



Bond Governance Group



Bribery Bill: Bond briefing paper February 2010

This briefing paper has been prepared by CAFOD, Global Witness, Tearfund and Transparency International UK on behalf of the [Bond Governance Group](#).¹

As a coalition of NGOs from the development sector with broad experience of the devastating impacts of corruption on poor communities in developing countries, we strongly support the government's Bribery Bill and urge parliament to enact it before the General Election.

Priority Recommendations

Parliament should:

- 1) Support the swift passage of the Bill through Parliament to ensure its Royal Assent before a General Election.
- 2) Retain the inclusion of facilitation payments within the Bill as a form of bribery.
- 3) Retain the "strict liability" corporate offence, set out in Clause 7 - failure of commercial organisations to prevent bribery.
- 4) Retain the current provision that criminalises the use of subsidiaries in acts of bribery.
- 5) Support the proposal as set out in Clause 9 to depoliticise the process of prosecution.
- 6) Ensure that the publication of non-statutory guidance does not unduly delay the enforcement of the Act and is implemented no later than October 2010.
- 7) Use its influence to ensure that the Government undertakes a thorough assessment of the resources needed to implement the Act and commits to providing sufficient funds for the effective investigation and prosecution of bribery offences.

INTRODUCTION

Bribery is a global phenomenon that takes place across, as well as between, national boundaries in developed and developing countries. The OECD conservatively estimates that multinational companies pay bribes totalling US \$80bn each year.²

The bribery of foreign public officials, by multinational companies, is prevalent in many developing countries. Bribery is not a victimless crime, or a regrettable but unavoidable cost of business for companies overseas. It contributes to poverty and human suffering. Bribery of public officials result in government revenue, which could be used for development, being wasted on unnecessary and poor quality procurement projects posing a risk to health and even life where essential services are effected.

A growing body of evidence demonstrates that corrupt practices, including bribery, stunt economic growth in developing countries, discourage foreign investment, prohibit access to vital public services and are a persistent threat to democracy. We strongly believe that the UK has an obligation to ensure that companies based here do not contribute to corruption in foreign countries through bribery, or other means, and we welcome the Bill as part of a commitment to tackling this issue.

Current UK anti-bribery laws are ineffective and out-of-date. The Bill will help to create a modern, effective legal framework to prosecute bribery. A new offence of bribing a foreign public official will finally make the UK compliant with the OECD Anti-Bribery Convention, an obligation since 1997. By putting its own house in order, the UK is in a better position to encourage good governance in countries that receive UK aid. The UK will also be able to use its influence to encourage major emerging economies to stop their own companies paying bribes.

ESSENTIAL PROVISIONS THAT MUST BE RETAINED

The Bond Governance Group recognises that the Bill is a result of long-term consultation and that it reflects a series of compromises. It is important that individual clauses are not revised as this would potentially undermine the legitimacy and effectiveness of the Bill as a whole; opening up significant loopholes in practice which would allow companies to continue to pay bribes.

We believe the following represents a 'bottom line' that should not be altered:

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

A test based on improper conduct, as recommended by the Law Commission and adopted in the current Bill, is the best option. In consultation, the overwhelming majority of views favoured a conduct-based, rather than a 'dishonesty' or agency-based test of criminality. The Bond Governance Group supports this approach. Facilitation payments are a form of bribery and help to sustain a framework of corruption. They must remain illegal. Any exemptions relating to such payments risks creating a loophole that enables companies to circumvent anti-bribery legalisation.

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

The Government has accepted the Joint Scrutiny Committee's view and has proposed a 'written law' defence i.e. any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned. This should be taken into account by prosecutors in determining whether a foreign bribery offence has occurred.

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

The Government has accepted the Joint Scrutiny Committee’s strong recommendation that strict liability, subject to an “adequate procedures” defence, is the correct corporate offence, because of the difficulties prosecutors might face in having to prove negligence. It is particularly important not to weaken this provision of the Bill, for example by including a ‘negligence’ test, as successful prosecution must be feasible under the new law, and it must act as an adequate deterrent to companies and their directors.

Subsidiaries (Clause 7.3)

We welcome the explicit inclusion of subsidiaries under the corporate liability clause. This is an important concept as it closes a potential loophole that could allow companies to use subsidiaries to pay bribes. Where companies benefit from bribery by their subsidiaries they should be held to account. To have a real impact, the Act must retain adequate provision that covers the use of subsidiary companies as intermediaries in instances of bribery.

Role of Attorney General (Clause 9)

The Bill would amend the current legislation that requires the Attorney General’s consent to prosecute. This is an important clause, as a bribery prosecution should not require the consent of a political appointee.

Guidance for companies

The Government intends to publish non-statutory guidance after the Bill receives Royal Assent, but before the new bribery offences come into force. It is critical that this guidance is produced quickly, drawing on the substantial amount of information already available within the private sector and from others. Importantly, the formulation of guidance should not be used as an excuse to defer enactment of the Bill.

FURTHER AREAS OF CONCERN TO THE BOND GOVERNANCE GROUP

Overseas Territories and Crown Dependencies

In common with standard practice, the new law would not automatically apply to Overseas Territories and Crown Dependencies. This represents a significant loophole, allowing overseas companies that are complicit in bribery to operate freely within these territories, for example using them for clearing funds or registering subsidiaries. We believe there is a high likelihood of this occurring given the significant number of parent companies that are based in Crown dependencies or Overseas Territories. The UNCTAD World Investment report shows that in 2007 there were 1,464 parent companies based in the British Virgin Islands, 404 based in the Cayman Islands, 555 based in Bermuda and 238 based in Gibraltar.³ Many of these territories are major financial centres characterised by a lack of transparency. To close this loophole, it is important that the Government works proactively to secure the adoption of the Bill in Overseas Territories and Crown dependencies at the earliest possible opportunity.

Security Services (Clause 13 - Defence for certain bribery offences: legitimate purposes)

We believe that Clause 13 on the Security Services should be omitted from the Bill. In the rare cases where bribery is employed in operations that are genuinely in the interests of national security, intelligent prosecutorial discretion could be exercised. However, the Bill’s readings in the House of Lords suggest that time spent debating this contentious clause could de-rail the passage of the entire Bill.

Since the government appears unwilling to drop this clause, we call on the government to amend it so that authorisation is required from the Secretary of State for the security services to pay bribes. However, if parliament is faced with a choice between the Bill failing to pass, and the Bill passing with Clause 13 in its current imperfect state, we would reluctantly accept the need for clause 13 to be retained in order to guarantee the Bill's enactment.

Resources for Enforcement

The lesson from other jurisdictions is that anti-bribery laws are only effective if they are rigorously enforced. For this to happen, adequate resources must be provided to agencies such as the City of London Police and the Serious Fraud Office for investigation and prosecution. There is a question mark as to whether the additional resources promised are adequate for the law to be implemented to maximum effect. The Government must commit to providing sufficient resources for effective implementation.

ABOUT BOND AND THE BOND GOVERNANCE GROUP

Bond is the UK membership body for non-governmental organisations (NGOs) working in international development. Bond has over 330 member organisations, from large organisations with a world-wide presence to smaller, more specialist organisations working in specific regions or with specific groups of people. The Bond Governance Group is a network of 52 organisations that focus on governance within international development, both at a policy and practice level.

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¹ Governance Group members: ACORD, ADD, Advocates for International Development, Article 19, BBC World Service Trust, CARE International UK, CAFOD, Canon Collins Educational Trust Southern Africa, Cecily's Fund, CHEC, ChildHope UK, Christian Aid, Concern Worldwide, Concern Universal, CORD, EN, GBCC, Global Witness, HU, IFRTD, International Alert, IRC-UK, IRT, IRW, KSIMC, Marie Stopes International, New Futures Nepal, One World Action, Oxfam GB, Panos London, Peru Support Group, People and Planet, Plan UK, Practical Action, Progressio, PWB, RED International, Results UK, Saferworld, Scottish Catholic International Aid Fund, Sightsavers International, Skillshare International, SPW, Tearfund, Transparency International-UK, UKAN, UNAIS, VSO, WaterAid, Womankind Worldwide, World Vision UK

² *Corruption: Myth and Facts*, The Irish Association of Non-Governmental Development Associations, March 2007.

³ *World Investment Report 2008*, UNCTAD, 2008 pp211-212