



Joint Committee reports on the draft Bribery Bill

The Joint Parliamentary Committee established to conduct pre-legislative scrutiny of the draft Bribery Bill has now published a report strongly supporting the Bill.

In summary, the Joint Committee:

- supports the proposed new statutory definition for the offence of bribery;
- recommends a strict liability test for corporates, subject only to a defence based on the adequacy of a company's anti-bribery procedures;
- did not comment on whether a parent company should be liable for the conduct of its subsidiaries; and
- endorses tough penalties: the legislation must have 'teeth'.

Following publication of the draft Bribery Bill by the Ministry of Justice on 25 March 2009, the Joint Committee established to conduct pre-legislative scrutiny of the Bill has now published a report strongly supporting the Bill. The committee welcomes it as an important step in reforming the domestic law on bribery and ensuring that the UK complies with its international obligations. It also urges the government to introduce the Bill as soon as possible and makes a number of recommendations.

Areas of particular interest for corporates and financial institutions are as follows.

The offences of bribing and being bribed

Criminalising civil wrongs/cultural differences

The committee endorses the objective 'improper' performance test (whether a 'reasonable person' would consider that the recipient had breached an expectation of 'good faith', 'impartiality' or 'trust'). This test had been developed by the Law Commission to distinguish bribes from legitimate conduct as regards both bribing (clause 1) and being bribed (clause 2). However, the committee acknowledges the concern that conduct which ought to be viewed as a civil wrong may in future be criminalised (such as 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). The

committee recommends that the government address this issue before introducing the Bill into parliament to minimise reliance on prosecutorial discretion and maximise certainty for those complying with, and enforcing, the law.

The committee is against a defence of local customs justifying corrupt practices, which would undermine the effectiveness of the Bill. The Law Commission has proposed that jurors apply the standards of a 'person of moral integrity' but the committee is concerned that it is unclear what this would mean in practice. It therefore recommends that the government clarify its intended approach to the matter of cultural variations before the Bill is introduced. This remains an area of considerable difficulty and great uncertainty.

Being bribed

The committee agrees that a person should be convicted of being bribed without proof of knowledge or intention to improperly perform his or her functions, notwithstanding that subjective fault is ordinarily required by the criminal law. The committee considers that this policy forms an important part of changing the culture in which taking a bribe is viewed as acceptable and, in particular, 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.

Criminal failure of companies to prevent bribery

Requirement to prove negligence

The committee agrees with targeting companies that fail to prevent bribery by persons acting on their behalf. It recommends removing the need to prove negligence by a responsible person and making corporates strictly liable for bribery, subject only to a defence of having adequate anti-bribery procedures in place.

Meaning of adequate procedures

The committee think adequate procedures:

- 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; and
- must depend on what a commercial organisation is doing in practice rather than in theory.

The Serious Fraud Office (SFO) is open to consultation on this issue.

Negligence of senior officers

The draft Bill provides that the adequate procedures defence does not apply where a 'senior officer' is negligent in performing their role as a 'responsible person'. The committee comments that it is hard to imagine any circumstances in which the procedures would be adequate if a senior officer was at fault. In line with its recommendation to remove the requirement to prove negligence, the committee recommends leaving 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 the meaning of the term 'senior officer'.

Liability for subsidiaries

The committee heard views on whether subsidiaries should automatically be covered by the draft Bill but was unable to consider this issue in detail due to lack of time. It notes, however, 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 it anticipates that the Law Commission's conclusions will inform future debate on this.

Penalties

The committee notes that the draft Bill 'must have teeth to be effective' and endorses substantial penalties, including the power to impose unlimited fines on companies and a maximum ten year imprisonment sentence for individuals. However, it states that the government must:

- clarify the way in which the unlimited fine will be assessed;
- ensure that civil powers of confiscation and recovery (currently capable of wide interpretation) will operate proportionately and reasonably; and
- take action at European level to prevent companies being automatically and perpetually debarred from competing for public contracts following a conviction. The committee believes that debarment should be discretionary for the SFO's new self-reporting process for corporates to work effectively.

Special cases

Facilitation payments

The committee agrees that facilitation payments should continue to be criminalised but recognises that businesses need clarity about the circumstances in which facilitation payments will actually be prosecuted.

Corporate hospitality

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 on bribery of a foreign public official (clause 4) is based on prosecutorial discretion. The committee is content with this but calls 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.

Jurisdiction

The draft Bill extends the jurisdiction of the new offences to include actions by anyone who is 'ordinarily resident' anywhere in the UK. The committee welcomes this but identifies two matters for the government to clarify

on the failure of commercial organisations to prevent bribery (clause 5) prior to the Bill's introduction:

- the meaning of 'carries on a business' and 'part of a business'; and
- the need to prove an offence under clauses 1 (bribing another person), 2 (being bribed) or 4 (bribing a foreign public official) as part of proving an offence under clause 5.

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