in general parlance as corruption. Moreover, there are sufficient distinguishing features to make the integrity of sport an area for specific anti-corruption provision, which would make it easier to prosecute.

Lord Condon (former Metropolitan Police Commissioner), giving evidence to the All-Party Parliamentary Betting and Gaming Group, said - "there is nowhere that we have encountered that has a really adequate piece of legislation to deal with criminal corruption in sport." He suggested that governments around the world saw this as predominantly a problem for the sporting bodies to resolve and were guilty of complacency.

Section 42 of the "Gambling Act 2005" created an offence of cheating at gambling. Some elements of this offence could conceivably cover some elements of fixing (subsection 1(b) and subsection (3)), but it would always be necessary to prove the betting connection, much of which will take place well beyond the jurisdiction and be difficult or impossible to prove. This clause tackles the serious criminal corruption involved in the actual fixing. There is no current UK offence apt for this purpose.

The betting will be on an event the outcome of which is not in doubt, because the fixer (or his agents etc) has done something corrupt to make sure it happens. This implies the cooperation of someone who is able directly or indirectly to influence the outcome of a sporting event. It is the fixers and the corrupted sportsmen/referees/umpires etc at whom this clause is directed. The fundamental distinction between this clause and section 42 is that the Gambling Act is aimed at safeguarding the integrity of gambling, whilst this clause is intended to safeguard the integrity of sport.

Clause 5 starts (subsections (1) and (2)) with familiar "bribery" concepts of advantage and offer or solicit etc, but the subsection (3) offences stand alone:

Sub paragraph (a) - "to do or not to do something which constitutes a threat to the integrity of a sporting event" etc is a concept that juries and others would readily understand.

Sub paragraph (b) is a very practical way of tackling the reality of the situation in which day to day discipline within sports is dealt with by sporting bodies, including "umbrella bodies" (defined to include the IOC). If for lesser offences reliance is to be placed on sporting bodies, it is essential that knowledge is reported.

It can confidently be said that there is no set of provisions in existing laws that gets close to covering these offences in a manner appropriate to sport. Certainly the reporting offence is nowhere covered.

This offence attracts the same penalties as for the general corruption offences (seven years), which is in line with the FSA regime for dealing with market abuse when dealing with insider information.

The HMG Bill contains no equivalent clause.

6 Presumption of corruption

The Law Commission and the government favoured the abolition of the presumption at present in section 2 of the Prevention of Corruption Act 1916. Earlier high level consideration (the Salmon Commission and the Redcliffe-Maud Committee) had considered extending the presumption. Corruption is an essentially covert offence, and in the public sector is so serious in its consequences that it should be possible to facilitate prosecution by inferring corrupt behaviour upon proof of the giving or obtaining of an advantage, in the absence of an innocent explanation.

There have been concerns around Article 6 of the European Convention on Human Rights (ECHR) – fair trial and presumption of innocence. However, the view is taken that this limited presumption clause would be upheld in the event of human rights challenge. It is only a rebuttable presumption affecting evidential burden. It applies only in the exercise of a public function and the evidence to rebut the presumption is “the balance of probabilities”.

The HMG Bill repealed the 1916 Act presumption and did not include an alternative presumption clause. Part 12 of the 2001 Act, removed the presumption in the case of foreign bribery.

7 Interpretation

The words and expressions defined in this clause have been commented upon above.

Reporting public sector corruption

8 Duty to report

9 Failure to report

10 Interfering with duty to report

This is an innovative group of clauses designed to make a strong contribution to a modern anti-corruption code. This is another area in which it is justifiable to distinguish corruption affecting the public function. For the first time there is a duty to report actual or suspected bribery. Failure to report constitutes an offence. This is both to protect public officials who blow the whistle and to improve the obtaining of information on which to base investigations and prosecutions. A defence and safeguards are built into the relevant clauses (**Clauses 8, 9 and 10**).

The duty applies only to UK public sector officials/employees, but will include persons in the UK Diplomatic Service overseas, where there is perhaps the best opportunity to know in advance the activities of UK nationals or companies attempting to win business by bribing foreign public officials, contrary to the OECD Convention. It is often the relatively junior staff who would feel most at risk from blowing the whistle. Although they would get some employment protection under the Public Interest

Disclosure Act 1998 (PIDA), this is not as powerful a tool for investigation and prosecution as a failure to report constituting a criminal offence.

The Bill distinguishes this offence from the general offences by specifying less severe penalties – see clause 16(2)(b).

The offence covers the duty of the official involved in the potential passive bribery offence and a “third party” official who knows or reasonably suspects etc.

The report should be made to “a constable” (on the analogy of money laundering legislation). This would deter those engaged in vindictive or frivolous behaviour, because offences of interfering with policing would apply.

There are a number of safeguards to avoid injustice. It is a defence if the person charged reasonably believed that if the disclosure was made he or she or another person would suffer physical harm to person or property. To avoid retaliation, a disclosure to a constable in accordance with the new duty to report is declared “a protected disclosure” for the purposes of the PIDA. Clause 10 is an additional offence committed by any person who retaliates in the employment context (clause 10). Clause 8(5) voids any provision in an agreement purporting to preclude the public sector employee from making disclosure in accordance with the new duty.

Supervision of subsidiaries etc

11 Duty to supervise foreign compliance

12 Failure to supervise foreign compliance

The most serious weakness in the OECD Anti-bribery Convention is that it does not currently apply to the subsidiaries of OECD country companies organised under the laws of another country. This is thought to be the principal way in which foreign bribes are paid. The first publication from UK Trade and Investment alerting UK companies to the criminalisation of foreign bribery in 2002, virtually signposted the way for the “coach and four” through the law by emphasising that Part 12 of the 2001 Act did not apply to foreign subsidiaries. In response to representations from the OECD Working Group on Bribery, the latest edition instead points out that under UK law a company can be criminally liable if it aids or abets an act of bribery by any of its overseas subsidiaries or if it conspires with an overseas subsidiary to commit such an act. It adds that this would include directing a subsidiary to pay a bribe or providing the necessary funds to a subsidiary, knowing that they were to be used for a bribe.

Steps are in hand to have application to foreign subsidiaries considered for future amendment of the OECD Convention. If the UK is serious about overseas corruption, it is legitimate to take action, whether or not the next OECD Convention addresses the issue. The only conceivable argument that could be deployed against the measures proposed in the Bill is that in some way UK companies will forfeit competitive advantage. Now that foreign bribery is a serious criminal offence in the UK, it cannot be claimed that the facility to commit crime is a competitive advantage. The act remains illegal and would constitute a misuse of corporate funds. In fact quite apart from the risk of damage to corporate and brand reputation, it can be demonstrated that zero tolerance of bribery will best equip UK and other companies operating internationally to compete.

Corporate reputation is a company's most valuable asset for conducting sustainable business. The duty to supervise in Clause 11 only gives statutory force to what any prudent company investing or operating overseas would do in its own interests. Sub-clause (1) refers to the straightforward situation of controlled subsidiary companies. However, major project foreign procurement and direct foreign investment is in practice undertaken through a variety of structures including incorporated and unincorporated joint ventures, associated companies, sub-contracting etc. Sub-clause (2) refers more generally to "relevant contractual arrangements" which are defined in Sub-clause (3).

The duty on the UK company "to take all such steps as are reasonably open to it" will obviously impose a higher standard of supervision for controlled subsidiaries than for certain types of "relevant contractual arrangement" in which authority, direction and control are likely to be more dispersed. What is clear is that a UK company undertaking normal due diligence as to its foreign business associates will have nothing to fear from these provisions and much to gain from ensuring that at least its UK competitors are subject to the same duties.

The HMG Bill contains no equivalent clause.

Miscellaneous

13 Corruption committed outside the UK

14 Jurisdiction

These clauses follow substantially the HMG Bill.

15 Powers of Serious Fraud Office

The SFO has assumed responsibility for vetting, investigating and prosecuting cases of foreign bribery under Part 12 of the 2001 Act. The jurisdiction rests, not on statute, but on written agreement which could be changed without notice or consultation. Before the SFO can investigate allegations of bribery, it has to be satisfied that some element of the criminal behaviour constitutes fraud. The SFO has express statutory power to deal with serious and complex fraud and with cartel offences under the Enterprise Act 2002. It is illogical that it does not have express jurisdiction to deal with serious and complex corruption. This is even more the case now that the Home Office Bribery Consultation considers the possibility of enhancing SFO powers for dealing with foreign bribery cases and acknowledges (para 53) that "the buck stops with the SFO – no other agency is likely to pick up any case the SFO leaves aside".

This Bill therefore includes express jurisdiction for the SFO.

The HMG Bill contains no equivalent clause.

16 Penalties

The Bill follows the HMG Bill for the basic offences, but differential penalties have been included for some of the new offences (clause 16(2)) as discussed above in respect of each offence.

17 Abolition of existing statutory offences etc

This provision follows the HMG Bill, save that it omits the abolition of common law offences (see para 1.6 above).

Clause 19 (1) of the HMG Bill states that the common law offence of bribery is abolished. The Law Commission Report referred to many overlapping common law offences. It seems that common law offences of corruption are hardly ever used, with the exception of misconduct (misfeasance) in public office, which is useful for local authority and police corruption cases. The Law Commission Report expressly mentions “misconduct in public office” as a common law corruption offence.

Article 19 of UN Convention against Corruption (UNCAC) contains a “shall consider” offence of the abuse of functions or position by a public official for the purpose of obtaining undue advantage, so it will be a matter for HMG consideration in due course. This offence is not included in the Bill.

18 Repeals and revocations

19 Commencement: Part 1

These provisions substantially follow the HMG Bill

PART 2

LIMITATION

20 Postponement of limitation periods

21 Actions in respect of trust property

22 Meaning of corrupt conduct

23 Commencement: Part 2

These provisions substantially follow the HMG Bill

PART 3

MISCELLANEOUS AND GENERAL

Miscellaneous

24 Extent

25 The Crown

26 Citation

These provisions substantially follow the HMG Bill

SCHEDULE REPEALS AND REVOCATIONS

With limited exceptions, the above follow substantially the HMG Bill.

Omissions from HMG Bill

2.1 Authorisations for intelligence agencies – Clauses 15 and 16. *These provisions authorise intelligence agencies to commit what would otherwise amount to bribery. It is considered that, if needed at all, these provisions would be better in a Security Service Bill. Their inclusion in the HMG Bill was criticised by the Chairman of the OECD Bribery Working Group in evidence to the JPC, looking at them in the context of the OECD Convention. They were also criticised as to content by the JPC. The Government would retain them with amendments in a new HMG Bill. They are rightly omitted from this Bill.*

2.2 Consent to prosecution – Clause 17. *The subject of this provision has been brought into sharp relief by the recent SFO decision to terminate prematurely the investigation into allegations of bribery affecting the Al Yamamah contracts with Saudi Arabia. It is considered that no special consent should be required for the statutory offence of corruption; none is required for common law offences of corruption; nor for fraud. It is regarded as meritless in modern conditions. To remove the consent altogether would demonstrate to the OECD Working Group that the UK is serious about following normal principles in democratic states – that criminal law enforcement is independent of government. The proposal of the Government to substitute the consent of the DPP or the Director of the SFO for the consent of the AG would go some way to improve the perception of the UK among co-signatory states of the OECD Convention, but it would be better to drop the requirement for consent altogether, as recommended by the Law Commission in its 1998 Report.*