The Corner House submission to the Law Commission's consultation on Reform of Bribery Laws

The Corner House is a non-governmental organisation focusing on environment, development and human rights. It has a track record of detailed policy research and analysis on overseas corruption and on corporate accountability.

The Corner House broadly welcomes the Law Commission's proposals for reform of the bribery laws. In particular, The Corner House welcomes the creation of a discrete offence of foreign bribery. The Corner House, however, has some major reservations about certain aspects of the proposals made. In particular, The Corner House believes that the proposals on deferring direct liability for legal persons and on keeping Attorney General's consent are deeply problematic. The Corner House also believes that the discrete offence of foreign bribery as proposed by the Law Commission is open to improvement, and has some significant reservations about the domestic bribery offence as currently formulated.

I. Corporate Liability

The Corner House considers the proposal to defer consideration of the law relating to direct liability of legal persons for bribery pending a wider review by the Law Commission as short-sighted and problematic. This is for the following reasons:

A. Failure of the new bribery law to apply to those most likely to break it

If this proposal is adopted, the Law Commission will be in the position of drafting a law which is not applicable to those for whose benefit and on behalf of whom most of this particular type of crime is committed, ie companies.

It is well known that bribery in international business transactions flourishes not because individuals within companies are primarily motivated by personal greed, but rather because they are driven by the logic of improving the company's financial position by winning business. On the supply-side, bribery in international business will almost always benefit the company before it does the individual involved. The new bribery laws need to lead to both effective enforcement and to have a preventative effect. The Corner House strongly believes that they will only be able to do so if they are correctly targeted to address the mischief at the heart of the bribery, and particularly the foreign bribery, offence. This mischief is recognised explicitly in the language proposed for the foreign bribery offence, where the offence is committed in order to obtain or retain business or a business advantage.

There is no imminent date for a wider review by the Law Commission, and such a review is not, as we understand it, a priority. The situation that the new bribery law

may not apply to those most likely to break it might therefore persist for several years.

B. Failure of the new bribery law to meet international obligations

If the bribery laws do not contain direct liability of legal persons for bribery, the laws will not meet the UK's international obligations which are clearly set out in the Law Commission's own report, ie. the OECD Anti-Bribery Convention, the UN Convention and the various EU instruments against Corruption.

The Corner House is not convinced by the Law Commission's arguments that:
a) the UK is broadly compliant with its international obligations;
b) there has been no sustained criticism of the current law.

The Corner House believes that the OECD and European Commission have made it perfectly clear that they do not consider that the UK's corporate liability laws to meet required standards. Furthermore, the chair of the OECD Working Group on Bribery, Professor, Mark Pieth, in a recent commentary on the OECD Convention, has explicitly written:

> "*With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently refusing a concept of 'aggregate knowledge', would in our view fail to meet the [OECD Bribery Convention] requirements of 'effective, proportionate and dissuasive sanctions*'."[1]

It is somewhat pedantic to suggest that because the UK is not specifically 'named and shamed' in the OECD's Mid-term Review or by the European Commission's 2004 report into implementation of the Second Protocol, the UK is therefore formally compliant with its obligations. This ignores the real criticisms made by both bodies elsewhere of UK law in this area, and quoted in the Law Commission's report. The Corner House believes that the UK should be prepared to engage with the spirit and intent of its international obligations and wish to follow best practice, rather than taking a narrow formalistic approach which will leave it lagging behind other countries' implementation of international corruption obligations.

The Corner House also notes that there has been considerable domestic criticism of the current corporate liability law, and is unclear on what grounds (or on whose opinions) the Law Commission has formed the judgment that there is no sustained criticism of the current law. The Law Commission will be aware of the considerable academic literature critiquing the identification model on which the current corporate

[1] Mark Pieth, 'Article 2 – The Responsibility of Legal Persons' in Mark Pieth, Lucinda Low and Peter Cullen (eds), *The OECD Convention on Bribery: A Commentary* (2006) 9

liability laws are based and its failure to secure convictions of large corporations.[2]

C. Existence of other free-standing corporate liability offences

The Corner House is puzzled by the Law Commission's position that piecemeal offence-by-offence change makes for poor law reform and would upset the orderliness of the statute book. Most importantly, The Corner House does not believe that orderliness of the statute book should be put before meeting the UK's international obligations. As Lord Bingham has recently said "the existing principle of the rule of law requires compliance by the state with its obligations in international law".[3] Ensuring that the UK is upholding the rule of law by implementing its obligations under international treaties is a more important principle than orderliness of the statute book. Additionally, providing a self-contained liability provision in the new bribery laws so that enforcers and legal practitioners do not need to look beyond the bribery statute to understand a company's liability in relation to bribery could be argued to be a very neat and orderly piece of law reform.

Furthermore, The Corner House notes that there are instances of free-standing corporate liability, the most clear of which is mentioned in the Law Commission's report, the Corporate Manslaughter and Corporate Homicide Act 2007. The fact that there have already been attempts to improve corporate liability in the area of corporate manslaughter shows that the current law is not adequate and that, where there are criminal offences that merit reform in relation to corporate liability, the government has undertaken it. There are very good arguments for saying that bribery is a special category of criminal offence requiring clear and urgent action on corporate liability for the reasons laid out in section A above, and that without corporate liability, the bribery laws will be unable to address the mischief which is at the heart particularly of foreign bribery.

The Corner House believes that it would be fairly quick and easy for the Law Commission to draft a suitable provision based either on the principle of vicarious liability, or on a more limited form of liability that has been recognised by the Corporate Manslaughter and Corporate Homicide Act 2007, but which is broader than identification theory. The court can and should be asked to consider, as in section 8 (3) of the Corporate Manslaughter and Corporate Homicide Act 2007, " the extent to which the evidence shows that there were attitudes, policies, systems or accepted

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[2] See Allens Arthur Robinson, "'Corporate culture' as a basis for the criminal liability of corporations", Report for the UN Special Representative to the Secretary General on Human Rights and Business, February 2008, http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf.; UNICORN, "Complying with the OECD Anti-Bribery Convention. Corporate Criminal Liability and Corruption: Exploring the legal options", Seminar Report, December 2005

[3] Lord Bingham, "The Rule of Law", *Cambridge Law Journal*, 66 (1) March 2007, pp. 67–85.

practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it." That is to say, the culture operating in a company should be a key consideration in assessing liability. This would also entail allowing a defence of an adequate anti-bribery system and appropriate due diligence.

Such a provision would of course be open to review, amendment or repeal once the Commission has conducted its broader review of corporate liability.

Summary

1. The Corner House considers the Law Commission's proposal to defer consideration of the law on direct liability of legal persons for bribery pending a wider review to be inadequate and short-sighted, and will be unable to support any new bill without some form of direct liability contained within it. The Corner House believes that the Law Commission should at the very least draft a suitable provision for inclusion in the new bribery bill.

2. The Corner House believes that a new criminal law offence is required, which can be supplemented by administrative measures already available, including debarment from procurement. The UK already recognises criminal liability of legal persons as a general principle. To introduce administrative measures as a substitute for a criminal law offence in the case of bribery would be to diminish the seriousness of corruption, which would be at odds with its categorisation as a serious criminal offence in the UK. Administrative sanctions are usually adopted by countries where there is no recognised principle of criminal liability of legal persons and a system of administrative law, which the UK does not have. Even in these countries, this approach has come under serious criticism.[4]

3. The Corner House believes that the corporate liability provision in the bribery law should include an offence of negligent supervision, with the defence that an adequate system was in place. The Corner House also believes that there should be individual liability of high-ranking officials where a criminal law offence is committed by a legal person, including an offence of negligent supervision.

4. The Corner House believes that without some form of offence covering negligence towards or connivance with foreign subsidiaries, there will be a large loophole in the new bribery laws. The Corner House notes that the US Foreign Corrupt Practices Act covers subsidiaries of US companies and believes that the UK would miss an opportunity to follow international best practice if it fails to cover subsidiaries in the new offence.

[4] Wolfgang Hetzer, "Corruption as Business Practice: Corporate Criminal Liability in the European Union," European Journal of Crime, Criminal Law and Criminal Justice, Vol. 15, Nos 3-4, 2007

II. Consent for prosecution

The Corner House notes that the government has now proposed, in its White Paper on The Governance of Britain – Constitutional Renewal, and in the Draft Constitutional Renewal Bill, to keep the Attorney General's role as a government minister, to abolish consent for prosecution for corruption, to ban the Attorney General from giving direction in individual cases, and to legislate for the Attorney General's right to intervene in prosecutions where there are national security concerns.

The Corner House welcomes the government's proposal to abolish much of the consent regime including for corruption. The Corner House is, however, extremely concerned about the proposals to legislate for the Attorney General's right to intervene in prosecutions where there are national security concerns. The Corner House notes that this is a new power conferred to the Attorney General that goes well beyond both the Law Commission's previous proposals and consultees' views that a consent element for national security should be retained. The Corner House believes the government's proposals to be fundamentally unconstitutional, in so far as they place all power for making national security decisions in the hands of the executive, with no judicial oversight, little effective Parliamentary oversight, and no checks and balances.

Background observations on the Law Commission's proposal on consent in relation to bribery

Before explaining its concerns about the new government proposals, The Corner House would like to register its concerns about the proposals made by the Law Commission with regard to keeping Attorney's consent for extra-territorial offences, despite the fact that the proposal has now obviously been superseded by the Draft Constitutional Renewal Bill. The Corner House notes that such a proposal would have placed the UK in breach of Article 5 of the OECD Anti-Bribery Convention, and would have seriously damaged the UK's reputation before the international community. Both the OECD and GRECO have repeatedly raised serious reservations about the Attorney General's consent provision, particularly with regard to foreign bribery. The Corner House does not believe it is appropriate for the Law Commission to make proposals that place the UK so directly in conflict with its obligations under international law.

We note that while the Law Commission's report on Consent to Prosecutions published in 1998 recommended keeping Attorney consent for offences involving national security and an international element, the Law Commission's report on Corruption, published after that report in the same year, stated clearly that the new corruption offences proposed would not fall within this category. On the basis of the

consultation conducted for that report where the vast majority of respondents did not want any consent, the Law Commission recommended that there be no consent requirement at all for corruption offences.

The Corner House would also like to register its concern that in making the proposal, the Law Commission took the views of the business community on this issue without taking a similar sounding from other stakeholders. The Corner House believes it is unfortunate that the Law Commission gave the impression that the business community's view about the attractiveness of Attorney General's consent for foreign bribery cases appeared to hold more weight with the Commission than the OECD's real concerns about the international perception that keeping such consent would create.

The Corner House was not convinced by the Law Commission's argument for consistency with the Serious Crime Act. It is still not clear whether Attorney's consent will be maintained for the Serious Crime Act under the current government proposals. The Government has, however, signalled its intent in the Draft Constitutional Renewal Bill to remove Attorney's consent for the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 and replace it with consent from the Directors of Public Prosecutions and Serious Fraud Office. If the Law Commission's consistency argument were taken to its logical conclusion, then all the offences listed in the Serious Crime Act should have required Attorney General's consent where there was an extraterritorial element. However, as the Law Commission itself observed, the trend, borne out by the Draft Constitutional Renewal Bill, is a reduction in Attorney's consent.

Current government proposal to create a new power for the Attorney to halt prosecutions on grounds of national security

The Corner House has the following serious reservations about the current government proposals:

1. Creation of a new power of halting a prosecution

The government has stated that its decision to create a new power for the Attorney to halt prosecutions on grounds of national security is in response to the fact that the majority of respondents who responded on this issue (14 out of 16, from a total of 52 respondents[5]) favoured the Attorney retaining some role in relation to cases which involve a national security or public interest element. The government also noted that this was in keeping with the Law Commission's 1998 report on Consents to Prosecution, which recommended keeping consent for offences involving the national

[5] These figures are, however, contradictory with the fact that the analysis of the consultation document specifically names six respondents who wished for no Attorney consent whatsoever.

security or an international element. The Law Commission's recommendations were also based on a consultation in which a narrow majority of respondents (14 out of 24 who responded specifically to the issue from a total of 60 respondents) thought there should be some form of consent for national security or international relations.[6] The Corner House notes that, as stated above, the Law Commission's 1998 report on Legislating the Criminal Code: Corruption specifically stated, on the basis that a majority of respondents to its consultation on corruption wanted no consent at all for corruption offences, that corruption offences would not fall into the category of offences where there should be a requirement for consent on the grounds of national security or an international element.

The government has not included international relations in the new powers for the Attorney (except in so far as the Attorney will not have to provide any information to Parliament about a decision to halt a prosecution on national security grounds that would damage international relations) which would have been in flagrant breach of the OECD Convention and been totally unacceptable to the international community.

It has, however, decided to go considerably beyond what both the Law Commission in its Consent report and many consultees can have envisaged when they agreed that some form of role for the Attorney on national security issues was desirable, by creating a new power for the Attorney to halt prosecutions on national security grounds. Indeed, the Law Commission's consent proposals in 1998 were that the consent provision be kept for a limited number of specific offences (War Crimes, Taking of Hostages, Biological Weapons, Prevention of Terrorism and the Official Secrets Act) which were likely to give rise to national security considerations, and the Law Commission made clear in its Legislating the Criminal Code: Corruption report that corruption would specifically not fall in this category.

There is a considerable difference between the consent provision and a new power to halt prosecutions. While the consent regime involves a certain amount of discussion and consensus reaching between Attorney and prosecutor, the new power envisages the right for the Attorney to take the decision without any input from the prosecutor, and indeed (clause 13 of the Draft Constitutional Renewal Bill) for a court to make an order to bring the proceedings to an end where the prosecutor fails to comply with the Attorney's direction.

In so far as the government received a mandate to keep some role for the Attorney in prosecutions involving a national security element (which given the very low numbers involved, and the contradictory numbers provided in the analysis to the consultation – *see* footnote 5 – is arguable), it appears that the government has far exceeded that

[6] The Law Commission's conclusion was drawing on the conclusions of both the Franks Report (Report f the Departmental Committee on s2 of the Official Secrets Act 1911) 1972 and the Philips Report (Royal Commission on Criminal Procedure) 1981.

mandate by creating the new power of intervention.

2. Concentration of power for decision-making on national security in the executive with no accountability or oversight.

The proposals for giving Attorney the right to halt prosecutions on national interest grounds will result in the executive being the sole arbiter of national security considerations, and provide no meaningful oversight of the executive either through Parliament or the Courts. This creates a serious risk of abuse by the executive of its power in this area and will not ensure that the public confidence in such important decisions is maintained and upheld.

The Corner House notes that under general international law, where a state wishes to invoke a national security exemption that would breach an international obligation, the state is not entitled to be the sole judge of whether the objective standards have been met which would allow the state lawfully to invoke the exemption. The existence of a national security justification is a matter for determination on objective grounds, and ultimately to be determined by the courts. There is clear authority for this, including from the International Court of Justice.

Under the proposals for the role of the Attorney General, the Attorney will remain a government minister. This essentially means that the state will be the sole judge of whether the standards have been met that would allow the state to invoke national security. The Attorney General will be under no statutory duty of independence, and the proposed new oath will be non-statutory (in contrast to the Lord Chancellor's new statutory oath to uphold the rule of law).

The role of the executive as sole arbiter is further enshrined by the provision in the Draft Constitutional Renewal bill that where "*any question arises whether a direction … is or was necessary for the purpose of safeguarding national security, a certificate signed by a Minister of the Crown certifying that the direction is or was necessary for that purpose is conclusive evidence of that fact*". The purpose of this provision is to prevent any judicial enquiry into whether there were in fact real national security grounds, or whether irrelevant or improper considerations were taken into consideration.

The power given to the Attorney under the Draft Constitutional Renewal Bill is furthermore a new power giving the executive the right to intervene directly in the independent prosecution process. This raises significant domestic constitutional issues. It is not a right, The Corner House believes, that can be granted without a proper assessment of its constitutional impact. And if it is to be granted, it has to contain clear mechanisms for accountability, including judicial oversight. It must also, The Corner House believes, contain a requirement on the Attorney or whoever takes

the decision (which we argue later should be an independent prosecutor) to conduct a thorough and document balancing exercise between national security issues and the rule of law.

Lack of meaningful Parliamentary oversight

Under the draft law, the Attorney would be required to inform Parliament as soon as is practicable after giving a direction. However, the provision for the Attorney to do this states that the Attorney shall not include information in a report to Parliament that is legally privileged, would prejudice national security or "seriously prejudice international relations", or would prejudice an investigation or proceedings before any court. In practice, this means that the Attorney is likely to provide extremely limited information about his or her decision.

Parliamentary accountability can be meaningful only when the Attorney General is able to put forward a full account of a decision, and is not able to hide behind considerations of international relations to refuse to give proper reasons. If the Serious Fraud Office's BAE/Al Yamamah decision were retaken under the draft Bill, the Attorney General would have been entitled to give no reasons to Parliament at all, because of the Saudi threats made to diplomatic relations with the UK.

The draft law does not require the Attorney to provide any factual evidence for his or her decision, or to lay out the basis on which his or her decision was made. Nor does the draft law provide for any scrutiny mechanisms within Parliament for the intelligence assessments on which a national security decision is made. Given recent controversies over executive manipulation of intelligence for political purposes, this is a grave oversight that will do nothing to enhance public confidence in the executive's decision-making with regard to national security.

Lessons from the dropping of the SFO's BAE/Saudi enquiry

In light of the recent court case brought against the SFO in relation to the dropping of the BAE/Saudi investigation, The Corner House has very serious concerns about the manner in which national security concerns are currently raised and assessed by the executive, and the real potential for abuse.

Documents released during the court case show that:

a) national security concerns were not based on rigorous intelligence assessments from the Security Services themselves on the basis of any objective criteria. The assessment made was from the Cabinet Office's Permanent Secretary for Intelligence, Security and Resilience. The assessment did not include any detailed analysis of the credibility of the

threats, the reliability of the source of the threats, the impact if such threats were to be carried out, and measures the government and security services might be able to take to mitigate any such impact;

b) national security concerns were intermingled with concerns prohibited by Article 5 of the OECD Anti-Bribery Convention, such as commercial considerations and damage to international relations, in a manner which made it exceptionally difficult to disentangle the real reasons for the government's case to drop the investigation.

The case raises the real possibility that the executive may have used national security arguments as a shield for other reasons to which it actually gave as much if not more weight, such as damage to international relations and to commercial contracts, and that it did so to avoid international obligations which prohibited it from taking these latter considerations into account (Article 5 of the OECD Anti-Bribery Convention). If the executive were to do so again, under the draft Bill, the use of conclusive certificates would likely prevent any meaningful judicial oversight, and the Attorney would not need to provide any information to Parliament that would enable Parliament to assess whether improper or irrelevant considerations had been taken into account.

Proposals for ensuring accountability and objectivity in decisions about national security

The Corner House believes that the current government proposals are unacceptable for all the reasons laid out above.

The Corner House believes that any mechanism for invoking national security exemptions in relation to prosecutions must be based on a clear, transparent and accountable process, with clear transparent and objective criteria in accordance with applicable international rules for the circumstances in which such exemptions may be invoked.

The objective criteria need to be drawn up and published with input from the assistance of international academic and government lawyers, based on the International Law Commission's Articles of State Responsibility and having regard to its Commentary. These criteria would include:

1) where security services information could become public that would cause loss of life or harm to agents or informers;

2) where a state faces an immediate threat to which it cannot respond in any alternative way; or otherwise

3) where the state of ‘necessity’ exists as defined in Article 25 of the International Law Commission’s Articles on State Responsibility.

The transparent process should include the following:

1) any such decision must be made by or with the concurrence of an independent prosecutor (the Director of Public Prosecutions or the Director of the Serious Fraud Office) who has responsibility for upholding the rule of law;

2) the decision must be based on full, rigorous objectively verifiable intelligence assessments from the security services, commissioned directly by Attorney General or the Director of the Serious Fraud Office or Public Prosecutions, and with no political mediation or interpretation through ministers. As much of this assessment as is possible should be made public, so that there is proper transparency as the grounds on which the decision is based;

3) a proper Shawcross exercise, conducted transparently, with full accounts of each government department’s position made to Parliament, according to clear rules. Such rules will include that government ministers may not raise considerations forbidden by international conventions, such as Article 5 of the OECD Anti-Bribery Convention, with the Attorney or Director, and that the government will not express an opinion on what the Attorney or Director should do in relation to the information provided to him/her;

4) the Attorney or the Director of the Serious Fraud Office or Public Prosecutions must make a full public and written account of the grounds on which the decision was taken, documenting clearly the balancing exercise that was undertaken weighing national security considerations against the rule of law and the government’s international obligations.

The Corner House believes that as long as the decision remains exclusively with a member of the executive, there will always be a perception that the decision may have been based on political rather than objective grounds and that any intelligence assessments on which such a decision is based may have been politically manipulated. For the sake of the integrity of both the judicial system and the security and intelligence system in the UK, a decision about national security that necessitates a breach of an international obligation recognised under domestic law should preferably be taken by an independent person or body who has responsibility for upholding the rule of law, and is able to weigh up the national security harm threatened against the potential damage to the rule of law. If the Attorney’s role is to be kept in any way, the

role should be limited to a consent role but with a built-in requirement on the Attorney to reach a consensus with the independent prosecutor in taking the decision to halt the prosecution.

The Corner House also believes that serious consideration should be given to establishing an ad hoc independent panel consisting of appropriate independent legal and national security experts and headed by a senior judge to assess any decision to halt a prosecution on national security grounds and whether that decision was taken correctly according to the principles of international law and domestic constitutional principles. Any such panel should provide a public account of any such assessment. This would greatly enhance the credibility of any national security decision taken.

Summary

1. The Corner House has serious concerns about the Law Commission's proposals for keeping consent for extraterritorial bribery offences. Although this proposal has now been superceded by the Draft Constitutional Renewal Bill, the Corner House believes that it is inappropriate for the Law Commission to make proposals that so directly conflict with the UK's international obligations, and to take on board only one set of stakeholders' views (the business community) in coming to their proposal.

2. The Corner House believes that the proposals to give the Attorney General a new power to halt prosecutions on grounds of national security under the Draft Constitutional Renewal Bill is unacceptable and potentially unconstitutional in so far as it allows the executive to intervene in the independent prosecution process with no proper oversight or checks and balances. The Corner House believes that in creating the new power, the government has far exceeded any mandate that can be considered to have been given to it by both the consultation on the Attorney's role and by the Law Commission's Consent to Prosecutions report.

3. The Corner House believes that any decision to halt a prosecution on grounds of national security must be taken on the basis of clear, objective criteria based on international law and follow a clear, transparent process. The Corner House believes that serious consideration should be given to establishing an ad hoc committee of experts headed by a judge to assess decisions to halt a prosecution on grounds of national security

III. Foreign Bribery Offence

While the Corner House welcomes the creation of a discrete offence of bribery of a foreign public official, it believes that the current formulation by the Law

Commission is open to improvement.

A. Definition of public official and inclusion of officials of foreign political parties

The Corner House believes that a good definition of a public official must be included in the new offence. This definition should be broad so as to capture private individuals who are exercising a public function, and in that role may cause harm or loss to the public interest, and to capture officials of public international organizations. The Corner House recommends that the Law Commission incorporate a full definition that reflects paragraphs 12-19 of the commentaries to paragraph 4 of Article 1 of the OECD Anti-Bribery Convention.

The Corner House also believes that the new foreign bribery offence must also cover, as does the US Foreign Corrupt Practices Act (FCPA), payments made to officials of foreign political parties or candidates for such parties. There is growing recognition that this can be a significant means of seeking to obtain influence and business advantage.

B. Removal of the phrase 'not legitimately due'

The Corner House believes that the phrase 'not legitimately due' with regard to an advantage given, offered or agreed with a foreign public official should be removed. The Corner House considers that the term 'not legitimately due' will create difficulties for enforcers and prosecutors in proving what is and what is not 'legitimate' in a foreign jurisdiction, or in disproving assertions made by a company as to what was 'legitimate' in that jurisdiction. That is to say, the term could recreate the problems highlighted in paragraphs 7.10 and 7.11 of the Law Commission's report, despite the evidential burden placed on P.

The Corner House notes that the US FCPA does not qualify the word advantage, but instead uses the phrases 'payment of any money' or the 'giving of anything of value'. The Corner House believes there is considerable merit in this approach in its simplicity, and that the Law Commission should consider using it as an alternative, particularly given that the Law Commission does not believe that under the general bribery offence an advantage should need to be 'undue' in order for bribery to have been committed.

If the Law Commission decides that under the foreign bribery offence, advantage does need to be qualified, The Corner House believes that instead of 'not legitimately due' the phrase 'improper advantage' would be more appropriate. The definition of improper or undue could be based on an appropriate mix of the improper influence and improper conduct models, where the intention behind the payment is to induce a public official to conduct an improper act. The Corner House believes that 'improper'

or ‘undue’ can be defined in relation to general, universal norms of a duty on public officials, including breach of trust, duty to act impartially, and duty to act in the public interest, as recognised by the International Code of Conduct for Public Officials adopted by the UN General Assembly in December 1996 and noted in the UN Convention Against Corruption, Article 8 on Codes of conduct for public officials. Such norms would recognise that receiving advantages in return for taking a particular action in favour of an individual or company is never in the public interest. This would be in keeping with the commentaries on the OECD Anti-Bribery Convention which state that where for instance the notion of a breach of duty is implied in a statute, it must be “understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country”.[7]

C. Coverage of payments made through intermediaries

The Corner House believes that the new offence must directly and specifically cover advantages or payments made through intermediaries. Although the Law Commission recognises such payments as important in its report as important, the foreign bribery offence as currently formulated does not spell out that such payments are covered. The Corner House believes this is an omission.

The Corner House believes that the most appropriate way in which to cover payments through intermediaries, particularly in the context where most foreign bribery is shielded through commission payments made to agents, would be to create an additional offence similar to that under the US FCPA, of making a payment to “*any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office*” for the purposes of influencing an official’s decision or inducing that official to do or omit to do an act in breach of his or her duty. The Corner House believes that the word ‘knowing’ should be defined to cover situations where the person making the payment engages in either conscious disregard or wilful ignorance. As the offence is currently formulated it is not absolutely clear that payments concealed in commission or agency fees via a third party would be covered.

If the Law Commission does not take this approach, The Corner House believes that at the very least, the new offence must be qualified by ‘whether directly or through intermediaries’. The Corner House believes that ‘intermediary’ could be defined in a similar fashion to the US Foreign Corrupt Practices Act, where an intermediary is a third party who knows that all or part of the improper advantage will be either offered or make it into the hands of a foreign official.

[7] Commentaries on the OECD Convention on Combating Bribery, paragraph 3.

D. ‘Serious risk’

The Corner House believes that the phrase ‘serious risk’ should be replaced with language that more suitably reflects the mindset of the payer (I section IV B below).

E. Extension of offence of bribing a foreign public official to inculpate the foreign public official who accepts a bribe

The Corner House believes that it is essential that the offence be extended to inculpate the foreign public official. Where foreign officials belong to previous administrations but may have left the country, they may not be triable in that country and would therefore escape justice. Additionally, there may be cases where bringing the foreign official to trial along with the payer of the bribe would considerably assist the prosecution case. The Corner House believes that prosecutors must be given the flexibility to allow them the option of bringing a case against a foreign public official where appropriate, and that it would be a retrograde step to close this option off.

Summary

1. The Corner House believes that the discrete foreign bribery offence proposed by the Law Commission would be considerably improved by the inclusion of a definition of foreign public official and the inclusion of officials of foreign political parties.

2. The Corner House believes that the phrase ‘not legitimately due’ should be removed and that the Law Commission should give serious consideration to using advantage in an unqualified manner as under the general offence. If the Law Commission decides to qualify advantage in relation to foreign bribery, the Corner House believes that the phrase ‘improper advantage’ should be used instead of ‘not legitimately due’. The definition of improper should be based on general, norms and duties expected of public officials and recognised internationally.

3. The Corner House believes that payments through intermediaries should be explicitly referred to and covered in the new offence, ideally through the creation of a separate offence. The Corner House also believes that the phrase ‘knowing’ should be used in relation to a payer knowing that an intermediary will pass on all or part of a payment to a foreign official for the purposes of influencing him or her, and that the phrase should be defined to include conscious disregard or deliberate ignorance.

4. The Corner House believes that the phrase ‘serious risk’ should be replaced

with language that more accurately reflects the mindset of the payer.

5. The Corner House believes that the offence must be extended to inculpate foreign public officials who accept bribes to allow prosecutors full flexibility.

IV. Elements to the new bribery offence

The Corner House has the following serious concerns and observations about the proposed new bribery offence:

A. 'Primary reason'

The Corner House believes that the notion that the advantage conferred must be the primary reason for the recipient doing the improper act, as at paragraph 6.19, is highly problematic and must be removed. It will be exceptionally hard for prosecutors to prove that the advantage is the 'primary reason' and create a significant barrier to bringing bribery prosecutions. The Corner House also believes that this is an unacceptably high threshold for proving criminal liability. The Corner House is not convinced by the Law Commission's arguments as to why 'substantial' is too broad a qualifying factor.

B. 'Serious risk'

The Corner House believes that the notion of 'serious risk' should be replaced with language that is more suited the mind-set of the potential offender, such as 'likelihood'. If the offender intends for the recipient to act improperly in relation to the advantage the offender confers, the offender is unlikely to consider the fact that the recipient will then act improperly as a risk, but rather as the desired outcome.

C. Definition of 'improper act'

The Corner House is concerned that the definition of 'improper act' in paragraph 5.50 is over-restrictive. There will be instances where bribery may involve a betrayal of trust which is not a legal or equitable duty and that the bribery offence will be unnecessarily limited if a breach of legal or equitable duty is required to be shown. The Corner House believes that the new offence should be based on a breach of trust, duty to act impartially and in the best interests of another, as formulated in section 2 of paragraph 5.50, or in breach of a duty to act in good faith.

D. Defences

The Corner House does not believe there should be a defence for where the payer confers the advantage in the reasonable belief that to do so was legally permissible.

Nor does The Corner House believe that there should be a defence for where the payer confers the advantage in the reasonable belief that to do so was legally required. The Corner House believes that the example given at 8C is a classic case of a company failing to undertake adequate due diligence when making a payment. A company cannot reasonably claim to have undertaken due diligence if they simply take the word of an official or even an official form, fail to make independent checks and take proper legal advice on whether a payments is legally required. It would be unfortunate if the defences allowed in the new offence served to undermine recent developments in corporate best practice in relation to corruption, where detailed and extensive due diligence is undertaken before employing agents, making payments, and engaging in business in general in a foreign jurisdiction.

In particular, The Corner House believes that these defences are most likely to be used in relation to foreign bribery. Despite the evidential burden being placed on the payer, The Corner House believes, that as at section III B above, these defences will place an additional burden on prosecutors given the difficulty of getting evidence from abroad, and that they are open to abuse. Furthermore, there can be few if any jurisdictions where it is legally required or permissible to influence a foreign official to breach their official duties, as recognised by general, universal norms of duty on foreign officials. This fact is recognised in article 15 and 19 of the UN Convention Against Corruption which now has 140 signatories, and which requires states to criminalise bribery of national public officials and to consider making abuse of functions or position a criminal offence.[8]

If the Law Commission decides to keep the defence for where the payer has a reasonable belief that the advantage was legally required, it must have very strict criteria under which the payer can assert this belief. The payer cannot be considered to hold a reasonable belief, for instance, if they have not undertaken extensive due diligence checks and taken legal advice before making a payment they believed to be legally required. Nor can they be considered to hold a reasonable belief if the payment made is not entered transparently in accounts, if the payment is paid through complex offshore channels, or in any other sense, is not made totally openly and transparently.

T. Bribery committed outside England and Wales

The Corner House agrees with the Law Commission that bribery committed outside of England and Wales should be an offence where it is done by a national or natural person who is resident in the United Kingdom. The Corner House believes this definition should include a body incorporated under the law of the United Kingdom

[8] Abuse of functions or position is explained as "the performance of or failures to perform an act in violation of laws, by a public officials in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity".

and the law of a Crown Dependency or an Overseas Territory. This would significantly enhance the effectiveness of the new bribery law.

Summary

1. The Corner House believes that the phrase 'primary reason' in the fault element required of the recipient must be replaced with 'substantial reason'.

2. The Corner House believes that the phrase 'serious risk' should be replaced with language that more adequately reflects the mindset of the payer, such as 'likelihood'.

3. The Corner House believes that the definition of 'improper act' is over-restrictive and that the necessity for such an act to be a breach of a legal or equitable duty should be removed.

4. The Corner House does not believe that the general offence and particularly the foreign bribery offence should have defences of reasonable belief that an advantage was legally permissible or legally required. The Corner House believes that if the Law Commission keeps the defence of reasonable belief that an advantage was legally required it must be subject to strict criteria.

5. The Corner House believes that the new general bribery offence should apply to acts committed outside of England and Wales, and to bodies incorporated under the laws of both the United Kingdom and the Crown Dependencies or Overseas Territories.

The Corner House
31st March 2008