



## The draft *Bribery Bill*

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This Note offers a brief introduction to the draft *Bribery Bill* published on 24 March 2009. For several years there has been pressure to update the UK anti corruption legislation, last amended in 1916, not least from the OECD and other international organisations who are promoting global anti corruption initiatives. The draft bill and white paper published on 25 March would implement proposals from the Law Commission in November 2008.

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. Finally it would set aside parliamentary privilege to make evidence from proceedings in Parliament admissible in the prosecution of a Member of either of the Houses of Parliament for a bribery offence or in related proceedings

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## 1 Background

Bribery and attempted bribery are common law offences punishable by imprisonment or a fine at large, or both.

The main statutes dealing with corruption are

- (1) the *Public Bodies Corrupt Practices Act 1889*;
- (2) the *Prevention of Corruption Act 1906*; and
- (3) 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 burden of proof is provided by section 2 of the *Prevention of Corruption Act 1916*. The consent of the Attorney General is required for prosecutions under these Acts.

There are other specific statutory offences involving corruption, including the *Honours (Prevention of Abuses) Act 1925*.<sup>1</sup>

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<sup>1</sup> 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)

There are relatively few prosecutions under the Acts. Christopher Sallon QC commented in an Annex to the 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.<sup>2</sup>

### 1.1 The need for reform

There has been long standing interest in overhauling the antiquated legislation against corruption, dating at least since the Salmon Commission of 1976<sup>3</sup> and the Nolan Committee of 1995.<sup>4</sup> 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*. Research Paper 01/92 *The Anti-Terrorism, Crime and Security Bill, Part XII: Anti-corruption legislation* contains background.<sup>5</sup>

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](http://www.lawcom.gov.uk/lc_reports.htm#1998). The main conclusions of the report were

- (1) the lack of consistency and comprehensiveness of the existing law on corruption,
- (2) the lack of a statutory definition of the term "corruptly", which was open to different interpretations, and
- (3) 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 in a White Paper – *Raising standards and upholding integrity: the prevention of corruption* (Cm 4759, June 2000). This can be found at: <http://www.archive.official-documents.co.uk/document/cm47/4759/4759.htm>.

### 1.2 Draft Corruption Bill 2002-3

A draft *Corruption Bill* was presented to Parliament following the 2002 Queen's Speech, but this legislative approach was rejected by the Joint Committee which examined the draft bill, under the chairmanship of Lord Slynn of Hadley. There was particular criticism of the

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<sup>2</sup> *Propriety and Peerages* HC 153 2007-08Annex  
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/153/15313.htm>

<sup>3</sup> Royal Commission on Standards in Public Life (the Salmon Commission) 1976 Cmnd 6524

<sup>4</sup> Committee on Standards in Public Life First Report May 1995 Cm 2850

<sup>5</sup> <http://www.parliament.uk/commons/lib/research/rp2001/rp01-092.pdf>

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.

This Committee also 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. It reported in July 2003.<sup>6</sup> The Joint Committee's report is archived at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/15702.htm>

The Government response of December 2003,<sup>7</sup> did not support the Joint Committee proposals for legislation. However it 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 2005 at <http://www.homeoffice.gov.uk/documents/450272/2005-cons-bribery?view=Binary><sup>8</sup>

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.<sup>9</sup>

The Law Commission proposals were published in a consultation paper *Reforming Bribery* in November 2007.<sup>10</sup> 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. Consultation closed in March 2008.

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 OECD Working Group on Bribery issued a report in 2008.<sup>11</sup> 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

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<sup>6</sup> HL 157/HC 705 2002-3

<sup>7</sup> HL Paper 157, HC 705 2002-03 Cm 6086

<sup>8</sup> *Reform of the Prevention of Corruption Acts and SFO Powers in cases of bribery against foreign officials* Home Office December 2005.

<sup>9</sup> <http://www.official-documents.gov.uk/document/hc0607/hc05/0552/0552.pdf>

<sup>10</sup> Law Commission Consultation Paper no 185

<sup>11</sup> <http://www.oecd.org/dataoecd/23/20/41515077.pdf>

Anti-Bribery Convention 10 years ago, it has so far failed to successfully prosecute any bribery case against a company.<sup>12</sup>

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 for reasons of national security. This decision was controversial, given the personal involvement of the then Prime Minister, Tony Blair.<sup>13</sup>

### 1.3 Law Commission draft bill

The Law Commission published its draft bill on 20 November 2008.<sup>14</sup> 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.<sup>15</sup>

## 2 The draft *Bribery Bill*

The Government published a white paper on 25 March 2009 which set out its proposals to legislate.<sup>16</sup> The legislation was modelled on the Law Commission proposals of November 2008. In his foreword, the Lord Chancellor, Jack Straw, noted that in his role as anti-corruption champion, he was co-ordinating the development of the UK’s strategy against foreign bribery. Mr Straw also made a written ministerial statement on 25 March.<sup>17</sup>

The summary noted:

9. 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 this country and abroad.

10. 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 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

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<sup>12</sup> “OECD’s Group demands rapid UK action to enact adequate anti-bribery laws” 16 October 2008 OECD [http://www.oecd.org/document/8/0,3343,en\\_2649\\_34855\\_41515464\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/8/0,3343,en_2649_34855_41515464_1_1_1_37447,00.html)

<sup>13</sup> “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 at [http://www.controlbae.org/background/CAAT\\_witness\\_statement.pdf](http://www.controlbae.org/background/CAAT_witness_statement.pdf)

<sup>14</sup> *Reforming Bribery Law* Com no 313 HC 928 2007-08 <http://www.lawcom.gov.uk/docs/lc313.pdf>

<sup>15</sup> [http://www.lawcom.gov.uk/docs/lc313\\_summary.pdf](http://www.lawcom.gov.uk/docs/lc313_summary.pdf)

<sup>16</sup> *Bribery: Draft Legislation* Cm 7570

<sup>17</sup> HC Deb 25 March 2009 c20WS

public official and a new offence of negligent failure of commercial organisations to prevent bribery.

11. The other main provisions of the Bill are:

- extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals, and UK corporate bodies;
- replacing the existing requirement for the Attorney General's consent to prosecute a bribery offence so that proceedings for 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, save the corporate offence, which will carry an unlimited fine.
- provision for Secretary of State authorisation of conduct that would constitute a bribery offence by the intelligence agencies;
- setting aside Parliamentary Privilege to make evidence from proceedings in Parliament admissible in the prosecution of a member of either of the Houses of Parliament for a bribery offence or in related proceedings.

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.

## 2.1 The detail of the Bill

The *Explanatory Notes* examine each clause in detail. A brief summary is provided below:

**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.

**Clause 2** defines the offence of bribery as it applies to the recipient or potential recipient of the bribe.

**Clause 3** defines the fields within which bribery can take place, that is, the types of function or activity that can be improperly performed for the purposes of the first two clauses.

**Clause 4** creates a separate offence of bribery of a foreign public official. It closely follows the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

**Clause 5** creates an offence of negligently failing to prevent bribery that can only be committed by a relevant commercial organisation.

**Clause 6** ensures that whether a person is performing services for or on behalf of the commercial organisation relates to the actual activities undertaken at the time rather than the person's general position.

**Clause 7** provides that even though actions in question take place abroad, they still constitute an offence if the person performing them is a British national or resident, a national of a British overseas territory or a body incorporated in the UK.

**Clause 8** is aimed at individuals who consent or connive at bribery, contrary to clauses 1,2 or 4, committed by a body corporate of any kind.

**Clause 9** deals with proceedings for an offence against partnerships.

**Clause 10** provides that a consent to prosecution under the Bill in England and Wales can only be brought with the consent of one of the three senior prosecuting authorities; that is, the DPP, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions. There are separate provisions for Northern Ireland.

**Clause 11** provides that offences under the Bill committed by an individual is punishable by fine or imprisonment of up to 10 years. An offence committed by a body is punishable by a fine; the fine is unlimited in both cases if it is on indictment.

**Clause 12** applies the Bill to individuals in the public service of the Crown.

**Clauses 13 and 14** provide that acts or omissions carried out by persons on behalf of the Security Service, the Secret Intelligence Service or GCHQ do not constitute a bribery offence under the Bill, if they are authorised by the Secretary of State. This authorisation is closely modelled on section 7 of the Intelligence Services Act 1994.

**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. This follows the recommendations of both the Joint Committee on Parliamentary Privilege of 1998-99<sup>18</sup> and the Joint Committee on the draft Corruption Bill.<sup>19</sup>

**Clause 16** abolishes the common law offences of bribery and embracery (bribery of jurors). Schedules 1 and 2 amend or repeal a series of acts, including sections 108-110 of the *Anti Terrorism, Crime and Security Act 2001*.

**Clause 17** defines the extent of the Bill, which is largely confined to England, Wales and Northern Ireland.

**Clauses 18 and 19** deal with commencement and short title of the Bill.

The financial effects of the bill were 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

## 2.2 Reaction to the draft bill

Jonathan Djanogly, Shadow Solicitor General, welcomed the draft bill, but asked for a definite timetable of implementation.<sup>20</sup> More specialised reaction has been sparse. The bill is due to be subject to pre legislative scrutiny, but a committee has not yet been set up.

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<sup>18</sup> HL Paper 43 and HC 214 1998-99 para 167

<sup>19</sup> HL Paper 157 and HC 705 2002-03 para 134

<sup>20</sup> "UK shapes up tough on corruption with draft bribery bill" *Ethical Corporation*  
<http://www.ethicalcorp.com/content.asp?contentid=6403>

### **3 Honours (Prevention of Abuses) Act 1925**

There was a long-running police investigation in 2006-7 into the so-called ‘cash for honours affair’ where the question of a possible prosecution under the *Honours (Prevention of Abuses) Act 1925*. Details are set out in Library Standard Note no 3960 *Loans to Political Parties*.<sup>21</sup>

The affair began once it was revealed in the media that three nominations for membership of the upper House had been rejected by the House of Lords Appointments Commission, because they were alleged to have made loans to the Labour Party which had not been revealed to the Electoral Commission. Allegations were made to the police that a criminal offence had been committed. The Crown Prosecution Service announced on 24 July 2007 that no charges would be brought. It issued an explanatory memorandum, which stressed the independence of the CPS.<sup>22</sup> The Public Administration Select Committee subsequently announced its plans to resume its inquiry into honours and propriety which was postponed by the police investigation<sup>23</sup> PASC reported in December 2007. In relation to the 1925 legislation, the summary in the report noted:

The Honours (Prevention of Abuses) Act was severely tested by the police investigation. In our view, its scope remains appropriate, even if the behaviour it criminalises is inherently difficult to prove to the necessary standard. In the longer term, we hope that these offences can be incorporated into a more general law on public sector corruption, a modern version of which is long overdue.<sup>24</sup>

The draft bill does not amend or repeal the 1925 Act and the white paper does not comment on the honours aspect at all.

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<sup>21</sup> <http://www.parliament.uk/commons/lib/research/notes/snpc-03960.pdf>

<sup>22</sup> “CPS decision: “Cash for Honours” case – explanatory document” 24 July 2007 *Crown Prosecution Service* at [http://www.cps.gov.uk/news/pressreleases/146\\_07\\_document.html](http://www.cps.gov.uk/news/pressreleases/146_07_document.html)

<sup>23</sup> “PASC statement on propriety and honours” 24 July 2007 at [http://www.parliament.uk/parliamentary\\_committees/public\\_administration\\_select\\_committee/pasc0607pn47.cfm](http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/pasc0607pn47.cfm)

<sup>24</sup> HC 153 2007-8