**Corner House submission to the All Party Parliamentary Group on Africa Enquiry on Corruption and Money Laundering**

1. The Corner House is a non-governmental research and advocacy organisation, working on development, environment and human rights. One of The Corner House's focuses over the past five years has been on international corruption, with particular reference to the role that British government institutions should be playing to prevent corruption. This submission focuses on what measures need to be taken to ensure that the UK is combating corruption, and particularly bribery by UK companies and individuals, and that the UK meets its international commitments in this regard.

## Summary


- The Corner House believes that while there have been improvements in the enforcement regime for the UK's laws on overseas corruption over the past year, there are ongoing weaknesses and a need for clear improvements.
- The Corner House believes that there is a distinct lack of evidence as to whether the laws that have made bribe payments non tax-deductible in the UK are being enforced.
- The Corner House believes that much more could be done across government to help prevent corruption, and that several opportunities for getting across an anti-corruption message are being missed.
- The Corner House believes that the government must introduce a comprehensive anti-corruption statute at the earliest opportunity and that it must introduce a fair and workable debarment system in line with the new EU Procurement Directive on excluding companies convicted of corruption from public procurement.

## ***A. Enforcing the laws on overseas corruption***

*"The true problem of the fight against corruption seems to lie rather in the field of implementing these [anti-corruption] laws, i.e. preventing, investigating, prosecuting and adjudicating corruption cases."*[1]
European Commission

*"A unique opportunity for deterrence on a massive scale".*[2]
US guidelines for prosecutors on prosecuting bribery offences under the US Foreign Corrupt Practices Act

2. The UK has a duty under several international conventions to criminalise and sanction bribery. Pro-active investigations and prosecutions of bribery offences are essential to send a clear signal that both government and law enforcement agencies in the UK are serious about enforcing corruption legislation.

3. As of June 2005, there were 44 referrals on the Anti-Terrorism Crime and Security Act register of part 12 offences. The SFO was investigating only 4 of these referrals and vetting a further 13 to see if they were worth investigating.[3] 15 of the referrals relate to Africa.[4]

4. Since the OECD Working Group on Bribery's Phase 2 review of the UK's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, there have been some welcome developments to the enforcement regime in the UK. The Serious Fraud Office has now taken the lead role in vetting and investigating overseas corruption offences and in maintaining the register of overseas corruption allegations. The Serious Fraud Office has agreed to accept all allegations of overseas corruption (although they are in practice unlikely to pursue small facilitation payments) and they now have a unit that is at least in part dedicated to dealing with overseas corruption offences.

5. While, these developments will hopefully bring significant improvements, there are ongoing problems with the effectiveness of enforcement in the UK:

5.1. *The self-confessedly reactive approach to enforcement taken by the Serious Fraud Office.* The Serious Fraud Office usually waits for enough evidence to emerge before starting an investigation. The OECD Phase 2 review of the UK's implementation of the OECD Convention on Combating Bribery raised concerns about "the extremely high level of proof … required to open an investigation into suspicious transactions".[5] The nature of corruption is that it can take a very long period of time for evidence to emerge, and that evidence may not emerge unless it is proactively sought. This is particularly the case for evidence that may be in company files, which would only come to light, other than if the SFO were to investigate, if a

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[1] European Commission, "Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy Against Corruption", 28/5/03, p 11, para 4 f).
[2] Quoted in OECD Working Group on Bribery, "United States: Phase 2. Report on Application of the convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions", October 2002, para 77, p 24.
[3] Hansard, 20/6/05, Column 767W.
[4] Hansard, 20/6/05, Column 767W. This compares to 5 for the Middle East, 4 for South Asia, and 11 for Europe.
[5] OECD Working Group on Bribery, "UK: Phase 2", p 49, para 151.

whistleblower were to reveal them. It is essential that UK law enforcement authorities act immediately on allegations of bribery from credible sources, and that they make use of appropriate surveillance techniques where such allegations arise.

5.2. *Ongoing weaknesses in reporting mechanisms for allegations, including continuing problems with handling of Suspicious Activity Reports, and no mechanisms in place to encourage and facilitate whistleblowers.* Money-laundering reports have been a crucial source of information on allegations in other OECD countries (particularly France).[6] In September 2005, a report commissioned by the Association of Chief Police Officers and funded by the Home Office found that Suspicious Activity Reports (SARs) were being under-utilised by the Law Enforcement Agencies.[7] The National Criminal Intelligence Service (NCIS) gets around 100,000 suspicious activity reports (SARs) per year in the UK. As of November 2004, none of the 37 allegations then on the register of overseas corruption offences had come from suspicious activity reports.[8] It is not clear whether enough priority is being given by NCIS to processing reports that relate to overseas corruption offences, compared with 'high priority' offences such as drugs and terrorism. In the past, there have also be problems with the speed with which NCIS has passed on intelligence drawn from SARs to the Serious Fraud Office. It is essential that the Serious Fraud Office have prompt access to reliable intelligence drawn from suspicious activity reports made to the National Criminal Intelligence Service, and that they make use of this intelligence proactively. It is also important that they facilitate the making of reports, particularly by whistleblowers, by opening a hotline or contact point to which whistleblowers and others can go.

5.3. *A reluctance to open investigations where investigations are taking place in other jurisdictions*. Bribery allegations relating to a Liquefied Natural Gas plant in Nigeria have revealed this tendency clearly. The allegations concern a consortium led by Halliburton, and including French, Italian and Japanese companies. Investigations have been opened in France, the US and Nigeria into these allegations, but while the Serious Fraud Office has confirmed that it is providing mutual legal assistance to these countries, it has not opened a domestic investigation in the UK. Evidence emerging from particularly the French investigation has suggested that much of the activity relating to the alleged bribery took place in the UK. The agent, who received commission payments for each contract on the project worth $60 million, $32.5 million and $51 million, and is alleged to have paid bribe money out of these payments, is a UK lawyer based in London, Jeffrey Tesler. He is also alleged to have helped Nigerian public officials buy houses and siphon wealth out of Nigeria for several decades. Despite this, he does not appear to be under direct investigation in the UK for either corruption or money-laundering. Furthermore, his contracts appear to have been handled by UK subsidiaries of Halliburton, Kellogg, Brown and Root and MW Kellogg. Notes discussing who to pay bribes to were found in the UK. The former chairman of the Nigerian LNG Company that awarded the contracts has

[6] OECD Working Group on Bribery, "France: Phase 2", January 2004.
[7] Matthew Fleming, "UK Law Enforcement Agency Use and Management of Suspicious Activity Reports: Towards Determining the Value of the Regime", Jill Dando Institute of Crime Science, University College of London, 29/9/05.
[8] Hansard, 3/11/04, Column 302W.

admitted to taking loans from Tesler while he was in London, and not repaying them.[9] This suggests that a lot of alleged bribe activity took place in the UK, which makes the failure of the Serious Fraud Office to open a domestic investigation somewhat surprising and a matter of serious concern.

5.4 *The ongoing potential for political interference, or perceived political interference.* The fact that the Attorney General has to give consent for corruption prosecutions allows for at least the perception that there may be political interference (both from the public but also from investigating officers assembling a case) in whether prosecutions are likely to go ahead or not. While in the vast majority of cases, it is extremely unlikely that the Attorney General would allow political reasons to intervene, there is a real question as to whether in a particularly sensitive case, involving potential damage to the UK economy, such as loss of jobs, and damage to international relations with an important ally, there is scope for a prosecution to be stopped.[10] Despite the fact that this would clearly be a breach of Article 5 of the OECD Convention on Combating Bribery, the perception that this may happen has clearly been a disincentive to law enforcement authorities in the past to pursue such sensitive cases. While the government has conceded that it will drop the requirement for Attorney General's consent in new corruption legislation, it has given no indication when such legislation will be brought forward, if at all (see section D below).

6. The Corner House recommends that in order to strengthen enforcement of the UK's anti-corruption laws, the government needs to:

- **Develop a strategy for pro-active enforcement, including prompt investigation of all allegations. Where allegations are being investigated in other jurisdictions that involve UK individuals or companies, the SFO should open a domestic investigation as soon as possible;**

- **Improvements need to be made to the speed and quality of intelligence passed to the SFO, particularly through the suspicious activity reports held by the National Criminal Intelligence service and through the Inland Revenue (see below, section B);**

- **Increase transparency in the enforcement regime, particularly by drawing up and publishing on an annual basis statistical information about the number of allegations received, investigated, prosecuted, and reasons for investigations being dropped;**

- **Improve the means for detecting and reporting bribery, particularly by establishing at the earliest opportunity a central contact point to which allegations of overseas corruption can be reported by members of the public and by whistleblowers (preferably a telephone and email hotline as**

[9] For full case studies on the Bonny Island Nigeria bribery allegations, *see* Michael Peel, "Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region", Chatham House Briefing Paper, July 2005, annex 6, and Susan Hawley, Corner House submission to the Trade and Industry Select Committee Inquiry into the Export Credits Guarantee Department, May 2005.
[10] This is less likely to be true of African countries, however, and much more likely to be true of Middle Eastern or Central Asian countries.

**happens in the US, and indeed with fraud at the City of London police in the UK);**

- **Ensure political interference cannot take place in investigations, particularly by removing the need for Attorney General's consent at the earliest opportunity. Issue guidelines to Crown Prosecutors, law enforcement agencies and Crown Servants that make clear that bribery and corruption will be prosecuted and must be reported and fully investigated regardless of political sensitivities, potential impact on relations with another State, or the identity of the persons or companies involved.**

***B. Enforcing the laws that makes bribes non tax-deductible***

7. The UK has stated that bribes are not tax-deductible in the UK. The government has maintained that Section 577A of the Income and Corporation Tax Act 1998, which denies tax relief for any payment the making of which constitutes the commission of a criminal offence, has made bribes not-tax deductible in the UK for some time. To close a technical anomoly, the government introduced a further measure in clause 67 in the Finance Bill 2002 which disallows UK companies from receiving tax relief for payments made overseas that would have constituted a criminal offence if they had been made in the UK.

8. Commission payments and consultancy fees however remain eligible for tax relief. These have traditionally been the route through which bribes have been paid by companies operating overseas. This means that if Inland Revenue (now HMRC) is not adequately scrutinising such payments and fees, then bribes concealed in commission payments or consultancy fees remain in effect tax-deductible. In early 2004, Inland Revenue stated that "the onus is on the taxpayer not to claim a deduction on … expenditure".[11] This does not suggest a robust approach to ensuring that the laws on non tax-deductibility are being kept.

9. The Inland Revenue has also stated that "Where a claim for such expenditure is discovered, the amount would be added back in the tax computation and the additional tax would be recovered together with interest and penalties where due."[12] Inland Revenue has, however, refused to answer questions put to it in Parliament and separately by the Corner House under the Freedom of Information Act about how many investigations it has conducted and how much it has earned in additional tax, interest and penalties from such claims. This suggests a lack of accountability at HMRC as to how they are enforcing the laws on non tax-deductibility. The Inland Revenue has stated that its Head Office regularly receives request for guidance about Section 577A of the Income and Corporation Tax Act 1998 (some 18 such requests since April 2004)[13], a fact that the UK government suggested in its questionnaire response to the OECD in 2004 showed that "suspicious payments are being picked up

[11] Hansard, 28/1/04, Column 355W, reply from Dawn Primarolo to Simon Thomas MP.
[12] Hansard, 26/5/05, Column 1710W, reply from Dawn Primarolo to Malcolm Bruce MP.
[13] Letter from HMRC to The Corner House.

by routine checks".[14] It is a legitimate public interest question as to what action the HMRC has taken with regard to these suspicions and what results they have had.

10. The OECD Working Group on Bribery has noted in several Phase 2 reviews of other OECD countries that tax authorities could be a "useful" and "excellent" source of information about potential bribery of foreign public officials.[15] The Anti-Terrorism Crime and Security Act created a gateway to enable Inland Revenue to pass information relating to suspected bribery to the law enforcement authorities. It is not mandatory however for Inland Revenue to do so. As of mid 2004, the Inland Revenue had not passed any information to the law enforcement authorities under this gateway.[16] The Inland Revenue has refused to answer questions put to it more recently in Parliament about how many suspicions of bribery it has passed to the law enforcement agencies.[17]

11. In France and Italy, there is mandatory reporting by companies to their tax authorities of all payments of commissions, fees and other payments to both residents and non-residents. While we would not want to suggest that this has prevented bribery occuring by companies in these countries, ensuring that there is mandatory reporting of commission payments could be a powerful route to ensuring greater scrutiny of such payments, which we believe is essential if bribery is to be effectively stopped.

12. The OECD noted that most of the UK's Crown Dependencies and Overseas Territories were not in compliance with the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.[18]

13. The Corner House recommends that the government needs to:

- **Ensure there is much greater transparency about how HMRC is enforcing the laws making bribes non tax-deductible, including HMRC providing public information on an annual basis for how many investigations it has conducted and how much income it has received from additional tax, interest and penalties from enforcing the laws on non tax-deductibility;**

- **Ensure that HMRC is under a statutory obligation to report evidence of bribery uncovered in the course of tax audits to the law enforcement agencies, that they are given specialised training in the detection of bribes and that there is greater cooperation between the Inland Revenue and law enforcement agencies;**

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[14] OECD, Working Group on Bribery in International Business Transactions, Phase 2 Questionnaire for the UK, 17.1 (ii), revised 28 May 2004.
[15] OECD Working Group on Bribery, "France: Phase 2", January 2004, para 50; see also "Norway: Phase 2", April 2004, para 41.
[16] OECD Working Group on Bribery in International Business Transactions, "UK: Phase 2", March 2005, para 63, page 20; Hansard, 28/1/04, Column 353W, Reply from Dawn Primarolo to Simon Thomas MP.
[17] Hansard, 12/5/05, Column 172 W, reply from Dawn Primarolo to Jim Cousins MP.
[18] OECD Working Group on Bribery in International Business Transactions, "UK: Phase 2", March 2005, para 57, page 19.

- **Establish a reporting system to HMRC, with companies required to provide a disaggregated list of all commissions, fees and other payments made to residents and non-residents with regard to overseas transactions, including amount paid per transaction and the host country for the transaction;**

- **Ensure that provisions are made to ensure that bribes are not tax-deductible in the UK's Crown Dependencies and Overseas Territories.**

***C. Preventing corruption***

14. There is much greater scope for preventative measures and awareness raising by government departments than the occasional seminar by the Foreign and Commonwealth Office or DTI. In Australia for instance, the Australian government has undertaken a concerted information campaign targeted at businesses, focusing on three clear messages: that bribery is illegal, it is bad for the economies of poor countries, and that if you suspect anyone of bribery you should report it to the Australian Federal Police. Articles have been placed in industry newsletters, on websites, and a leaflet outlining these three messages is included with every new passport issued.

15. There are various government departments that provide export support to UK companies operating abroad, including ECGD, DTI, UK Trade and Invest, the Foreign and Commonwealth Office and DESO. While the ECGD has developed anti-corruption procedures, there is much greater scope for anti-corruption awareness and preventative measures to be introduced across the whole spectrum of export support provided by the UK government. In the US for instance, companies have to agree in writing with the US government that neither it, nor its affiliates have or will engage in bribery and that it and its affiliates maintain and enforce a policy prohibiting bribery of foreign officials, in order to be eligible for export advocacy support from the government and to be able to participate in trade missions.[19] Making export support, including participation in trade missions, and the granting of export licences particularly in the defence sector dependent upon a company making a no-bribery undertaking and having in place an anti-corruption code of conduct, would be a powerful awareness raising tool.

16. In addition, several government departments provide advice to companies on agents in overseas markets. UK Trade and Invest for instance provides both off the shelf lists of agents available in the UK and bespoke lists of agents drawn up specifically for the company by the Overseas Market Introduction Service.[20] However, UK Trade and Invest does not appear to undertake any due diligence on the agents including on their business standing or integrity.[21] UK Trade and Invest has stated that "the onus remains on UKTI customers to satisfy themselves" on these issues.[22] Given the risks associated with employing agents, it is surprising that UKTI

[19] Eleanor Robert Lewis, "What the US Government can do to assist US companies with respect to transnational corruption", American Bar Association Forum on the Foreign Corrupt Practices Act and the OECD Convention, 21/3/02.
[20] Hansard, 30/6/05, Column 1771 W, Response from Ian Pearson to Malcolm Bruce MP.
[21] Hansard, 14/6/05, Column 238W, Response from Ian Pearson to Malcolm Bruce MP.
[22] ibid.

does not appear to undertake corruption checks on the agents they recommend, or to use the provision of agent's lists as an opportunity to inform companies about the corruption laws in the UK, and the ways in which UK companies could become liable for bribe payments made through agents. The Defence Export Services Organisation (DESO) also provides information, on an informal basis, to companies about whether it is advisable to appoint an agent, as well as passing on information that might help the company select a suitable agent.[23] It is not clear whether DESO uses these opportunities to inform companies about the risks of bribery and liability for bribe payments made through agents. It is also not clear what advice has been provided to DESO staff to ensure that they only include information about reputable agents in the advice they give to companies. Again, given the risks associated with employing agents particularly in certain countries, it is crucial that DESO have proper procedures in place for ensuring the integrity of agents they provide information about, and for raising awareness with companies of the risks and liability involved.

17. The Corner House recommends that in order to improve awareness of the problems and risks with corruption and to encourage greater reporting of suspicions of bribery, the government should:

- **Increase its awareness raising activities with regard to corruption including re-writing the UK Trade and Invest leaflet to include information on how companies can report suspicions, and what they should do when faced with a demand for a bribe;**

- **Require no-bribery warranties and appropriate corporate anti-corruption compliance programmes as preconditions for export licences and as preconditions for *all* government export-related support, including participation in trade missions;**

- **Undertake a concerted information campaign to promote appropriate and effective corporate anti-corruption compliance programmes and responsible use of agents and intermediaries among UK companies;**

- **Where government departments, such as UK Trade and Invest and DESO, are providing direct information to UK companies about agents, staff of these departments should be required to undertake anti-corruption and integrity due diligence checks on agents before suggesting them to UK companies, and should be required to spell out to UK companies their liabilities for bribes paid through agents.**

## ***D. Legislation and sanctions***

18. The OECD's Phase 2 evaluation of the UK noted that the lack of "significant progress in the implementation of the conclusions" from the OECD's Phase 1bis examination looking at the UK's legislation on corruption, "gave rise to the lead examiners' concerns about the level of implementation of the OECD Convention by the UK authorities". The OECD's Phase 1bis in October 2002 called specifically for the UK government "to proceed at the earliest opportunity to enact a comprehensive

[23] Letter from Defence Export Services Organisation to the Corner House, 2/9/05.

anti-corruption statute." Three years on there is no sign of such a statute being brought forward by the government. An early draft of a new corruption bill was widely criticised by law enforcement agencies, legal experts, and the joint scrutiny committee that assessed it. A comprehensive anti-corruption statute that removes the requirement for Attorney General's consent and that makes clear that the bribery of foreign officials is an offence, that payments through third parties (including agents and subsidiaries) and to third parties are offences and that legal persons are explicitly liable for corruption offences, is long overdue. The failure of the UK government to fast track such a statute is increasingly a matter for international embarrassment.

19. The OECD Phase 2 evaluation also recommended that the UK "adopt an additional regime of administrative or civil sanctions for legal persons" found guilty of bribery. Introducing a system of debarment of companies convicted of bribery would be an important way of meeting this recommendation. The UK must implement an EU Procurement Directive by January 2006 that provides for exclusion from public procurement of companies convicted of fraud, corruption, money-laundering and participation in a criminal organisation. The Office of Government Commerce is responsible for overseeing the implementation of this Directive, but has yet to produce guidance on how it will work in practice. It is essential that the UK establish a workable, fair and proportionate debarment system if it is to be effective. This should include debarring companies for set periods of time depending on the circumstances surrounding and severity of the offence and establishing a Central Database of excluded companies at the Office of Government Commerce which is publicly available online.

20. The Corner House recommends that the government:

- **Introduce at the earliest opportunity a comprehensive anti-corruption statute that removes the requirement for Attorney General's consent, and that refers specifically to bribery of a foreign official as an offence, to payments via third parties (including agents and subsidiaries) and to third parties as offences, and that makes legal persons explicitly liable for corruption offences;**

- **Establish a fair and workable debarment system, including debarring companies convicted of corruption, fraud and money-laundering for set periods of time proportionate to the severity of the offence, and setting up a Central Database of excluded companies at the Office of Government Commerce.**