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Bribery Bill [HL]

Bill No 69

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This Paper describes the background to and details of the *Bribery Bill*. For several years there has been pressure on the UK to update its anti-corruption legislation, last amended in 1916, not least from the OECD and other international organisations who are promoting global anti corruption initiatives. The Bill was published in draft on 25 March 2009 and has been redrawn in the light of comments during previous consideration in the Lords.

The Bill replaces the offences at common law and under the *Public Bodies Corrupt Practices Act 1889*, the *Prevention of Corruption Act 1906* and the *Prevention of Corruption Act 1916* with two general offences covering the offer, promise and giving of an advantage or the request, agreeing to receive or acceptance of an advantage. The formulation of these two offences abandons the agent/principal relationship in favour of a model based on an intention to induce improper conduct. The Bill also creates a discrete offence of bribery of a foreign public official and a new offence of negligent failure of commercial organisations to prevent bribery.

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Summary

The UK government has been under pressure to reform its bribery laws for a considerable time. Pressure has come from international organisations such as the OECD and non-governmental organisations. This is not because the UK is seen as an especially corrupt country but because of its poor record in prosecuting offences. Until 2009 there had not been a single case of a British company being convicted of bribery offences.

Currently in the UK, bribery and attempted bribery are common law offences punishable by imprisonment or a fine, or both. Currently the main statutes dealing with corruption are the *Public Bodies Corrupt Practices Act 1889*; the *Prevention of Corruption Act 1906*; and the *Prevention of Corruption Act 1916*.

A review of the bribery law began with work by the Law Commission in 1998. A draft *Corruption Bill* was presented to Parliament following the 2002 Queen's Speech, but was rejected by the Joint Committee which examined it. The Law Commission's response was published in a consultation paper *Reforming Bribery* in November 2007. The report was a comprehensive review of the options for legislation which also looks at the perceived failings of the 2001 legislation on foreign officials. It proposed broadening the offence of bribery to avoid the need for an agent to betray a principal as in current legislation. The offence would be committed by someone who offers an advantage to another as a reward for breaching a trust, or breaching a duty to act impartially or in the best interests of another person. The person soliciting or taking the advantage would also be guilty and agreeing to use one's influence to persuade someone else to breach a duty would also be an offence of bribery.

The current Bill followed consideration of a draft Bill in March 2009. Various changes were made reflecting consideration of the draft when the Bill was introduced into the Lords in November 2009 however, the main thrust of the Bill, replacing the existing legislation with new offences of giving or taking bribes was retained.

Key issues that attracted considerable interest during Lords proceedings were:

- The introduction of a strict liability offence of failure by a commercial organisation to prevent bribes being made on its behalf by associates;

- The fact that unlike in other countries there is no distinction between bribes and 'facilitation payments'; and

- The exemption from the general law given to the armed forces and security and intelligence services in cases of bribes

The current Bill does not include provisions with respect to Parliamentary privilege. It does include provisions with respect to bribing public officials abroad.

The Bill applies to England, Wales and Northern Ireland. A Sewel motion has been applied for with respect to Scotland.

1 Introduction

Bribery is a worldwide phenomenon and occurs to varying degrees in business, the public sector and in politics. It is not always easy to distinguish between say, legal 'agents commissions' and illegal bribing of key stakeholders, be they purchasing managers or politicians with sway over the granting of export or exploration licences. It also varies in scale from substantial payments to secure contracts worth many multiples of the bribe, to small payments to speed up customs clearance or product approvals. In many respects, the political will to tackle the issue has been more pronounced at the international level than at the national level, where efforts towards change are hampered by the view that if one country ends the practice others will not necessarily follow.

Furthermore, because of the nature of the activity the overall level of corruption in a country is hard to judge, based as it often is on the attention given to a few high profile cases. The main non-governmental organisation which monitors and campaigns on corruption issues is Transparency International, which maintains a world league table of corrupt countries.[1] According to the 2009 edition of this table, headed by the Nordic states and Australia and New Zealand, the UK is in the top twenty of least corrupt countries.[2] What has drawn more criticism of the UK is its record on prosecuting British companies for bribery offences. Until 2009 there had only been one successful prosecution of a UK company in UK courts. Campaigners like Transparency International take this as evidence of either a deficiency in the legal framework or a lack of prosecuting vigour, or both, rather than an implausible record of corporate good behaviour on the part of UK firms worldwide. The purpose of this Bill is to improve the legal options open to prosecutors by simplifying and extending the law on bribery.

The current Bill is the iterative result of a series of draft proposals from Government and the Law Commission.

2 The existing law

Bribery and attempted bribery are common law offences punishable by imprisonment or a fine, or both. Currently the main statutes dealing with corruption are the *Public Bodies Corrupt Practices Act 1889*; the *Prevention of Corruption Act 1906*; and the *Prevention of Corruption Act 1916*.

Section 1(1) of the *Public Bodies Corrupt Practices Act 1889* makes it an offence for any person alone, or in conjunction with others, to corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned. Section 1(2) of the Act creates a similar offence to that of section 1(1), in respect of anyone who gives the bribe.

Section 1 of the *Prevention of Corruption Act 1906* creates offences relating to corrupt transactions by and with agents in relation to their principal's activities. Crown servants are within the definition of agents of this Act.

In relation to offences created by the *Public Bodies Corrupt Practices Act 1889* and the *Prevention of Corruption Act 1906*, the burden of proof is shifted on to the defendant to show (on the balance of probabilities) that the money, gift, or other consideration is not received corruptly. This shift in the burden of proof is provided by section 2 of the *Prevention of*

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1 Transparency International CPI table

2 As measured by public sector corruptibility.

Corruption Act 1916. The consent of the Attorney General is required for prosecutions under these Acts.

Other specific statutory offences involving corruption, include those under the *Honours (Prevention of Abuses) Act 1925*.[3]

There have been relatively few prosecutions under the Acts. Christopher Sallon QC commented in evidence to a Public Administration Committee report:

> 45. On average, 21 people were prosecuted in each year between 1993 and 2003 under the Prevention of Corruption Acts referred to above. By comparison on average, some 23,000 defendants were prosecuted each year for fraud between 1997 and 2001[170]. Though these figures may not be entirely accurate, it is clear that there is a considerable difference between those prosecuted for public sector corruption and those prosecuted for private sector fraud. [4]

2.1 The need for reform

There has been long standing interest in overhauling the antiquated legislation to tackle corruption, dating since at least the Salmon Commission of 1976[5] and the Nolan Committee of 1995.[6] The need for reform and rationalisation of the UK's corruption law has been in large part driven by the International obligations incurred in agreements with the OECD, the European Union, the Council of Europe, and the United Nations which have attempted to develop common standards for anti-corruption measures internationally.

The OECD Convention on combating bribery of foreign public officials in international business transactions was implemented in the UK by Part 12 of the *Anti-Terrorism, Crime and Security Act 2001.*[7]

The Law Commission reviewed the UK's corruption laws in its 1998 report *Legislating the criminal code: corruption* (LC 248) which can be found, together with the Commission's draft bill, via the following link: http://www.lawcom.gov.uk/lc_reports.htm#1998. The main conclusions of the report were:

- a lack of consistency and comprehensiveness of the existing law on corruption,
- a lack of a statutory definition of the term "corruptly", which was open to different interpretations, and
- the dependence of the existing law on the distinction between public and non-public bodies.

The report called for a modern statute to replace all or parts of the existing relevant legal provisions on corruption and to incorporate the common law offence of bribery.

The Government responded to the report with a White Paper – *Raising standards and upholding integrity: the prevention of corruption* (Cm 4759, June 2000).[8].

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3 For background on other statutes, see the Law Commission Legislating the Criminal Code: Corruption (1997) Consultation Paper No 145, para 1.2 (1997) and *Corruption and Misuse of Public Office,* Colin Nicholls et al (2006)

4 *Propriety and Peerages* HC 153 2007-08Annex

5 Royal Commission on Standards in Public Life (the Salmon Commission) 1976 Cmnd 6524

6 Committee on Standards in Public Life First Report May 1995 Cm 2850

7 Research Paper 01/92 *The Anti-Terrorism, Crime and Security Bill, Part XII: Anti-corruption legislation* contains background information.

2.2 Draft Corruption Bill 2002-3

A draft *Corruption Bill* was presented to Parliament following the 2002 Queen's Speech, but was rejected by the Joint Committee which examined it. There was particular criticism of the retention of the agent/principal relationship as the basis for the offence. Library Standard Note no 2059 *Corruption: Draft Legislation* gives a detailed overview of the proposed legislation and the alternative approached preferred by the Joint Committee.

The Committee also considered in some depth the problems of reconciling the right of free speech for Members of Parliament, in Article IX of the Bill of Rights 1688, and the difficulties of prosecuting a Member for bribery. It reported in July 2003.[9]

In its response of December 2003,[10] the Government did not support the Joint Committee's proposals for legislation, but did accept a recommendation that the DPP should continue to authorise prosecutions against MPs to guard against frivolous accusations. The draft bill had proposed the consent of the Attorney General in Clause 17. In an effort to achieve consensus, the Home Office issued a consultation paper in December.[11]

The Law Commission Annual Report for 2006-7 noted as follows:

> 3.57 In March 2007 the Government announced that the outcome of the consultation process was that there was broad support for reform of the current law but no consensus as to how it could be best achieved. As a result, the Government has asked the Law Commission to undertake a thorough review of the bribery law of England and Wales. See paragraphs 5.18 to 5.21 of this report for further information on that review.[12]

2.3 The Law Commission's response

The Law Commission's response was published in a consultation paper *Reforming Bribery* in November 2007.[13] This paper acknowledged that the Commission's earlier proposals were no longer the most desirable options for reform. The report was a comprehensive review of the options for legislation which also looks at the perceived failings of the 2001 legislation on foreign officials. It proposed broadening the offence of bribery to avoid the need for an agent to betray a principal as in current legislation. The offence would be committed by someone who offers an advantage to another as a reward for breaching a trust, or breaching a duty to act impartially or in the best interests of another person. The person soliciting or taking the advantage would also be guilty and agreeing to use one's influence to persuade someone else to breach a duty would also be an offence of bribery. The paper argued that the distinction between bribery in the public sector and bribery in the private sector should be abolished The Commission also proposed a new offence of bribing a foreign public official. The Consultation closed in March 2008.

There was also external pressure on the Government to maintain the search for reform. In 2008 the OECD continued to press for more action by the UK to update its law and undertake more prosecutions, particularly against multi-nationals operating abroad. The

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[8] Available at Raising standards and upholding integrity: the prevention of corruption . Home Office. 2000.

[9] HL 157/HC 705 2002-3

[10] HL Paper 157, HC 705 2002-03 Cm 6086

[11] *Reform of the Prevention of Corruption Acts and SFO Powers in cases of bribery against foreign officials* Home Office December 2005.

[12] Annual Report 2006-07, Law Commission 2007.

[13] Law Commission Consultation Paper no 185

OECD Working Group on Bribery issued a report in 2008.[14] The accompanying press release stated:

> Current UK legislation makes it very difficult for prosecutors to bring an effective case against a company for alleged bribery offences. Although the UK ratified the OECD Anti-Bribery Convention 10 years ago, it has so far failed to successfully prosecute any bribery case against a company.[15]

The last sentence is no longer true. A company called Mabey & Johnson was convicted and fined in September 2009 for trying to unlawfully influence officials in Jamaica and Ghana and also for violating the terms of the UN 'Oil for Food' scheme in Iraq. In 2008 Balfour Beatty agreed to pay a fine to settle bribery allegations concerning its work to rebuild Alexandria's Library but this was not a formal conviction.

Allegations about BAE arms deals in Saudi Arabia have caused particular concern, given the decision by the Senior Fraud Office in December 2006 not to continue with a prosecution (a decision since rescinded) for reasons of national security. This decision was controversial, given the apparent personal involvement of the then Prime Minister, Tony Blair.[16] More information about the BAE systems case may be found in Library Standard Note 5367.

2.4 Draft corruption Bill 2008-9

The Law Commission published its revised response and a draft bill on 20 November 2008.[17] An extract from the summary of the report set out the main proposals:

> 1 Bribery has been contrary to the law at least since Magna Carta declared, "We will sell to no man…either justice or right". Most people have an intuitive sense of what "bribery" is. However, it has proved hard to define in law. The current law is both out-dated and in some instances unfit for purpose.
>
> 2 We propose repeal of the common law offence of bribery, the whole of the 1889, 1906 and 1916 Acts, and all or part of a number of other statutory provisions.
>
> 3 These offences will be replaced by two general offences of bribery, and with one specific offence of bribing a foreign public official. In addition, there will be a new corporate offence of negligently failing to prevent bribery by an employee or agent.[18]

In response, the Government published a white paper on 25 March 2009 which set out its proposals to legislate.[19] The legislation was modelled on the Law Commission proposals of November 2008. In his foreword, the Lord Chancellor, Jack Straw, noted that his role was to co-ordinate the development of the UK's strategy against foreign bribery. Mr Straw also made a written ministerial statement on 25 March 2009.[20]

The substantive provisions of the bill apply to England and Wales and Northern Ireland. In Scotland, the criminal law is a devolved matter. *The Prevention of Corruption Acts 1889-1916* would remain in force in Scotland.

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14 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS. OECD. 2008.

15 "OECD's Group demands rapid UK action to enact adequate anti-bribery laws" 16 October 2008 OECD

16 "OECD hits out at lack of action on corruption" 18 August 2008 *Financial Times; "Blair: I pushed for end to Saudi arms inquiry", The Times, 15 Dec 2006.* The alleged sequence of events in December 2006 is set out in a witness statement

17 *Reforming Bribery* Law Com no 313 HC 928 2007-08

18 *Reforming Bribery: Summary* Law Com no 313 HC 928 2007-08

19 *Bribery: Draft Legislation* Cm 7570

20 HC Deb 25 March 2009 c20WS

3 The current Bribery Bill [HL]

3.1 Introduction

The Bill was published in draft on 25 March 2009 for pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Committee received written and oral evidence beginning in May 2009 and published its report on 28 July 2009.

The Committee supported the draft Bill in principle but made a number of recommendations, many of which are reflected in the Bribery Bill as introduced in the House of Lords on 19 November 2009. Material on the Bill can be found on the Ministry of Justice website,[21] including the Bill, which can be found here,[22] and the Explanatory Notes which can be found here.[23] The Bill had its second reading in the Lords on 9 December 2009.[24]

The Explanatory Notes provide a brief summary of the Bill's intent:

> The purpose of the Bill is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom (UK) and abroad.
>
> The Bill replaces the offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known collectively as the Prevention of Corruption Acts 1889 to 1916 and which would be repealed: see Schedule 2) with two general offences. The first covers the offering, promising or giving of an advantage (broadly, offences of bribing another person). The second deals with the requesting, agreeing to receive or accepting of an advantage (broadly, offences of being bribed). The formulation of these two offences abandons the agent/principal relationship on which the current law is based in favour of a model based on an intention to induce improper conduct. The Bill also creates a discrete offence of bribery of a foreign public official and a new offence where a commercial organisation fails to prevent bribery.
>
> The other main provisions of the Bill include:
>
> replacing the existing requirement for the Attorney General's consent to prosecute a bribery offence with a requirement that the offences in the Bill may only be instituted by, or with the consent of, the Director of the relevant prosecuting authority;
>
> a maximum penalty of 10 years imprisonment for all new offences, except the offence relating to commercial organisations, which will carry an unlimited fine;
>
> extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies;
>
> a defence for conduct that would constitute a bribery offence where the conduct was necessary for the prevention, detection or investigation of serious crime by or on behalf of a law enforcement agency, or for the proper exercise of any function of the intelligence services or the armed forces engaged on active service.

3.2 Parliamentary Privilege

One issue not now included in the Bill is that of parliamentary privilege. The *Bribery Bill* does not clarify the law relating to the use of parliamentary privilege when investigating allegations

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21 Bribery Bill, Ministry of Justice website
22 http://www.publications.parliament.uk/pa/ld200910/ldbills/003/10003.i-ii.html
23 http://www.publications.parliament.uk/pa/ld200910/ldbills/003/en/index_003.htm
24 HL Deb 9 December 2009 c1085.

against Members. The 2002-3 draft bill did contain such provisions, and this did provoke some comment in the Joint Committee on the Bill in 2002-3. This Committee considered in some depth the problems of reconciling the right of free speech for Members in Article IX of the Bill of Rights 1688 and the difficulties of prosecuting a Member for bribery.[25] Originally, the Government did intend to tackle this complex issue. Clause 15 of the draft Bill stated, according to the Explanatory Notes:

> **Clause 15** makes the word or conduct of an MP or peer admissible in proceedings for a bribery offence under the Bill where the MP or peer is a defendant or co-defendant notwithstanding any enactment or rule of law including Article 9 of the Bill of Rights 1689.

The Joint Committee on the draft Bribery Bill concluded that this complex matter should not be addressed "piecemeal" through different Bills, such as the Draft Bribery Bill and the Parliamentary Standards Bill (now the Parliamentary Standards Act 2009). The Committee recommended that clause 15 be deleted, as the analogous provisions were from Parliamentary Standards Bill.[26] This issue should only be addressed in future as part of a comprehensive Bill specifically on Parliamentary Privilege.[27]

The clause did not reappear in the *Bribery Bill* as first published, and no amendments to this nature have been made during its passage in the law. To some extent, a broader debate has begun on the need or otherwise to clarify the role and nature of parliamentary privilege. Standard Note 4905 *Parliamentary privilege and individual members* sets out how the Clerks of both Houses have recently called for legislation to clarify the extent of parliamentary privilege, following some recent controversies.

Speaking on second reading in the Lords the Minister, Lord Bach defended this omission but appeared to leave open the possibility of inclusion at a later date. He said:[28]

> There is one point that is not in the Bill but which the House would expect me to mention. The general offences in the Bill apply to all those performing functions of a public nature. As such, we intend that the Bill would apply to Members of this House and of the other place. The Joint Committee did not demur from this. It is, I believe, axiomatic that no Peer or Member of Parliament should be above the law. The draft Bill sought to deal with the consequences of this by providing for Article 9 of the Bill of Rights 1689 to be waived so that the words or conduct of a Member of Parliament or Peer charged with an offence under the Bill may be admissible as evidence.
>
> We recognise that the issue of parliamentary privilege is an emotive one, as we saw during the passage of the Parliamentary Standards Act. Members of both Houses rightly do not want to see an erosion of hard-won freedoms. The Joint Committee took the view that there were dangers in adopting a seemingly piecemeal and inconsistent approach to parliamentary privilege and suggested that the matter should more appropriately be dealt with in a parliamentary privilege Act. Given the Joint Committee's conclusion on this matter and the complexities and sensitivities surrounding this issue, we have not included provision in respect of parliamentary privilege in the Bill as introduced into your Lordships' House. None the less, we recognise that the House will wish to consider this issue carefully during the course of

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25 Joint Committee on the draft Corruption Bill http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/15702.htm

26 For further detail on the deletion of the relevant clause from the Bill, see Library Standard Note 5121 *The Parliamentary Stages of the Parliamentary Standards Bill*

27 Joint Committee on the draft Bribery Bill 2008-09 http://www.publications.parliament.uk/pa/jt/jtbribe.htm

28 HL Deb 9 December 2009 c1088

> our debates, both today and during the subsequent amending stages of the Bill. We look forward to those debates and will reflect carefully on what is said on both sides of the argument.

Another issue he drew attention to, which will remain outside of the Bill but is pertinent to its operation, is forthcoming guidance available to businesses to illustrate what is and what is not acceptable practice. Such guidance would he said be drawn up with the 'expertise of business representatives, Transparency International and others'.[29] The next section deals with the main clauses in the Bill as they went through the Lord's stages.

3.3 The Bill in detail and proceedings in the Lords

This section looks in more detail at the Bill. Where aspects of the Bill were discussed at length during the course of the Bill's progress these proceedings will be the primary source for comment and explanation.

Note: because of the new clause introduced for the Commons' stages the clause numbering used in the Explanatory Notes and that used in the Lords stages are different. This Paper will use the latest clause number throughout even though comments in the Lords may refer to a different number. This is particularly pertinent with respect to Lords' Clause12

In terms of the language used in the Bill the common understanding of two concepts are expressed in the Bill thus:

- the bribe: 'receive or accepts a financial or other advantage'
- the desired outcome of the bribe (defined in the OED as the 'bribe service'): 'a relevant function or activity (should be) performed improperly'

Clause 1

Clause 1 defines the offence of bribery as it applies to the person who offers, promises or gives a financial or other advantage to another.

Speaking for the Conservatives, Lord Lyell of Markyate (previously a Solicitor General and an Attorney General) moved an amendment that would have inserted 'corrupt intent' as a qualifier of activity caught under the clause; bribery could only be defined as such if it was done with such intent. He pointed to the fact that jurisdictions in the USA, Canada, New Zealand and South Africa, all include reference to corrupt activity in their law on bribery. For the Government, Lord Goodhart thought that the existing requirements in the clause implied corrupt activity and that the extra language could get in the way of prosecutions as it might imply that a further condition had to apply before an act could be deemed to be bribery.

The debate did include a discussion about 'facilitation payments' and their relationship to corrupt behaviour. Lord Lyell noted that the US Foreign Corrupt Practices Act had been amended 11 years after it came in to exclude facilitation payments from the operation of that Act.[30] Under the Bill as it now stands such payments, even though they might not be thought of as being corrupt (for example, paying for an official to stamp a passport or provide some paperwork normally within their power so to do) would be covered by the Bill. Lord Goodhart, quoted the Law Commission's view that de-criminalising payments such as these would be 'legitimising corruption at the thin end of the wedge'.[31] In reply, Lord Mackay of

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29 Ibid c 1087

30 HL Deb 7 January 2010 GC27

31 Ibid GC29

Clashfern gave the example of barge owners waiting their turn to go through a lock and the temptation for some to offer inducements to pass through more quickly than others. Since "we are not living in a perfect world" "barge people from the United States [which excludes facilitation payments] will give the pourbouire and get through, while the people from other countries will get left behind".[32] Lord Williamson of Horton outlined the consideration to be given to the 'bold approach' of the Bill to include such payments and its impact on the business community:[33]

> We have included facilitation payments in the Bill as bribes, which is a bold approach and has the advantages of a bold approach. It is fully defensible vis-à-vis international opinion, and so on. However, it has the disadvantage to which the noble Lord referred; that is, that others are not covered by this broad approach, such as traders from the United States and so on.
>
> We have a straight choice between sticking with the broad approach, with its advantages-and let us remember that there are advantages-or go back in the other direction and make some distinct exception for facilitation payments. There is no amendment down to do that, although it is effected by the amendment that we are now discussing. I make the point now, so that I will not have to do so later on, that if we stay with the current approach, in giving advice or making information available to companies, particularly small companies, it is extremely important to emphasise that, although these types of payments are covered by the Bill, there is an existing discretion for the prosecutorial authority. That is a second best in one sense, but it is extremely important that they should understand that because, unlike noble Lords in this Committee, they will not have it all in their heads. Some companies and organisations will be quite worried that what we might call a minute payment of some kind might bring them into serious difficulty. It is very important to keep that in mind when we come to the later stages of the Bill.

The issue of proportionality and the vagueness of the boundary between minor inducements and bribes was mentioned several times. Lord Lyell raised the concept of 'prosecutorial discretion' as being the way in which such confusion would be settled.[34] The implication being that although all bribes were bribes, minor bribes would not be prosecuted or would be left to "the good sense of juries [which] may well restore common sense to the way the Act is implemented".[35] However, his amendment, requiring 'corrupt intent' would give the jury clear guidance.

Responding for the Government, Lord Bach said, quoting the Law Commission, that the "lack of clarity surrounding this concept (of acting corruptly) weakened the effective application of the law".[36] He continued by saying that the related concept of dishonesty as a basis for prosecution was also flawed:[37]

> The Law Commission considered the alternative approaches to the formulation of the general bribery offences in great detail and consulted widely on them. Its report, however, recommended that a model based on improper performance was the best possible option. Under that model, an offence is committed where a financial or other advantage is given to induce or reward impropriety in relation to what is described as a relevant function or activity. There must be an expectation that the relevant function or

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32 Ibid GC30
33 Ibid
34 Ibid GC32
35 Ibid
36 Ibid GC34
37 Ibid GC35

> activity is to be carried out in good faith, impartially, or the person performing it is in a position of trust.
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> Following that model, Clauses 1 and 2 set out two active and four passive bribery cases that describe the conduct of the payer or the recipient that will constitute a bribery offence. Those cases can be readily understood and provide the required legal certainty. I recognise that the terms "good faith", "impropriety" and "position of trust" are not defined in the Bill, but they are readily capable of being understood by juries in the relevant context of the case without further elaboration.

The amendment was withdrawn.

Clauses 2 – 5 were not discussed in Committee.

Clause 2 defines the offence of bribery as it applies to the recipient or potential recipient (called "R" in the Bill) of the bribe.

At the centre of the clause is the requirement that the recipient "requests, agrees to receive or accepts" an advantage. This requirement is linked to an act of "improper performance" of some function or activity. The clause proceeds by outlining various cases, which illustrate activity which would be unlawful. Following a request for a 'bribe' in Case 3 the consequence is that some act is performed improperly; Case 4 is where the request itself is improper; Case 5 is where R receives something in return for 'improper performance' either by himself or another. Case 6 is where in anticipation or because of R asking or receiving a bribe a bribe service is done by someone other than R, but at their request or with their connivance. The clause makes clear (cl 2(7)) that it doesn't matter whether R knew the bribe service was improper or not.

The types of function or activity that can be improperly performed for the purposes of the first two clauses is defined in **Clause 3.** The functions (Cl 3(2)) are drawn widely:

> (a) any function of a public nature,
>
> (b) any activity connected with a business,
>
> (c) any activity performed in the course of a person's employment,
>
> (d) any activity performed by or on behalf of a body of persons (whether corporate or un-incorporate)

The explanatory notes explain that there is intended to be an equivalence of treatment across both the public and private sectors, but that:[38]

> Not every defective performance of one of these functions for reward or in the hope of advantage engages the law of bribery. *Subsections (3) to (5)* make clear that there must be an expectation that the functions be carried out in good faith (condition A), or impartially (condition B), or the person performing it must be in a position of trust (condition C).
>
> 30.*Subsection (6)* provides that the functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK.

Clause 4: defines "improper performance" (see above) as performance which breaches a relevant expectation which is defined in **Clause 5.** The 'expectation test' is defined as being (cl5 (1)) what a reasonable person *in the UK* would expect of a person performing the

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[38] EN http://www.publications.parliament.uk/pa/cm200910/cmbills/069/en/10069x--.htm

relevant function or activity. The qualification that it is what might be expected in the UK means that local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law.

Clause 6

Clause 6: creates a separate offence of bribery of a foreign public official. Its provisions closely follow the requirements of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* which was implemented in the UK originally by Sections 108-110 of the *Anti Terrorism, Crime and Security Act 2001*. These provisions are repealed under this Bill. The Explanatory Notes distinguish this offence from those in previous clauses because:

> the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. The person giving the bribe must intend to influence the recipient in the performance of his or her functions as a public official, and must intend to obtain or retain business or a business advantage. [39]

The clause includes a 'conduct element' and a fault element. The clause was debated in Grand Committee and Lord Henley moved a 'probing' amendment which would have added the word 'corruptly' to the 'conduct element' part of the clause. His purpose was to ask the "Minister to explain clearly where the distinction will be drawn in deciding what bribery is?"[40]

He outlined again, the potential difficulties regarding facilitation payments, and the insistence in the proposed UK law of reliance upon *written* foreign law, as opposed to custom and practice not written down, compared to other countries 'softer' line on the same things. Potentially difficult hypothetical scenarios were not hard to construct – two countries, one with a written law on X, one in which it was custom etc – but they all argued for clarity of definition of the subject of the clause.

Replying for the Government, Lord Tunnicliffe said that:[41]

> The Clause 6 offence is formulated so as to avoid the need to identify precisely the nature of the functions of and duty owed by foreign public officials. Such matters have proved to be one of the difficulties experienced by prosecutors in this kind of case under the current law.

Speaking to the amendment his view was that adding "an inherently difficult and vague concept" such as 'corruptly', would result in less clarity and entail searching for the meaning of it amongst "old inconsistent case law".42 He considered the impact of the clause more generally on commercial practice as Lord Henley had invited him to do.[43]

> Should there be a defence for reasonable corporate hospitality? We do not believe one is needed. The offence applies only to advantages given to foreign public officials which are intended to influence officials and to obtain or retain business. This will not necessarily be the case in respect of hospitality. To the extent that any corporate

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39 Ibid
40 HL Deb 7 January 2010 GC39
41 Ibid GC41
42 Ibid GC 42
43 Ibid GC 43

> hospitality might be caught by this division-which will certainly not generally be the case-it is appropriate for prosecutors to take a view on where the public interest lies. It is unlikely that reasonable hospitality to foreign officials will attract the interest or action of enforcement authorities.

The amendment was withdrawn.

Clause 7

Clause 7: Failure of commercial organisations to prevent bribery. This clause has caused some concern amongst the business community for obvious reasons. The chain of command from head office to local employees might be a long one and proving that the degree of supervision required to prevent something done on one's behalf by a third party may be difficult. It had also been one of the issues discussed during the Bill's Second Reading. Lord Henley moved amendments on this clause. He began by noting the 'strict liability' nature of the offence, i.e. a company is guilty if the event happens regardless of intent. The main defence for a company was that it had "in place adequate proceedings designed to prevent a person connected with it engaging in bribery".[44] At issue was what was meant by 'adequate'. The Explanatory Notes add that:

> Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities.

Lord Henley's contention was that whilst one might leave the final determination in a case to the judicial authorities, companies needed clarity before the Bill came into force and therefore needed guidance, something recognised by the Government and bodies such as the Law Society. His amendment would commit the Government to publish such guidance before the law came into effect. An amendment by Lord Goodhart went further; it required the Government to produce guidance on a continued basis for the law to hold. Several of their Lordships supported the concept of an ongoing commitment to guidance. Lord Mackay of Clashfern directed attention as to where it should come from, clearly preferring the Department most closely associated with business to the Ministry of Justice. A point supported by Lord Borrie.

Responding for the Government, Lord Tunnicliffe accepted the need for guidance and outlined progress made towards producing it:[45]

> As the noble Lord, Lord Bach, said in his letter of 16 December to the noble Lord, Lord Henley, Ministry of Justice officials have already made a good start on the development of guidance. Officials have already met with a number of experts from organisations such as Transparency International, the Institute of Business Ethics and the Anti-Corruption Forum about what should be included in the guidance and they will be meeting other stakeholders with an interest in this subject over the coming weeks.
>
> In addition, my ministerial colleague, Claire Ward, met a wider group of stakeholders, including the Confederation of Business and Industry and the Federation of Small Businesses on 15 December to discuss the Bill in general. Naturally, that discussion turned to the Clause 7 offence and the need for government guidance on adequate procedures. What is clear from these discussions is that there is a wealth of information published by reputable organisations on which we can and should draw

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[44] Ibid GC45
[45] Ibid GC51

> when developing our own guidance. The OECD is working on good practice guidance on internal ethics and controls, due to be published later this year, which we will undoubtedly wish to reflect in our own guidance. Organisations such as Transparency International and the Global Infrastructure Anti-Corruption Centre have published impressive anti-bribery strategies on their websites, which, if adopted by commercial organisations, would go a long way to eradicating bribery.
>
> We would expect our guidance to cover much the same ground as the examples to which I have referred. Among the issues that I anticipate will be addressed are: the responsibilities of an organisation's board of directors; the identification of a named senior officer with particular responsibility for combating bribery; risk management procedures; gifts and hospitality policy; facilitation payments; staff training; financial controls; and reporting and investigation procedures. This is not a comprehensive list, but it will provide the Committee with a flavour of the issues we would expect to cover. We aim in advance of Report to let noble Lords have a more detailed list of the content of our guidance. Having given an absolute commitment to publish guidance, we remain unpersuaded of the case for enshrining that undertaking in statute. I again pray in aid the noble and learned Lord, Lord Woolf, who said at Second Reading that,
>
> "it is of no great significance whether it is statutory or non-statutory guidance".-[*Official Report*, 9/12/09; col. 1100.]
>
> The Government are often criticised, I might add unfairly, for legislating needlessly. Our submission is that Amendments 10 and 11 fall into that same trap. They are unnecessary and would create an unwelcome precedent.

More information on the 'flavour' of the guidance can be had from a letter written by Lord Bach to Lord Henley in December 2009. This included a copy of a draft paper provided by representatives of GC100, a group which brings together the senior legal officers of more than 85 FTSE 100 companies, with an outline of the areas which guidance will cover in due course. The letter can be found on the Ministry of Justice website.[46]

Further discussion centered upon whether the guidance should be part of the Bill, or some secondary legislation, or not. The Minister thought that "it is unnecessary to have something in the Bill" but added, "We will reflect on everything that has been said in Committee and the force with which it was said". The outcome of these reflections were two amendments, one a new clause (now Clause 9), introduced by the Government during the Report Stage (HL Deb 2 February 2010 c143 and c147) requiring the guidance to be published by the Secretary of State.

Lord Henley moved further amendments that examined the nature of the relationship between companies required to prevent bribery and those whom they might be expected to have control over. In other words, the extent of control that the law might reasonably expect. He said:[47]

> I raise the subject of consortia for good reasons. Much international business in the petroleum, mineral, banking, financial and construction industries is conducted through consortia or contractors who have sole or overall responsibility for a project. The relationship with the other entities is not one of control, but regulated by contract only. In many cases, the partners may be state entities. A UK company, especially in one of the extractive industries, may have no choice but to take a state entity as a partner. It can investigate potential partners and then monitor them for bribery, using contractual

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46 Ministry of Justice website

47 HL Deb 7 January 2010 GC57

> provisions or by exercising its maximum influence. The latter is regarded as acceptable in United States practice, and that may be the maximum extent of the control of its fellow consortium member that the UK company would be able to exercise. Would the provisions in the Bill be sensitive enough to deal with such situations? If they are not, there is a risk that the Bill could put UK businesses at a distinct disadvantage.
>
> The United States recognises, especially in the audit provisions, the importance of the degree of control when deciding the responsibility of the company for bribery by associates. The Bill makes no such allowance, the sole criterion being whether services are being performed. There is no doubt that partners in the industries mentioned mutually perform services. Accordingly, in certain regions and in respect of certain resources, a UK company would have no choice but to abstain from participation. The cost to the United Kingdom could be considerable. It would rise to an even greater magnitude if UK companies had to withdraw from existing groups because of the potential impact of the Bill. In any event, the place that might have been available for UK enterprise would quickly be filled by companies from other jurisdictions.

Lord Tunnicliffe offered guidance on what the law would require:[48]

> The Clause 7 offence applies whenever a person performing services for a commercial organisation bribes another to obtain or to retain business for that organisation. Where that connection cannot be made, the organisation will not be guilty. However, where the organisation can benefit from a bribe that is ostensibly paid on its behalf, liability will be determined by the procedures that the organisation took to prevent such bribes from occurring. It is for the courts to determine whether a person was performing services for the organisation in question based on all the circumstances. Consideration of liability will then rest on whether the commercial organisation had adequate procedures in place to prevent bribery.
>
> The formulation of the defence under Clause 7 is broad enough to cater for different corporate structures: including contractors, consortia and joint ventures. The Government are also committed to publishing guidance on the meaning of adequate procedures well before the offence is brought into force. We are considering what guidance may be appropriate in respect of different corporate structures. This is not a one-size-fits-all approach. The procedures should be appropriate to the circumstances of the enterprise. This issue was considered by the Joint Committee, which examined the draft Bill. The committee considered a number of suggested amendments to the draft Bill that sought to limit the offence to cases in which the commercial organisation controls the subsidiary or joint venture. The committee noted, however, that the same end could be achieved through suitable guidance.

The amendments were withdrawn and Clause 7 agreed to. On Report, a further amendment was discussed. It would shift the onus of proof away from the company defending its conduct, onto the prosecuting authorities who would have to prove that it had not done enough to prevent it. Lord Henley, moving the amendment, noted the 'strict liability nature' of the offence currently sways the balance of probabilities against a company. Speaking for the Liberal Democrats, Lord Goodhart described the amendment as a "wrecking" one, "for the principal reason that if any prosecution has to identify a single individual… who were negligent in preventing bribery, it would make it almost impossible to obtain a conviction".[49] Replying for the Government Lord Tunnicliffe echoed this view:[50]

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48 Ibid GC58
49 HL Deb 2 February 2010 c140
50 Ibid c142

> While I understand the motivation behind these amendments, the noble Lord will recall that the Joint Committee that scrutinised the draft Bill specifically recommended that we should remove the requirement to prove negligence. Witnesses to the Joint Committee described the relationship between the negligence element of the offence and the adequate procedures defence as uncomfortable. The Joint Committee was concerned that focusing 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, would introduce an unnecessary level of complexity. Clause 7 as it now stands follows the Joint Commission's persuasive recommendation and removes this complexity and uncertainty.
>
> We also accepted the Joint Committee's view that a commercial organisation is well placed to demonstrate on the balance of probabilities that it had adequate procedures in place to prevent bribery. I understand that, when a defence is specified, it does not have to be proved beyond reasonable doubt; it merely has to be proved on the balance of probabilities. The burden of proof is therefore not completely reversed as the noble Lord, Lord Henley, suggested. It is a strict liability.
>
> Our view on these matters has not changed. The reality is that the commercial organisation is best placed to establish the adequacy of its procedures. Placing the burden on the prosecution to prove a negative could render this important offence ineffective in practice. I stress, however, that while the prosecution will need to prove the offence beyond reasonable doubt, the defendant will have only to establish on the balance of probability that the defence has been made out.

Clause 8: defines the meaning of 'associated person'; and was agreed to without debate.

Clause 10

Clause 10: this clause provides that a prosecution under the Bill in England and Wales can only be brought with the consent of the Director of one of the three senior prosecuting authorities,

- the Director of Public Prosecutions;
- the Director of the Serious Fraud Office; and
- the Director of Revenue and Customs Prosecutions.

Equivalent provisions exist for prosecutions in Northern Ireland. Thus, this clause would prevent private groups launching their own criminal prosecutions. For example, one of the development or environmental charities could not initiate a prosecution. In Grand Committee, the main debate was over the omission from the above list of the Attorney General. Lord Henley queried why "has the role of the Attorney General been so reduced?" He, and others, believed the reason was international pressure from bodies like the OECD to remove political influence from the prosecution of bribery cases. Lord Mackay spoke in favour of the principle of accountability of Law Officers whereas Lord Goodhart quoted the findings of the Joint Committee on the draft Bill which said:

> "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 ... Any broader

> reform of the Attorney General's Office, including her power of direction, must await comprehensive proposals being pursued in the future".

For the Government, Lord Bach accepted the strong views on both sides and prayed in aid the views of bodies such as the OECD and Transparency International and other lobby groups ("who have been pressing us to reform our bribery laws for some years")[51] who argue that this is an area of law where political influence is best left out.

The clause was agreed to.

With respect to Scotland, which has its own criminal system, the Government has applied for a Sewel motion. More information on this and the procedures can be found in Library Standard Note 2084.

Clause 11 sets out the penalties under the Bill, and **Clause 12** their territorial extent. Offences by an individual under clauses 1, 2 or 6 is punishable either by a fine or imprisonment for up to 10 years (12 months on summary conviction in England and Wales or Scotland or 6 months in Northern Ireland), or both. An offence by a company is punishable by a fine.

In the case of fines they may be up to the statutory maximum (£5000 in England and Wales or Northern Ireland, £1000 in Scotland) if the conviction is summary, and unlimited if it is on indictment. The Clause 7 offence can only be tried upon indictment.

Both clauses were agreed to without debate.

Clause 13

Clause 13: defence for certain bribery offences: legitimate purposes. Subsection (1) of this clause provides a defence where a person charged with a relevant bribery offence can prove that it was necessary for:

> the proper exercise of any function of one of the intelligence services; or
>
> the proper exercise of any function of the armed forces when engaged on active service.

The Explanatory Notes add, "Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities".

As might be expected this clause (note: it was Clause 12 at this point) attracted considerable interest and debate and it monopolised all the remaining Committee stage. For the Opposition, Lord Henley began with 'probing' amendments to examine whether the limits of the applicable exemption were drawn too widely. In the version of the Bill before the Lords, the defence included an extra category, to include actions by a 'law enforcement agency' connected with serious crime.

The 'probing' nature of the amendment rapidly escalated in the course of the debate as the extent of their Lordships' concerns became evident. Their main concern was that the exemption relating to a law enforcement agency was an exemption to far and they noted that this exemption had noted been part of the original draft Bill.

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[51] HL Deb 7 January 2010 GC72

The Minister, Lord Bach, struggled against frequent interventions which drew attention to a variety of facets on the same theme. Before long he declared "I have heard the strong views of the Committee" and "I accept that our approach may have cast the net too widely."[52] On Report the objected to exemption was removed.[53]

This was not the only objection raised about this clause. Speaking for the Liberal Democrats, Lord Goodhart declared "we would prefer to knock out Clause 12 altogether".[54] Other objections were frequently sourced to comments made by the Lords Select Committee on the Constitution in its Report on this clause in the Bill.[55] The Report concluded that:

> 7.The Joint Committee on the Draft Bill recommended that clauses 13 and 14 be removed. The Committee stated that it had heard "no persuasive evidence of a need for the domestic intelligence services to be granted an authorisation to bribe", and noted longstanding concerns as to whether a provision such as clause 13 complies with the United Kingdom's international treaty obligations.[4] In its response to the Joint Committee's Report, the Government flatly re-iterated that it is "satisfied that some provision is required in the Bribery Bill to address those circumstances in which the intelligence services may have to use financial or other inducements to carry out their relevant statutory functions", without furnishing anything more in terms of reasons or evidence.
>
> 8.It is to be noted that clause 12 of the Bill as introduced is markedly different from clauses 13-14 of the Draft Bill. The scheme for ministerial authorisation has been abandoned in favour of a series of blanket defences. **The removal in the Bill of the safeguard of there being a Minister responsible is, of itself, a matter of constitutional concern**.
>
> 9.Our concerns, however, go deeper than this. **The defences provided for in clause 12(1)(a) and (b) are drawn too widely, in three separate respects**. (We raise no objection to the defence in clause 12(1)(c).)
>
> 10.First, the defence applies to "any function" of the Security Service, the Secret Intelligence Service, and GCHQ. While we can see that there may be a case for such a defence in the context of the Security and Secret Intelligence Services' statutory functions in connection with national security and with the prevention and detection of serious crime, **it is not self-evident that such a defence should extend also to the Services' statutory function "to safeguard the economic well-being of the United Kingdom"**.[6]
>
> 11. Secondly, the defence applies equally to the Security Service, the Secret Intelligence Service, and GCHQ. While, again, we can see that there may be a case for such a defence in the context of the Security and Secret Intelligence Services' functions with regard to national security and serious crime, **it is not self-evident that GCHQ requires the same statutory protection from the law of bribery. Unless compelling evidence is produced as to why there is such a need, clause 12(1)(b) should be amended so as to limit the scope of the defence.**[56]

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52 HL Deb 13 January 2010 GC92
53 HL Deb 2 February 2010 c175
54 HL Deb 13 January 2010 GC96
55 *Clause 12 of the Bribery Bill*, Select Committee on the Constitution, HL 10 2009/10
56 Ibid pp7-11

Their Lordships concentrated their comments on the restrictions, or not, implied by the use of the words “proper exercise of any function”. “Any function” gives the authorities an unlimited defence. To what extent would “proper” limit this, and how, in the absence of any authorisation procedure noted in the Report. Lord Thomas of Gresford noted that ‘protection of the economy’ was not part of the OECD Convention upon which much of the rest of the Bill was focussed on implementing.

Replying for the Government, Lord Bach said:

> The purpose of subsection (1)(b) of Clause 12 is to provide a defence in circumstances where the Security Service, the Secret Intelligence Service and GCHQ may have to use financial inducements or rewards to carry out their relevant functions. As we have just been reminded, those functions are set out in statute. It is right that the Bill should mirror them and not take a selective approach which would undermine the ability of the services to discharge their legitimate purposes as previously endorsed by Parliament.
>
> Moreover, in order to be effective, the defence cannot be focused on only part of the intelligence services' statutory functions. All of the statutory provisions under which each of the services fulfil their respective roles refer to the three purposes on which their work focuses. These are national security, the economic well-being of the nation, and the prevention or detection of serious crime. Each of the relevant statutes deals with how the services exercise their functions in slightly different ways. The position of the Security Service is slightly different, but certainly the Secret Intelligence Service and GCHQ need to exercise their statutory functions across the entire range of the three purposes. That range is intended to cover matters that are of significant national importance but not necessarily matters that relate simply to national security. There is-this is the point I am trying to make-considerable overlap between the three purposes. They are not neat silos and it is not practicable to seek to distinguish one as being more important than another. It is true that the national security category is quite broad and would cover many operational needs.
>
> I shall give an example of the response of the services to a planned terrorist outrage. It is obvious from this that it could fall within two or three of the statutory functions that I have just outlined. If there were a planned attack on a power station, the response might amount to action to protect national security and to protect, quite legitimately, the economic well-being of the nation. Other operations might fall entirely under one or other headings.
>
> Similarly, information-gathering on the part of GCHQ or the Secret Intelligence Service, in support of a number of linked investigations into large-scale fraud or other financial irregularities that are of significant relevance to the economic well-being of the UK, may not naturally fall within the scope of the national security category. Perhaps of even more significance is the fact that a single operation may comprise a number of parts, each of which may fall to different categories.
>
> The point is that it will not always be clear, at least not always initially, what precise function the conduct in question related to. Moreover, it would be wrong to deny the defence where the conduct occurred in the pursuit of one of the functions that Parliament had actually conferred on the services because it appeared, on a later analysis, that the case did not fall within the scope of one specific function. Our proposition is that reliance on the national security category alone would be inflexible and, frankly, operationally ineffective.
>
> I know that some noble Lords will be particularly concerned about the inclusion within the scope of the defence of conduct on the part of the services in order to protect the economic well-being of the nation. There is nothing particularly mysterious about this

> category of work by the services. Under this heading, the services might act to safeguard and/or obtain intelligence in the interests of the national economic interest. Clause 12 expressly excludes any offence involving bribery of a foreign public official, thereby complying, we would argue, with the OECD convention.[57]

With respect to GCHQ, which both the Report and several Peers had though ought not to be included within the defence, Lord Bach agreed that there were far fewer likely occasions when it would need to take advantage of this provision than other branches of the security services, though he denied that it was a purely passive intelligence gathering body. In the Government's view:

> To avoid doubt, and in order to allow GCHQ to reassure its staff that any such activity that is a proper exercise of its functions is within the law, the Government believe that the defence in the Bill should be available to GCHQ on the same basis as the other services. Moreover, this role may of course be fulfilled in partnership with the other services. The inability of GCHQ to deploy inducements where it is necessary in order to fulfil its operational role could obviously potentially compromise operational effectiveness of all three intelligence services. It would therefore clearly be wrong to exclude GCHQ from the scope of the defence[58]

On the issue of Ministerial authorisation, it is worth recalling that the Government has significantly moved its position from where it was in the draft Bill. That provided for authorisation by Ministers based upon class of activity or time. At the heart of Lord Bach's justification of the Government's change of mind was the unworkability of either a pre- or post-authorisation scheme and possible undesirable constitutional outcomes should it be in place. Regardless of whether it was a pre- or post-authorisation system, the outcome was the same, a Minister would in effect, be deciding the outcome of a potential criminal action because they would be ruling on whether the key defence was triggered or not. Bearing in mind who the prosecuting authorities could be (see notes on Clause 10) one branch of government would likely to be overruling another in a criminal matter.

Subsequent to the Grand Committee proceedings the Constitutional Committee produced a further Report about Clause 12. They commented upon the Government's defence of its rejection of an authorisation procedure with respect to the defence for the armed forces and intelligence services. It said:[59]

> 8.As we explained in our previous report, the Bribery Bill was preceded by a Draft Bill, which was scrutinised in great detail by a Joint Committee. The Draft Bill contained no "defences" clause similar to clause 12. Instead, in clauses 13-14, it provided for a system of prior ministerial authorisation. **From a constitutional point of view the advantage of a system of prior ministerial authorisation is that it provides a measure of oversight by a Minister who is accountable to Parliament.**
>
> 9.In their response the Government explained their reason for abandoning in the Bill the scheme of prior ministerial authorisation which had featured in the Draft Bill: namely, that including additional agencies within the scope of the defences in clause 12 meant that a prior authorisation scheme would not be "workable … without imposing an undue administrative burden". This explanation is unpersuasive since a prior authorisation scheme could allow for authorisation, where appropriate, on a class

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57 HL Deb 13 January 2010, GC101-102

58 Ibid GC103

59 *Clause 12 of the Bribery Bill: Further Report*, Select Committee on the Constitution, HL 49 2009/10

> basis. Moreover, since the Government have agreed to remove clause 12(1)(a) from the Bill, the only new agency is the armed forces.
>
> 10.The Government also suggest that the clause 12 defence "has a number of advantages over the authorisation scheme" in that it is "more focused and case specific". In the Committee's view it is unsatisfactory to leave regulation of possible acts of bribery by the State to post-event assessment through the criminal law. It is highly desirable that such acts do not occur unless authorised in advance by a Minister answerable to Parliament. In our view, it is not a question of choosing between prior authorisation (which may be on a class basis) and case specific assessment of whether to bring a criminal prosecution. The Committee considers that both protections should be available. An act of bribery by the State should not occur without prior authorisation, and there may be rare cases where such authorisation has occurred (in particular on a class basis) where the individual defendant appears to have acted improperly in performing an authorised act of bribery, and so a prosecution should be considered.
>
> 11.**We reiterate our recommendation that the defences in respect of both the intelligence services and the armed forces should be accompanied by a system of prior ministerial authorisation.**

Debate on Clause 12 resumed on Report. As mentioned above the Government moved an amendment to remove 'law enforcement agencies' from the list of bodies benefitting from the defence outlined in subsection 1 of the clause. A long debate followed which touched on many of the issues already raised, such as the scope of the exemption and the way it will apply and the role of the Government's law officers. Lord Goodhart moved an amendment, about the scope of the exemption regarding the actions of the security services.[60]

> My Lords, I propose now to ask for the opinion of the House on something that will be short and simple. We have had a very long debate on a number of scattered provisions and problems arising from Clause 12, to a degree that was wholly unexpected. Certainly, I was not expecting it and I doubt that the Minister was. Amendment 20 raises only one short and simple issue. ... The question is: should the functions of the security services include using bribery to obtain information relevant to protecting the economic well-being of the country, but not relevant to national security or the prevention of serious crime? We say that the function of the security services should not be extended to bribery which is solely for the purpose of protecting economic well-being.

The remaining clauses in the Bill were not discussed during Lords' proceedings.

Clause 14: Offences under sections 1, 2 and 6 by bodies corporate. Once it is established that an offence under these sections has been committed, Clause 14:

> provides that a director, partner or similar senior manager of the body is guilty of the same offence if he or she has consented to or connived in the commission of the offence. In a body corporate managed by its members, the same applies to members. In relation to a Scottish partnership, the provision applies to partners.
>
> It should be noted that in this situation, the body corporate and the senior manager are both guilty of the main bribery offence. This clause does not create a separate offence of "consent or connivance".[61]

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60 HL Deb 2 February 2010, c184

61 Explanatory Notes

This is in contrast to **Clause 15** which deals with offences under section 7 by partnerships. Under this clause proceedings must be brought in the name of the partnership (and not the partners). Any fines imposed on the partnership on conviction must be paid out of the partnership assets.

Of the remaining clauses, the Explanatory Notes say:

> **Clause 16: Application to the Crown**
>
> 69 Clause 16 applies the Bill to individuals in the public service of the Crown. Such individuals will therefore be liable to prosecution if their conduct in the discharge of their duties constitutes an offence under the Bill.
>
> **Clause 17: Consequential provision**
>
> 70.This clause abolishes the common law offences of bribery and embracery (bribery etc of jurors), and gives effect to Schedules 1 and 2, which contain consequential amendments and repeals.
>
> **Clause 18: Extent**
>
> 72.This clause provides that the Bill extends to the whole of the UK and that any amendments or repeals of a provision of an enactment have the same extent as that provision. However the amendment of and repeals in the Armed Forces Act 2006 do not extend to the Channel Islands and the amendments of the International Criminal Court Act 2001 and the repeal in the Civil Aviation Act 1982 do not extend to the Channel Islands, Isle of Man or the British overseas territories

The financial effects of the bill are estimated at £2.18m, based on an estimate of a small number of new offences, given the new corporate offence. In its commentary on ECHR provisions, the white paper acknowledges that the Law Commission expressed concerns in 1998 that the presumption of corruption in certain cases contained in section 2 of the *Prevention of Corruption Act 1906* might be incompatible with Article 6(2) of ECHR. The Bill would repeal the whole of the 1906 Act